

SENTENCING PROCESS IN CASES INVOLVING FORMER CHILD SOLDIERS AT THE ICC



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¹ This memorandum was written by the members of the International Law Clinic's 2020 class, under the supervision of Professor Héctor Olasolo Alonso and with support from Andrés Sánchez Sarmiento and Luisa Villarraga Zschommler. The International Law Clinic is a program jointly established by the Universidad del Rosario (Bogotá, Colombia), and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands), with the cooperation of the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC).

INTRODUCTION

This paper is part of the research work by the International Law Clinic, organized by the *Universidad del Rosario, Bogotá, Colombia* and the *Ibero-American Institute of the Hague for Peace, Human Rights and International Justice (IIH)*, in cooperation with the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC). This memorandum seeks to answer the following three questions regarding the Dominic Ongwen case:

- A) *How does being a former child soldier (or any equivalent circumstances where a child is forced to commit crimes or subjected to any type of victimisation), affect the gravity of the crime?*
- B) *Should the Court consider this fact as part of the assessment of the gravity of the crimes or should they be considered as part of the criteria to determine the existence of aggravating or mitigating circumstances (provided that such factor can be assessed only once by a Chamber either as part of gravity or aggravating circumstance, not cumulatively)?*
- C) *Which option is best suited in the context of the statutory provisions of the ICC?*

Dominic Ongwen was born in Northern Uganda in 1975. He was abducted as a child by the Lord's Resistance Army ("LRA") in 1987² and the evidence shows that he ascended through the ranks and acquired more powerful command positions due to his operational performance: by 2002, he became the commander of the Oka battalion. In September 2003, he escalated to the position of second in command of the Sinia brigade, and in March 2004 he became the brigade's commander.³ The evidence also demonstrates that multiple attacks were carried out by the LRA against the civilian population, from 2002 to 2005 on the territory of Uganda, and as a result, the Pre-Trial Chamber II issued a warrant of arrest against Dominic Ongwen in 2005.⁴ The Prosecutor charged Ongwen with crimes against humanity under Article 7 and war crimes under Article 8 of the Rome Statute. Consequently, the charges were confirmed, the Trial began on December 6th, 2016 and the closing statements were presented on March 12th, 2020. Trial Chamber IX is yet to deliver its verdict.⁵

In this context, the Defence has raised several times the following argument with the intent of excluding Ongwen's individual criminal responsibility: since the accused was abducted into the LRA at a young age and made a child soldier, he should benefit from the international legal protections provided for children. According to the Defence, such protections should

² ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Fourth Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing"*, filed on January 18, 2016 and August 7, 2020, ICC Doc. No: ICC-02/04-01/15, para. 1.

³ ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15, para. 58.

⁴ *Ibid*, para. 4.

⁵ ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Case Information Sheet*, Updated in December, 2020, ICC Doc. No.: ICC-02/04-01/15.

include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed. The Defence contends that, even if individual criminal responsibility is not excluded, being a former child soldier should at least be considered as a mitigating factor throughout the sentencing process that Trial Chamber IX will conduct.⁶

In light of this, the ICC Office of Public Counsel for Victims (OPCV) asked the Law Clinic to resolve the three questions presented above. In order to do so, the 2020 International Law Clinic's team conducted an analysis of the available international jurisprudence regarding child recruitment and its relevance throughout the sentencing process. The scope of this analysis was limited to (i) the International Criminal Court (ICC) and (ii) the Special Court for Sierra Leone (SCSL), since these are the only two international criminal tribunals presenting relevant jurisprudence in relation to child recruitment.

A) How does being a former child soldier (or any equivalent circumstances) affect the gravity of the crime?

A. INTERNATIONAL CRIMINAL COURT

Article 78 (1) of the Rome Statute of the International Criminal Court (ICC Statute) establishes two important factors that the Chambers ought to consider when determining a sentence: (i) **the gravity of the crime**, and (ii) the individual circumstances of the convicted person.

