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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge
Judge Chang-ho Chung
Judge Marc Perrin de Brichambaut

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

PUBLIC

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

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC
Adesola Adeboyejo

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

Victims Participation and Reparations Other Section

I. INTRODUCTION

1. International humanitarian law protects children from recruitment into armed forces and their use in armed conflicts. Abducted by the Lord's Resistance Army ("LRA") in 1987, at the young age of 9.5 years old, Ongwen Dominic enjoyed no such protection.¹
2. Dominic was abducted while he was on his way to school [REDACTED]
[REDACTED]² On the same day of Dominic's abduction, his mother was allegedly killed by LRA forces who shot her as she searched for him. Dominic's father was never seen again, but he was said to have been killed by the National Resistance Army (modern day UPDF) because they believed him to be a rebel fighter.³
3. Stolen from his family and community, Dominic was taken to a make-shift training area. Along the way, the LRA rebels beat, tortured and subjected him to constant acts of violence and forced him to perform the same.⁴ Dominic was forced to witness acts that no person, let alone child, should have to witness. His indoctrination into the LRA was made under threats of imminent violence and death and, like other children stolen by the Rebels,⁵ he was made to believe at a young age that Joseph Kony had supernatural and spiritual powers, and was above reproach and question.

¹ Dominic's recruitment in the armed forces can never be considered as voluntary (Schauer, Elizabeth, "The Psychological Impact of Child Soldiering", Vivo, as found in ICC-01/04-01/06-1729-Anx1, pp. 7-8 ("Schauer")).

² D26-0007, UGA-D26-0010-0263, paras 1-4.

³ D26-0008, UGA-D26-0010-0307, para. 7.

⁴ See Prosecution Brief, para. 635 referring to OTP-0252, UGA-OTP-0243-0428-R01 at 0442, where the Prosecution states that child soldiers were disciplined through continuous beatings.

⁵ Children, like Dominic, are often used by armed groups as they do not have the capacity to appreciate whether or not they are committing a moral act. Acts therefore become instinctive reactions to their lawless environment (D26-0022, UGA-D26-0010-0600 at 0600; Schauer, pp. 6-7).

4. Dominic has lived most of his life under duress (*i.e.* from the age of 9.5 years old).⁶ The all-knowing and all-seeing Joseph Kony instilled an institutional ethos that required compliance and discipline.⁷ Throughout the rest of his life and until surrendering to US Special Forces, he remained under the apprehension of fear of imminent death, especially if he were to flee. The environment of duress never dissipated as Dominic remained in the rebel group.⁸ His so-called rank was demonstrative of one thing: that he was surviving better than others while under duress.
5. If the laws of war were meant to protect children like Dominic from being forcibly recruited into the LRA and forced to engage in hostilities, it is inapposite to suggest that individual criminal liability can then be imposed upon those like him who were to be protected, but ended up *enslaved* by Joseph Kony.

II. OVERVIEW OF RESPONSE BRIEF

6. This brief will raise a number of factual and legal issues pertinent to the adjudication of this matter. First, section IV of this brief will discuss Dominic's age, the relevance of Dominic's background as a child soldier and of the contextual circumstances of Joseph Kony. Second, section V will outline the Defence's submissions and in doing so will address matters pertaining to Dominic's alleged criminal liability and the crimes for which he has been charged.
7. In relation to factual matters, the Defence has consistently raised the issue of its inability to properly review the evidence disclosed by the Prosecution. As such, and in the interest of our client, the Defence is not in a position to respond to all

⁶ See D26-0002, UGA-D26-0010-0602 at 0602.

⁷ See section concerning Joseph Kony, *infra*, paras 11-26.

⁸ See D26-0002, UGA-D26-0010-0602 at 0602.

of the factual matters at this stage.⁹ While the Defence reiterates its position that this has resulted in unfairness and prejudice to Dominic, the Defence nonetheless provides its preliminary observations in relation to the attacks on IDP. In light of the circumstances, the Defence further reserves its right to amend any factual characterisation made after confirmation should this case proceed.

8. The Defence respectfully submits that the Pre-Trial Chamber should deny all of the charges against Dominic. It is submitted that: (i) the burden cannot be reversed on child soldiers who remained in rebel groups; (ii) criminal liability should be excluded on the basis of duress pursuant to Article 31 of the Statute; (iii) eleventh-hour evidence should be excluded pursuant to Rule 76(3) of the Rules of Procedure and Evidence; (iv) the Chamber should refrain from confirming charges in the interest of fairness where such charges are based on the same facts; (v) Indirect Co-perpetration should not be regarded as a mode of liability since it is not included in the Statute; (vi) Dominic did not order the alleged crimes; (vii) Dominic did not aid, abet or otherwise assist in the commission of the crimes charged; (viii) the subjective elements pursuant to Article 30 of the Statute have not been met; (ix) Dominic is not responsible pursuant to Article 28(a) of the Statute; (x) the crime of forced marriage is subsumed by the crime of sexual slavery and cannot therefore be charged; and (xi) Dominic did not possess the requisite intent for the alleged sexual and gender-based crimes.

9. Based on the foregoing, the Defence respectfully requests that the Chamber refrain from confirming the charges.

⁹ The Defence recognises that the purpose of the Confirmation Hearing is not to conduct a trial.

III. CONFIDENTIALITY

10. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, this filing is classified as confidential as it refers to information disclosed as such. The Defence will file a public redacted version.

IV. BACKGROUND CONCERNING DOMINIC, JOSEPH KONY AND THE LRA

A. Dominic is thirty-seven years old and forty as alleged by the Prosecutor

11. The Defence submits that, contrary to the Prosecution's assertion, Dominic is approximately 37 years-old. Although the Prosecution claims that Dominic is 40 years old, being born in May of 1975, it wrongfully bases this claim from when he was questioned, without an attorney present, by the Central African Republic authorities¹⁰ and during Dominic's initial appearance.¹¹

12. After investing years investigating the case from 2004 through 2010, the Office of the Prosecutor determined that Dominic was born in May 1978. The Prosecution talked to his family and asked about birth records. They know that the records no longer exist.¹² It is disingenuous to now say that his birth was in 1975.¹³

13. The two people best positioned to testify to Dominic's age (*i.e.* his mother and father) were murdered by the warring factions just after Dominic was abducted.¹⁴

The next best persons would be [REDACTED]

¹⁰ ICC-02/04-01/15-189-Conf-Exp-Anx1, page 2.

¹¹ ICC-02/04-01/15-T-4-ENG, p. 4, lns 6-9.

¹² See OTP-0103, UGA-OTP-0165-0091-R01, paras 7-19 and OTP-0100, UGA-OTP-0165-0069-R01, paras 21-23.

¹³ The Defence notes that the material available before 6 January 2015 are no longer available, but it was commonly known that his birth was in 1978.

¹⁴ D26-0008, UGA-D26-0010-0307 at para. 7.

[REDACTED]¹⁵ D26-0008 states that Dominic was born in May 1978 and around 9 to 10 years old when he was abducted in November 1987.¹⁶

14. The Defence submits that in a culture where birthdays are not significant, it is easy for one not to know their own birthdate. Dominic himself does not know an exact date.

15. The Prosecution's evidence also supports the proposition that many people who returned from the bush did not know their true age or birthdate. For instance, OTP-0309 gives three different birthdates in three different years in the same interview.¹⁷ As the witness does not have a birth certificate, he states that he knows his true birthday because his mother told him.¹⁸ The same can be said for D26-0004/P-0235¹⁹ and D26-0005/P-0236.²⁰

16. It is submitted that as a result, the most reliable confirmation of Dominic's birthdate being in May 1978 comes from D26-0008, [REDACTED]

[REDACTED]²¹ [REDACTED].²²

B. Joseph Kony was Believed to have Spiritual and Supernatural Powers

17. Joseph Kony has been described as an all-seeing and all-knowing individual, making it unthinkable for a recruit/abductee to escape.²³ Many believed that he could talk to the Holy Spirit ("Spirits"), sometimes referred to as *Lakwena*. Many

¹⁵ See D26-0007, UGA-D26-0010-0263; D26-0008, UGA-D26-0010-0307; and D26-0012, UGA-D26-0010-0336.

¹⁶ D26-0008, UGA-D26-0010-0307 at paras 1-2.

¹⁷ UGA-OTP-0249-0472-R01 at para. 13.

¹⁸ *Ibid.*

¹⁹ UGA-OTP-0240-0003-R01 at para. 11.

²⁰ P-0236 at para. 14.

²¹ D26-0008, UGA-D26-0010-0307 at paras 1-2

²² D26-0012, UGA-D26-0010-0336 at para. 8.

