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No: **ICC-02/04-01/15**
Date: **24 November 2016**

TRIAL CHAMBER IX

Before:

**Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan**

SITUATION IN UGANDA

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

Public

**Application by Child Soldiers International for leave to submit an *amicus curiae*
brief pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Child Soldiers International

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

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A: Introduction

1. The International Criminal Court issued a warrant of arrest for Mr Dominic Ongwen on 8 July 2005.¹ He was surrendered to the Court by the Central African Republic on 16 January 2015 and made his first appearance before Pre-Trial Chamber II on 26 January 2015.² Mr Ongwen is charged with crimes against humanity and war crimes committed in northern Uganda between 1 July 2002 and 31 December 2005.³
2. On 23 March 2016 the Pre-Trial Chamber confirmed the charges against him.⁴ Mr Ongwen is due to stand trial before Trial Chamber IX on 6 December 2016.⁵
3. At the confirmation stage, the Defence for Mr Ongwen argued that his former status as a child soldier raised the defence of duress pursuant to Article 31(1)(d) of the Statute.⁶ The Pre-Trial Chamber dismissed this argument indicating that it was a matter for trial.⁷
4. On 9 August 2016 the Defence filed notices indicating that it intended to raise arguments pursuant to Article 31(1)(a) (mental disease) and Article 31(1)(d) duress) at trial.⁸ These arguments arise, in part, as a result of Mr Ongwen's treatment and status as a former child soldier.

¹ *Situation in Uganda* 'Warrant of arrest for Dominic Ongwen', ICC-02/04, 8 July 2005.

² *Prosecutor v Dominic Ongwen*, Initial Appearance, ICC-02/04-01/15-T-4-ENG, 26 January 2015.

³ *Prosecutor v Dominic Ongwen* 'Document containing the charges', ICC-02/04-01/15, 22 December 2015.

⁴ *Prosecutor v Dominic Ongwen* 'Decision on the confirmation of charges against Dominic Ongwen', ICC-02/04-01/15, 23 March 2016. ("Decision on the conformation of charges").

⁵ With evidence to commence on 16 January 2017.

⁶ *Prosecutor v Dominic Ongwen* 'Further Redacted Version of "Defence Brief for the Confirmation of Charges Hearing, filed on 18 January 2016"', ICC-02/04-01/15, 3 March 2016 at paras 50-57.

⁷ Decision on the confirmation of charges at §§150-157.

⁸ 'Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence', ICC-02/04-01/15-517 and ICC-02/04-01/15-517-Conf-AnxA, 9 August 2016.

5. The resolution of these important issues will set an important precedent and have ramifications for former child soldiers, both as perpetrators and as victims, beyond the *Ongwen* case.
6. Child Soldiers International offers an independent, balanced and unique perspective on these important issues. The organisation seeks to safeguard the interests of child soldiers as victims and the accountability of those who recruit child soldiers. At the same time, the organisation recognises the special circumstances that arise when considering the criminal conduct of adults who were themselves recruited as children.
7. Child Soldiers International therefore respectfully seeks leave from the Trial Chamber pursuant to Rule 103 of the Rules of Procedure and Evidence ('Rules') to submit written and oral observations as an *amicus curiae*.

B: Relevant law

8. Rule 103 (*Amicus curiae* and other forms of submission) of the Rules provides:
 1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
 2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
 3. A written observation under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

9. Thus, the question of whether to grant leave to an organisation to submit an *amicus curiae* brief will depend upon:

- (i) The extent to which the identified issue is deemed appropriate; and
- (ii) Whether the Chamber considers additional submissions ‘desirable for the proper determination of the case’.

10. Whether or not to allow an amicus intervention is a matter entirely within the discretion of the Chamber.⁹ In *Lubanga*, the Trial Chamber was seized of a Rule 103 application by the UN Special Representative of the Secretary-General (SRSG) for Children and Armed Conflict for leave to submit written observations on matters of law arising in the case.¹⁰ The Chamber found that, in light of her mandate to ensure the protection of children affected by armed conflict, the SRSG was well-placed to ‘supply information and assistance of direct relevance on certain issues that otherwise [would] not be available to the Court’.¹¹ With regards to the scope of the proposed intervention, the Chamber went on to grant leave in respect of observations pertaining to the definition of ‘conscripted or enlisting’ of children as soldiers and the correct interpretation of ‘using them to participate actively in the hostilities’ under Article 8(2)(e)(vii) Rome Statute,¹² such questions being ‘clearly relevant’ to the proceedings.¹³

11. Also of importance is the extent to which the *amicus* submission will ‘enable the Chamber to be more fully informed’ about the issue at hand.¹⁴ At other international tribunals *amicus* interventions have been allowed where it was considered they would

⁹ *Prosecutor v Lubanga* ‘Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”’. ICC-01/04-01/06, 22 April 2008, para 8.

