

## Separate opinion of Judge Marc Perrin de Brichambaut

1. I signed the disposition of Pre-Trial Chamber II's decision<sup>1</sup> to confirm the charges laid against Dominic Ongwen by the Prosecutor. I share the view that there is sufficient evidence to establish substantial grounds to believe that Mr Ongwen committed each of the crimes charged and that he must therefore be committed to a Trial Chamber for trial on the charges as confirmed.

2. This separate opinion addresses what are, in my view, the regrettable shortcomings and approximations that beset the text of the decision and the insufficient indication of the reasons on which it is based in terms of both rationale and analysis of the evidence. Consequently, I consider it necessary to make, in my own name, a number of additions which ought to have been made in order for the decision to be well-founded both in law and in fact. It is in the light of these additions that I have felt able to put my name to the decision on the confirmation of charges.

3. The provisions of article 61(7) of the Rome Statute of the International Criminal Court ("the Statute") require substantial grounds to be established for each of the charges to be confirmed. This is also a requirement under article 21(3) of the Statute, as it is enshrined in the internationally recognised human rights which the Court is bound to apply.<sup>2</sup> Establishing substantial grounds is clearly necessary if all parties are to understand the rationale underlying the decision. It safeguards the rights of the defence and makes it possible for the defence to challenge the decision,

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<sup>1</sup> *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red.

<sup>2</sup> ECHR, *Hadjianastassiou v. Greece*, 16 December 1992, Application no. 12945/87, para. 33.

should it so wish. Furthermore, it puts together a set of references for use by the Trial Chamber when it is seized of the decision on the confirmation of charges.<sup>3</sup>

4. The Appeals Chamber has reviewed the minimum threshold for a reasoned decision. In one specific case the Appeals Chamber stated that it “does not consider that the decision is so lacking in reasoning that it can be said that the Pre-Trial Chamber failed to comply with its obligation to provide a reasoned decision and therefore made an error of law”; nonetheless it emphasised the requirement for the Pre-Trial Chamber to provide full reasoning.<sup>4</sup>

5. This is particularly true at the start of judicial proceedings before the Court, when the Pre-Trial Chamber filters out those cases which should go to trial before the Trial Chamber.<sup>5</sup> In this connection, I fully endorse Judge Kovács’ analysis set out in his separate opinion<sup>6</sup> in the annex to the decision on the confirmation of charges in the case of *Al Mahdi*, in particular, at paragraphs 7 and 16. A Pre-Trial Chamber’s approach to analysis and characterisation cannot be reflected in the text of the decision on the confirmation of charges merely by means of generic allusions on the ground that the disposition of the decision would be sufficient in itself.<sup>7</sup>

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<sup>3</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “[Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I](#)” entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’’, 14 December 2006, ICC-01/04-01/06-774, para. 30. See article 74(5) of the Statute, which expressly requires that decisions of conviction or acquittal issued by the Trial Chamber must contain “a full and reasoned statement of the [...] Chamber’s findings on the evidence and conclusions”.

<sup>4</sup> *The Prosecutor v. Laurent Koudou Gbagbo*, Appeals Chamber, “[Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’](#)”, 26 October 2012, ICC-02/11-01/11-278-Red, paras. 48 and 49.

<sup>5</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, “[Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009](#)” Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’’, 12 July 2010, ICC-01/04-01/07-2259, para. 40.

<sup>6</sup> [Separate Opinion of Judge Péter Kovács](#), ICC-01/12-01/15-84-Anx.

<sup>7</sup> See also my partly dissenting opinion on Pre-Trial Chamber II’s decision on the confirmation of charges against Dominic Ongwen “[Opinion partiellement dissidente du Juge Marc Perrin de Brichambaut](#)”, ICC-02/04-01/15-428-Anx, dated 10 May 2016, paras. 11, 17 *et seq.*

6. Article 61(7) of the Statute requires “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.

7. In *Mbarushimana*, the Appeals Chamber stated that the Pre-Trial Chamber had the authority to evaluate the evidence presented by the parties and note any ambiguities and contradictions which would be such as to cast doubt on the credibility of testimony.<sup>8</sup>

8. The Appeals Chamber stated that in order to make a determination as to the sufficiency of the evidence, the Pre-Trial Chamber must *necessarily* draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence. This is particularly true when the evidence is challenged by the defence.<sup>9</sup>

9. The Appeals Chamber held, lastly, that the Pre-Trial Chamber should have had available to it most of the Prosecutor’s evidence because the investigation should largely be completed at the stage of the confirmation of charges hearing.<sup>10</sup> That perspective gives the Pre-Trial Chamber a complete picture of the record of the case and enables it to examine the consistency of each item of evidence having regard to the entire record of the case, as presented by the Prosecution.

10. The Pre-Trial Practice Manual, as adopted in 2015 by the Pre-Trial Section and which in 2016 became the Pre-Trial Chambers’ Practice Manual, served as inspiration for the decision on the confirmation of the charges against Dominic Ongwen.

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<sup>8</sup> *The Prosecutor v. Callixte Mbarushimana*, Appeals Chamber, “[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’](#)”, 30 May 2012, ICC-01/04-01/10-514.

<sup>9</sup> This function flows clearly from article 69(4) of the Statute and rule 63(2) of the Rules of Procedure and Evidence, which vest in the Pre-Trial Chamber the discretionary authority to assess freely all evidence submitted in order to determine its relevance or admissibility.

<sup>10</sup> *The Prosecutor v. Callixte Mbarushimana*, Appeals Chamber, “[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’](#)”, 30 May 2012, ICC-01/04-01/10-514, para. 44.

Chapter VII of that document concerning the confirmation decision advises that the charges confirmed must be distinguished from the reasoning underlying that confirmation. The charges laid by the Prosecution are reproduced in the disposition of the decision, with the effect of confirming them and setting the basic parameters for the trial.<sup>11</sup> The Manual suggests that the Pre-Trial Chamber “should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber’s findings on the charges”. The guidance is not intended to call into question the need for the Pre-Trial Chamber to present the reasoning for any confirmation of charges decision it may make – nor can it have that effect.<sup>12</sup> While the Manual encourages restraint by calling on the Pre-Trial Chamber to limit its reasoning to “what is necessary”, it does not call on it to erase all references to the evidence presented by the Prosecution. The Pre-Trial Chamber must still set out, clearly and precisely, definitions of each of the crimes charged against the accused, and supplement each definition with a succinct description of the main evidence it considers relevant to make out each of these crimes and each of the modes of liability ascribed to the accused. Moreover, the Manual is no more binding than a set of recommendations, as confirmed by the Appeals Chamber on 18 December 2015.<sup>13</sup>

11. In the instant case, the Pre-Trial Chamber had to examine all the evidence and note any ambiguities, contradictions, inconsistencies and doubts as to its credibility.

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<sup>11</sup> Pre-Trial Chambers’ Practice Manual, February 2016, p. 18.

<sup>12</sup> See the Pre-Trial Chambers’ Practice Manual, which states that: “Findings on the substantial grounds to believe standard are made exclusively with respect to the material facts described in the charges, and there is no requirement that each item of evidence or each subsidiary fact relied upon by either party be addressed or referred to in the confirmation decision – nor would this be realistic or otherwise providing any benefit. In decisions confirming the charges, in order not to pre-determine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber’s findings on the charges.”

<sup>13</sup> *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “[Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I](#)” entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’, 18 December 2015, ICC-02/11-01/15-369, 18 December 2015, para. 54.

In the light of that examination, the Chamber had to draw all the necessary conclusions as to the evidence and to look at the evidence presented to it by the Prosecution and the evidence presented by the Defence, in order to determine which evidence, in its view, was admissible. The decision on the confirmation of charges is supposed to reflect this twin task and indicate which evidence is sufficient to give the Chamber grounds to believe that the person has committed each of the crimes charged.

12. The Chamber requested the Prosecution to submit two separate documents, a pre-confirmation brief,<sup>14</sup> a document for which no provision is made in the Statute or the Rules of Procedure and Evidence, and which has been produced for the first time in confirmation of charges proceedings,<sup>15</sup> and a document containing the charges, as provided for by article 61(3) of the Statute.

13. The pre-confirmation brief is a 257-page document setting out methodically, on a charge-by-charge basis, the evidence on which the Prosecution has relied to make out the crimes attributed to Dominic Ongwen, that is, 70 charges often referring to five or six separate modes of liability.

14. The Chamber's decision on the confirmation of charges comprises two parts. The first part contains an outline of the evidence and questions of law as examined by the Chamber. It runs to 73 pages. Some of the charges, such as forced marriage, have been substantially fleshed out by the definition of the crime and the testimony gathered in the context of the procedure provided for by article 56 of the Statute which make it out against Dominic Ongwen. Far less time is expended on other charges, which are not explicitly defined and in relation to which the specific

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<sup>14</sup> *The Prosecutor v. Dominic Ongwen*, OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red.

<sup>15</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red.

evidence supporting each charge is not identified. The same holds true for the modes of liability, where the evidence is but rarely mentioned.

15. The second part of the decision is the disposition containing the charges confirmed. It reproduces the document containing the charges presented by the Prosecution almost verbatim. Its role is not to indicate the reasons for the Chamber's decision, which should be set out in the first part of the decision alone. The Chamber's confirmation, in the operative part of the decision, of the facts and legal arguments set out in the Prosecution's text, and the repetition of those facts and arguments in the disposition, do not waive the requirement for the Chamber to present the factual and legal elements on which it bases its decision transparently and intelligibly for all the parties in the first part of the decision.

16. Consequently, it is in the first part of the decision that the reasoning – the judges' explanation of the whys and wherefores of their decision – ought to be indicated. However, in my view, that reasoning was seriously deficient, as the following examples show.

17. When Dominic Ongwen sought leave to appeal against the decision on the confirmation of the charges against him, I stated, in a partly dissenting opinion, that it would have been desirable for the Appeals Chamber to be invited to examine this new practice when it comes to indicating the reasons for a decision on the confirmation of charges.<sup>16</sup>

18. The decision provides no definitions in respect of the following crimes ascribed to Dominic Ongwen during the attacks on each of the camps, namely Pajule, Odek, Lukodi and Abok:

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<sup>16</sup> "[Opinion partiellement dissidente du Juge Marc Perrin de Brichambaut](#)", ICC-02/04-01/15-428-Anx.

- attack against the civilian population as such or against individual civilians not taking direct part in hostilities (article 8(2)(e)(i) of the Statute);
- murder as a crime against humanity and as a war crime (articles 7(1)(a) and 8(2)(c)(i) of the Statute);
- torture as a crime against humanity and as a war crime (articles 7(1)(f) and 8(2)(c)(i) of the Statute);
- violence to life and person (article 8(2)(c)(i) of the Statute), and other inhumane acts (article 7(1)(k) of the Statute);
- enslavement (article 7(1)(c) of the Statute);
- pillaging (article 8(2)(e)(v) of the Statute);
- persecution (article 7(1)(h) of the Statute).

19. No definition is given for a crime ascribed to Dominic Ongwen only during the attack on Odek camp:

- outrages on personal dignity (article 8(2)(c)(ii) of the Statute).

20. The decision fails to define the contextual elements of the war crimes and the contextual elements of the crimes against humanity.