²³ See D26-0022, UGA-D26-0010-0600, at 0600. In addition, it is noted that "children are only forming their identity during the years that the children are being used in armed groups. D26-0022 contends that this is an important factor since group mentality is important and how this affects ability to break away from the group and impact on identity when moving into adulthood" (*ibid.*).

believed that Kony talked to the Holy Spirits (“Spirits”), and that Kony was only a messenger (*Lakwena*) of the Spirits. These spirits introduced rules into the LRA, which had to be strictly followed. Failure to follow the rules meant punishment (usually death in the battlefield) by the spirits that always knew who was breaking which rules. Absolute obedience to the spiritual rules was therefore the only way to survive like with the LRA.²⁴

18. This type of indoctrination was not without consequence. This was a powerful tool in Kony’s arsenal and in his ability to control people from children to adults who were trained to believe that he was a prophet and in the vengeance of the Spirits. This is not insignificant given that many of the children in the LRA came from societies where spiritual beliefs are important.²⁵ From this indoctrination, Kony ruled with complete and unfettered power. His orders were final and meant to be followed. Disobeying orders of the prophet resulted in torture, death or even worse.

i. Joseph Kony and his spiritual powers

19. Joseph Kony is believed to have been endowed with the Spirits since the beginning of the LRA. The legend ranges from him quickly rising to power amongst the disjointed rebel factions²⁶ to being drawn to a sacred rock one night to pray for 14 days, eventually having the Spirits guide him.²⁷ No matter how he ascended to lead the LRA, the end product remained the same; Kony was perceived by the LRA as having prophetic powers.

²⁴ There is wealth of anthropological literature that supports this assertion, for instance; K Titeca ‘The Spiritual Order of the LRA’ in ‘The Lord’s Resistance Army: Myth and Reality (eds) T Allen & K Vlassenroot (2010) p 59 – 71; S Finnstrom ‘Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda (2008); A Vinci, ‘The Strategic Use of Fear by the Lord’s Resistance Army: Small Wars and Insurgencies (2005) p 360; Carlo Rodriguez Soto, ‘Tall Grass: Stories of Suffering and Peace in Northern (2009) p 22 – 23.

²⁵ D26-0022, UGA-D26-0010-0600, at 0600.

²⁶ See D26-0028, UGA-D26-0010-0540, paras 30-32.

²⁷ See D26-0018, UGA-D26-0010-0204, paras 47-50.

20. Kony led the LRA through prayer and the orders/commands of the Spirits. His “War Council” consisted of him and several Spirits, including “Mother Selini”,²⁸ “Who are You”, “Silver”²⁹ and others. When being possessed by the Spirits, Kony would go into a trance, changing his demeanour and sometimes speaking in tongues.³⁰ To secure loyalty through the Spirits, Kony would hold mass every week in the morning, acting as the central religious preacher.³¹
21. The evidence consistently demonstrates that Kony would use this spiritual power to control people and their behaviour. Through the Spirits, Kony is consistently said to have the power to foretell the future, including troop movements of the UPDF. The most prominent predictions are:
- a. The failed 1993 Peace Talks and the move to Sudan – Just before the 1993 Peace Talks, Kony spoke about an upcoming cessation of hostilities for the purpose of peace talks in 1993. Kony foretold his people that the peace talks would last just long enough to move everyone to Sudan. He was correct, as the peace talks broke down just as the last of us escaped into Sudan.³²
 - b. River Aswa 1997 shelling – After crossing the River Aswa and making camp, Kony became possessed by a Spirit, and instructed everyone to pick-up camp and move immediately. Following his instructions, the group started leaving immediately. Whilst leaving, the UPDF shelled the camp, destroying the area where the group was sitting just five minutes earlier. At this time, no one in the group, including Kony, had a functioning radio or communication device.³³

²⁸ Called “Silili” by D26-0018.

²⁹ D26-0006, UGA-D26-0010-0115, paras 30-33, *see also* D26-0018 at UGA-D26-0010-0540, paras 53-56.

³⁰ D26-0018, UGA-D26-0010-0540, at para. 55.

³¹ D26-0006, UGA-D26-0010-0115, at para. 24; *see also* UGA-D26-0010-0486, at paras 23-24.

³² D26-0006, UGA-D26-0010-0115, at paras 25-26.

³³ D26-0018, UGA-D26-0010-0204, at para. 58(b).

- c. March 2002 Iron Fist Offensive – Kony predicted the Iron Fist offensive months before it happened. Because of this prediction, people were able to prepare for the attack and go on the offensive to slow the UPDF.³⁴
- d. Garamba Park Bombing – About a week before the Garamba Park bombing, Kony assembled everyone and told them that the UPDF would attack them in one week. The day before the attack, Kony spoke to everyone again. He told them to leave if they wanted, but that if they stayed, they would not be killed. When the fog abated the next morning, four to five planes flew overhead, dropping bombs all around the LRA's location. Two people received minor injuries from exploding trees, and not a single person was killed.³⁵

22. In this context, it is important to note that it would be difficult to break such beliefs as a young adult since child soldiers are being taught such things during a time in which ones opinions and thoughts are being formed.³⁶ It is from these spiritual powers that Kony was able to lead through duress and threats of violence. If one disobeyed, they would not receive the protections and prophecies given by Kony.

- ii. Joseph Kony's healing power, ability to interpret dreams and read people's mind

23. Joseph Kony did not have a formal education, but he was believed to be able to heal people when they were sick. His remedies came from guidance of the Spirits

³⁴ D26-0024, UGA-D26-0010-0407, at para. 17; D26-0026, UGA-D26-0010-0486, at paras 23-24 and 43(a); D26-0006, UGA-D26-0010-0115, at paras 38-43.

³⁵ D26-0026, UGA-D26-0010-0486, at para. 43(c); D26-0028, UGA-D26-0010-0540, para. 44.

³⁶ D26-0022, UGA-D26-0010-0600, at 0600.

and knowledge of the land. Kony could cure syphilis with local herbs/fungus. Those that did not follow his instructions to the word were not cured.³⁷

24. He also interpreted dreams and seemingly normal, everyday acts, which were a routine part of his duties as spiritual leader of the LRA. Dream and occurrence interpretations formed a part of the day-to-day operations of the LRA; the interpretations shaped actions of the Holy Army.³⁸ Radio intercept records prove the importance of Kony's power to interpret dreams and everyday acts, even the death of Charles Tabuley.³⁹
25. Finally, people believed that Kony used the Spirits to learn of secret plots of desertion and disobedience.⁴⁰ It was believed by LRA fighters that Kony had spies at every corner. For instance, shortly before his death, Nyeko Tolbert Yadin came to Dominic with escape plans. Nyeko had heard of Amnesty, and came to his clan brother (who also heard of Amnesty). A scout, [REDACTED], was sent by them to see if a route was clear to surrender. Just after being sent, Otti summonsed Dominic and D26-0013 to Kitgum.⁴¹ Otti arrested Dominic, beat him and told him of the untold horrors that would happen if he left the LRA.⁴²

³⁷ D26-0027, UGA-D26-0010-0521, para. 11; D26-0006, UGA-D26-0010-0115, paras. 44-47.

³⁸ D26-0006, UGA-D26-0010-0115, paras. 27-28.

³⁹ See UGA-OTP-0025-0509 at 0512. For more examples, see UGA-OTP-0025-0662 at 0663; UGA-OTP-0025-0649 at 0652; UGA-OTP-0025-0807 at 0808; UGA-OTP-0025-0795 at 0796; UGA-OTP-0025-0732 at 0734-35.

⁴⁰ K Titeca 'The Spiritual Order of the LRA' in 'The Lord's Resistance Army: Myth and Reality (eds) T Allen & K Vlassenroot (2010) p 62 emphasises that the fear of spiritual revenge ensured that many abductees did not escape at the first opportunity or even during the peace negotiations.

⁴¹ D26-0013, UGA-D26-0010-0173, paras 37-40.

⁴² *Ibid.*

C. The LRA was Unstructured with Joseph Kony as the Supreme and Singular Leader

26. The LRA was not an organised armed group as compared to any structured military or paramilitary group. If anything, it was akin to a gang⁴³ with Joseph Kony as the all-seeing and all-knowing cult-like leader, as described above.⁴⁴ The Prosecution itself recognises the immense and singular power of Joseph Kony. The Defence notes that the Prosecution itself states that “application of LRA policy that could be started and stopped in accordance with orders *ultimately dictated by Joseph Kony*”.⁴⁵ This factor cannot be overlooked, especially in the context of the modes of liability for which it seeks to charge Dominic (*i.e.* command responsibility, ordering and the like). Any and *all* plans were devised, conceived, dictated and ordered by one man alone – Joseph Kony.

i. Military Rank

27. Military rank meant little in the LRA. Rank was demonstrative of survivability, ability to follow orders or what the Spirits told Kony.⁴⁶ Ranks meant so little, for instance, in early June 2004, Kony promoted a Lt. Colonel to a Lt. General for merely passing on information distributed on FM radio and Kony promoted himself as a response to the information in the radio transmission. As reported below on 5 June 2004:

Otti - UPDF are fools yesterday they were on radio belittling our promotions.