¹⁰ *Prosecutor v Lubanga* ‘Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict’ ICC-01/04-01/06-1175.

¹¹ *Ibid* at para. 7

¹² *Ibid* at para. 11

¹³ *Ibid* at para. 9. The Chamber rejected other issues for consideration by the Special Representative.

¹⁴ *Prosecutor v Katanga* ‘Order authorizing the submission of observations’ ICC-01/04-01/07, 7 March 2013 at para. 12.

assist the tribunal concerned to reach the right decision.¹⁵ This does not mean, however, that the submission must be ‘*essential*’ to the Chamber.¹⁶

12. Impartiality on the part of the applicant, while preferable, is not determinative. At the International Criminal Tribunal for Rwanda (ICTR), the Trial Chamber in *Bagasora* observed that it would take ‘into consideration that such briefs are filed by a party, not part of the action, but one with strong interests in or views on the subject matter before the court.’¹⁷

13. Moreover, the Special Court for Sierra Leone (SCSL) Appeals Chamber has observed that the intervening party may have an interest in the issue where the decision ‘*will be likely to create a precedent affecting [it] in the future*’, or where a ‘*State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way*’.¹⁸

14. Thus, by way of example, in *Brdjanin and Talic* the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber permitted an *amicus curiae* brief to be submitted on behalf of over 30 media organisations in a case where the imposition of a *subpoena* raised issues of journalistic privilege.¹⁹ Similarly, in *Furundzija* a coalition of women’s organizations was granted leave²⁰ to file an *amicus* brief on discrimination

¹⁵ *Prosecutor v Prlic et al* ‘Order Appointing an Amicus Curiae’ IT-04-74-T, 3 July 2009 (ICTY); *Prosecutor v Akayesu* ‘Order Granting Leave for Amicus Curiae to Appear’, ICTR-96-4-T, 12 February 1998 (ICTR); and *Prosecutor v Kallon* ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’ SCSL-2003-07, 1 November 2003 (SCSL).

¹⁶ SCSL CASE – KALLON???

¹⁷ *Ibid* at p. 3

¹⁸ *Prosecutor v Kallon* ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’ SCSL-2003-07, 1 November 2003 (SCSL) at para 4.

¹⁹ *Prosecutor v Brdjanin and Talic* ‘Decision on Motion to Set Aside Confidential Subpoena to Give Evidence’, 7 June 2002.

²⁰ *Prosecutor v Furundzija*, ‘Order granting leave to file an amicus curiae brief’, Trial Chamber, 10 November 1998,

against women concerning the evidentiary standard to be applied to victims of sexual offences.²¹

C: The importance of the issue

Procedural background

15. All parties to the *Ongwen* case (the Prosecution, Defence and Victims) accept that Dominic Ongwen was a child at the time he was abducted into the Lord's Resistance Army and became a child soldier.²²

16. The Defence for Dominic Ongwen sought dismissal of the charges against him at the confirmation stage pursuant to Article 31(1)(d) of the Statute (duress) arising as a result of his abduction and status as a former child soldier.²³ The Defence submitted that '*Dominic [Ongwen]'s duress was indeed caused by persons and the circumstances of his abduction, of his continued enslavement in the organization. This continued from the day he was abducted until the day he surrendered*'.²⁴ The Defence asserted that Dominic Ongwen's position is '*much like other child soldiers*'²⁵ and that there is a '*continuous, isolating and enduring nature*' in '*the experience of a child soldier*'.²⁶ This, said the Defence, '*cannot be addressed in mitigation*'.²⁷

²¹ *Prosecutor v Furundzija* 'Application to file an Amicus Curiae Brief in the Case of Prosecutor v Anto Furundzija Case No. IT095-17/1-T', 5 November 1998.