21. To support these contextual elements, the decision makes only very vague references to “evidence” or to notorious facts that are mentioned at paragraphs 60 to 64.

22. In the pre-confirmation brief, the Prosecution states that

the Chamber may be presented with facts, supported with evidence, which may satisfy more than one mode of liability or more than one crime. When multiple legal characterisations of the same facts are established by the evidence, it is appropriate that the charges be confirmed with all of the various modes of liability available, in order for

the Trial Chamber to determine whether any of those legal characterisations is established to the applicable standard of proof at trial.<sup>17</sup>

In fact, the Prosecution bases its argument concerning the modes of liability ascribed to Dominic Ongwen on a small number of testimonies. As regards the attack on Pajule camp, it is the testimony provided by witnesses **P-0009**, **P-0309** and **P-0249** together with radio communications intercepted by the Ugandan services that, for the most part, the Prosecution cited and used to support each of the modes of liability.

23. The decision refers to only a small amount of evidence in support of five to six modes of liability in the case of charges brought in relation to the attacks on the camps.<sup>18</sup> Only with regard to the mode of individual commission by Dominic Ongwen in relation to charges 50 to 61 is reference made to a larger volume of evidence.<sup>19</sup>

24. Concerning the attack on Pajule camp, the decision cites no evidence of how Dominic Ongwen contributed to that crime as an indirect co-perpetrator having regard to the criterion of the common plan.<sup>20</sup> No evidence is provided in support of the crime of persecution.<sup>21</sup>

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<sup>17</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 5.

<sup>18</sup> For example, in the case of the attack on Pajule, reference is made to article 25(3)(a) through P-0101 and to article 25(3)(b), through P-0249; See *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, paras. 66-68.

<sup>19</sup> *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, paras. 102-135.

<sup>20</sup> The Chamber refers to the testimony of P-0101, who states that the leaders of the LRA, including Dominic Ongwen, met to plan the attack on Pajule on the evening before the attack, and that Dominic Ongwen had been selected to lead one of the groups on the ground; *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, para. 66.

<sup>21</sup> Charge 10 laid by the Prosecutor, persecution as a crime against humanity, under article 7(1)(h) of the Statute.

25. As regards the other modes of liability, the decision fails to demonstrate how each constituent element of the mode of liability charged can be proved on the available evidence. For the mode of liability under article 28(a) of the Statute, the Chamber, at paragraph 149 of its decision on the confirmation of the charges, restricts itself to a very general reference to the available evidence, without specifying any testimony or any other evidence that would enable the constituent elements of command responsibility to be established.

26. It would have been desirable for the Chamber's decision to have specified, for each mode of liability, the evidence relied on in support of each constitutive element of a given mode of liability. That would have involved a great deal of work, given the Prosecution's aim to have 70 charges taken into consideration according to six modes of liability. By circumventing that systematic analysis, the Chamber has undermined its decision and failed to hold the Prosecution to account for its highly ambitious goal.

27. I also note that the evidence relied on to establish the commission of crimes by Dominic Ongwen during the attacks on the camps is generally restricted to one or two witnesses, some of whose testimony relates to more than one crime. Full account has not therefore been taken of the Prosecution's presentation of the evidence that it considered relevant in its pre-confirmation brief.

28. The following paragraphs are not intended to replace the decision as adopted in its entirety. Their purpose is to illustrate the method that, in my view, the Chamber should have applied to conclude that there was sufficient evidence to establish substantial grounds to believe that, during the period between 1 July 2002 and 31 December 2005, Dominic Ongwen committed the crimes of which he is accused in accordance with the modes of liability charged.

29. Firstly, (I) certain contextual elements of the crimes against humanity and war crimes are examined.<sup>22</sup> Secondly, (II) as regards the crimes ascribed to Dominic Ongwen, the sample used concerns charges 2, 3, 8 and 22. The crimes analysed were committed during the attacks on Pajule and Odek camps. They are murder as a crime against humanity and as a war crime, pillaging as a war crime, and outrage upon personal dignity as a war crime.<sup>23</sup>

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<sup>22</sup> See Section I. Contextual elements, p. 11.

<sup>23</sup> See Section II. Charges 2, 3, 8 and 22, p. 33.

## I. Contextual elements

30. It would have been useful had explicit reasons been given for the contextual elements necessary for establishing the crimes against humanity charged against Dominic Ongwen. The following paragraphs relate to a selection of the contextual elements of crimes against humanity and war crimes and illustrate how they might have been presented.

### A. Crimes against humanity<sup>24</sup>

#### 1. The Prosecution's allegations

31. In the pre-confirmation brief, the Prosecution alleges that:

From at least 1 July 2002 to 31 December 2005, the LRA committed a widespread and systematic attack directed against the civilian population of northern Uganda. It engaged in a course of conduct that involved the multiple commission of acts, pursuant to an organisational policy.

The conduct that amounts to charges 2, 4, 7, 8, 10, 12, 14, 16, 18, 20, 23, 25, 27, 29, 31, 33, 36, 38, 40, 42, 44, 46, 49, 50, 51, 53, 55, 57, 58, 61, 62, 64, 66 and 68, which are charged as crimes against humanity, was committed as part of that attack. Dominic Ongwen knew that his conduct was part of or intended the conduct to be part of the widespread and systematic attack directed against the civilian population of northern Uganda.<sup>25</sup>

#### 2. Applicable law

32. Article 7(2)(a) of the Statute provides:

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

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<sup>24</sup> In its "[Decision on the confirmation of charges against Dominic Ongwen](#)", of 23 March 2016, ICC-02/04-01/15-422-Red, Pre-Trial Chamber II confirmed the existence of the contextual elements of crimes against humanity, paras. 62-63.

<sup>25</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, paras. 38-39.

33. The Elements of Crimes state that, “attack directed against a civilian population” denotes “a course of conduct involving<sup>26</sup> the multiple commission of acts referred to in article 7, paragraph 1 of the Statute against any civilian population”. The requirement that the acts be part of a “course of conduct” clearly shows that the provision does not seek to prosecute isolated acts, but “describes a series or overall flow of events as opposed to a mere aggregation of random acts”.<sup>27</sup>

34. Trial Chamber II has held that that indicated the existence of a quantitative threshold requiring the commission of “more than a few”, “several” or “many” acts. The number of acts as referred to in article 7(1) is, however, irrelevant provided that each of the acts falls within the course of conduct and cumulatively satisfies the required quantitative threshold.<sup>28</sup>

35. The “course of conduct” must be directed against “any civilian population”. The term “civilian population” denotes a collective, as opposed to individual “civilians”.<sup>29</sup> It is therefore accepted that the term refers to a group of people who may be described as civilians. Those people (i) are no longer or have never been members of the armed forces of a State or of a non-State entity or of an armed group subject to an organised command structure; and (ii) are not taking a direct part in hostilities. There is therefore no requirement that an individual victim of the crimes charged be a civilian within the strict meaning of the term.<sup>30</sup>

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<sup>26</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1101; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 149.

<sup>27</sup> *The Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, “[Decision on the confirmation of charges against Laurent Gbagbo](#)”, 12 June 2014, ICC-02/11-01/11-656-Red, para. 209.

<sup>28</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 150.

<sup>29</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 152.

<sup>30</sup> *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, ICTY, [Appeals Judgement](#), 5 May 2009, IT-95-13/1-A 249/3739 BIS, para. 32.

36. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. Where an attack is carried out in an area containing both civilians and non-civilians, factors relevant to determining whether an attack was directed against a civilian population include the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course and the extent to which the attacking force complied with the precautionary requirements of the laws of war.<sup>31</sup>

37. The requirement that the attack be “directed against” the civilian population means that the civilian population must be the primary, as opposed to incidental, target of the attack. The Prosecution must establish that civilians were targeted during the attack in numbers or a manner sufficient to satisfy the Chamber that the attack was directed against the civilian population, as opposed to just a limited number of specific individuals.<sup>32</sup>

38. The attack must be carried out “pursuant to or in furtherance of a State or organizational policy”.<sup>33</sup> At paragraph 1119 of the *Katanga* judgment, Trial Chamber II set out the criteria for defining an organisation, as adopted by Chamber III in *Bemba*. It would therefore appear to be authoritative and constitute a reference for examination of the nature of the armed group to which Mr Ongwen belonged.

39. The policy need not be formalised in advance in a pre-established plan. It may take shape progressively, as and when actions occur. Its existence may therefore be

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<sup>31</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 153.

<sup>32</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1104; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 154.

<sup>33</sup> Elements of Crimes, article 7 of the Statute, footnote 6.

inferred from, *inter alia*, a recurrent pattern of violence, the existence of preparations, the involvement of the State or the organisation in the commission of the crimes, their statements or even collective mobilisation orchestrated and coordinated by that State or organisation.<sup>34</sup>

40. In accordance with the provisions of article 7(2)(a) of the Statute, the attack must be widespread or systematic, implying that the acts of violence are not spontaneous or isolated. The adjective “widespread” refers to the large-scale nature of the attack and the resulting number of victims. The adjective “systematic” reflects the organised nature of the acts of violence committed and the existence of a pattern of crimes reflected in the non-accidental repetition of similar criminal conduct on a regular basis.<sup>35</sup>

41. The nexus between the actions referred to in article 7, paragraph 1, sub-paragraphs (a) to (k) of the Statute and the widespread or systematic attack against a civilian population must be assessed by the Chamber, taking account of the characteristics, the aims, the nature and the consequences of the acts.<sup>36</sup> Furthermore, the Chamber must determine whether it is part of the widespread or systematic attack, considered as a whole, and in respect of its various components.<sup>37</sup>

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<sup>34</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1104; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 160.

<sup>35</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1123; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, paras. 162-163.

<sup>36</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1124; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, paras. 164-165.

<sup>37</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1124.

42. Lastly, article 7(1) of the Statute requires that acts charged be committed “with knowledge of the attack”. Proof that the perpetrator of the act knowingly participated in the attack directed against a civilian population must elucidate the responsibility of the perpetrator of the act in the attack considered as a whole.<sup>38</sup> Paragraph 2 of the introduction to article 7 of the Elements of Crimes provides that the knowledge element of the context of the conduct “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization”. It must be established that “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population”.<sup>39</sup>

### 3. Summary of the evidence

#### (a) Evidence relating to the existence of a series of attacks targeting the civilian population

43. Several items of evidence indicate that, between July 2002 and December 2005, attacks were directed against villages and camps inhabited by civilians<sup>40</sup> with the aim of killing civilians<sup>41</sup> or of capturing them.<sup>42</sup>

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<sup>38</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1125; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 167.

<sup>39</sup> Elements of Crimes, article 7(1)(a) of the Statute.

<sup>40</sup> ISO logbook, UGA-OTP-0063-0194, at 0219; ISO logbook, UGA-OTP-0063-0194, at 0221; ISO logbook, UGA-OTP-0063-0194, at 0327; ISO logbook, UGA-OTP-0060-0002, at 0012; ISO logbook, UGA-OTP-0060-0002, at 0123; ISO logbook, UGA-OTP-0060-0002, at 0103; ISO logbook, UGA-OTP-0063-0002, at 0079 and 0123; ISO logbook, UGA-OTP-0063-0002, at 0083; ISO logbook, UGA-OTP-0065-0002, at 0058; ISO logbook, UGA-OTP-0066-002-R01, at 0087; ISO logbook, UGA-OTP-0061-0002, at 0093.

