

ICC, Confirmation of Charges against LRA Leader

INTRODUCTORY TEXT: *Pre-Trial Chamber II of the International Criminal Court confirmed certain charges against Dominic Ongwen, Commander of the Lord Resistance Army (LRA). In particular, we will focus on the confirmation of the charges of the war crimes of committing violence to life and person; committing outrages upon personal dignity; intentionally directing attacks against the civilian population; pillaging; committing rape and forced pregnancy; conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; destroying the property of an adversary when such destruction is not imperatively demanded by the necessities of the conflict. Furthermore, Pre-Trial Chamber II confirmed the charge of command responsibility against Mr Ongwen, for failing to take all necessary and reasonable measures to prevent or repress the commission of the crimes, or to submit the matter to competent authorities for investigation and prosecution. The Chamber found the crimes to have taken place in the context of the non-international armed conflict between the LRA and the Ugandan government.*

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

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ICC DECISION ON THE CONFIRMATION OF CHARGES AGAINST DOMINIC ONGWEN

[Source: ICC, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15, Pre-Trial Chamber II, 23 March 2016, available at: https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF (footnotes omitted)]

[PART A]

[...]

I. BACKGROUND AND PROCEDURAL HISTORY

3. In the late 1980s, the Lord's Resistance Army (LRA), an armed group originating from northern Uganda, began an insurgency against the government of Uganda, with the stated objective to overthrow the government of Yoweri Museveni, who had taken power in 1986 at the head of the National Resistance Army. Until the present day, there has been armed fighting at varying levels of intensity, mostly in northern Uganda, but also in the neighbouring areas of Uganda, Sudan/South Sudan, the Democratic Republic of Congo and the Central African Republic, between the LRA fighters under the command of Joseph Kony, on the one hand, and the Ugandan government, on the other hand, which in the course of the years launched different military offensives against the LRA. Deliberate targeting of civilians and grave civilian suffering are notorious traits of this long conflict.

4. On 16 December 2003, the government of Uganda referred to the Prosecutor of the Court the "situation concerning the Lord's Resistance Army". The Prosecutor proceeded with an investigation, specifying that it would extend to the entire situation in northern Uganda, regardless of who committed the crimes under investigation (ICC-02/04-1, p. 4). [...]

[...]

II. PRELIMINARY AND PROCEDURAL MATTERS

A. Nature and purpose of the present decision

13. In the present decision, the Chamber renders its determination under article 61(7) of the Statute as to whether there is sufficient evidence to establish substantial grounds to believe that Dominic Ongwen committed the crimes with which he is charged.

[...]

E. Remarks on modes of liability

[...]

36. The alternative modes of liability with which the Prosecutor charges Dominic Ongwen are:

- 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; and
- 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.

[...]

45. Finally, charges 1 to 49 and 61 to 70 contain the alternative of article 28(a) of the Statute – command responsibility. As previously observed in the jurisprudence of the Court, article 28 reflects a different form of criminal responsibility than that found in article 25(3)(a) of the Statute in the sense that a superior may be held responsible for the prohibited conduct of his or her subordinates for failing to fulfil his or her duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. Accordingly, as pointed out by Pre-Trial Chamber I, a fundamental difference exists between the forms of commission incriminated in article 25 of the Statute, which establish liability for one’s own crimes, and article 28 of the Statute, which establishes liability for violation of duties in relation to crimes committed by others. For this reason, and in light of the facts of the present case, in this decision the allegation of command responsibility is addressed separately from the allegations of commission under article 25(3) of the Statute (see section III.J).

III. FINDINGS

[...]

B. The LRA and Dominic Ongwen’s status within the organisation

[...]

56. The evidence demonstrates that, at the relevant time, the LRA was an organised entity disposing of a considerable operational capacity. The undisputed leader of the organisation was Joseph Kony, from whom emanated all important decisions. To maintain his tight grip on the organisation, Joseph Kony also successfully invoked possession of mystical powers. Directly under Joseph Kony were a central organ known as Control Altar and a so-called Division, which was also an operational unit. Most importantly, however, the operational units of the LRA were its four brigades: Sinia, Gilva, Trinkle and Stockree. These brigades were composed of a considerable number of individuals under an effective command structure, which ensured that orders were executed. A strict system of discipline was used for this purpose, which included capital punishment and imprisonment as sanctions for disobedience. The Chamber notes the argument of the Defence that the LRA was not a proper army and that Joseph Kony frequently bypassed the chain of command [...], but does not consider dispositive this objection to the charges. The evidence overwhelmingly shows that the hierarchical structure was effective, notwithstanding the possibility of deviations as described by the Defence.