- They said you promoted yourself to Gen and that I was promoted to Lt Gen. And that it was because you are trying to copy Museveni's recent promotions.

⁴³ D26-0022, UGA-D26-0010-0600, at 0600.

⁴⁴ *Supra*, para. 19-22.

⁴⁵ ICC-02/04-01/15-375-Conf-AnxC, para. 43 (emphasis added).

⁴⁶ D26-0018, UGA-D26-0010-0204, para. 56.

- Since he is now a General and Aranda is a Lt. Gen.

Kony - I had lowered myself to the rank of Lt. Gen. But know since radio Uganda says I am a full General and the whole world now knows it, from this moment I am a full General!

- Now I am at the same rank as Museveni!
- Now for you don't complain, you continue slowly with Aranda at the rank of Lt. Gen. because the whole world now knows, the LRA leader is a full General!

Otti - It is Lt Col. Walter Ochora who reported like that.

Kony - From this moment I promote Walter Ochora to the rank of Lt. Gen. I

- He was my man from long ago.

Otti - He was also happy with our promotions.⁴⁷

28. The Defence asserts that military rank was not demonstrative of power and responsibility in the LRA. Kony's promotions, and the ranks granted thereof, were based on survivability, ability to follow orders or what the Spirits told Kony. This is not indicative of a military or military-like structure, as is required by Articles 8 and 28(a).

ii. The LRA did not have a proper chain-of-command

29. The LRA did not maintain a proper chain-of-command. Joseph Kony ruled the LRA with supreme power. Kony's orders were issued himself or through Otti Vincent in an inconsistent fashion, never following a chain-of-command.

30. Everyone reported to Kony, and Kony could order anyone to a mission. Former senior commanders of and with the LRA expressed to the Defence that orders did not always trickle down the chain-of-command as one would expect in a military.⁴⁸ Kony could and would tell junior commanders to go on missions, and the senior commanders would not know about the mission until after-the-fact.

⁴⁷ UGA-OTP-0016-0458, p. 0460.

⁴⁸ D26-0030, UGA-D26-0010-0580, paras 1-2; D26-0024, UGA-D26-0010-0407, para. 34.

31. This is not how a military or military-like structure operates. Orders flow from the top, through senior commanders to the intended recipients. Senior commanders are not by-passed for convenience; they are part of the loop to ensure success and accountability of their subordinates. This is not how they LRA operated. It operated with Kony at the top, giving orders to whomever he wanted, without any true chain-of-command.

iii. The brigades in the LRA were not brigades as in a normal military

32. In conjunction with the lack of a chain-of-command, the LRA did not maintain a normal military structure with its brigades.

33. In a regular military, the brigade commander would be apprised of all actions of his or her subordinates. Nothing would go around the commander. In the LRA, this was not the case as discussed below.

34. Additionally, there were times when the LRA had more than one brigade commander per brigade. Again, a clear chain-of-command would not be present. Two persons with the same “responsibilities and powers” destroy the normal command structure of militaries and military-like organisations.

35. Names like Sinia, Gilva, Trinkle, Stockree and Control Alter, along with Oka, Terwanga, etc. meant little. They were loose groups without a command structure. The command structure of the LRA was such that everyone reported to Kony.

V. SUBMISSIONS

A. The Court Should not Reverse the Burden on Child Soldiers

36. Dominic is a former child soldier. He lived his life like many child soldiers who are fighting on front lines across in prohibition of international humanitarian law.⁴⁹ In light of the many child soldiers around the globe, the Chamber ought to pay credence to this very special and significant issue before it. It is respectfully submitted that the fact that one was forcibly conscripted as a child soldier and lived in that environment of ruthlessness and duress throughout one's life cannot simply be regarded as a matter to be resolved during the sentencing phase at trial when addressing mitigation.

37. Under international law, including under the Rome Statute, treaties and customary international law, age is used as a reference to protect children from being recruited or forced to engage actively in hostilities.⁵⁰ However, in the instant case, this very law which was meant to protect Dominic is now being used against him.

38. Society forgives and rehabilitates young people who had the good fortune of leaving an armed group, but questions are raised in relation to adults who were abducted at childhood and who did not have the same opportunity or assistance to do so.⁵¹ This is however a far too simplistic view as options are not quite that simple in the face of imminent threat of death. Dominic never had the good

⁴⁹ The Defence notes that not all child soldiers actively engage in hostilities and that many around the globe serve in various roles from porters to cooks to sex slaves, *inter alia* (see Schauer, p. 6). Since Dominic himself was forced to actively engage in hostilities, the Defence limits its discussion to this.

⁵⁰ See Geneva Conventions (1949), Additional Protocol I, Article 77(2) and Addition Protocol II, Article 4(3)(c), of the Geneva Conventions (1949), Convention on the Rights of the Child, Optional Protocol on the Involvement of Children in Armed Conflict (2000), African Charter on the Rights and Welfare of the Child, Cape Town Principles, and Paris Principles. The Defence recognises that children are not only used in hostilities but can hold other positions.

⁵¹ See D26-0022, UGA-D26-0010-0600 at 0601.

fortune of leaving the LRA. Unlike some other child soldiers, he did not have the good fortune of coming into contact with an NGO or international organisation to safely assist in his demobilisation, rehabilitation and reintegration.

39. As a result, Dominic remained a child soldier and was enslaved until he surrendered on 6 January 2015. After that day, Dominic could finally say that he was a former child soldier.

40. By allowing a case such as Dominic's to proceed would be akin to endorsing an approach which imposes an additional requirement not found in customary international law; namely, that once a child soldier turns 15 years old, he or she has the obligation to release him or herself or escape – even where this would put his or her life at stake – or face the possibility of prosecution before international *fora* such as this Court.⁵²

41. This is a position which cannot be reconciled with notions of justice and human rights when we are speaking about those who were forcibly abducted as children and who were to be protected under international humanitarian law. It is submitted that if international humanitarian law was meant to protect Dominic but did not, that it cannot now be used against him to justify the charges before this very Court.

42. In this regard, it is important to bear in mind that once a child is within the armed group, there is a psychological breakdown of the child, his or her family ties and desire to return.⁵³ This process cannot, however, be seen as inconsequential; this is a methodological process to desensitize children and force them to dehumanize.⁵⁴ The younger a child is when conscripted, the more

⁵² The Defence realises that the Court lacks jurisdiction for persons under the age of 18, but this is not the case in all national jurisdictions.

⁵³ D26-0022, UGA-D26-0010-0600, at 0600.

⁵⁴ D26-0022, UGA-D26-0010-0600, at 0600.

of an influence this will have on them in the long term. It is recalled that Dominic was abducted at the tender age of 9.5 years old and that this cannot be disregarded.

43. This environment creates a certain dependence on the organisation as well, which is a function of how that organization is disconnected from “society” and its “norms”.⁵⁵ The LRA was incredibly disconnected from the social construct of normal society in Northern Uganda. Individuals within its ranks were therefore an instrument of that organization which was instinctive and not intellectual.

44. Further, disassociation is cited to be a factor as a result of severe child traumatisations⁵⁶ such as that which Dominic was subjected to. During times of trauma, research demonstrates that “fight or flight is rarely an option for children, as they are often physically unable to defend themselves or escape.”⁵⁷ It is noted that this is the “most readily accessible response to the pain of trauma may be to activate dissociative mechanisms, involving disengagement from the external world.”⁵⁸ This allows a child soldier, like Dominic, to “psychologically and physically survive the trauma”.⁵⁹

45. Further, the Defence contends that the age of 18 years old, which serves as a marker for adulthood and criminal responsibility before the Court, has little relevance for former child soldiers. Child soldiers in the LRA, like Dominic, did not have the so-called normal development.⁶⁰ The very use of child soldiers in the LRA is demonstrative of the lawless environment in which Dominic was raised. It was an environment without education.⁶¹ It was one which subjected innocent

⁵⁵ D26-0002, UGA-D26-0010-0602, at 0602.

⁵⁶ Schauer, *supra* note 1, p. 20.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *See generally* Schauer, p. 7.

⁶¹ Schauer, p. 3.

children, like Dominic, to witness and perform unspeakable acts.⁶² This life, as noted by [REDACTED], is experiential and not intellectual.