²² Defence 'Third Public Redacted Version of "Defence Brief for Confirmation of Charges Hearing"', filed on 18 January 2016 as ICC-02/04-01/15-404-Conf' on 25 May 2016 at para. 1; Prosecution stated that Ongwen was 'once himself a victim of the LRA's policy on child soldiers' Transcript of Confirmation of Charges hearing 22 January 2016 p. 58 line 25 to p. 59 line 1; Office of Public Counsel for Victims, 'Pre-Trial Brief on behalf of Victims represented by the Common Legal Representative', 6 September 2016 at para. 29.

²³ 'Third Public Redacted Version of "Defence Brief for Confirmation of Charges Hearing"', filed on 18 January 2016 as ICC-02/04-01/15-404-Conf' on 25 May 2016 paras. 50 to 57.

²⁴ Transcript of Confirmation of Charges hearing 26 January 2016 p. 7 lines 16 to 18.

²⁵ *Ibid* p. 8 line 4

²⁶ *Ibid* p. 9 lines 12 to 15.

²⁷ *Ibid* p. 9 lines 12 to 13.

17. The Pre-Trial Chamber, while acknowledging that there was no procedural rule precluding the Defence from raising duress at the confirmation of charges stage, rejected the Defence submissions²⁸ and stated that such issues are better resolved at trial.²⁹
18. On 9 August 2016 the Defence for Mr Ongwen issued two notifications of its intention to (i) present an affirmative defence of duress pursuant to Articles 31(1)(d) and 31(3) at trial,³⁰ and (ii) to produce by October 2016 an Article 31(1)(a) defence on whether Mr Ongwen suffered from a mental disease or defect that destroyed his capacity to appreciate the unlawfulness or nature of his conduct, or capacity to control his conduct to conform with the requirements of law.³¹
19. It is noted that, without the benefit of any medical or expert evidence, the Office of Public Counsel for Victims has asserted that *'while being a former child soldier himself, Mr Ongwen took active part in maintaining and enforcing the system of terror that the LRA operated. Therefore, [...] Mr Ongwen cannot possibly be considered as someone who had been suffering from a mental disease or defect that destroyed his capacity to appreciate the unlawfulness or nature of his conduct or capacity to control his conduct to conform to the requirements of law within the meaning of article 31(1)(a) of the Rome Statute.'*³² The Office of Public Counsel for Victims appears also to reject the defence of duress.³³

²⁸ 'Decision on the confirmation of charges against Dominic Ongwen', 23 March 2016, para. 156.

²⁹ *Ibid* para. 151.

³⁰ 'Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence' 9 August 2016 at para. 9.

³¹ 'Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence' 9 August 2016 at paras. 2 and 3. It is noted that on 20 October 2016 the Defence for Mr Ongwen indicated that 'for reasons outside the control of the Defence or Experts, the Experts were not able to meet with Mr Ongwen' during the required time period. See 'Public Redacted Version of "Defence Update to its Notification Pursuant to Rule 79(1)(b) of the Rules of Procedure and Evidence"', filed on 20 October 2016.

³² 'Pre-Trial Brief on behalf of the Victims represented by the Common Legal Representative', 6 September 2016, para.29.

³³ *Ibid* para. 30.

The issue

20. Whether and to what extent the impact of having been a child soldier continues into adulthood is obviously case- and fact-specific. The question of whether Dominic Ongwen's criminal liability is in any way affected by his status as a former child soldier will be determined on the basis of the evidence he is able to produce in support of his position. Child Soldiers International does not seek to make submissions on the specific facts of Dominic Ongwen's case and recognizes that the ultimate determination regarding such issues is a matter exclusively for the Trial Chamber.
21. Nonetheless, these issues have not previously been considered by any international tribunal. They are also of wider importance than to the position of Mr Ongwen alone. The question of whether and under what circumstances it is appropriate to take into account a former child soldier's experiences, as either a victim or perpetrator or both, is a matter of significant importance to other former child soldiers who may also find themselves subject to criminal prosecution.
22. The Prosecution accepted in the *Lubanga* case³⁴ and in the *DRAFT Policy on Children*³⁵ that the impact of having been a child soldier continues long after someone has ceased to be a child soldier. Even so, Child Soldiers International understands that the Prosecutor does not yet have any specific or formal policy guidelines on how to address the criminal responsibility of former child soldiers accused of international crimes.³⁶ The determination by the Trial Chamber of the issues arising in this case will be of enormous significance not only to future proceedings at the ICC, but in proceedings at other international tribunals and in any future domestic criminal prosecutions against former child soldiers.