[...]

58. As concerns Dominic Ongwen, the evidence demonstrates that at all times relevant to the charges, he was a commander in position to direct the conduct of the significant operational force subordinate to him. In August 2002, he is reported to have been the commander of Oka battalion. In September 2003, he progressed to the position of second in command of the Sinia brigade, and in March 2004 he became the brigade's commander. It is also notable that the evidence indicates that Dominic Ongwen's performance as commander was valued highly by Joseph Kony, and it is indeed telling that his appointments to more powerful command positions and his rise in rank followed and were associated with his operational performance [...].

[...]

C. The armed conflict and the LRA attack on the civilian population

60. The Prosecutor charges Dominic Ongwen with both war crimes and crimes against humanity. [...]

61. In particular, it is a notorious fact, referred to abundantly in the evidence, that in the time period relevant to the charges brought against Dominic Ongwen (i.e. between 1 July 2002 and 31 December 2005) in northern Uganda there was protracted armed violence between the LRA on the one side and the Ugandan government, principally its armed forces, the UPDF, together with associated local defence units (LDUs) on the other side. 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 within the meaning of article 8 of the Statute. Also, due to the time, place and nature, it is satisfactorily established that the conduct with which Dominic Ongwen is charged as amounting to war crimes was closely linked to the hostilities between the LRA and the Ugandan government. [...]

62. Simultaneously to these hostilities between armed groups, the LRA also engaged in a pattern of deliberate attacks against civilians, in particular against those residing in IDP camps established by the government. According to the evidence, the leadership of the LRA held the belief that all civilians who resided in such IDP camps were supporting the government, and that this fact alone sufficed to make them legitimate targets. [...].

[...]

D. The attack on Pajule IDP camp on or about 10 October 2003

[...]

66. [...] The purpose of the attack was retribution against civilians perceived as supportive of the government, as well as to supply the LRA with food and abductees.

67. Approximately 15,000-30,000 people were living in Pajule IDP camp in October 2003. On 10 October 2003, early in the morning, the attack took place as planned. Approximately 40 LRA fighters, armed with

guns and knives, entered the camp in groups, one attacking the barracks of the UPDF/LDU, where an armed confrontation ensued with the approximately 150 soldiers stationed there, and another immediately attacking the civilian areas. Also as planned in advance, Dominic Ongwen led the group of LRA fighters who attacked the civilian trading centre.

[...]

E. The attack on Odek IDP camp on or about 29 April 2004

[...]

72. This evidence demonstrates that approximately 200 LRA fighters attacked Odek IDP camp on 29 April 2004 at approximately 17.00 hours. The attackers operated in two groups: one attacked the barracks, where a force of about 40 UPDF and LDU soldiers was stationed, while the other spread in the civilian areas, and in particular the trading centre. At the time of the attack, an estimated 2,000 to 2,600 people lived in the camp. Many civilians were shot by the LRA attackers: at least 61 died as a result of their injuries, but there is also evidence that some survived the shooting. A number of witnesses [...] state to have seen many dead civilians lying scattered around the camp. In addition, the evidence includes references to instances of grave physical abuse, such as beating with sticks and guns or kicking. In one instance, a female LRA attacker raped Witness P-270, a civilian resident of the camp, with a comb and a stick used for cooking, while the victim's husband was forced to watch. The attackers forced Witness P-252 to kill an abducted man, and later to inspect decomposing bodies, including that of his father, to ensure that no one was alive. The LRA also abducted people, and forced them to carry loot and wounded LRA attackers away from the camp. Witness P-245 estimated that 35 civilians were abducted. If the abductees walked too slowly, they were beaten. In order to increase their carrying capacity and walking speed, mothers were forced to abandon their children on the side of the road, as observed by Witnesses P-268 and P-275. Some abductees were released after several days, while others, including Witness P-252, remained in captivity for up to over a year. Witnesses P-218 and P-274 provide partial lists of people who were killed, injured or abducted during the attack. The LRA attackers (including Dominic Ongwen personally, as reported by Witness P-54) also pillaged food and personal items from the trading centre and from civilian homes.