46. Dominic remained in this environment from the age of 9.5 until he became a former child soldier the day he surrendered on 6 January 2015. It is noted that the Prosecution itself contends, in relation to the charges against Dominic for the recruitment of child soldiers that the crime of conscription of child soldiers is a *continuous crime*.⁶³ It is inapposite to suggest that this crime ended the moment Dominic became 15 and has no impact. It is submitted that the same reasoning of this crime being continuous applies at hand and cannot be overlooked.

47. It is respectfully submitted that the fact that an individual continues to be what they were as a child (*i.e.* enslaved and placed under duress by an armed group and forced to participate in hostilities) cannot be used in the premise of international legal proceedings.

48. It is inapposite to reverse burden upon those children who remain in the same position, no matter how much development is perceived to have taken place by reference to our own standards or by the rank one has obtained. Rank is simply demonstrative of one's survivability in an environment, which is experiential.⁶⁴ According to [REDACTED], the sense of survival does not necessarily dissipate and that dependence on the organisation never abates even when a commander moves up the ranks.⁶⁵

49. The Defence respectfully argues that proceeding with this case is therefore in direct contradiction with international humanitarian law. It is contrary to notions of justice to now shift gears to the alleged leadership of armed groups that have

⁶² See D26-0022, UGA-D26-0010-0600 at 0600; *see generally* Schauer.

⁶³ See ICC-02/04-01/15-375-Conf-AnxC, para. 623.

⁶⁴ D26-0002, UGA-D26-0010-0602 at 0602.

⁶⁵ See D26-0002, UGA-D26-0010-0602 at 0602.

been developed from children. One can neither bring a clear case nor a reasonable suspicion of guilt under such circumstances. The Defence respectfully submits that under these circumstances, the Pre-Trial Chamber must dismiss the charges against Dominic with the contempt it deserves.

B. Grounds exist to exclude Dominic's liability pursuant to Article 31 of the Statute

50. In the event that the Chamber fails to accept the Defence's submission that it is inapposite to proceed with the charges against Dominic, a former child soldier, the Defence respectfully submits that there are grounds for excluding criminal liability.

51. In particular, Article 31 of the Statute provides grounds for excluding criminal responsibility. In particular, subparagraph (d) provides that for exclusion from criminal liability where the:

[C]onduct 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.

52. It is further provided that such threats must be: (i) made by other persons; or (ii) constituted by other circumstances beyond that person's control.

53. The Defence respectfully submits that any alleged conduct on the part of Dominic which is alleged by the Prosecution to constitute a crime if proven resulted from the threat of imminent death and bodily harm to himself, his

family, and village. Dominic indeed acted necessarily and reasonably under the circumstances which he faced since the age of 9.5 years old which has been described above.

54. As discussed above, [REDACTED], and others indicate that 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.⁶⁶ With systematic indoctrination and commanders “can over time replace the position of a caretaker/parent and serve as an adult role model, which children will naturally accept.”⁶⁷ However, this cannot be seen as voluntary but a forced adaptation.⁶⁸

55. Instinct and survival therefore becomes part of the experience of a child soldier.⁶⁹ Child soldiers are aware of the parameters of the organization only since this is an element of their survival.⁷⁰ A person will therefore follow the rules because of the ethos of the institution instilled among its ranks.⁷¹ According to [REDACTED], in this environment, instinctive reactions are instilled which are not intellectual.⁷²

56. The Defence further argues that the next prong of the test has been met since those threats were made by others persons (*i.e.* Joseph Kony) *and*⁷³ that they also constituted circumstances beyond Dominic’s control. Dominic could not be said to have had any control over the ruthless environment in which he found himself in at the age of 9.5. Having grown up in this environment, his circumstances, and

⁶⁶ INSERT; See also generally Schauer, *supra* note 1.

⁶⁷ Schauer, *supra* note 1, p. 8.

⁶⁸ *Ibid.*

⁶⁹ D26-0002, UGA-D26-0010-0602 at 0602; See also Schauer, *supra* note 1.

⁷⁰ D26-0002, UGA-D26-0010-0602 at 0602.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ The Defence notes that it is able to meet a higher standard than has been set out in this prong of the test by the use of the term “or”.

namely his need to survive in that environment were beyond his control. Dominic also did not *intend* to cause harm to others. On the contrary, Dominic was simply surviving in an environment which enslaved him.⁷⁴

57. The Defence submits that, under the circumstances, there are indeed grounds to exclude criminal liability. In these circumstances, the Defence respectfully requests that the Pre-Trial Chamber dismiss the charges against Dominic.

C. Eleventh-hour Evidence Should be Excluded Pursuant to Rule 76(3) of the Rules of Procedure and Evidence

58. Rule 76(3) of the Rules of Procedure and Evidence requires that “[t]he statements of prosecution witnesses *shall* be made available in original and in a language which the accused fully understands and speaks.”⁷⁵ The former Single Judge noted that the only language which Dominic speaks and understands is Acholi.⁷⁶

59. The former Single Judge, during the transition period of Counsel taking over from Duty Counsel, signed away Dominic’s right to have all witness statements in Acholi.⁷⁷ The Defence submits that this is not a right that can be waived and that Dominic is indeed entitled to all relevant materials in a language in which he fully understands.

60. Dialogue existed between the parties in attempt to streamline partial translations of witness statements to the Defence so that Dominic could participate. For the

⁷⁴ See Kasper, Olson T., “Violence Against Civilians in Civil War: Understanding Atrocities of the Lord’s Resistance Army in Northern Uganda”, Working Paper, No 28, February 2007, pp. 7-10.

⁷⁵ Emphasis added.

⁷⁶ ICC-02/04-01/15-203, para. 30.

⁷⁷ *Ibid*, at para. 35.

purpose of Rule 76(3), the Defence accepts that the partial translations of the 2015 statements are suitable for the purpose of the Confirmation Hearing.⁷⁸

61. The Defence takes serious note of the sheer number of statements disclosed to the Defence, albeit not translated, during the final disclosure. The amount of statements and evidence disclosed renders it impracticable for Dominic to participate actively in his Defence with respect to those statements disclosed at the eleventh hour.
62. The Defence notes the hardships it has had in relation with the ICC computer systems.⁷⁹ Even with the statements being disclosed, it took a former Case Manager a few days to download and prepare the disclosure for use by the Defence.⁸⁰ By the afternoon of 24 December 2015 when everything was prepared, people were home for the holiday season. For example, CSS informed the Defence that there would be no interpretation services for Acholi from 22 December 2015 through 5 January 2016.⁸¹ Assuming that all the computer systems worked flawlessly, and that the Defence was able to access the files seamlessly, the Defence still could not have physically been able to review and determine the substance of all 30 statements and transcripts in relation to a 61-page DCC, a 44-page List of Evidence and a 257-page Pre-Confirmation Brief.
63. On 21 December 2015, the Prosecution disclosed 20 untranslated witness statements and 10 incriminatory transcripts of interviews, one of which is an approximate 120-page English only transcript. Out of the 20 statements, 16 are

⁷⁸ Email communications between Ben Gumpert, QC and Tom Obhof from 27 September 2015 to 2 October 2015. Mr Gumpert asked the Defence if it was alright to skip the introductory paragraphs for translation.

⁷⁹ Email between CSS and Thomas Obhof on 16 December 2015 at 05h54 CET about problems affecting Ms Bridgman's, Ms Anzovino's and his ICC account; ICT tickets 1621783 and 162784 created on 27 December 2015; 5 January 2016 with Michelle Oliel having her entire system reset, email from CSS to Thomas Obhof confirming that Ms Bridgman's Citrix account was reset.

⁸⁰ Email communication between Francesca Anzovino and the Defence Team on 24 December 2015.

⁸¹ Email between CSS and Tom Obhof on 9 December 2015.

classified as incriminatory and not translated.⁸² Seventeen witness statements were disclosed on 21 December 2015 without Acholi translations. Out of these, seven of them were signed before 2008. These seven witness statements were therefore in the hands of the Prosecution for eight or more years. The Defence questions why these statements have not been translated to-date.

64. The Defence submits that given the length of time in the Prosecution's possession, the Prosecution had an obligation to disclose these statements in a language which Dominic can understand. The Defence believes that approximately seven (7) years is indeed more than a reasonable amount of time to do as such.