<sup>41</sup> ISO logbook, UGA-OTP-0063-0002, at 0083; ISO logbook, UGA-OTP-0065-0002, at 0058; ISO logbook, UGA-OTP-0066-002-R01, at 0087; ISO logbook, UGA-OTP-0061-0002, at 0093.

<sup>42</sup> ISO logbook, UGA-OTP-0063-0002, at 0083; ISO logbook, UGA-OTP-0066-002-R01, at 0087; P-0231, UGA-OTP-0243-2025-R01, at 2040, paras. 497-498.

44. The statement by Witness **P-0224**, a former LRA fighter in the Sinia brigade led by Dominic Ongwen, affirms that between 2003 and 2004 the LRA's primary activity was to capture and kill civilians.<sup>43</sup>

45. Witness **P-0231**, an LRA fighter until 2014, gave an account of the attack on Ojwii in which he took part in 2002 under the command of Dominic Ongwen. It may be inferred from his testimony that the attack targeted civilian goods since its aim was to secure food items.<sup>44</sup>

46. The attacks also targeted schools and places of worship.<sup>45</sup> Furthermore, the LRA fighters organised several ambushes involving civilian vehicles.<sup>46</sup>

47. Children were captured in more than one attack,<sup>47</sup> as confirmed by Joseph Kony and Vincent Otti on Mega FM, a public radio station,<sup>48</sup> for the purpose of recruiting new fighters to the LRA<sup>49</sup> or taking them as sexual slaves.<sup>50</sup>

(b) Evidence relating to the existence of a widespread or systematic attack

48. Pajule, Odek, Lukodi and Abok camps are located within an area in the shape of an equilateral triangle whose sides each measure 80 km.<sup>51</sup>

49. The attacks committed by the members of the LRA affected many civilians. For example, in June 2003, 56 female schoolchildren were captured during an attack

<sup>43</sup> P-0224, UGA-OTP-0244-3160-R01, at 3163.

<sup>44</sup> P-0231, UGA-OTP-0243-2025-R01, at 2039-2040.

<sup>45</sup> ISO logbook, UGA-OTP-0063-002, at 0185; ISO logbook, UGA-OTP-0060-0149, at 0154; ISO logbook UGA-OTP-0197-1078, at 1085.

<sup>46</sup> ISO logbook, UGA-OTP-0062-0145, at 0181; ISO logbook, UGA-OTP-0152-0002, at 0179 and 0183.

<sup>47</sup> ISO logbook, UGA-OTP-0060-0149, at 0178; ISO logbook, UGA-OTP-0163-0007, at 0169; ISO logbook UGA-OTP-0170-0077, at 0088; P-0233, UGA-OTP-0243-1149-R01, at 1152 paras. 80-90, at 1153 para. 130, at 1154 paras. 153-154; P-0245, UGA-OTP-0244-0520-R01, at 0523-0526.

<sup>48</sup> Mega FM sound recording, UGA-OTP-0023-0002; Mega FM translation and transcript, UGA-OTP-0023-0011; Mega FM translation and transcript.

<sup>49</sup> Mega FM sound recording, UGA-OTP-0023-0002; Mega FM translation and transcript, UGA-OTP-0023-0011; P-0233, UGA-OTP-0243-1149-R01, at 1157 paras. 238-242.

<sup>50</sup> Mega FM translation and transcript, UGA-OTP-0023-0011, at 0020.

<sup>51</sup> "Atrocities committed by LRA rebels in Northern and Eastern Uganda", UGA-OTP-0252-0352.

on Otuboi, Kaberamaido.<sup>52</sup> A further 200 children were captured by the LRA fighters between Gere Gere and Lira Palwo on 2 July 2003.<sup>53</sup> On 23 November 2005, 18 people were killed in an ambush of vehicles in the district of Pader.<sup>54</sup>

50. In addition, on 14 December 2004, Witness **P-0038**, the Prosecutor's official UPDF contact, provided a document dated August 2004 entitled "Atrocities committed by LRA rebels in Northern and Eastern Uganda".<sup>55</sup> The document was based on an analysis of the official documents prepared by the Ugandan security and intelligence organisations. The report identifies crimes committed by the LRA, along with the number of victims, and reports the following events: between July 2002 and August 2004, 51 attacks were committed in Apac district, 164 in Lira district, 88 in Pader district, 118 in Gulu district, 126 in Kitgum district, 32 in unidentified districts and 133 in Soroti, Katakwi, Kabermaido and Kotido districts. These events variously gave rise to murders, abductions and pillaging involving many people.<sup>56</sup>

51. Witness **P-0245**, an LRA fighter and member of the Oka battalion, listed 10 sites at which attacks were carried out by the Oka battalion under the direct command of Dominic Ongwen or under his orders, during which civilians were captured.<sup>57</sup>

52. Witness **P-0224**, an LRA fighter until 2014, also stated that, in Uganda between 2003 and 2004, the LRA's primary activity was to capture and kill civilians.<sup>58</sup>

53. On 25 November 2003, Vincent Otti informed Joseph Kony that the fighters under the command of Dominic Ongwen had carried out an attack at the trading

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<sup>52</sup> ISO logbook, UGA-OTP-0060-0149, at 0154.

<sup>53</sup> ISO logbook, UGA-OTP-0060-0149, at 0178.

<sup>54</sup> ISO logbook, UGA-OTP-0170-0077, at 0088.

<sup>55</sup> P-0038, UGA-OTP-0244-0912-R01, at 0914 and 0916.

<sup>56</sup> "Atrocities committed by LRA rebels in Northern and Eastern Uganda", UGA-OTP-0037-0153.

<sup>57</sup> P-0245, UGA-OTP-0244-0520-R01, at 0523-0526.

<sup>58</sup> P-0224, UGA-OTP-0244-3160-R01, at 3163.

centre at Labwor Omer (Palaro). Many civilians were killed and captured. The rebels also pillaged food and set fire to houses.<sup>59</sup>

54. In February 2004, an LRA commander reported to Joseph Kony that he had attacked a camp in Barlonyo (Ogur) and had indiscriminately killed those UPDF soldiers and civilians who were present. He also reported that all the houses had been set ablaze and that clothing, including the uniforms of UPDF soldiers, had been pillaged.<sup>60</sup>

55. In August 2004, Dominic Ongwen reported to Buk Abudema, an LRA commander, that an ambush had been set up on the Awach road leading to the death of civilians, including an individual known as “Boda Boda”.<sup>61</sup>

56. In February and March 2005, LRA commanders ambushed vehicles causing civilian deaths.<sup>62</sup>

57. Abductions were numerous. On 10 July 2005, Dominic Ongwen stated that he was aware of the order given by Joseph Kony to capture young girls.<sup>63</sup> Witness **P-0233**, an LRA fighter in the Stockree brigade, stated that he had participated in the abduction of boys and girls of between 13 and 15 years of age, under the orders of Dominic Ongwen.<sup>64</sup>

58. Witness **P-0205**, a member of the LRA until 2010, belonged to the Sinia brigade under the command of Dominic Ongwen. Witness **P-0205** stated that Joseph Kony had given the order, passed on by Dominic Ongwen to his fighters, to capture children aged between 10 and 12 years.<sup>65</sup> That witness also explained exactly how the order to capture children had been issued by Kony, and repeated by Vincent Otti,

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<sup>59</sup> ISO logbook, UGA-OTP-0066-0002-R01, at 0087.

<sup>60</sup> ISO logbook, UGA-OTP-0061-0002, at 0093.

<sup>61</sup> ISO logbook, UGA-OTP-0197-0697, at 0780.

<sup>62</sup> ISO logbook, UGA-OTP-0152-0002, at 0179, 0183.

<sup>63</sup> ISO logbook, UGA-OTP-0163-0007, at 0169

<sup>64</sup> P-0233, UGA-OTP-0243-1149-R01, at 1152, paras. 80-90, at 1153 para. 130, and at 1154, paras. 153-154.

<sup>65</sup> P-0205, UGA-OTP-0243-0819-R01, at 0825-0833.

who transmitted it to the heads of divisions who themselves transmitted it to the brigade leaders.<sup>66</sup> Witness **P-0205** stated that the order was to be implemented until Joseph Kony considered that sufficient numbers of children had been captured.<sup>67</sup> According to the witness, the order to capture children was in force from 2003 to 2006.<sup>68</sup>

59. Witness **P-0048**, an LRA fighter, gave an account of the attacks carried out by the LRA in Soroti as from June 2003. Before the attacks started, Vincent Otti addressed the LRA fighters, of which he was a member, informing them that the purpose of the upcoming attacks was to force civilians to join the ranks of the LRA and spread chaos so as to undermine the influence of the Government.<sup>69</sup>

60. Lastly, Witness **P-0040**, an LRA fighter, spoke about preparations for the attack on Barlonyo. The witness mentioned the order given by Joseph Kony, in December 2003, to kill many people to attract the attention of the international community and to bring pressure to bear on the Ugandan Government to enter into negotiations with the LRA.<sup>70</sup>

#### **4. Observations of the parties**

61. On the basis of the evidence relating to a widespread or systematic attack directed against a civilian population, the Prosecution submits that, from 1 July 2002 to 31 December 2005, LRA fighters committed a widespread and systematic attack against the civilian population of Northern Uganda, of which the attacks on Pajule, Odek, Lukodi and Abok are but examples.<sup>71</sup>

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<sup>66</sup> P-0205, UGA-OTP-0243-0819-R01, at 0826.

<sup>67</sup> P-0205, UGA-OTP-0243-0819-R01, at 0826, paras. 208-209.

<sup>68</sup> P-0205, UGA-OTP-0243-0819-R01, at 0827.

<sup>69</sup> P-0048, UGA-OTP-0209-0227-R01.

<sup>70</sup> P-0040, UGA-OTP-0220-0678-R01, at 0685-0686, paras. 254-257.

<sup>71</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", OTP, ICC-02/04-01/15-375-AnxC-Red, para. 38.

62. During the hearing, in response to questions which I had put to it, the Prosecution supplemented its observations. As regards the question of whether the Ugandan People's Defence Force (UPDF) soldiers who were in the camps had fled during the attacks, and the number of lost or injured, the Prosecution assumes, with regard to the attack on Lukodi, on the basis of evidence, that no members of the UPDF were killed while 45 civilians lost their lives, but that some of the UPDF soldiers were allegedly wounded.<sup>72</sup> As for Pajule, the number of UPDF soldiers wounded has not been established, but apparently fluctuates between one and seven, with three UPDF soldiers allegedly killed.<sup>73</sup> As regards the attack on Odek, the number of UPDF soldiers wounded or killed is uncertain but is allegedly around 10, whereas numerous civilians were killed, according to the radio communications intercepted by the intelligence services of the Internal Security Organisation (ISO).<sup>74</sup> As regards the attack on Abok, many UPDF soldiers fled when they heard rumours of the attack and only 15 were present when the LRA fighters arrived.<sup>75</sup>

63. As regards my question concerning the number of soldiers who had been deployed in each of the four camps, the Prosecution stated, on the basis of the testimony of P-0035, that 30 UPDF soldiers were present at Lukodi camp, which accommodated several thousand civilian refugees.<sup>76</sup> As regards Pajule camp, the Prosecution stated that 150 UPDF soldiers were continually protecting the camp and that, during and after each attack, another 145 reinforcement troops arrived, along with helicopters. The camp accommodated between 15,000 and 30,000 civilian

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<sup>72</sup> *The Prosecutor v. Dominic Ongwen*, [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 2, line 24, to p. 3, lines 1-2.