73. According to the evidence, in particular the statement of Witness P-245, the order to attack Odek IDP camp originated from Joseph Kony. The order was relayed by Dominic Ongwen and executed jointly by fighters from Sinia and Trinkle brigades under the command of Dominic Ongwen and other Trinkle and Sinia commanders. The aim of the attack was twofold: to get supplies and to attack the civilians living in the IDP camp, who were perceived to be supportive of the government. Dominic Ongwen briefed and instructed the troops before the attack. His instructions, described by Witnesses P-54, P-142, P-205 and P-245, included express orders to target civilians, and orders to abduct civilians and to pillage. Dominic Ongwen also participated in the attack on the ground, commanding and coordinating the LRA fighters.

[...]

F. The attack on Lukodi IDP camp on or about 19 May 2004

[...]

77. According to the evidence submitted, LRA fighters attacked Lukodi IDP camp, which was at that time inhabited by approximately 7,000 civilians and defended by approximately 30 soldiers, on 19 May 2004 at around 18.00 hours. The UPDF unit in the camp withdrew after a short fight, and the LRA fighters proceeded to attacking the civilian population in the camp. After looting, they systematically set fire to the civilian houses and other property. The civilian residents, whose statements are relied on by the Prosecutor, consistently describe this fact. The attackers killed at least 45 civilians, by shooting, stabbing, beating and by burning them inside houses. Evidence of killing is provided by, inter alia, Witnesses P-24 and P-26, and by Witness P-36, who examined the bodies the day after the attack. The attackers also left at least 16 camp residents wounded. [...]

[...]

H. Sexual and gender based crimes

[...]

1. Introductory remarks on certain crimes charged

The Prosecutor's charge of "forced marriage" as an other inhumane act

87. The Prosecutor charges Dominic Ongwen with other inhumane acts within the meaning of article 7(1)(k) of the Statute in the form of forced marriage committed both directly and indirectly (charges 50 and 61, respectively). The Defence, consistent with its general position that the Chamber should refrain from allowing the Prosecutor to charge the same conduct under more than one legal characterisation, argues that the proposed crime of forced marriage is subsumed by the crime of sexual slavery rather than amounting to a category of other inhumane acts [...].

[...]

92. Indeed, the Chamber considers that forced marriage as an other inhumane act differs from the other crimes with which Dominic Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests. It may be stated that forced marriage will generally be committed in circumstances in which the victim is also sexually or otherwise enslaved by the perpetrator. Moreover, restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, or forced labour, in particular the forced performance of domestic duties, are all factors which indicate a situation of "forced marriage". [...]

93. According to the Chamber, the central element of forced marriage is the imposition of "marriage" on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator's "wife". The fact that such "marriage" is illegal and not recognised by, in this case, Uganda, is irrelevant. What matters is that the so-called "marriage" is factually imposed on

the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which Dominic Ongwen is charged. As held by the SCSL, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is “not predominantly a sexual crime”.

94. Also, the Chamber recognises, as submitted by the Prosecutor [...], that the victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery, or other crimes under the Statute. Indeed, forced marriage as defined above violates the independently recognised basic right to consensually marry and establish a family. This basic right is indeed the value (distinct from e.g. physical or sexual integrity, or personal liberty) that demands protection through the appropriate interpretation of article 7(1)(k) of the Statute.

95. In conclusion, the conduct under consideration, insofar as sufficiently demonstrated by the available evidence, constitutes the crime of an other inhumane act within the meaning of article 7(1)(k) of the Statute in the form of forced marriage, which differs from the other crimes with which Dominic Ongwen is charged, and accordingly warrants a specific separate charge, as presented by the Prosecutor.

The charge of forced pregnancy under article 7(1)(g) and 8(2)(e)(vi)

96. Under charges 58 and 59, the Prosecutor charges Dominic Ongwen with the crime of forced pregnancy as a crime against humanity under article 7(1)(g) and as a war crime under article 8(2)(e)(vi) of the Statute.

97. Article 7(2)(f) of the Statute defines the crime of forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”. Article 8(2)(e)(vi) of the Statute refers to the same provision for the definition of forced pregnancy as a war crime.