65. The Defence further calls into question the priority placed by the Prosecution on the translation of statements for persons who were examined pursuant to Article 56 of the Statute. Dominic listened to their testimonies in Court, as the Prosecution is well aware. Eight of the 20 translated statements from the final round of disclosure come from those individuals already examined during Article 56 proceedings.⁸³

66. The Defence further submits that the Prosecution's untimely disclosure of untranslated documents on 21 December 2015 was further compounded by the closure of Interpretation services for the ICC Detention Centre until 6 January 2016. The Defence could therefore not speak in detail to our client in order to make a preliminary determination for the necessary translations, especially considering that some of the statements are from newly discovered insider witnesses.⁸⁴ There were nonetheless approximately 30 statements and

⁸² There were an additional nine sets of interviews which were disclosed on 21 December 2015 which did contain the Acholi interpreters and Acholi words of the witnesses.

⁸³ One of them is P-0198, whose examination was not finished.

⁸⁴ For example, see UGA-OTP-0249-0472-R01 (a 30-page witness statement from [REDACTED] who signed his witness statement on [REDACTED] and was disclosed on 21 December 2015).

transcripts disclosed, and this was not enough time for the Defence to review them.

67. Based on the foregoing, it is submitted that, as a result of the late disclosure of these statements and transcripts, which effectively denied the Defence its right to inspect and request interpretations, the 17 statements and transcripts described in paragraph should not be admitted as evidence for the purpose of the Confirmation Hearing.

D. The Chamber Should Refrain from Confirming Multiple Charges

68. The Prosecutor seeks to charge Dominic cumulatively for certain aspects of the same alleged conduct arising from the alleged facts. Contrary to the Prosecution's submission,⁸⁵ this approach neither promotes judicial efficiency nor fairness to Dominic. It is argued that charging someone for multiple crimes stemming from the same act, no matter how serious, directly contradicts principles of justice

69. It is also noted that the *Bemba* Pre-Trial Chamber held that cumulative convictions for rape and torture were impermissible. It asserted that "the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of a specific purpose."⁸⁶ It further stated:

The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly

⁸⁵ ICC-02/04-01/150-375-Conf-AnxC, para. 5.

⁸⁶ ICC-01/05-01/08-424 at para. 195.

breached in relation to one and the same conduct requires *at least one additional material element not contained in the other*.

70. The Pre-Trial Chamber next distinguished procedure at the ICC, noting that it is Chambers that determines the most appropriate legal characterisation of the crimes.⁸⁷ Since re-characterisation can also be done at trial, it was asserted that there was no need for the Prosecution to present all possible characterisations of a crime in order to attempt to secure a conviction. The same argumentation is said to apply to the charges against Dominic.

71. In this regard, the Defence notes that cumulative charges or convictions are not explicitly provided for in the ICC Statute. 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.

72. It is respectfully submitted that cumulative convictions have the same effect as the retrial of the same conduct and should therefore not be allowed on the basis of the principle of *ne bis in idem*. In the regard, the Defence respectfully reminds emphasises that the ICC is not a Truth Commission and that its policy of charging everything possible is not an appropriate approach before the ICC.

73. The Defence argues that the Chamber should restrict such practices and reject characterisations of charges which result in Dominic being charged more than once for the same underlying act. The Prosecution relies upon jurisprudence of the ICTY to support its proposition that cumulative convictions and thus cumulative charges are permissible. The Defence will, however, elaborate on its objections to adopting the approach of the ICTY.

⁸⁷ See Regulation 55 of the RoC.

74. While acknowledging the practice of inter-Article cumulative convictions before the ICTY,⁸⁸ the Defence argues that the ICTY approach of charging Dominic, for example, under Articles 7 and 8 of the Statute is contrary to notions of justice and fairness. It is further submitted that the test, as put forward by the Prosecution, was not always as such and that the Tribunal in earlier cases was indeed prepared to consider contextual elements when assessing cumulative convictions.⁸⁹

75. In particular, the Defence points to the dissenting opinion in the *Čelebići* case, which the Defence submits should be regarded by the Pre-Trial Chamber as an important caution when approaching this issue:

[T]he fundamental consideration arising from charges relating to the same conduct is that an *accused should not be penalised more than once for the same conduct*. The purpose of applying this test is therefore to determine whether the conduct of the accused genuinely encompasses more than one crime. For that reason, we believe that it is not meaningful to consider for this purpose, legal prerequisites or contextual elements which do not have a bearing on the accused's conduct, and that the focus of the test should therefore be on the substantive elements which relate to the accused's conduct including his mental state.⁹⁰

⁸⁸ It is to be noted that the practice of *intra*-Article 5 cumulative convictions has been the subject of numerous dissenting opinions and was only practice as a result of a narrow majority (see Stakić AJ, Opinion Dissidente Du Juge Güney Sur Le Cumul De Déclarations De Culpabilité; Naletlić AJ, Opinion Dissidente Conjointe Des Juges Güney Et Schomburg Sur Le Cumul De Déclarations De Culpabilité; *Nahimana* AJ, Partly Dissenting Opinion Of Judge Güney).

⁸⁹ See for e.g. *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, 14 January 2000; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998.

⁹⁰ *Delalić et al. (Celebici)*, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, paras 26-27.

76. The Defence submits that charging Dominic, for instance, pursuant to Articles 7 and 8 for the same underlying would only serve to charge “additional crimes which have a distinct existence only as a purely legal and abstract matter, effectively through the historical accidents of the way in which international humanitarian law has developed in streams.”⁹¹ In other words, it is erroneous to view the *chapeau* requirements of war crimes and crimes against humanity as materially distinct elements because they cannot be attributed to the conduct of the suspect or accused. It is far too simplistic to view war crimes and crimes against humanity in such a way which regards them as materially distinct so to allow such practice.

77. At the ICTR, similar caution was enunciated:

In my opinion, the criteria articulated and applied in *Musema* are too formalistic, and result in cumulative convictions in instances where they should not be allowed. Although the *Musema* test purports to limit cumulative convictions by requiring that each of the cumulative crimes have different elements, the practical result is that inter-article cumulative convictions for the three crimes in the Statutes are always possible without any legal obstacle.⁹²

78. This point is made clear by the objections the Defence will raise below in relation to the Prosecution’s proposed crime of forced marriage being subsumed by the crime of sexual slavery.⁹³ The Prosecution’s characterisation of the so-called materially distinct elements are effectively legal folklore when observed against the fact that they both rely upon the same underlying facts.

⁹¹ *Ibid.*

⁹² *Prosecutor v. Semanza*, Judgment and Sentence, Dissenting Opinion, para. 1, Case No. ICTR-97-20-T.

⁹³ See *infra*, paras 129-131.

79. The Defence notes that there can be considerable consequences for a suspect or accused who is charged with, or convicted for, convicted of multiple offenses for the same underlying facts in regards to social stigma which can play out both in detention circumstances or even upon release.⁹⁴

80. It is argued that the matter of cumulative charging should be resolved at Pre-Trial and that this matter in the name of judicial expediency and in light of the fact that Chambers has the power to re-characterise crimes at trial.

81. Based on the foregoing, the Defence requests that the Pre-Trial Chamber refrain from confirming cumulative charges against Dominic. It is respectfully submitted that cumulative charges are only permissible where those charges require proof of different facts in order to be established by the Prosecution.

E. Indirect Co-Perpetration is not a Crime Before the Court

82. It is respectfully submitted that the definition of indirect co-perpetration as proffered by the Prosecution, as asserted by Judge Christine Van den Wyngaert, goes beyond the terms of the Statute and is therefore incompatible with Article 22 of the Statute.⁹⁵ Judge Van den Wyngaert opined that:

In doing so, the Pre-Trial Chamber developed a new axis for the attribution of criminal responsibility: in addition to the horizontal axis (joint perpetration) and the vertical axis (perpetration through another person), a new diagonal axis ("indirect co-perpetration") was created.

⁹⁴ For example, Krstić's request to be transferred to a lower security facility on the basis of the gravity of his offences (Krstić v. Sec'y of State for Justice [2010] EWHC (Admin.) 2125, para. 9). The Defence therefore submits that when multiple convictions have been entered for the same facts, that this could similarly have an impact on Dominic in the future.

⁹⁵ ICC-01/04-02/12, paras 2, 64.

This combined reading leads to a radical expansion of Article 25(3)(a) of the Statute, and indeed is a totally new mode of liability.⁹⁶

83. In this regard, the Defence also notes that the ICTY has adopted the third category or expanded joint criminal enterprise liability (“JCE III”) which is a similar form of liability to indirect co-perpetration.⁹⁷ JCE III much like the other two forms of this liability were considered to be a part of customary international law. The Defence contends that indirect co-perpetration cannot be applied before this Court since it is based on customary international law and not found in the Statute. It is respectfully submitted that the Pre-Trial Chamber in *Katanga and Ngudjolo* overstepped its bound as the role of customary international law does not play the same role at the ICC as it does as the *ad hoc* Tribunals.