³⁴ ICC-01/04-01/06-T-360-Red2-ENG CT WT 13-06-2012 34/70 PV T. At the *Lubanga* sentence hearing Mr Moreno-Ocampo stated: "*The harm produced by this treatment [recruitment as a child soldier] continue even after demobilisation. Those who did not die as soldiers have permanent physical effects or have ongoing psychological trauma; all them still suffer.*" At p. 34 lines 1-3.

³⁵ June 2016. The OTP recognizes that (i) '*witnesses who are adults, and who were victimised as children, may also require special attention.*' (at para. 29); and (ii) that '*witnesses who were victimized as children*' [but who are now adults] may also require psycho-social assessments (at para. 68).

³⁶ The OTP has a *DRAFT Policy on Children* June 2016, but this does not address the criminal responsibility of a former child soldier accused of international crimes.

23. Child Soldiers International submits that it is in a *unique position* to assist the Trial Chamber with identifying the relevant issues and articulating an appropriate framework for the consideration and '*proper determination*' of such matters. Unlike the parties in this case, Child Soldiers International is independent in that they neither seek the conviction nor acquittal of the accused. They offer a balanced and unique perspective in seeking to safeguard the interests of child soldiers as victims, while simultaneously recognizing that the consequences of such victimhood continue into adulthood and may be of relevance when considering the actions and behaviour of a former child soldier as an adult.

24. With specific reference to the Ongwen case, Child Soldiers International has previously stated:

His being a former child soldier raises the question about how such defendants can be justly treated in either national or international courts. This has caused some debate, particularly in Uganda where some community leaders and lawyers argue that former child soldiers are not wholly responsible for their actions.

The offences Mr Ongwen is charged with were committed during his adulthood. [...] Mr Ongwen's past experience as a child soldier may be relevant for his legal defence; however, without prejudice to other factual and legal issues, his being a victim of a similar crime is not a defence in itself. His status as a former child soldier may be more relevant at the sentencing stage, should he be found guilty.³⁷

³⁷ See full article for ICRtoP on 26 March 2015 at: <https://www.child-soldiers.org/News/children-in-armed-conflict-a-war-crime-we-have-the-responsibility-to-prevent>

25. It is emphasized that Child Soldiers International does not seek to make submissions on the merits of Mr Ongwen's case. Rather, it applies for leave to file limited submissions:

- (i) Explaining the reasons why a perpetrator's status as a former child soldier is generally of more relevance at the sentencing stage (if convicted), but also
- (ii) Expanding upon when and under what circumstances an individual's past experience as a child soldier *may* have a bearing on their criminal responsibility.

26. In formulating such submissions, Child Soldiers International will draw on (1) a large body of research on social determinants at the family and community level which impact children's mental health and development, and can influence their behaviour as adults, and (2) the approach various domestic jurisdictions have taken when determining the effect of such past trauma on the legal liability of defendants in criminal proceedings. Specific and comparative consideration will be given to how domestic jurisdictions have addressed the question of duress and the mental health of the accused.

27. Moreover, Child Soldiers International is ready to assist the Trial Chamber by considering any question posed by the Chamber that will assist with a proper determination of the issues in this case, including by conducting focused research on specific issues that the Chamber considers will be of assistance.

D: The expertise of Child Soldiers International

28. Child Soldiers International was formerly known as the Coalition to Stop the Use of Child Soldiers. It was established in 1998 by a group of leading human rights organisations, including Amnesty International, Human Rights Watch and Save the Children.

29. The original purpose was to campaign for a human rights treaty to prevent the military recruitment of children and their use in violent conflict. This was achieved with the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC), which entered into force in 2002.
30. Since 2011, Child Soldiers International has been an independent human rights organisation, based in London and working internationally. It is comprised of a team of eight full and part-time staff and supplemented by specialist consultants when needed to enhance research. The organisation is directed by a leadership team comprising a Director of Programmes and a Director of Operations, and governed by a Board of nine trustees.
31. In this case the following expert will assist in compiling relevant material to present to the Trial Chamber:³⁸

Dr Eileen Vizard CBE MD FRCPsych: trained as a Child Psychiatrist at Great Ormond Street Hospital and has had Consultant Psychiatrist posts in Newham, the Tavistock Clinic and Whittington Health. She is an Honorary Senior Lecturer in the Institute of Child Health, UCL, an Honorary Consultant Child and Adolescent Psychiatrist in Great Ormond Street Hospital and a visiting professor at New York University London (NYUL).