98. At the confirmation hearing, the Defence argued that the Prosecutor has not proven to the requisite threshold the specific intent required for this crime [...]. It appears that the Defence submits, essentially, that the special intent applies to the act of forcibly making the woman pregnant rather than to the act of confinement of a woman forcibly made pregnant as instead argued by the Prosecutor [...].

99. It is clear from the statutory provision that the relevant conduct of the crime of forced pregnancy is the “unlawful confinement of a woman forcibly made pregnant”. It is therefore the act of confinement which must be carried out with the required special intent. Indeed, the crime of forced pregnancy does not depend on the perpetrator’s involvement in the woman’s conception; it is only required that the perpetrator knows that the woman is pregnant and that she has been made pregnant forcibly. It is apparent that the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.

100. By the same token, it is not necessary to prove that the perpetrator has a special intent with respect to the outcome of the pregnancy, or that the pregnancy of the woman is in any way causally linked to her

confinement. While the first alternative of the special intent requirement (intent of “affecting the ethnic composition of any population”) would typically include such component, the second alternative (intent of “carrying out other grave violations of international law”) does not call for any such restrictive interpretation.

101. Therefore, the Chamber concludes that the Prosecutor’s submissions that Dominic Ongwen confined women who had been forcibly made pregnant, with the intent to carry out grave violations of international law, including to use them as his forced wives and to rape, sexually enslave, enslave and torture them, are adequate under the applicable law, and that therefore, contrary to the argument of the Defence, and to the extent as sufficiently established by the evidence, the charges of forced pregnancy can be confirmed.

2. Sexual and gender based crimes directly committed by Dominic Ongwen

102. The Prosecutor charges Dominic Ongwen for the direct commission of a number of sexual and gender based crimes against eight women. [...]

103. The Chamber notes that, with the exception of the testimony of Witness P-198 [...], the testimonies provided by the other seven women and clear and consistent [...]. [...]

104. In short, the evidence provided by the seven witnesses establishes that: (i) all seven women were abducted by the LRA; (ii) they were all distributed to Dominic Ongwen’s household; (iii) they were all made so-called “wives” to Dominic Ongwen – whether immediately upon distribution to him or after a period of being domestic servants (referred to as *ting tings*) in his household; (iv) they were all regularly forced to have sexual intercourse with Dominic Ongwen either by brute force, threat of force, or other forms of coercion; (v) they were all deprived of their personal liberty for the duration of their abduction; and (vi) all of them, with the exception of [redacted] (P-226), became pregnant as a result of rapes by Dominic Ongwen.

105. While these women share the very same experience, the Prosecutor has only charged crimes within the time period between 1 July 2002 and 31 December 2005. The Court indeed does not have jurisdiction over crimes committed before 1 July 2002. As for the end date, the Prosecutor has submitted to the Chamber that the crimes committed after 31 December 2005 were not charged because they “post-date the upper limit of the charged period, 31 December 2005, which was selected because the evidence does not support the existence of a non-international armed conflict between the UPDF and the LRA or a widespread and systematic attack against a civilian population after that date” [...]. [...]

106. The Chamber does not have the power to interfere with the Prosecutor’s selection of the charges brought against Dominic Ongwen [...]. However, since the Prosecutor attempts to justify these parameters as required by the applicable law and given that this argument is manifestly incorrect, the Chamber feels compelled to ensure that the record includes the correct statement of the law. This is in order to protect the integrity of the judicial proceedings and the public standing of the Chamber and the Court as a whole, also considering that ultimately, as a result of the Prosecutor’s determination, four victims may have to be denied, at least in part, reparations for the harm suffered.

107. Therefore, for the record, the Chamber notes that crimes against humanity must be committed “as part

of” a widespread and systematic attack directed against any civilian population, and war crimes “in the context of” and “associated with” an armed conflict. It is not required that the crimes against humanity are committed during the attack, or war crimes in the midst of the armed conflict, as the required nexus can be established otherwise. This is true irrespective of whether the crimes at issue are continuous crimes or not. In this sense, the Prosecutor’s choice of the cut-off date of 31 December 2005 cannot be attributed to the operation of the nexus requirements of articles 7 and 8 of the Statute or any other provision of the Statute or the Rules.

[...]