84. The Defence therefore submits that the charge of indirect co-perpetration cannot be confirmed since it is not a crime which is based on the Statute.

85. *In arguendo*, if Chamber decides that indirect co-perpetration exists, the Chamber should adopt the standard used by Pre-Trial Chamber II and Trial Chamber I. The standard is: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrator(s) must be mutually aware and accept that

⁹⁶ *Ibid.*, para. 59.

⁹⁷ *Prosecutor v. Brdanin*, IT-99-36-A, Judgment, 3 April 2007, para. 424

implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).⁹⁸

86. With respect to (ii), the Prosecution has failed to demonstrate that Dominic carried out *essential* contributions in a coordinated manner which resulted in the fulfilment of the material elements of the crimes.

87. For Pajule, the Prosecution has failed to demonstrate that Dominic planned and participated in the attack on Pajule. The Prosecution's key witnesses for this attack are unreliable at best, as is described below in the section on Article 25(3)(c). OTP-0009 and OTP-0309 cannot be relied upon with enough certainty to support a claim that Dominic carried out any essential plans.

88. For Odek, the Prosecution has failed to show where the plans originated. Alleged insider Prosecution witnesses tell different stories as to who planned and ordered the attack. OTP-0258 states that Dominic requested this location to Kony, but OTP-0245 states that he heard it over the radio.⁹⁹ OTP-0142 states that the order from Kony took place two days before the attack.¹⁰⁰ Oddly enough these stories do not appear in the UPDF or ISO record books. It appears that the radio transmissions never took place.¹⁰¹

89. The lack of radio transmissions documenting the communications between Kony and Dominic before the attack on Odek should be dispositive of this issue because, as the Prosecution admits, by 2001, both ISO and UPDF had established

⁹⁸ Pre-Trial Chamber II, ICC-01/09-02/11-01, para. 36; Pre-Trial Chamber II, ICC-01/09-01/11-01, para. 40.

⁹⁹ OTP-0245, UGA-OTP-0244-0269, at 0276 lines 212-222 (stating that he heard the orders over the radio).

¹⁰⁰ OTP-0142, UGA-OTP-0244-0667-R01, at 0675, lines 257-259.

¹⁰¹ See UGA-OTP-0197-1670 at 1682-1688 and UGA-OTP-0061-0206, at 0252-0266. The Defence notes that there are no records of conversations between Joseph Kony and Dominic Ongwen about Odek from 25 April 2004 through 29 April 2004.

permanent offices and were intercepting LRA radio communications daily with trained staff on a full time basis.¹⁰²

F. Dominic did not Order the Alleged Crimes Pursuant to Article 25(3)(b)

90. Pursuant to Article 25(3)(b) a person can be held criminally liable for ordering a crime which occurs or is attempted. The elements of ordering have been considered as follows: (a) *the person is in a position of authority* (emphasis added) (b) the person instructs another person to either commit a crime which in fact occurs or is attempted or instructs another person to perform an act or omission in the execution of which a crime is carried out; (c) the order had a direct effect on the commission or attempted commission of a crime; and (d) the person is aware that the crime will be committed as a normal consequence of events.¹⁰³

91. The Defence reiterates the arguments encompassed in Section K above on Command Responsibility. For ordering to be upheld, it has to be shown that the suspect was in a position of authority. Dominic did not enjoy such a luxury. From the moment he was abducted into the rebel forces, he had to follow the orders that came from the High Priest and his War Council. He was not just a messenger and an executor of orders, he did not have any other choice but to follow through otherwise he would have to pay the price.

92. This is evident from various Prosecution witnesses and the contents of the Prosecution Brief. P-0099 categorically stated that it was not possible for any commander, including Dominic, to disobey orders from superior officers. Prosecution Witness P-0142 states that if an order was given and a commander did not follow through, they would be arrested. As already mentioned,

¹⁰² Prosecution Pre-Confirmation Brief, ICC-02/04-01/15-375-Conf-AnxC, para. 63.

¹⁰³ See e.g. *Prosecutor v. Sylvestre Mudacumura*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, para. 64.

Dominic's promotions were due to his survival skills of the harsh realities of being a child soldier.

93. From the time of his abduction, he had witnessed enough to understand that his role as a "leader" was to do as he was told otherwise he would suffer the consequences. As a matter of fact, other instances indicate the price he had to pay when he did not obey the commands from Kony. Indeed, Dominic followed orders to the letter and expected the same from his fighters. P-0245 states that all orders came from Kony alone. And indeed this is true because as the Prosecution correctly states, Dominic knew that he had to follow superiors' orders and did so, demonstrating that he understood his position in the non-existent LRA chain of command.

G. Dominic did not aid, abet or otherwise assist in the commission of the crimes charged

94. Article 25(3)(c) of the Rome Statute provides for complicity by assistance. It provides that a person will be found criminally responsible and liable for punishment if for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

95. The Prosecution argues that Dominic's purported presence at Pajule trading centre provided moral assistance and that amounts to aiding, abetting, or otherwise assisting in the commission of the crimes charged. The prosecution further argues that Dominic's supposed actions, including his violent treatment of civilians, served as an example to LRA fighters who participated in the attack. The Defence submits that the Prosecution is in fact wrong.

96. The Defence notes the strong inconsistencies with OTP-0009's statements. In his [REDACTED] statement, he barely mentioned Dominic. The first mention of his name in relation to Pajule was when OTP-0009 arrived at Latanya Hill with the group.¹⁰⁴ Six paragraphs later, and completely out of place with the story being told, he briefly mentions that Dominic talked to him at the attack. By its location and context, it can be assumed that he is not talking about the attack, but about the RV point of Latanya Hill.¹⁰⁵ In [REDACTED], OTP-0009 changed his story towards Dominic, inventing a story about Dominic being at the trading centre and seriously mistreating people there.¹⁰⁶ His only excuse for not mentioning it ten years earlier was that he was not asked. He gave a 15-page statement in [REDACTED] about Pajule and forgot to mention being physically abused by Dominic because he was not asked?¹⁰⁷

97. The Defence also keenly points out that OTP-0081 claimed that OTP-0009 was a collaborator for the Pajule attack, telling a story of person that saw and heard [REDACTED].¹⁰⁸ The Defence expected a statement from the person [REDACTED]) that allegedly witnessed [REDACTED] but it did not find one from the Prosecution. OTP-0009's story cannot be trusted.

98. Additionally, OTP-0309's statement is not believable. In the past week, his statement has been slowly described and interpreted to Dominic. Dominic does not recognise his name or alleged nicknames. The only [REDACTED] [REDACTED]. The attachments to the statement, which would have pictures, are not available to the Defence. Finally, if OTP-0309 truly spent almost two years [REDACTED], how is it that he did not know the name of

¹⁰⁴ UGA-OTP-0151-0167-R01, para. 47.

¹⁰⁵ UGA-OTP-0151-0167-R01, para. 53

¹⁰⁶ Compare UGA-OTP-0151-0167-R01 with UGA-OTP-0241-0546-R01.

¹⁰⁷ OTP-0009, UGA-OTP-0241-0546-R01, at para. 31.

¹⁰⁸ OTP-0081, UGA-OTP-0070-0029-R01, at paras 44-45.

the brigade that he was in?¹⁰⁹ When viewed in its totality, OTP-0309 is not a credible witness, and therefore his characterisation of the events cannot be relied upon for the Confirmation of Charges.

99. Even if the Chamber finds evidence placing Dominic in Pajule during the attack, his actions cannot be found substantial to muster the test as proposed by the Prosecution in paragraph 220 of its brief. Pre-Trial Chamber I in *Mbarushima* acknowledged that while there is little jurisprudence at this time interpreting articles 25(3)(b) or (c) of the Statute, the application of analogous modes of liability at the ad hoc tribunals suggests that a substantial contribution to the crime may be contemplated.¹¹⁰ In this regard, the Prosecution has failed to demonstrate how any conduct substantially contributed to the crimes by the perpetrators.

100. A common thread in the various attacks from Prosecution witnesses is that during the heat of the moment, none of the fighters would be paying attention to their colleagues. Their memories are muddy and hazy at best. As such, there is no way one can properly argue that Dominic's actions during the attack gave moral support to the troops on the ground. Encouragement and moral support can only have a substantial effect on the commission of the crime if the perpetrators are aware of it.¹¹¹ In *Brdjanin*, the ICTY Appeals Chamber held that the awareness of the perpetrators can be inferred from the facts of the case. However, this must be the only reasonable inference from the evidence.¹¹² The same cannot be said in the present instance since the fighters were not motivated by the presence or lack thereof of Dominic. Rather, just like everyone in the LRA,

¹⁰⁹ OTP-0309, UGA-OTP-0249-0472-R01, at para. 79

¹¹⁰ ICC-01/04-01/10-465-Red, para. 279.