<sup>73</sup> *The Prosecutor v. Dominic Ongwen*, [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 3.

<sup>74</sup> *The Prosecutor v. Dominic Ongwen*, [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 4.

<sup>75</sup> *The Prosecutor v. Dominic Ongwen*, [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 4.

<sup>76</sup> [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 6, lines 15-16.

refugees.<sup>77</sup> Odek camp was protected by around 30 government soldiers from the regular army and the local defence units, plus a mobile UPDF force of around 30 men present on the day of the attack.<sup>78</sup> In Abok, the Prosecution states that there were 54 UPDF soldiers on the day of the attack, plus an unknown number of Amuka. According to official figures, the camp had 7,360 inhabitants when it was established.<sup>79</sup>

64. The Defence raises no direct challenge to the existence of the contextual elements of the crimes against humanity.<sup>80</sup>

## 5. Analysis and conclusion

65. I note that the attacks on Pajule, Odek, Lukodi and Abok are a few examples of a whole series of attacks perpetrated by fighters of the Lord's Resistance Army (LRA) between 1 July 2002 and 31 December 2005. These attacks gave rise to the commission of various acts referred to in article 7(1) of the Statute.<sup>81</sup>

66. In view of the evidence and in the light of the response provided by the Prosecution during the hearing, thanks to which I can conclude that most of the people who were at the camps during the attacks were civilians, I am of the opinion that there are substantial grounds to believe that the attacks led by Dominic Ongwen targeted the civilian population.

67. I also note that these attacks affected a large number of victims and extended over a wide geographical area.

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<sup>77</sup> [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 5.

<sup>78</sup> [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 5.

<sup>79</sup> [Confirmation of charges hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG, p. 7.

<sup>80</sup> *The Prosecutor v. Dominic Ongwen*, Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2.

<sup>81</sup> These acts were confirmed by Pre-Trial Chamber II in its Decision on the confirmation of charges against Dominic Ongwen. See *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red.

68. I conclude that there are substantial grounds to believe that the series of attacks led by LRA fighters between 1 July 2002 and 31 December 2005 were carried out on a large scale and were therefore widespread.

69. I further note that the acts of violence were organised, in view of the fact that they followed a pattern reflected in the non-accidental repetition of similar criminal conduct, such as pillaging, abduction and murder of civilians.

70. In addition, the evidence shows that the attacks and acts of violence committed resulted from orders that were given directly by Joseph Kony or were relayed to LRA members through a chain of command.

71. In view of these findings, I conclude that there are substantial grounds to believe that the attack perpetrated by LRA fighters against the civilian population of northern Uganda targeted the civilian population and was systematic.

## **B. War crimes<sup>82</sup>**

### **1. The Prosecution's allegations**

72. In its pre-confirmation brief, the Prosecution alleges that:

From at least 1 July 2002 to 31 December 2005, an armed conflict not of an international character was taking place in northern Uganda. The parties to that conflict were the LRA and the UPDF together with associated local armed forces raised for the purpose of resisting LRA attacks.<sup>83</sup>

Each of the war crimes charged and described in this document should be read in conjunction with this section to establish their objective and subjective elements. The conduct that amounts to charges 1, 3, 5, 6, 9, 11, 13, 15, 17, 19, 21, 22, 24, 26, 28, 30, 32, 34, 35, 37, 39, 41, 43, 45, 47, 48, 52, 54, 56, 59, 60, 63, 65, 67, 69, and 70, which are charged

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<sup>82</sup> In its Decision on the confirmation of charges against Dominic Ongwen, issued on 23 March 2016 (ICC-02/04-01/15-422-Red), Pre-Trial Chamber II confirms that the contextual elements of the war crimes are established.

*The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, para. 61.

<sup>83</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 23.

as war crimes, took place in the context of and were associated with that armed conflict. As a senior LRA commander and a key participant in the armed conflict, Dominic Ongwen was aware of the factual circumstances that established its existence.<sup>84</sup>

## 2. Applicable law

73. The contextual elements of war crimes include the existence of an “international armed conflict” or an “armed conflict not of an international character”. Neither the Statute nor the Elements of Crimes define these concepts; instead they refer to international law.<sup>85</sup>

74. Like the Statute, neither the Geneva Conventions nor their Additional Protocols explicitly define the concept of “armed conflict”.

75. The definition of this concept has been explicated by other international courts, and specifically by the International Criminal Tribunal for the former Yugoslavia in its case law:

70. [...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>86</sup>

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<sup>84</sup> OTP, Public Redacted Version “[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)”, ICC-02/04-01/15-375-AnxC-Red, para. 24.

<sup>85</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “[Judgment pursuant to Article 74 of the Statute](#)”, 14 March 2012, ICC-01/04-01/06-2842, para. 532; *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1172; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 128.

<sup>86</sup> ICTY, *Prosecutor v. Tadić*, Appeals Chamber, case IT-94-1-AR72, “[Decision on Defence Motion for Interlocutory Appeal on Jurisdiction](#)”, 2 October 1995, para. 70.

76. This definition has been adopted by Pre-Trial Chamber II<sup>87</sup> and Trial Chambers I, II and III.<sup>88</sup>

77. For the purpose of establishing the existence of an armed conflict not of an international character, article 8(2)(f) of the Statute provides that they are “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.

78. Article 8(2)(f) of the Statute requires only that a “protracted” conflict exist between “organized armed groups”; it does not require that the armed groups “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”.<sup>89</sup>

79. The “organized armed groups” must have a sufficient degree of organisation to enable them to carry out protracted armed violence. For the purpose of deciding whether a body is an organised armed group (with regard to an armed conflict not of an international character), the following non-exhaustive list of factors may be relevant: the force or group’s internal hierarchy; the command structure and the rules applied; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into

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<sup>87</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision on the confirmation of charges, 15 June 2009, ICC-01/05-01/08-424, para. 229.

<sup>88</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “[Judgment pursuant to Article 74 of the Statute](#)”, 14 March 2012, ICC-01/04-01/06-2842, para. 532; *The Prosecutor v. Germain Katanga*, Trial Chamber II, “[Judgment pursuant to article 74 of the Statute](#)”, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1172; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 128.

<sup>89</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “[Judgment pursuant to Article 74 of the Statute](#)”, 14 March 2012, ICC-01/04-01/06-2842, para. 536; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “[Judgment pursuant to Article 74 of the Statute](#)”, 21 March 2016, ICC-01/05-01/08-3343, para. 134.

effect; and the extent, seriousness and intensity of any military involvement.<sup>90</sup> None of these factors is individually determinative.

80. Moreover, the intensity of the conflict is relevant for the purpose of determining whether an armed conflict that is not of an international character existed, because under article 8(2)(f) the violence must be more than sporadic or isolated.<sup>91</sup>

81. In order to assess the intensity of a potential conflict, a Chamber should take into account, among other things, the seriousness of the attacks and the potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council and, if so, whether any resolutions on the matter have been passed.<sup>92</sup>

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<sup>90</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "[Judgment pursuant to Article 74 of the Statute](#)", 14 March 2012, ICC-01/04-01/06-2842, para. 537; *The Prosecutor v. Germain Katanga*, Trial Chamber II, "[Judgment pursuant to article 74 of the Statute](#)", 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1186; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "[Judgment pursuant to Article 74 of the Statute](#)", 21 March 2016, ICC-01/05-01/08-3343, para. 134.

<sup>91</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "[Judgment pursuant to Article 74 of the Statute](#)", 14 March 2012, ICC-01/04-01/06-2842, para. 538; *The Prosecutor v. Germain Katanga*, Trial Chamber II, "[Judgment pursuant to article 74 of the Statute](#)", 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1187; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "[Judgment pursuant to Article 74 of the Statute](#)", 21 March 2016, ICC-01/05-01/08-3343, para. 137.

<sup>92</sup> Trial Chamber II, *The Prosecutor v. Germain Katanga*, "[Judgment pursuant to article 74 of the Statute](#)", 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1187; ICTY, Trial Chamber II, *Prosecutor v. Mile Mrkšić*, "[Judgement](#)", 27 September 2007, IT-95-13/1-T, para. 407.

### 3. Summary of the evidence

#### (a) Evidence of the existence of an armed conflict between governmental authorities and an organised armed group

82. The events that took place at the camps of Pajule, Odek, Lukodi and Abok are examples of the many clashes that occurred between UPDF soldiers and LRA fighters.

83. The UPDF is the national army of Uganda.<sup>93</sup> It is sufficiently structured, hierarchical, organised and equipped to carry out military operations.<sup>94</sup> As regards the local defence units of northern Uganda, the evidence presented indicates that these units were integrated into the UPDF in order to counter the LRA's attacks on camps for internally displaced persons.<sup>95</sup>

84. With regard to the structure of the LRA, Witnesses **P-0070** and **P-0142**, both former LRA fighters, explain in particular that the LRA comprised a central organ known as the "Control Altar", led by Joseph Kony, a "Division", and brigades known as "Stockree", "Sinia", "Trinkle" and "Gilva".<sup>96</sup> Radio communications

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<sup>93</sup> R. Gersony, *The anguish of northern Uganda. Results of a field-based assessment of the civil conflicts in northern Uganda*, submitted to the United States Embassy, USAID Mission, Kampala, August 1997, UGA-OTP-0231-0271, at 0311; Human Rights and Peace Centre and Liu Institute for Global Issues, *The hidden war: The forgotten people. War in Acholi land and its ramifications for peace and security in Uganda*, 30 October 2003, UGA-OTP-0231-0484, at 0540.

<sup>94</sup> Human Rights and Peace Centre and Liu Institute for Global Issues, *The hidden war: The forgotten people. War in Acholi land and its ramifications for peace and security in Uganda*, 30 October 2003, UGA-OTP-0231-0484, at 0539-0540; R. Gersony, *The anguish of northern Uganda. Results of a field-based assessment of the civil conflicts in northern Uganda*, submitted to the United States Embassy, USAID Mission, Kampala, August 1997, UGA-OTP-0231-0271, at 0311-0312; Human Rights Watch, *Abducted and abused: Renewed conflict in northern Uganda*, Vol. 15, No. 12, July 2003, UGA-OTP-0231-0188, at 0192, 0202 and 0253.

<sup>95</sup> Human Rights and Peace Centre and Liu Institute for Global Issues, *The hidden war: The forgotten people. War in Acholi land and its ramifications for peace and security in Uganda*, 30 October 2003, UGA-OTP-0231-0484, at 0540-0541; Refugee Law Project, *Behind the violence: causes, consequences, and the search for solutions to the war in northern Uganda*, Working Paper No. 11, February 2004, UGA-OTP-0231-0383, at 0421-0425.