I. Conscription and use in hostilities of children under the age of 15

[...]

142. The statements of these witnesses show that the abduction of children under the age of 15, sometimes even under the age of 10, was a systematic practice and a policy choice of the LRA. Young children were targeted because they were easier to control. After abduction, children of both genders would regularly undergo military training, including in the handling of firearms. These child soldiers were then sent on mission as part of regular LRA units, which included the conduct of hostilities with the UPDF. Another systemic abuse of children in the LRA was their use as “escorts” assigned to fighters. Such escorts would accompany the fighters closely, including in active conflict zones, and would provide physical security and operational assistance.

143. The abductions of children to replenish the LRA combat forces was, according to the evidence, an explicit plan of the LRA leadership, including Joseph Kony and senior commanders, among them Dominic Ongwen. Dominic Ongwen himself used escorts under the age of 15. Moreover, he ordered abductions of children to use as child soldiers, supervised their military training, and coordinated and deployed LRA units which included fighters under 15 years of age.

144. In light of the available evidence, the Chamber considers that the objective elements of the following crimes are sufficiently established by the evidence: conscription of children under the age of 15 into an armed group as a war crime pursuant to article 8(2)(e)(vii) of the Statute [...]; and use of children under the age of 15 to participate actively in hostilities as a war crime pursuant to article 8(2)(e)(vii) of the Statute [...].

[...]

J. Alternative charges of command responsibility (article 28(a) of the Statute)

[...]

147. In the view of the Chamber, the narrative of the relevant events as emerging from the available evidence is such that Dominic Ongwen’s conduct cannot be seen as a mere failure to prevent or repress crimes committed by other persons. To the contrary, as explained above, the Chamber finds that it is precisely the deliberate conduct of Dominic Ongwen that resulted in the realisation of the objective elements

of the crimes. At the same time, the Chamber observes that, as a matter of fact, the narrative proposed by the Prosecutor, and accepted in the present decision, by which Dominic Ongwen intentionally committed the crimes charged does, by definition and by necessary logic, include as a corollary that Dominic Ongwen did not “prevent” or “repress” the crimes that he himself committed jointly with others and making use of his subordinates over whom he had indeed, at the relevant time, effective command and control.

[...]

IV. CONCLUSION

157. In light of the above, the Chamber finds that there are substantial grounds to believe that Dominic Ongwen committed the crimes referred to [...] above, and accordingly confirms the charges brought by the Prosecutor against Dominic Ongwen as set out in the operative part of the present decision.

[...]

[PART B]

FOR THESE REASONS, THE CHAMBER

CONFIRMS the charges against Dominic Ongwen as follows:

[...]

2. STATEMENT OF FACTS REGARDING CONTEXTUAL ELEMENTS OF ARTICLE 7 AND ARTICLE 8

[...]

Contextual elements of article 8: existence of a non-international armed conflict

5. From at least 1 July 2002 to 31 December 2005 a protracted armed conflict not of an international character between the LRA and armed forces of the government of Uganda together with associated local armed units existed in northern Uganda. The armed hostilities exceeded, in intensity, internal disturbances and tensions such as riots, isolated and sporadic acts of violence.

6. Both parties were well structured, armed and carried out protracted armed violence. During this time, the LRA was an organised armed group with a sufficient degree of organisation to enable it to plan and carry out military operations for a prolonged period of time. The Uganda People’s Defence Force (“UPDF”) was the regular military of Uganda.

7. The conduct that forms the basis for the charges in this document took place in the context of and was associated with this armed conflict. [...]

[...]

3. STATEMENT OF FACTS REGARDING COMMON ELEMENTS OF MODES OF LIABILITY

[...]

10. Between at least 1 July 2002 and 31 December 2005, the LRA was an organised and hierarchical apparatus of power. It had a headquarters, a division, brigades, battalions and companies, with a commander assigned to each unit. The Sinia brigade, as one of the four LRA brigades, consisted of a brigade headquarters and a number of battalions and companies. Joseph Kony was the commander-in-chief of the LRA. Orders were generally communicated from Joseph Kony and other leaders to the brigade commander, who communicated them to the battalion commanders, who in turn passed them to their subordinates.