¹¹¹ *Prosecutor vs Brdjanin*, No. IT-99-36-A, "Judgment", 3 April 2007, para. 277.

¹¹² *Prosecutor vs Brdjanin*, No. IT-99-36-A, "Judgment", 3 April 2007, para. 280.

they were driven by fear and the need to survive the conditions that befell them by their mere abduction.

101. To properly capture this sentiment, one cannot ignore the pleas from various prosecution witnesses to have Dominic forgiven and granted amnesty just like they were. After all, their circumstances are similar in all respects. It is therefore inconceivable for a fact finder to conclude that Dominic's actions aided, abetted or otherwise assisted in a substantial manner any of the crimes charged.

H. Article 25(3)(d)

102. Criminal liability pursuant to Article 25(3)(d) has been characterised as follows:¹¹³

(i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; (iii) the individual contributed to the crime in any way other than those set out in article 25(3)(a) to (c) of the Statute (objective elements); (iv) the contribution is intentional; and (v) the contribution has been made either (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime (subjective elements).

103. The Defence notes that this legal characterisation is inapposite to the facts which have been extensively discussed above. With respect to the first element, the Defence notes that there could not have been considered to be a common

¹¹³ Pre-Trial Chamber I, ICC-01/04-01/10-1, para. 39 ; Pre-Trial Chamber II, ICC-01/09-02/11-01, para. 47; Pre-Trial Chamber II, ICC-01/09-01/11-01, para. 51.

purpose since this requires “agreement or common plan between two or more persons”.¹¹⁴ As noted above, Kony was the *singular* leader of the LRA. As a result, the alleged plan could therefore not have come to fruition since it is required between two or more persons.

104. The Defence contends that it is inappropriate to consider *any* contribution to a group crime.¹¹⁵ It is argued that under the circumstances which Dominic faced, as has already been extensively discussed, it is inappropriate to charge him “for acting with a mere knowledge of the group’s intent to commit a crime”.¹¹⁶ When assessing Dominic’s contribution, it cannot be said to be a significant one.¹¹⁷

105. When determining whether a contribution is significant, regard is to be had to several factors.¹¹⁸ First and as also noted above, Dominic could not have made any efforts to prevent criminal activity or to impede the efficient functioning of the group’s crimes. Dominic, like other LRA fighters ordered by Kony, would be required to execute any order. Importantly, the contribution to the plan must be intentional.¹¹⁹ As noted below, Dominic did not possess the requisite intent.

106. Second, if having contributed at all, cannot be said to have done so with the aim of furthering the *criminal activity of the group*. As noted above, Dominic was simply surviving. Knowledge under these circumstances cannot be sufficient to incur criminal liability when that common purpose was established, developed, and directed by one individual alone who held his ranks under duress through a methodological process of spiritual indoctrination.

¹¹⁴ Pre-Trial Chamber I, ICC-01/04-01/10-465-Red, at para. 271.

¹¹⁵ *Ibid*, at paras. 276-277.

¹¹⁶ *See Ibid*, at para. 278, footnote 658.

¹¹⁷ *Ibid*, at para. 283.

¹¹⁸ *Ibid*, at para. 284.

¹¹⁹ *Ibid*, at para. 288.

I. The Prosecution Failed to Prove Attempt Pursuant to Article 25(3)(f)

107. Article 25(3)(f) of the Rome Statute provides for criminal liability for attempts to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

108. It is therefore of critical importance, in considering whether a crime can be characterised as attempted (or "inchoate") to determine whether the perpetrator's conduct was adequate to bring about as a consequence the crime in question. Such adequacy requires that, in the ordinary course of events, the perpetrator's conduct will have resulted in the crime being completed, had circumstances outside the perpetrator's control not intervened.¹²⁰

109. The Prosecution submits that plans to commit murder were thwarted by independent circumstances. As an example, the Prosecution argues that an LRA fighter fired shots into [REDACTED] door because it was locked. The fighter might have been attempting to access the locked house and not necessarily to commit murder of the residents therein. The fact that he shot through the door and not indiscriminately supports this hypothesis. As such, the fighter's conduct cannot be said to have been adequate to bring about the injuries that were sustained.

J. The Subjective Elements Pursuant to Article 30 have not Been Met

110. Article 30 of the Rome Statute sets the default *mens rea* element for the Statute. As such, Article 30 allows for *dolus directus* and *dolus indirectus*. Unlike as

¹²⁰ The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus Corrigendum on the "Decision on the Confirmation of Charges" of 7 March 2011 at para. 96.

indicated by Pre-Trial Chamber I in *Katanga* and *Ngudjolo*, *dolus eventualis* does not exist within Article 30 of the Statute.

111. As shown by the Report of the Preparatory Committee on the Establishment of the International Criminal Court, the legal standard of *dolus eventualis* was put forth as one of the default *mens rea* for the Rome Statute.¹²¹ As one can obviously see, *dolus eventualis* was not included in Article 30, and thus excluded from the Rome Statute unless specifically allowed within the specific crime.

K. Dominic is not Responsible Pursuant to Article 28(a) of the Statute

112. Article 28(a) of the Statute requires that the Prosecutor demonstrate: (i) the suspect is a military commander or a person effectively acting as such; (ii) has effective command and control, or effective authority and control over the forces who committed one or more of the crimes set out in articles 6 to 8 of the Statute; (iii) that the crimes committed by the forces resulted from the suspect's failure to exercise control properly over them; (iv) the suspect either knew or should have known that the forces were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and (v) the suspect failed to take the necessary and reasonable measures *within his or her power* to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.¹²²

¹²¹ ICC document A/CONF.183/2, from 14 April 1998.

¹²² See ICC-01/05-01/08, para. 407.

- i. Dominic was not a military commander or a person effectively acting as such

113. While it is alleged that Dominic held the rank of Commander of the Sinia Brigade, in the context of the Rebels, rank did not mean very much.¹²³ The LRA and its structure cannot be compared to a proper military structure but rather a clan or gang which one cannot easily leave.¹²⁴

114. Rank in the context of the LRA does not necessarily indicate level of control or command since achieving rank was often a matter of loyalty in this context. As mentioned above, Dominic's rank was also demonstrative of his survivability while under duress.¹²⁵ Achieving rank is indicative that he behaved in a loyal and pleasing way to the ultimate leader, Joseph Kony. It would be wholly erroneous to view LRA commanders' as having rights, power, and obligations similar to those in regular armed forces or even in other rebel forces.

- ii. Dominic did not have effective command and control or effective authority and control

115. It is further submitted that Dominic did not have effective control necessary to fulfil the requirements pursuant to Article 28(a) of the Statute.¹²⁶ Orders ultimately came from Joseph Kony, who created an environment whereby members of the LRA believed him to be a prophet.¹²⁷ His word was law. For instance, all alleged missions and attacks as alleged by the Prosecution could not have taken place without Kony ordering it.¹²⁸ Dominic did not possess the ability

¹²³ D26-0018, UGA-D26-0010-0204, para. 56; D26-0022, UGA-D26-0010-0600, at 0601.

¹²⁴ D26-0022, UGA-D26-0010-0600, at 0601.

¹²⁵ See D26-0002, UGA-D26-0010-0602, at 0602.

¹²⁶ ICC-01/05-01/08, at para. 415.

¹²⁷ For example see D26-0027, UGA-D26-0010-0521, at paras 10-12; D26-0024, UGA-D26-0010-0407, at paras 13-15.

¹²⁸ See D26-0026, UGA-D26-0010-0486, at paras 35-39.

to influence actions, let alone control them, which falls short of the statutory requirements outlined by this Chamber.¹²⁹

iii. Dominic did not have the power to exercise proper control over the LRA rebels

116. There is a casual link between this and the second requirement.¹³⁰ One must have effective command/authority and control over his or her subordinates to have the power necessary to control them.

117. Dominic had little to no power to control the persons allegedly under his command. As stated above, no one overruled Joseph Kony, and no one did anything without his approval. Refusing to follow an order would result in torture, death or the possible destruction of your home village.¹³¹ If Kony said jump, no one would ask how high; they would jump. Sole power resided in Kony.

118. Kony would circumvent his senior commanders, ordering the lower ranks to whatever mission the Spirits told him.¹³² LRA rebels followed these orders. Senior commanders did not have proper control over their subordinates.