<sup>96</sup> P-0070, UGA-OTP-0208-0214-R01, at 0232-0246; P-0142, UGA-OTP-0244-0776-R01, at 0779-0786; map of P-0142, UGA-OTP-0233-1361.

intercepted on 9 September 2002 by the intelligence services of the Internal Security Organisation (ISO) also provide details on the structure of the LRA, whose fighters were distributed among the battalions that made up each brigade.<sup>97</sup> Witness **P-0070** also specifies that the Control Altar was divided into several sections, including the operations section, the political affairs section, the personnel administration section and the religious affairs section, each led by a director or supervisor.<sup>98</sup> According to these radio communications and Witness **P-0142**, there were also commanders at the division, brigade and battalion levels.<sup>99</sup>

(b) Evidence relating to the intensity of the armed conflict

85. In a public radio broadcast on Mega FM in Gulu in December 2002, Joseph Kony declared that the LRA was at war with the Ugandan Government.<sup>100</sup> Several other radio communications intercepted by the ISO intelligence services attest to the conflict between the two parties in question, over a protracted period extending from 9 November 2002 to 2 December 2005,<sup>101</sup> with Dominic Ongwen reportedly being present during that time. One of these radio communications reported that LRA members had operations planned until 5 April 2006.<sup>102</sup>

86. Other evidence, including testimonies from several former LRA fighters, attests to the intensity and duration of the armed conflict.<sup>103</sup> For example, Witness **P-0019**, a former LRA fighter, describes how the LRA attacked and

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<sup>97</sup> ISO logbook, UGA-OTP-0064-0093, at 0166-0167.

<sup>98</sup> P-0070, UGA-OTP-0208-0214-R01, at 0232-0239 and 0246.

<sup>99</sup> ISO logbook, UGA-OTP-0064-0093, at 0166-0167; P-0142, UGA-OTP-0244-0776-R01, at 0779-0786; Map of P-0142, UGA-OTP-0223-1361.

<sup>100</sup> Transcript and translation of the Mega FM radio recording, UGA-OTP-0023-0011, at 0011 and 0017.

<sup>101</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 30.

<sup>102</sup> ISO logbook, UGA-OTP-0170-0077, at 0233-0234.

<sup>103</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 32.

ambushed UPDF vehicles in order to take weapons and equipment from them.<sup>104</sup> Statements from, among others, Witness **P-0037**,<sup>105</sup> formerly director of operations in the LRA; Witness **P-0070**,<sup>106</sup> formerly a battalion commander in the LRA; Witness **P-0133**,<sup>107</sup> a former lieutenant commanding a company in the second battalion of Gilva brigade; Witness **P-0048**,<sup>108</sup> formerly a captain in the LRA; Witness **P-0045**,<sup>109</sup> a female former high-ranking LRA fighter who was present at the attack on Pajule; Witness **P-0145**,<sup>110</sup> formerly a second lieutenant in the second battalion of Gilva brigade; Witness **P-0146**,<sup>111</sup> a former LRA fighter; Witness **P-0104**,<sup>112</sup> formerly a second lieutenant in Sinia brigade, and Witness **P-0016**,<sup>113</sup> formerly an LRA officer in Gilva brigade, show that numerous clashes between UPDF soldiers and LRA members took place in northern Uganda between 2002 and 2006, resulting in a large number of deaths and injuries on both sides.

87. Other testimonies even recount that Dominic Ongwen was present during these attacks. For example, Witness **P-0205**,<sup>114</sup> a former officer in Sinia brigade, describes a battle in November 2002 in which Dominic Ongwen received a gunshot wound. Witness **P-0231**, a former LRA fighter, states that he served under Dominic Ongwen in Oka battalion before Ongwen was promoted to command the Sinia brigade, between 2002 and 2003.

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<sup>104</sup> P-0019, UGA-OTP-0218-0571-R01, at 0579-0582.

<sup>105</sup> P-0037, UGA-OTP-0221-0979-R01, at 1004-1007; UGA-OTP-0221-0869-R01, at 0884.

<sup>106</sup> P-0070, UGA-OTP-0228-3165-R01, at 3191-3197; UGA-OTP-0228-2331-R01, at 2333.

<sup>107</sup> P-0133, UGA-OTP-0180-0009-R01, at 0021.

<sup>108</sup> P-0048, UGA-OTP-0221-0280-R01, at 0292.

<sup>109</sup> P-0045, UGA-OTP-0218-0223-R01, at 0238.

<sup>110</sup> P-0145, UGA-OTP-0219-0180-R01, at 0186-0187; UGA-OTP-0219-0143, at 0177.

<sup>111</sup> P-0146, UGA-OTP-0228-4397-R01, at 4427-4428.

<sup>112</sup> P-0104, UGA-OTP-0223-0345-R01, at 0362-0366.

<sup>113</sup> P-0016, UGA-OTP-0228-3416-R01, at 3436-3438, in particular regarding the death of Raska Lukwiya in a battle that took place in November 2006.

<sup>114</sup> P-0205, UGA-OTP-0243-0544-R01, at 0563; UGA-OTP0243-0574-R01, at 0581-0583.

#### 4. Observations of the parties

88. On the basis of this evidence relating to the structure of the LRA and the intensity of the armed conflict, the Prosecution contends that, from 1 July 2002 to 31 December 2005, northern Uganda was the theatre of an armed conflict not of an international character between the UPDF and the LRA.<sup>115</sup>

89. With regard to the structure of the LRA, the Prosecution claims that it was sufficiently structured and equipped, and that it possessed the required degree of organisation that enabled it to participate in a protracted armed conflict.<sup>116</sup>

90. In order to ascertain the intensity of the armed conflict, the Prosecution asserts that the clashes which took place between the UPDF and the LRA are evidence of a protracted armed conflict, as they were never sporadic, isolated or of low intensity, but rather they were spread all over northern Uganda.<sup>117</sup>

91. The Defence, however, challenges the organised nature of the LRA, claiming that Joseph Kony alone was its supreme leader and that, because of this, the LRA's structure cannot be compared to that of a military or paramilitary group. That being said, the Defence does not draw the conclusion that a non-international armed conflict did not take place between 1 July 2002 and 31 December 2005, or that the related charges of war crimes consequently cannot be confirmed.<sup>118</sup>

#### 5. Analysis and conclusion

92. Of the many items of evidence adduced by the Prosecution, the statements of Witnesses **P-0070** and **P-0142** are, in my view, sufficiently coherent. Their statements

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<sup>115</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 23.

<sup>116</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 27.

<sup>117</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 28.

<sup>118</sup> *The Prosecutor v. Dominic Ongwen*, the Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, paras. 26-35.

are, moreover, corroborated by the radio communications intercepted by the ISO intelligence services.

93. With regard to the Defence's allegations that the LRA was unstructured, with Joseph Kony as its one and only leader,<sup>119</sup> these allegations are corroborated by the testimonies of Witnesses **D26-022**, **D26-0018**, **D26-0030** and **D26-0024**. The Defence first refers to the testimony of Witness **D-26-022**, a doctor specialising in issues relating to child soldiers, explaining that the LRA was akin to a gang with Joseph Kony as the supreme leader.<sup>120</sup> Nevertheless, this witness does not appear to support the argument of a non-hierarchical structure, but rather provides information only on how child soldiers were conditioned by the LRA.<sup>121</sup>

94. The Defence's allegations subsequently rely on the statement of Witness **D26-0018**, a former LRA fighter, to prove that military rank meant little in the LRA. However, Witness **D26-0018** recounts this information without calling into question the presence of different brigades, instead insisting on the considerable authority held by Joseph Kony.<sup>122</sup>

95. In the same vein, the Defence refers to a radio communication between Vincent Otti and Joseph Kony on 5 June 2004<sup>123</sup> that illustrates how promotions were subject to the whims of Joseph Kony, such as the time when he promoted himself to General. In my opinion, however, this testimony does not cast doubt on the organised nature of the LRA. To refute the effective nature of the LRA's chain of command, the Defence also relies on the statements of Witnesses **D26-0030** and

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<sup>119</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, paras. 26-35.

<sup>120</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, para. 26.

<sup>121</sup> D26-0022, UGA-D26-0010-0600, at 0600-0601.

<sup>122</sup> D26-0018, UGA-D26-0010-0204, at 0219.

<sup>123</sup> UGA-OTP-0016-0458, at 0460.

**D26-0024**, two former senior commanders of the LRA. Witness **D26-0030**<sup>124</sup> confirms that Joseph Kony did not follow the standard structure of the chain of command and that he would sometimes give orders directly to lower-ranking LRA members without going through the LRA's middle ranks. Witness **D26-0024**<sup>125</sup> also states that Joseph Kony sometimes did not inform senior commanders of the orders that he gave to junior commanders. However, this witness subsequently states that Vincent Otti and Raska Lukwiya had planned the Pajule attack,<sup>126</sup> which indicates that they too had hierarchical authority, and this is corroborated by the statements of Witnesses **P-0070** and **P-0142**.

96. Lastly, the Defence alleges that the LRA brigades were not conventional army brigades but it fails to cite any evidence in support of this claim.<sup>127</sup>

97. I therefore conclude that there are substantial grounds to believe that the LRA was, throughout the entire period relevant to the charges brought against Dominic Ongwen, an organised armed group,<sup>128</sup> as there is, at minimum, sufficient evidence to establish that the LRA had an internal hierarchy, a command structure and the ability to plan military operations and put them into effect.

98. In the same vein, with regard to the intensity of the conflict, I observe that the testimonies of Witnesses **P-0019**, **P-0037**, **P-0070**, **P-0133**, **P-0048**, **P-0145**, **P-0146**, **P-0104** and **P-0016**, as well as the testimonies of Witnesses **P-0205** and **P-0231**, contain sufficient detail and do not appear to contradict each other.

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<sup>124</sup> D26-0030, UGA-D26-0010-0580, paras. 1-2.

<sup>125</sup> D26-0024, UGA-D26-0010-0407, at 0417-0418.

<sup>126</sup> D26-0024, UGA-D26-0010-0407, at 0418.

<sup>127</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, paras. 32-35.

<sup>128</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "[Judgment pursuant to Article 74 of the Statute](#)", 14 March 2012, ICC-01/04-01/06-2842, para. 537; *The Prosecutor v. Germain Katanga*, Trial Chamber II, "[Judgment pursuant to article 74 of the Statute](#)", 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1186; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "[Judgment pursuant to Article 74 of the Statute](#)", 21 March 2016, ICC-01/05-01/08-3343, para. 134.

99. Accordingly, I conclude that there are substantial grounds to believe that, during the period between 1 July 2002 and 31 December 2005, the intensity of the conflict between the UPDF forces and the LRA was such that it led to multiple clashes and attacks causing a large number of deaths and injuries on both sides, taking place over a protracted period of more than three years, in the region of northern Uganda, with government forces supported by local militia, and the acquisition of substantial numbers of weapons and combat equipment, in particular by the LRA troops.