11. In the LRA, including the Sinia brigade, subordinates followed the orders of their superiors almost automatically. LRA fighters, conditioned by, and under threat of, physical punishment, obeyed superiors and followed orders. The LRA maintained a violent disciplinary system that guaranteed adherence to orders and rules. The LRA, including the Sinia brigade, was composed of a sufficient number of fungible individuals capable of replacement to guarantee that the orders of superiors were carried out, if not by one subordinate, then by another. Dominic Ongwen was aware of the fundamental features of the LRA, including the Sinia brigade, as an organised and hierarchical apparatus of power.

[...]

13. Dominic Ongwen had effective command and control, or authority and control, over his subordinates between 1 July 2002 and 31 December 2005. He mobilised his authority and power in the LRA, including the Sinia brigade, to secure compliance with his orders and cause his subordinates to carry out the conduct described in this document. This allowed him to exert control over the crimes charged as well as to prevent or repress any conduct by his subordinates of which he disapproved. His subordinates complied with his orders. He had the power, *inter alia*, to issue or give orders; to ensure compliance with the orders issued; to order forces or units under his command, whether under his immediate command or at a lower level, to engage in hostilities; to discipline any subordinate; and the authority to send forces to the site of hostilities and to withdraw them at any time.

4. ATTACK ON PAJULE IDP CAMP ON OR ABOUT 10 OCTOBER 2003 (Counts 1-10)

[...]

Torture/cruel treatment/other inhumane acts

22. LRA fighters under the joint control of the Pajule co-perpetrators including Dominic Ongwen subjected many Pajule civilians to severe physical or mental pain or suffering or serious injury to body or to mental or physical health. The pain and suffering did not arise from and was not inherent in or incidental to lawful sanctions. The perpetrators carried out this treatment to intimidate and/or punish the Pajule civilian population because of their perceived support for the Ugandan government. This treatment was carried out

when the victims were under the custody or control of the LRA attackers. LRA fighters under the joint control of Dominic Ongwen and his co-perpetrators abducted civilians, forced them to carry looted items, forcibly removed civilians from their homes, shot at them, threatened them with acts of violence or physically assaulted them, tied up civilians, separated them from family members and forcibly removed clothing from civilians.

[...]

Pillaging

24. LRA fighters broke into homes and shops and appropriated food items and other property. They intended to deprive the owners of their food and property and to appropriate it for private or personal consumption and use. The owners did not consent to the appropriation.

[...]

6. ATTACK ON LUKODI IDP CAMP ON OR ABOUT 19 MAY 2004 (Counts 24 to 36)

[...]

Destruction of property

51. The attackers destroyed property belonging to the civilian residents of the government-protected Lukodi IDP camp, including by burning their houses. Dominic Ongwen viewed these civilian residents as adversaries. Such property was protected from destruction under the international law of armed conflict. [...] The destruction was not required by military necessity.

[...]

COMMITTS Dominic Ongwen to a Trial Chamber for trial on the charges as confirmed.

[...]

Discussion

I. Classification of the Conflict and Applicable Law:

1. ([Part A], paras 3, 56, 61 – 62, 66 – 67, 73; Part B, paras 5 – 6, 10 – 11, 22)

a. How does the Court classify the situation in Uganda? What elements does the Court consider when assessing the “protracted armed violence” in northern Uganda? Is the “broad geographical scope” of such violence, referred to by the Court in [Part A], para. 61, relevant for the classification of the conflict? Why? Why not? Does it matter for the determination of the applicable IHL if some hostilities occurred on the territory of States other than Uganda? Would it still be a NIAC if the protracted armed violence between the LRA and the UPDF/LDUs only covered a smaller portion of the territory of Uganda? Which indicative factors

does the Court consider for the assessment of the intensity of the armed violence? And for the assessment of the level of organization of the LRA? (ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Decision, 1995, para.70; See See ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Judgment, Trial Chamber, 2008, paras. 49, 60)

b. What is the applicable law? Is the threshold for the application of Additional Protocol II met? Why? (GC I - IV, Art. 3; P II, Art. 1)

c. What is the geographical scope of application of IHL? Is the fact that, according to the Court in [Part A], para. 3, the armed fighting has occurred “at varying levels of intensity” relevant for the application of IHL? Why? Why not? Does IHL apply in the “neighbouring areas of Uganda”, as mentioned in [Part A], para. 3? Does it cover acts that occurred outside the territory of Uganda, in the neighbouring areas of Sudan/South Sudan, the Democratic Republic of Congo and the Central African Republic? Does IHL apply throughout the whole territory of the States into which the conflict has “spilled over”? (ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Decision, 1995, para. 70; ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment, Trial Chamber, 1998, para. 636)