Dr Vizard has worked for over 35 years with children and families where serious abuse and violence has occurred. In 1986 she set up a treatment service in the east end of London for convicted adult sex offenders. In 1988 she founded a service for children and young people who sexually abuse, in which she was clinical director for 25 years until her NHS retirement in 2014. She has published extensively and has over 100 publications, mostly in the area of child abuse, notably child sexual abuse. She has researched into the origins of child maltreatment by adults and by other children and has taught extensively on child care and child abuse nationally and internationally.

³⁸ See letter of instruction at Annex A
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Dr Vizard has a particular interest in the age of criminal responsibility in young children, issues relating to their mental capacity, their fitness to plead and to conduct their own defence as well as developmental pathways from childhood delinquency to adult psychopathy. She has made submissions to the UK Law Commission on these issues and published a letter in *The Times* with 33 other senior practitioners describing the neurodevelopmental immaturity of children's brains and the effect this may have upon their competency to stand trial.

32. If granted leave to submit an *amicus* brief in this matter, Child Soldiers International will be assisted with the preparation of the brief by the following legal experts from Doughty Street International:

- (i) Professor Juan Mendez: UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment between November 2010 and October 31, 2016. Professor of Human Rights Law in Residence at the American University – Washington College of Law. Faculty Director of the Anti-Torture Initiative, a project for WCL's Center for Human Rights and Humanitarian Law and Faculty Advisor to the War Crimes Research Office of WCL. He is a member of the bar of Mar del Plata and Buenos Aires, Argentina, and the District of Columbia, USA.
- (ii) Professor Kevin Jon Heller: holds the Chair in Criminal Law at SOAS, London University. He has published three books and more than 30 academic articles on international criminal law, international humanitarian law, and comparative criminal law. He has practiced in the USA as a criminal lawyer and has extensive international law experience.
- (iii) Mr Steven Powles is a barrister in England and Wales and is Head of Doughty Street International. He has nearly 20 years' experience in international criminal proceedings. He is also co-author of a practitioner text on International Criminal Law.

(iv) Ms Jelja Sane is barrister in England and Wales. She is a specialist international criminal lawyer with experience at both the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICC. Her mother tongue is French.

33. In relation to a previous application, and on a different issue, the Appeals Chamber rejected an application by Child Soldiers International for leave to submit observations pursuant to Rule 103 on the basis that the suggested observations were of an *‘essentially legal nature, whereas Child Soldiers International is a “research and advocacy organization”*.³⁹

34. It is respectfully submitted that it is precisely Child Soldiers International’s *“research and advocacy”* experience that now makes it uniquely placed to assist the Trial Chamber on the issues arising in this case. Moreover, in collaborating with experienced lawyers in the preparation of the brief, Child Soldiers International is now also well placed to makes submissions of a legal nature.

35. More recently, Child Soldiers International was, along with a number of non-governmental organisations (NGOs), called upon by Trial Chamber II in *Lubanga* to make submissions on how to provide reparations to the defendant’s victims for recruiting and using child soldiers in the Democratic Republic of Congo, from the Trust Fund for Victims. Child Soldiers International was also one of two NGOs that was asked to make oral submissions to Trial Chamber II on 11 and 13 October 2016.

³⁹ *Prosecutor v Lubanga* ‘Decision on the application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence’, 16 August 2013.

E: Relief requested

36. Child Soldiers International respectfully seeks:

(1) Leave to submit an *amicus curiae* brief on:

- (i) The reasons why a perpetrator's status as a former child soldier is generally of more relevance at the sentencing stage (if convicted), and
- (ii) When and under what circumstances an individual's past experience as a child soldier *may* have a bearing on their criminal responsibility.

(2) A timetable for submission of any such brief.

(3) An indication as to whether there are any specific topics that the Trial Chamber would like the brief to address.



Steven Powles, counsel.

Instructed by Child Soldiers International.

Dated this 24 November 2016,

The Hague, The Netherlands.