## II. Charges 2, 3, 8 and 22

### A. Charges 2 and 3: murder as a crime against humanity and as a war crime (articles 7(1)(a) and 8(2)(c)(i) of the Statute)<sup>129</sup>

#### 1. The Prosecution's allegations

100. In the pre-confirmation brief, the Prosecution alleges that:

During the course of the attack, LRA fighters shot at civilian residents who tried to escape or refused to carry pillaged items, resulting in the killings of civilians.<sup>130</sup>

#### 2. Applicable law

101. Article 7(1)(a) of the Statute refers to murder as a crime against humanity but does not specifically define it.

102. The Elements of Crimes do, however, shed some light on the definition of the objective element of the crime of murder, specifying that "[the] perpetrator killed one or more persons".<sup>131</sup>

103. As established by the case law of the Court, it must be proven that an individual, by act or omission, caused the death of one or more persons. The victim's

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<sup>129</sup> In its decision of 23 March 2016, Pre-Trial Chamber II confirmed charges 2 and 3 for murder as a crime against humanity pursuant to article 7(1)(a) of the Statute, and as a war crime pursuant to article 8(2)(c)(i) of the Statute, perpetrated by LRA fighters who participated in the Pajule attack under the joint control of Dominic Ongwen and the co-perpetrators of the attack, killing at least two civilian residents of Pajule camp. The Chamber concludes, in particular, that there are substantial grounds to believe that, in the light of the testimonies of Witnesses P-0067 and P-0008, LRA fighters killed at least two civilians from the camp in the course of the attack.

*The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, paras. 68 and 69.

<sup>130</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 159.

<sup>131</sup> Elements of Crimes, article 7(1)(a) of the Statute, footnote p. 7 ("The term 'killed' is interchangeable with the term 'caused death'").

death must be the result of the conduct of the accused in such a way that a causal link is established between the conduct and the result.<sup>132</sup>

104. With regard to murder as a war crime pursuant to article 8(2)(c)(i) of the Statute, the Elements of Crimes specify that, aside from the fact that it must be established that the conduct took place in the context of and was associated with an armed conflict not of an international character and that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict, the constituent elements of these crimes are as follows:

1. The perpetrator killed one or more persons;
2. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities;
3. The perpetrator was aware of the factual circumstances that established this status.<sup>133</sup>

105. Lastly, in accordance with the provisions of article 30 of the Statute, the crime of murder must have been committed with intent and knowledge.

### 3. Summary of the evidence

#### (a) Evidence relating to the material element of the crime of murder

106. With regard to the commission of the murders, Witnesses **P-0067** and **P-0249** claim in their statements that they directly witnessed the murders of several civilians by LRA fighters.<sup>134</sup>

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<sup>132</sup> Elements of Crimes, article 8(2)(c)(i) of the Statute; *The Prosecutor v. Germain Katanga*, Trial Chamber II, "[Judgment pursuant to article 74 of the Statute](#)", 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 767.

<sup>133</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, "[Judgment pursuant to article 74 of the Statute](#)", 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 784.

<sup>134</sup> P-0067, UGA-OTP-0139-0193-R01, at 0201; P-0249, UGA-OTP-0238-0771-R01, at 0774.

(i) *The murders attributed to the LRA*

107. Witness **P-0067**, who was abducted by LRA fighters at around seven o'clock in the morning during the attack of 10 October 2003, describes having directly witnessed the murder of a trader whom the witness knew, at Lacektar, near Pajule camp.<sup>135</sup> The witness states that the leader of the group which abducted the civilians ordered his execution because he refused to carry bags that he thought were too heavy for him.<sup>136</sup> The civilian was then executed by one of the leader's bodyguards and was shot three times in the back of the head.<sup>137</sup>

108. Witness **P-0067** also claims to have been present when, somewhat further away, in Wang Duku, another civilian was stabbed in the side by a fighter from another LRA group using a bayonet attached to the fighter's gun.<sup>138</sup>

109. Other similar statements assert this, namely the statements of Witnesses **P-0081**, **P-0007**, **P-0008** and **P-0006**, even though they had not directly witnessed the murders in question.

110. Witness **P-0081**, who was also abducted by the rebels on the day of the attack, attests to the death of the civilian killed in Wang Duku, who had once helped the witness transport Witness **P-0048**, who had received a bullet wound.<sup>139</sup> The rebels had thought he was too weak, and they set him free two miles from Pajule camp so that he could rest. On returning home about six months later, the witness learned that the civilian in question had been killed.<sup>140</sup>

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<sup>135</sup> P-0067, UGA-OTP-0139-0193-R01, at 0201.

<sup>136</sup> P-0067, UGA-OTP-0139-0193-R01, at 0200 and 0201.

<sup>137</sup> P-0067, UGA-OTP-0139-0193-R01, at 0201.

<sup>138</sup> P-0067, UGA-OTP-0139-0193-R01, at 0201.

<sup>139</sup> P-0048, UGA-OTP-0209-017-R01, at 0185 and 0186.

<sup>140</sup> P-0081, UGA-OTP-0070-0029-R01, at 0033 and 0035.

111. In the same connection, Witness **P-0007**, who was also abducted on 10 October 2003, saw the victim's body at the funeral organised by his family members the day after he died.<sup>141</sup>

112. Witness **P-0008**, the commander of Pajule camp, claims to have seen the trader's body near the camp on the day after the attack, as well as the body of the civilian killed at Wang Duku after the civilian's relatives brought it back home.<sup>142</sup>

113. Witness **P-0006**, who was also abducted by the LRA on the day of the Pajule attack, affirms having heard about the civilian's death. The witness also mentions that her uncle died, but does not specify the circumstances of his death or whether it was caused by the LRA rebels during the Pajule attack.<sup>143</sup>

114. Witness **P-0249**, who was abducted by LRA rebels on the morning of the attack, also claims to have directly observed, at the time the witness was abducted, the rebels executing a boy whose name the witness did not know, near the witness's house within the confines of the camp itself, as the boy tried to run away.<sup>144</sup>

115. Lastly, Witness **P-0249** mentions the murder of a young man near the Pajule police station, at a place known as Wang Kweyo, committed by the members of the group led by Dominic Ongwen because he had refused to carry pillaged items. Witness **P-0249** nonetheless specifies not having directly observed this murder.<sup>145</sup>

*(ii) The other civilian casualties reported*

116. Witness **P-0084**, a UPDF captain who conducted a fact-finding mission a few hours after the attack ended, in the early afternoon, noted the deaths of several

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<sup>141</sup> P-0007, UGA-OTP-0147-0219-R01, at 0218.

<sup>142</sup> P-0008, UGA-OTP-0137-0002-R01, at 0007 and 0008.

<sup>143</sup> P-0006, UGA-OTP-0144-0072-R01, at 0080.

<sup>144</sup> P-0249, UGA-OTP-0238-0771-R01, at 0774.

<sup>145</sup> P-0249, UGA-OTP-0238-0771-R01, at 0776.

civilians, including five within the confines of the camp itself, and three at the barracks, who were family members of the UPDF soldiers living at Pajule.<sup>146</sup>

117. These statements are similar to those of Witness **P-0047**,<sup>147</sup> who claims to have seen the bodies of dead civilians in the vicinity of the barracks, and Witness **P-0067**,<sup>148</sup> who saw the body of a woman of approximately 40 years of age, with her child crying next to her, at the trading centre.

118. However, Witness **P-0052**, a UPDF soldier who was present at the precise moment of the attack and who examined the bodies, claims that the civilians who were found dead in the camp were collateral victims of mortar fire from the UPDF.<sup>149</sup>

(b) Evidence relating to the volitional element of the crime of murder

119. Since the Prosecution does not allege that Dominic Ongwen is criminally responsible as a direct perpetrator of the murders in question, I will summarise only the evidence relating to the intent of the LRA fighters.

120. The direct intent of the LRA fighters, who were armed with knives and firearms,<sup>150</sup> to kill civilians is presented in the Prosecution's pre-confirmation brief<sup>151</sup> on the basis of the statements of Witnesses **P-0006**, **P-0008**, **P-0061**, and **P-0067**,<sup>152</sup> civilian residents of Pajule who said that LRA fighters had threatened to shoot or kill them, and the statement of Witness **P-0249**, who claims he was shot at while he was

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<sup>146</sup> P-0084, UGA-OTP-0139-0149-R01, at 0152 and 0156.

<sup>147</sup> P-0047, UGA-OTP\_0027-0177-R01, at 0152.

<sup>148</sup> P-0067, UGA-OTP-0139-0193-R01, at 0197 and 0198.

<sup>149</sup> P-0052, UGA-OTP-0207-0196-R01, at 0208.

<sup>150</sup> P-0006, UGA-OTP-0144-0072-R01, at 0075; P-0052, UGA-OTP-0207-0196-R01, at 0206; P-0061, UGA-OTP-0144-0043-R01, at 0046; P-0067, UGA-OTP-0139-0193-R01, at 0196; P-0130, UGA-OTP-0191-0272-R01, at 0280; P-0249, UGA-OTP-0238-0771-R01, at 0774.

<sup>151</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21st December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 163.

<sup>152</sup> P-0006, UGA-OTP-0144-0072-R01, at 0075; P-0008, UGA-OTP-0137-0002-R01, at 0005; P-0061, UGA-OTP-0144-0043-R01, at 0047; P-0067, UGA-OTP-0139-0193-R01, at 0196.

at home with his wife.<sup>153</sup> Witness **P-0130**, a former LRA fighter, also claims to have seen the rebel group head towards the camp while firing their weapons.<sup>154</sup>

121. Witness **P-0052** also claims to have observed the first shots fired by the rebels.<sup>155</sup> Witness **P-0130**, a former LRA fighter, gives a similar account, stating that his group opened fire near the barracks.<sup>156</sup>

#### 4. Observations of the parties

122. In support of the foregoing evidence, the Prosecution contends that, during the Pajule attack which took place on or around 10 October 2003, the LRA fighters opened fire on civilians who tried to escape or refused to carry pillaged items, causing the death of several civilians.<sup>157</sup>

123. The Defence makes no observations on the evidence presented in support of the constituent elements of the crime of murder.<sup>158</sup>

#### 5. Analysis and conclusion

124. I note that, in order to establish the material element of the crime in question, the Prosecution relies on the statement of direct witness **P-0067**, which, as claimed by the Prosecution in its pre-confirmation brief,<sup>159</sup> mentions that the civilian casualties include two residents of the camp. I also note that the testimony of Witness **P-0067** is detailed and appears coherent. It is also corroborated by the statements of

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<sup>153</sup> P-0249, UGA-OTP-0238-0771-R01, at 0779.

<sup>154</sup> P-0130, UGA-OTP-0191-0272-R01, at 0280.

<sup>155</sup> P-0052, UGA-OTP-0207-0196-R01, at 0206.

<sup>156</sup> P-0130, UGA-OTP-0191-0272-R01, at 0280.

<sup>157</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 159.

<sup>158</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2.

<sup>159</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 160.

Witnesses **P-0081**, **P-0007**, **P-0008** and **P-0006**, who confirm the death of two civilians from the camp.

125. Having regard to the evidence submitted, I am of the view that there are substantial grounds to believe that two murders were committed by LRA members near Pajule camp on or around 10 October 2003.

126. As regards the statement of Witness **P-0249** mentioning the death of two other civilians near the witness's home and at Wang Kweyo, this statement does not appear to have been contradicted.

127. Consequently, I conclude that there are substantial grounds to believe that two other people, whose identities remain unclear, were killed by LRA rebels.