119. Contrary to the Prosecution's assertion, Dominic could not have ordered or initiated investigations of crimes by LRA forces under his command. This sole power rested in the hands of Kony. Similarly, Dominic could not discipline, dismiss, demote, or refrain from promoting or rewarding members of the LRA. As mentioned above, Dominic had no ability to issue orders. It is impracticable for the Prosecution to suggest that he failed to fulfil any so-called obligation to

¹²⁹ See ICC-01/05-01/08-424, para. 415.

¹³⁰ See ICC-01/05-01/08-424, para. 419.

¹³¹ See D26-0013, UGA-D26-0010-0173, at para. 40; ICC-02/04-01/15-375-Conf-AnxC, at p. 31, top paragraph.

¹³² D26-0030, UGA-D26-0010-0580, at 0580.

issue orders that were necessary and reasonable in the circumstances to prevent or repress the commission of crimes by the LRA fighters. This theory of the crimes could apply in the context of a conventional army or even in other conventionally organised rebel groups. The structure of the LRA was that Kony and his spiritual council were supreme. Only Kony and the Spirits gave orders and rules that had to be strictly followed. In this situation, punishment was not carried out by commanders but by the spirits that protected the obedient in the battlefield and punished the disobedient (who were killed in battle). It is therefore inapposite to suggest that Dominic had such obligations under the circumstances.

120. This matter cannot be simply viewed as an argument or acting on superior orders.

- iv. The Prosecution has failed to demonstrate that Dominic knew or should have known that his so-called subordinates were committing or about to commit one or more of the crimes set out in Article 6 to 8 of the Statute

121. Actual knowledge cannot be presumed; it must be shown through direct or circumstantial evidence.¹³³ The “should have known” standard requires the Prosecution to demonstrate that Dominic had “an active duty...to take...necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.”¹³⁴

122. It was commonplace for Kony or Otti to order groups of people to specific locations or missions without contacting the commander.¹³⁵ Brigades were

¹³³ See ICC-01/05-01/08-424, para. 431.

¹³⁴ Pre-Trial Chamber II, Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 433.

¹³⁵ For example, see D26-0030, UGA-D26-0010-0580, at 0580.

ordered on missions without a senior commander's knowledge. Lieutenants would be contacted instead of Lt. Colonels, Captains would be told before Majors. Generals were often left in the dark about missions until after the mission was complete.

123. Furthermore, Dominic could not have been aware of the general crimes being committed by his alleged subordinates. Kony changed his mind on general orders based on the advice of his "War Council".¹³⁶ It was and still is impossible to know what the general orders are unless you hear them directly from Kony that day.

- v. Dominic did not fail to take the necessary and reasonable measures **within his power** to prevent or repress the commission of such crimes or fail to submit the matter to the competent authorities for investigation and prosecution

124. Kony was and is the leader of the LRA. Power rests in him, and the ability to prevent or repress fell upon him with his seemingly omnipotent power. Kony decided what was a crime and the punishment for the crimes.

125. Training of persons was rudimentary at best. This is the training that Dominic received when he was 9.5 years old. The only training Dominic understood was taught to him by the persons who stole him from his family. This was his upbringing. His power to train people was limited.

126. Dominic had little to no power to repress anything. Kony's word was law. If you disobeyed minor orders, you would be beaten and tortured. If you disobeyed a larger order, execution was the norm.¹³⁷ Again though, the Rebels educated Dominic.

¹³⁶ D26-0018, UGA-D26-0010-0204, at paras 53-56.

¹³⁷ D26-0024, UGA-OTP-0010-0407, at para. 45; D26-0026, UGA-D26-0010-0486, at paras 35-39.

127. Finally, punishments for disobedience were harsh. Death and torture were commonplace. The “competent authorities” to punish people for what they had done were the same people that gave the alleged orders to attack the IDP Camps. If Dominic had the power to punish these people himself, there are no jails, judges or juries. Torture or execution was it.

L. The Crime of Forced Marriage is subsumed by the crime of sexual slavery

128. The Prosecutor seeks to charge Dominic with forced marriage as a category of other inhumane acts. Since forced marriage is not recognised as a crime before the ICC or in the Statute, it is submitted that forced marriage does not amount to a category of other inhumane acts since it is subsumed in the crime of sexual slavery. In *Katanga and Ngudjolo*, the Pre-Trial Chamber clearly stated that sexual slavery encompasses forced marriage and forced labour involving compulsory sexual activity.¹³⁸ The distinctions drawn by the Prosecution, based on this reasoning, have been adjudicated before the ICC and are deemed to be subsumed by another crime.

129. Consideration must be given to all of the factual circumstances.¹³⁹ Although the Prosecution submits that there are distinctions between sexual slavery and forced marriage, it is also noted that the very facts that the Prosecution utilises to support its allegation of sexual slavery are facts similar to those in which it now utilises to draw a distinction between the two crimes. It is therefore clear, especially in this case, that forced marriage is subsumed by sexual slavery.

130. The Defence accordingly requests that the Pre-Trial Chamber refrain from confirming the charge of forced marriage.

¹³⁸ Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo, Decision on the confirmation of charges, ICC-01/04-01/07-717, 1 October 2008, para. 431.

¹³⁹ Pre-Trial Chamber I, ICC-01/04-01/07-717, para. 449.

M. Dominic did not possess the requisite intent for the alleged Sexual and Gender-Based Crimes

131. The Prosecutor alleges that Dominic acted with intent and knowledge pursuant to Article 30 and that he “meant to engage in and knew about or was fully aware of the consequences of his conduct against P-0099, P-0101, P-0198, P-0214, P-0226, P-0227, P-0235, and P-0236.”¹⁴⁰ The Defence submits that this assertion is both incorrect and ignores a number of important contextual factors.

132. First, the Prosecution’s assertion that as Dominic “forced them to marry him” is inaccurate based on the evidence. Any alleged acts were a result of duress. It is clear from the evidence that there was a general policy in the LRA whereby Joseph Kony would distribute wives to commanders and LRA members in support of the overall policy to ensure that forces were maintained through time.¹⁴¹ Having wives were not a choice a choice for Dominic. [REDACTED] notes that a commander could not refuse to have a wife, noting that this was part of their indoctrination since it was believed that one would have to produce children for the LRA.¹⁴² It is therefore inapposite to suggest that it was Dominic who committed those acts. To the contrary, they were all required to marry one another by the order of Joseph Kony. In this environment, everyone was under duress.

133. Similarly, Dominic did not have sexual intercourse with the wives “with the aim of continuing this victimisation” as is asserted by the Prosecution. To the contrary, Dominic was required to do so or he could have been killed just as the wives who refused could have been.¹⁴³

¹⁴⁰ ICC-02/04-01/15-375-Conf-AnxC, at para. 534.

¹⁴¹ D26-0022, UGA-D26-0010-0600, at 0600.

¹⁴² D26-0022, UGA-D26-0010-0600, at 0600.

¹⁴³ See D26-0027, UGA-D26-0010-0521, at para. 21; D26-0024, UGA-D26-0010-0407, at paras 45-48.

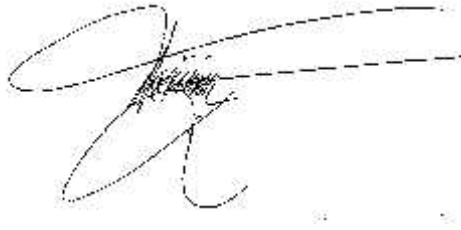
134. The Prosecution has failed to investigate this issue in relation to one's ability to refuse Kony's orders to take or distribute wives. People in the LRA had no choice when receiving wives. They had no choice but to distribute wives. Wives were received by their mate under the threat of duress, and thus does not meet the *mens rea* requirement under the Rome Statute.

IV. CONCLUSION

135. Based on the foregoing, the Defence respectfully submits that: (i) the case should be dismissed on the basis that one cannot reverse the burden in international law on child soldiers; (ii) criminal liability should be excluded on the basis of duress pursuant to Article 31 of the Statute; (iii) eleventh-hour evidence should be excluded; (iv) the Chamber should refrain from confirming charges in the interest of fairness where such charges are based on the same facts; (iv) Indirect Co-perpetration should not be regarded as a mode of liability since it is not included in the Statute; (v) Dominic did not order the alleged crimes; (vi) Dominic did not aid, abet or otherwise assist in the commission of the crimes charged; (vii) the subjective elements pursuant to Article 30 of the Statute have not been met; (viii) Dominic is not responsible pursuant to Article 28(a) of the Statute; (ix) the crime of forced marriage is subsumed by the crime of sexual slavery and cannot therefore be charged; and (x) Dominic did not possess the requisite intent for the alleged sexual and gender-based crimes.

136. Based on the foregoing, the Defence requests that the Pre-Trial Chamber deny confirming the charges.

Respectfully submitted,



Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 25th day of May 2016

At Kampala, Uganda