d. ([Part A], paras 61, 105 – 107) Does IHL apply to acts committed outside the strict geographical or temporal scope of the armed conflict? Can the *nexus* between the act and the armed conflict be established otherwise? What is the position of the Court in this regard? Which parameter does the Court consider when assessing the nexus of conduct with which Mr Ongwen is charged as amounting to war crimes in [Part A], para. 61? (CIHL, Rule 156)

e. ([Part A], paras 62, 66 – 67, 73; [Part B], para. 22) Are deliberate crimes against civilians in a NIAC governed by IHL? Even when those civilians have no link to a party to the armed conflict? In what circumstances would such crimes not be covered by IHL?

II. Legitimate Targets in NIACs:

2. ([Part A], paras 62, 66 – 67, 72 – 73, 77; [Part B], para. 22)

a. Who can be legitimately targeted in a NIAC? Can ideological support for one Party to the conflict constitute direct participation in hostilities? (ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities, pp. 27 – 36, 43 – 64; P II, Art. 13(3); CIHL, Rule 6)

b. If the members of the LRA had entered the IDP camps with the sole purpose of attacking the barracks of the UPDF/LDU, where fighters were stationed, would these have been lawful attacks? Are there any additional obligations the LRA fighters would have had to comply with? If an attack is directed against the civilian population, is it necessary to assess the respect for the principles of proportionality and precautions to qualify it as an unlawful attack? Can the civilian trading centre become a military objective? Under what circumstances? (P II, Art. 13(1) and (2); CIHL, Rules 1, 7, 8, 9, 10, 14 and 15)

c. Does the prohibition of murder set out in GC I - IV, Art. 3 cover the conduct of hostilities? Do the obligations set out in P II, Art. 4(2) apply to the conduct of hostilities? Could the attacks on the IDP camps constitute collective punishments? (CIHL, Rules 89, 93 and 103)

III. Destruction of property:

3. ([Part A], para. 77; [Part B], para. 51) What does the Court refer to when affirming in [Part B], para. 51 that the property of the civilian residents of the IDP camp was “protected from destruction under the international law of armed conflict”? Does IHL prohibit the destruction of property in IACs and NIACs? Is it an absolute prohibition? According to the Court, was the systematic destruction of civilian property by the LRA required by imperative military necessity? In your opinion, can the civilian residents of the IDP camp be considered

“adversaries” for the purposes of this prohibition? Why? Why not? According to the Court? (ICC Statute, Article 8(2)(e)(xii); CIHL, Rule 50)

IV. Wounded and sick:

4. ([Part A], paras 72, 77) Did the LRA breach any IHL obligations by leaving “at least 16 camp residents wounded” in Lukodi IDP camp, as described in [Part A], para. 77? Did members of the LRA have the obligation under IHL to search and collect the wounded and sick? If yes, would this obligation apply at all times or only after each engagement? Does IHL impose an obligation to treat and care for the wounded and sick upon each party to the conflict? (P II, Arts 7 and 8; GC I - IV, Art. 3; CIHL, Rules 109 and 110)
5. ([Part A], para. 72) Did the LRA breach any IHL obligations by leaving “many dead civilians lying scattered around the camp”? Did the LRA have an obligation under IHL to identify every dead body found? Did it only have the obligation to try and collect information for the identification? (P II, Art. 8; CHIL, Rule 112)
6. ([Part A], paras 72 – 73, 77; [Part B], para. 24) Is there an obligation under IHL to protect the wounded and sick against pillage? Does IHL address pillaging in a NIAC? Is there an absolute prohibition on pillage? Would an appropriation of food by an armed group to feed its members constitute pillage? (P II, Art. 4 (2) (g); CIHL, Rules 52 and 111)