128. Regarding the civilian casualties mentioned by Witness **P-0084**, which the Prosecution relies on to claim that other civilians were killed by the rebels,<sup>160</sup> although Witness **P-0047** (another UPDF intelligence officer) confirms the existence of civilian casualties following the attack,<sup>161</sup> and Witness **P-0067** claims that the body of a female civilian was at the Pajule trading area,<sup>162</sup> none of these witnesses directly witnessed the civilians in question being executed by LRA rebels. Moreover, these allegations are contradicted by the statement of Witness **P-0052**, a UPDF soldier who was present at the very moment of the attack and examined the bodies. This witness claims that the civilians who were found dead at the camp were collateral victims of mortar fire from the UPDF.<sup>163</sup>

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<sup>160</sup> OTP, Public Redacted Version "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 162.

<sup>161</sup> P-0047, UGA-OTP-0027-0177-R01, at 0183, 0193 and 0194.

<sup>162</sup> P-0067, UGA-OTP-0139-0193, at 0198.

<sup>163</sup> P-0052, UGA-OTP-0207-0196-R01, at 0208.

129. Accordingly, I cannot conclude that there are substantial grounds to believe that these eight civilians found within the confines of Pajule camp were killed by LRA rebels.

130. I would point out that, in order to characterise intent in the crime of murder, the Prosecution relies on the direct testimonies of **P-0006, P-0008, P-0061, P-0067, P-0249, P-0130 and P-0052**,<sup>164</sup> and goes on to submit that there is no doubt that LRA fighters who took part in the attack had express intent of killing civilians and were armed accordingly. I concur that it is quite clear from the weapons used and the conditions in which they were used that it was the intention of the LRA soldiers who attacked Pajule camp to commit murder.

131. Accordingly, I conclude that there are substantial grounds to believe that crimes of murder were committed by LRA rebels and that they were committed with intent.

132. Consequently, I am of the view that the Chamber should have found that there was sufficient evidence establishing substantial grounds to believe that four people at most were killed by the LRA rebels in the attack on Pajule camp. In finding that at least two people were killed by the LRA rebels, the Pre-Trial Chamber unfortunately left scope for the Prosecution to make different allegations before the Trial Chamber, which could trigger unnecessary litigation before it.

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<sup>164</sup> OTP, Public Redacted Version, "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 163.

## B. Count 8: enslavement (article 7(1)(c) of the Statute)<sup>165</sup>

### 1. The Prosecution's allegations

133. In the pre-confirmation brief, the Prosecution alleges that:

LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. LRA fighters abducted hundreds of civilians and made them carry food items and other equipment that they had looted from the camp. In doing so, attackers exercised any or all of the powers attaching to the right of ownership over the abductees including by depriving them of their liberty and exacting forced labour, reducing them to a servile status. The exertion of powers which may be associated with the right of ownership may include detention or captivity, restrictions on freedom to come and go or on any freedom of choice or movement, or, more generally, any measure taken to prevent or deter any attempt at escape.<sup>166</sup>

### 2. Applicable law

134. Article 7(1)(c) of the Statute provides:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

(c) Enslavement.

135. Under article 7(2)(c) of the Statute and the Elements of Crimes, the perpetrator must have exercised "any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."<sup>167</sup>

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<sup>165</sup> In its Decision of 23 March 2016, Pre-Trial Chamber II confirms count 8 of the charges for enslavement as a crime against humanity pursuant to article 7(1)(c) of the Statute. The Chamber finds in particular, on the basis of the testimonies of P-0009, P-0067, P-0199 and P-0249, that there are substantial grounds to believe that LRA fighters enslaved civilian inhabitants of Pajule camp.

*The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision on the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, paras. 68 and 69.

<sup>166</sup> OTP, Public Redacted Version, "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 175.

<sup>167</sup> Elements of Crimes, article (7)(1)(c) of the Statute.

136. Further, according to footnote 11 of the Elements of Crimes, “such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery”. The conduct includes “trafficking of persons, in particular women and children”.<sup>168</sup>

137. Lastly, pursuant to article 30 of the Statute, the crime of enslavement must have been committed with intent and knowledge.

### 3. Summary of the evidence

#### (a) Facts establishing the material element of the crime of enslavement

138. Regarding the commission of the crime of enslavement, several testimonies describe abductions of civilians by the LRA rebels, who forced them to carry loot and LRA fighters wounded in the attack as far as the LRA meeting point.

139. Witness **P-0081** states that he was abducted on the morning of the attack by LRA fighters and made to help a civilian (who was subsequently found dead) and his own neighbour to carry Witness **P-0048**, who was wounded at the time, as far as the LRA meeting point.<sup>169</sup> To this end, Witness **P-0081** and the other two civilians were tied together with a rope around the waist.<sup>170</sup>

140. Other civilian witnesses also state that they were abducted by the LRA rebels during the attack and forced to carry previously looted goods. Witness **P-0009** states that he was abducted by child soldiers while asleep at home, and that they subsequently forced him to carry half a bag of rice.<sup>171</sup> Witness **P-0061**, a local civilian

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<sup>168</sup> Elements of Crimes, article (7)(1)(c) of the Statute, footnote 11; See also, Rome Statute, article 7(2)(c).

<sup>169</sup> P-0081, UGA-OTP-0070-0029-R01, at 0033-0036.

<sup>170</sup> P-0081, UGA-OTP-0070-0029-R01, at 0033.

<sup>171</sup> P-0009, UGA-OTP-0151-0167-R01, at 0175-0176.

aged 15 at the time of the attack,<sup>172</sup> was forced out of his home under threat of being shot dead by an LRA fighter. The fighter ripped off his shirt and used it to tie his hands behind his back.<sup>173</sup> Witness **P-0061** states that as he left his house he saw other people who had been abducted before the attack, outside Pajule camp, carrying bags of maize and beans. He states that he was forced to carry soft drinks but did not specify the quantity.

141. Other testimonies contain similar statements. Witness **P-0138**, a former LRA fighter who took part in the attack on Pajule camp, states that over 200 persons including Witness **P-0009**, the head of Pajule camp, were captured and forced to follow the LRA rebels.<sup>174</sup> Witness **P-0144**, another rebel who took part in the attack, estimates the number of people abducted at close to 400 and confirms that Witness **P-0009** was in the group.<sup>175</sup>

142. Similarly, Witness **P-0084** states that, while flying over Pajule camp in a helicopter half an hour after the attack started, he saw abducted people forced to carry loot at the Pajule trading centre and over 300 civilians captured by LRA members.<sup>176</sup> In addition, Witness **P-0047** states that he had heard from local chiefs of Pajule camp that the number of civilians captured was about 300.<sup>177</sup>

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<sup>172</sup> P-0061, UGA-OTP-0144-0043-R01, at 0045.

<sup>173</sup> P-0061, UGA-OTP-0144-0043-R01, at 0046.

<sup>174</sup> P-0138, UGA-OTP-0228-0568-R01, at 0598.

<sup>175</sup> P-0144, UGA-OTP-0228-1418-R01, at 1426.

<sup>176</sup> P-0084, UGA-OTP-0139-0149-R01, at 0164-0165; UGA-OTP-0069-0416, at 0419.

<sup>177</sup> P-0047, UGA-OTP-0027-0177-R01, at 0182, 0191.

(b) Evidence relating to the volitional element of the crime of enslavement

143. The Prosecution does not refer to Dominic Ongwen as a direct perpetrator of crimes of enslavement. It is for this reason that the intentions of the LRA fighters alone will be summed up in order to characterise intent in the crime of enslavement.

144. The intention of the rebels to enslave the civilians in Pajule camp is revealed in the statements of Witnesses **P-0067**, **P-0249** and **P-0081**. According to these Witnesses any civilians who failed to move quickly enough or disobeyed the rebels' instructions were killed.

145. Witness **P-0067**, who was also abducted by the LRA on the day of the attack, describes how the commander of the group of which he was part gave the order for a trader to be killed near Lacektar for refusing to carry four containers of beans that he thought were too heavy for him to carry.<sup>178</sup> Witness **P-0081** states that the civilian found dead after the attack was released and isolated from the group by the rebels because he was too weak to carry Witness **P-0048**.<sup>179</sup> Witness **P-0249**, who was also abducted by the LRA during the attack and chained to other civilians, states that a civilian was killed by LRA members for having refused to carry loot.<sup>180</sup>

146. According to statements given by Witnesses **P-0249** and **P-0067**, civilians were beaten by the LRA rebels.<sup>181</sup> According to the statements given by Witness **P-0309**, a former LRA fighter who took part in the attack and directly witnessed the events,<sup>182</sup> LRA members beat people under their responsibility for moving slowly.<sup>183</sup>

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<sup>178</sup> P-0067, UGA-OTP-0139-0193-R01, at 0199-0200.

<sup>179</sup> P-0081, UGA-OTP-0070-0029-R01, at 0035.

<sup>180</sup> P-0249, UGA-OTP-0238-0771-R01, at 0776.

<sup>181</sup> P-0067, UGA-OTP-0139-0193-R01, at 0199-200; P-0249, UGA-OTP-0238-0771-R01, at 0776.

<sup>182</sup> OTP, Public Redacted Version, "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 176.

<sup>183</sup> P-0309, UGA-OTP-0249-0472-R01, at 0487.

147. Lastly, Witness **P-0309** states that he captured two elderly men in order for them to carry beans previously stolen by LRA rebels.<sup>184</sup>

#### 4. Observations of the parties

148. On the strength of this evidence, the Prosecution charged Dominic Ongwen with the crime of enslavement, allegedly committed close to or within Pajule camp, on or around 10 October 2003.<sup>185</sup>

149. The Defence, for its part, questions Witness **P-0009**'s credibility, contending firstly that the Witness does not situate Dominic Ongwen inside Pajule camp until 10 years after he made his first statement, in which he had mentioned him only as from the meeting point outside the camp.

The Defence notes the strong inconsistencies with OTP-0009's statements. In his 2005 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. 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. In 2015, OTP-0009 changed his story towards Dominic, inventing a story about Dominic being at the trading centre and seriously mistreating people there. His only excuse for not mentioning it ten years earlier was that he was not asked. He gave a 15-page statement in 2005 about Pajule and forgot to mention being physically abused by Dominic because he was not asked.<sup>186</sup>

150. Secondly, the Defence points out that Witness **P-0081** claimed that Witness **P-0009** was a collaborator for the Pajule attack:

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 OTP-0009 on the phone with Otti Vincent the night before the attack. The Defence expected a statement from the person that allegedly witnessed the phone call between OTP-0009 and

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<sup>184</sup> P-0309, UGA-OTP-0249-0472-R01, at 0487.

<sup>185</sup> OTP, Public Redacted Version, "[Document Containing the Charges](#)", 22 December 2015, ICC-02/04-01/15-375-AnxA-Red, para. 8.

<sup>186</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, para. 96.

Otti Vincent, but it did not find one from the Prosecution. OTP-0009's story cannot be trusted.<sup>187</sup>

151. Lastly, the Defence submits that Witness **P-0309** is not believable:

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 attachments to the statement, which would have pictures, are not available to the Defence. Finally, if OTP-0309 truly spent almost two years as Dominic's escort, how is it that he did not know the name of the brigade that he was in? 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.<sup>188</sup>

## 5. Analysis and conclusion

152. I note that, in order to characterise the material element of the crime of enslavement, the Prosecution relies on the direct testimonies of **P-0081**, **P-0061**, **P-0067** and **P-0249**, who were abducted on the day of the Pajule attack. I note that the testimonies are sufficiently precise and do not appear to be contested.

153. I also note that the Prosecution additionally relies on the direct testimonies of **P-0067** and **P-0249** in its claim that the civilians who failed to move quickly enough or disobeyed instructions were whipped, beaten or killed.

154. I note lastly that, in order to determine the number of people who were enslaved during the Pajule attack, the Prosecution relies on the testimony of **P-0138**, a former LRA fighter, whose estimate is that at least 200 civilians were abducted and enslaved following the attack on the camp.<sup>189</sup> The Prosecution refers, however, to

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<sup>187</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, para. 97.

<sup>188</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, para. 98.

<sup>189</sup> OTP, Public Redacted Version, "[Document Containing the Charges](#)", 22 December 2015, ICC-02/04-01/15-375-AnxA-Red, para. 176.

several other testimonies stating that a greater number – between 300 and 400 – were abducted.<sup>190</sup>

155. For these reasons I consider that there are substantial grounds to believe that the material element of crimes of enslavement is established, given that between 200 and 400 civilians living in Pajule were deprived of their liberty by the LRA fighters.

156. Concerning Witness **P-0009**'s credibility, the Defence challenges it with respect to Dominic Ongwen's presence in the camp itself and with respect to the Witness's allegations of being physically abused.<sup>191</sup> Closer examination of Witness **P-0081**'s testimony reveals that in fact the witness states that a civilian told him about having heard, on the eve of the attack, Witness **P-0009** on a satellite telephone allegedly suggesting in Acholi that he might come to the camp the following day, in order to take advantage of the fact that everyone would be drunk, including the UPDF soldiers.<sup>192</sup> Witness **P-0052** also states that Witness **P-0009** had connections with the LRA leaders and that he had already distributed supplies to LRA members.<sup>193</sup> Further, Witness **P-0105**, a former LRA fighter, claims to have been present when, on the eve of the attack, Vincent Otti had a telephone conversation with a collaborator living in Pajule.<sup>194</sup>

157. For these reasons, I consider that there is doubt about the credibility of both statements by Witness **P-0009**. However, I note that, concerning the facts relating to enslavement, his presence among the civilians who were captured was corroborated

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<sup>190</sup> OTP, Public Redacted Version, "[Document Containing the Charges](#)", 22 December 2015, ICC-02/04-01/15-375-AnxA-Red, para. 176.

<sup>191</sup> The Defence for Dominic Ongwen, "[Defence Brief for the Confirmation of Charges Hearing](#)", 3 March 2016, ICC-02/04-01/15-404-Red2, para. 96.

<sup>192</sup> P-0081, UGA-OTP-0070-0029-R01, at 0037.

<sup>193</sup> P-0052, UGA-OTP-0207-0196-R01, at 0201.

<sup>194</sup> P-0105, UGA-OTP-0228-4996-R01, at 5013-5014.

on several occasions, in particular by direct witnesses **P-0081**,<sup>195</sup> **P-0067**,<sup>196</sup> **P-0249**<sup>197</sup> and **P-0144**.<sup>198</sup> I therefore infer that, regarding enslavement, Witness **P-0009**'s statements maintain their credibility.

158. I note, with respect to intent in the crime of enslavement, that the Prosecution relies on the statements of direct witnesses **P-0067**, **P-0081** and **P-0249**, which contain sufficient detail and do not appear to contradict each other.

159. Concerning the testimony of **P-0309**, who claims to have been a direct perpetrator of enslavement, I would point out that he appears to be consistent in his statement and does not contradict the other testimonies. The mere fact that Dominic Ongwen alleged he did not know him or even that he does not recall the name of the brigade to which he was assigned,<sup>199</sup> does not seem sufficient to call into question his credibility with respect to his statements.

160. I consider therefore, taking into account the manifest concerns of the LRA leaders to ensure that their instructions were obeyed, including their desire to set an example through the death of one of the civilians – as stated by Witness **P-0067** – that they had the intention of depriving the civilians in Pajule camp of their liberty and also reducing them to a servile status, among other things by forcing some of them to join the LRA.

161. I am therefore of the view that there are substantial grounds to believe that the LRA fighters enslaved the civilians living in Pajule camp by depriving them of their liberty so as to use them to carry loot and fighters wounded during the attack, and to compel some of them to join the LRA.

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<sup>195</sup> P-0081, UGA-OTP-0070-0029-R01, at 0038.

<sup>196</sup> P-0067, UGA-OTP-0139-0193-R01, at 202.

<sup>197</sup> P-0249, UGA-OTP-0238-0771-R01, at 0776.

<sup>198</sup> P-0144, UGA-OTP-0228-1418-R01, at 1426.

<sup>199</sup> P-0309, UGA-OTP-0249-0472-R01, at 0485.

## C. Count 22: outrages upon personal dignity (article 8(2)(c)(ii) of the Statute)<sup>200</sup>

### 1. The Prosecution's allegations

162. In the pre-confirmation brief, the Prosecution alleges that:

The attackers humiliated, degraded or otherwise violated the dignity of Odek residents. The severity of the humiliation, degradation or other violations was of such degree as to be generally recognised as an outrage upon personal dignity.<sup>201</sup>

### 2. Applicable law

163. Article 8(2)(c)(ii) of the Statute provides:

2. For the purpose of this Statute, "war crimes" means:

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: [...]

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.

164. In accordance with the Elements of Crimes, in addition to the fact that it must be established that the conduct took place in the context of and was associated with an armed conflict not of an international character and that the perpetrator had knowledge of the factual circumstances establishing the existence of an armed conflict, the constituent elements of that crime are as follows:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons;
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.<sup>202</sup>

<sup>200</sup> In its Decision of 23 March 2016, Pre-Trial Chamber II confirmed the count 22 of the charges relating to the crime of outrage upon personal dignity as a war crime in accordance with article 8(2)(c)(ii). *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, "[Decision at the confirmation of charges against Dominic Ongwen](#)", 23 March 2016, ICC-02/04-01/15-422-Red, para. 74.

<sup>201</sup> OTP, Public Redacted Version, "[Pre-confirmation brief, 21<sup>st</sup> December 2015](#)", ICC-02/04-01/15-375-AnxC-Red, para. 264.

165. This wording is a reference to human rights jurisprudence, according to which “‘treatment’ itself will not be ‘degrading’ unless the person concerned has undergone – either in the eyes of others or in his own eyes – humiliation or debasement attaining a minimum level of severity”.<sup>203</sup> Accordingly, acts and omissions which may constitute outrage upon personal dignity can be triggered when “outrages are carried out by unlawfully attacking the body or humiliating and debasing the honour, the self-respect or the mental well-being of a person.”<sup>204</sup>

166. Furthermore, the crime of committing outrages upon personal dignity must have been perpetrated on persons placed hors de combat, civilians, medical staff or religious personnel taking no active part in the hostilities. The perpetrator must be aware of the factual circumstances of that status.<sup>205</sup>

167. Pursuant to article 30 of the Statute, crimes within the jurisdiction of the Court must have been committed by the perpetrator with intent and knowledge.

### 3. Summary of the evidence

168. Witness **P-0252**, who was a schoolchild at the time of the attack on Odek, states that, a few days after he was captured by LRA fighters, two members of Dominic Ongwen’s escort ordered him to cut sticks and beat to death another of the men who had been captured in Odek.<sup>206</sup> Both members of the escort stayed behind to

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<sup>202</sup> Elements of Crimes, article 8(2)(c)(ii) of the Statute.

<sup>203</sup> M. Eudes, “*article 8 Statut de Rome*”, in J. Fernandez, “*Statut de Rome de la Cour pénale internationale: commentaire article par article*”, Pedone, 2012, p. 517; ECHR, [Case of Campbell and Cosans v. The United Kingdom](#), Application No. 7511/76; 7743/76, para. 28.

<sup>204</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “[Decision at the confirmation of charges](#)”, 30 September 2008, ICC-01/04-01/07-717, p. 128, para. 369; ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Case No. IT-95-17/1-T. “[Judgement](#)”, 10 December 1998, para. 183.

<sup>205</sup> Elements of Crimes, article 8(2)(c)(ii) of the Statute.

<sup>206</sup> P-0252, UGA-OTP-0243-0428-R01, at 0440, para. 70.

ensure that the witness and another captive performed the assignment.<sup>207</sup>  
The witness describes the pain he felt and his emotional numbness.<sup>208</sup>

169. Witness **P-0252** stated that all the men captured in Odek were killed after the attack by either other civilians or fighters. Members of Dominic Ongwen's escort took the witness to see the bodies, among which was his father's. When he saw them, the witness states, he felt helpless and emotionally numb.<sup>209</sup>

170. The LRA members then asked Witness **P-0252** to go back and check the corpses for three days until the onset of decomposition.<sup>210</sup>

171. A few days later, under the supervision of LRA fighters, Witness **P-0252** again had to beat a man to death.<sup>211</sup>

172. According to witnesses **P-0270**, **P-0268** and **P-0275**, who were also captured on the day of the attack on Odek, they met women who told them that they had been forced to leave behind their children by the roadside or, as they travelled with the LRA fighters from Odek camp, came across children left alone at the roadside.<sup>212</sup>

#### 4. Observations of the parties

173. On the strength of this evidence, the Prosecution submits that Dominic Ongwen committed the crimes of outrage upon personal dignity against Witness **P-0252**, who was forced to club to death a man captured during the Odek attack and then to inspect the decomposing bodies of men killed on the same day, including his father's, and against women from Odek camp who were captured during the attack and forced to abandon their children by the roadside.

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<sup>207</sup> P-0252, UGA-OTP-0243-0428-R01, at 0440, para. 70.

<sup>208</sup> P-0252, UGA-OTP-0243-0428-R01, at 0440, para. 70.

<sup>209</sup> P-0252, UGA-OTP-0243-0428-R01, at 0440, paras. 71-73.

<sup>210</sup> P-0252, UGA-OTP-0243-0428-R01, at 0441, para. 74.

<sup>211</sup> P-0252, UGA-OTP-0243-0428-R01, at 0441, paras. 76-77.

<sup>212</sup> P-0268, UGA-OTP-0248-0013-R01, at 0021, para. 55; P-0270, UGA-OTP-0241-0168-R01, at 0174, para. 48; P-0275, UGA-OTP-0244-3398-R01, at 3402, para. 31.

174. The Defence makes no observations on the evidence presented in support of the factors constituting the crime of outrage upon personal dignity.

### **5. Analysis and conclusion**

175. I note that **P-0252**'s testimony is detailed and presents no inconsistencies. I consider that the treatment inflicted by the LRA fighters caused him grave mental suffering. Furthermore, albeit less detailed, all three indirect testimonies describe the same facts. I consider that it can be inferred from the indirect testimonies that forced abandonment of a child is a source of grave mental suffering for a mother, amounting to outrage upon her dignity.

176. Furthermore, I note that on the basis of the testimonies it can be established that there are substantial grounds to believe that the crime of outrage upon personal dignity was committed by the LRA fighters against civilians. I consider that, when capturing these people in Odek camp the LRA fighters were aware of their status as civilians.

177. Consequently, it is my conclusion that there are substantial grounds to believe that the material and subjective elements of the crime of outrage upon personal dignity are established.

Done in English and in French, the French being authoritative.

**[ signed ]**

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**Judge Marc Perrin de Brichambaut**

Dated this 19 May 2016

At The Hague, the Netherlands