V. Deprivation of Liberty:

7. ([Part A], paras 72, 77; [Part B], para. 22)
- a. Does IHL regulate the treatment of persons deprived of their liberty in NIACs? Is there a legal basis for internment in NIACs? Is the power to detain in NIACs implied in the language of GC I-IV, Art. 3 and P II? In Customary International Law? Which view does the ICRC support? Where should the legal source setting out the grounds and process for internment be found? In international law? In the domestic law of Uganda? In both? Does the principle of equality of belligerents lead to the conclusion that also members of the LRA, as all non-state armed groups have a right to detain in NIACs? Would the abduction of civilians residing at the IDP camps constitute an arbitrary deprivation of liberty? Why? (GC I - IV, Art. 3; CIHL, Rule 99; See also, ICRC Commentary of 2016, GC I – IV, Art. 3, paras 717 – 728;)
- b. ([Part A], para. 72; [Part B], para. 22) Was the treatment of the civilians in “custody or control of the LRA”, as noted by the Court in [Part B], para. 22, in compliance with IHL? Why? Why not? (GC I - IV, Art. 3; P II, Arts .4 and 5; CIHL, Rules 87, 90, 91 and 95)

VI. Command Responsibility:

- 8.
- a. ([Part A], paras 45, 147) In what circumstances can a superior be held responsible for the prohibited conduct of his/her subordinates ? (ICC Statute, Art. 28(a)(ii); CIHL, Rule 153; P I, Art. 86)
- b. ([Part B], para. 58; [Part B], para. 13) Was Mr. Ongwen a military commander *de iure* ? What are the factors considered by the Court in the assessment of the effective command and control of Mr Ongwen over his subordinates? Did Mr Ongwen have disciplinary powers over members of the LRA? If he did, would this have any implication on his duties as a military commander under IHL? (CIHL, Rule 153; P I, Arts 86 and 87)

VII. Sexual and Gender-based Crimes:

9. ([Part A],, paras 87 – 95) What does the Chamber conclude is the defining feature of the crime of forced marriage? How does the Chamber argue that it is different from sexual slavery? Which indicative factors are

considered by the Court for the qualification of the crime as forced marriage? According to the Court, is the fact that the marriage is not recognized by Uganda relevant for the qualification of the crime? What is the relevant element to be considered in this regard? In the decision, the crime of forced marriage is discussed as a crime against humanity, but what IHL provisions could the conduct discussed by the Chamber also be in violation of? In your opinion, could such violations amount to war crimes? (GC I - IV, Art. 3; P II, Art. 4(2); CIHL, Rules 90, 93 and 105; ICC Statute, Arts 7(1)(k) and 8(2)(c)(i)-(ii) and (e)(vi))

10. ([Part A], paras 97 – 101) What does the Defence conclude is the essence of the crime of forced pregnancy? Does the Chamber agree with this? What provisions of IHL are violated by the conduct at issue here? (GC I - IV, Art. 3; P II, Art. 4(2); CIHL, Rules 90, 93 and 105; ICC Statute, Art. 8(e)(vi))

11. ([Part A], para. 104 – 107) What provisions of IHL are violated by the conduct dealt with in para. 104? Are these acts covered by the provisions of IHL even if they occurred after 31 December 2005? Why? How should the *nexus* with the armed conflict be established for these acts? Are the identity of the perpetrators and the identity of the victims relevant to establish such *nexus*? What is the Court's position on this regard? (GC I - IV, Art. 3; P II, Art. 4(2); CIHL, Rules 90, 93 and 105; See ICTY, *The Prosecutor v. Kunarać, Kovać and Vuković*, Appeals Chamber, Judgement, 2002, paras 57 – 59; ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment, 2000, para. 69)

VIII. Recruitment of Children under the Age of 15:

12. (Part A, para. 142)

a. Is there a difference between the prohibition of child recruitment in IACs and in NIACs? Do States benefit from a more favorable regime in NIACs? Why? (P II, Art. 4(3)(c)-(e); CIHL, Rules 136 and 137; P I, Art. 77(2); ; Convention on the Rights of the Child, Art. 38; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Arts 2, 3 and 4)

b. Are children integrated in the LRA always legitimate targets? Only if they have a continuous combat function? Only if, and for as long as, they directly participate in hostilities? Are the children used as escorts by the LRA directly participating in hostilities? Those used as bodyguards? Scouts? Does raising alarms qualify as direct participation in hostilities? Burning and pillaging houses? Collecting and carrying pillaged goods from attack sites? (ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities, pp. 43-64)