In addition to this provision, Rule 145 (1) (c) of the ICC Rules of Procedure and Evidence (ICC RPE) establishes an additional handful of elements that can be analysed through the lens of Article 78 (1). Elements such as the nature of the unlawful behaviour, the means employed to execute the crime and the circumstances of manner, time and location, amongst others.⁷

The ICC has jurisprudentially established that, when determining the gravity of a crime, Chambers must analyse the elements directly related to the nature of the unlawful behaviour and the means employed to execute the crime, as well as the degree of participation of the convicted person and the mode of liability. In the Judgment and Sentencing issued by Trial Chamber VIII in the Al-Mahdi case, it was stated that when determining the gravity of the

⁶ ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Further Redacted Version of "Defence Brief for the Confirmation of Charges Hearing"*, filed on 18 January 2016, and March 3, 2016, Doc. No.: ICC-02/04-01/15, paras 36-49.

⁷ Rome Statute of the International Criminal Court, available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> ; Rules of Procedure and Evidence, available at: https://legal.un.org/icc/asp/1stsession/report/english/part_ii_a_e.pdf

crime, the Chamber must consider the extent of the damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of time, place and manner.⁸

Moreover, in the Sentencing Judgment issued by Trial Chamber VI in the Ntaganda case, it was stated that the Chamber's assessment of the gravity must take into account particular circumstances of the acts constituting the elements of the offence and the mode of liability. Additionally, it must evaluate the extent of the damage caused, the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, and/or the circumstances of manner, time and location, as well as the nature and degree of participation of the convicted person in the commission of the crime and his/her degree of intent.⁹

It is important to highlight the fact that the ICC has not been absolutely consistent throughout its jurisprudence in relation to every single factor grasped when assessing the gravity of the crime, since the Chamber's assessment must take into account the particular circumstances of each case.¹⁰ The Chamber has a margin of discretion when outweighing other relevant factors (either for the purpose of determining the gravity of the crime, or as an aggravating circumstance).¹¹

In conclusion, it is reasonable to say that being a former child soldier (or any equivalent circumstance where a child is forced to commit crimes) does not affect the gravity of the crime, since the ICC's chambers have not studied circumstances of similar nature when determining the gravity of the crime.

B. SPECIAL COURT FOR SIERRA LEONE

Much like the ICC, the Special Court for Sierra Leone establishes two important factors that Chambers ought to consider when determining a sentence: (i) **the gravity of the crime**, and (ii) the individual circumstances of the convicted person.¹² In fact, the gravity of the crime has been substantially developed through the SCSL's jurisprudence, as will be discussed below.

⁸ ICC, the Prosecutor v. Ahmad Al Faqi Al Mahdi, Trial Chamber VIII, *Judgment and Sentence*, September 27, 2016, Doc. No.: ICC-01/12-01/15, para.76, available at: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF

⁹ ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, Doc. No.: ICC-01/04-02/06. para. 16, available at: https://www.icc-cpi.int/CourtRecords/CR2019_06674.PDF

¹⁰ ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Sentencing Judgement*, May 23, 2014, Doc. No.: ICC-01/04-01/07. para. 61; ICC, the Prosecutor v. Jean Pierre Bemba, Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, June 21, 2016, Doc. No.: ICC-01/05-01/08. para. 16.

¹¹ ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, Doc. No.: ICC-01/04-02/06. para. 16.

¹² Statute of The Special Court for Sierra Leone, Article 19(2), available at: <http://www.rscsl.org/Documents/scsl-statute.pdf>

The Sentencing Judgement issued by Trial Chamber I in the Revolutionary United Front (RUF) case, established that the determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of participation of the Accused in the crime. Furthermore, the Chamber listed a variety of elements/circumstances that can be taken into account when determining the gravity of the crime: (i) the scale and brutality of the offences committed; (ii) the role played by the accused in their commission; (iii) the degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim; and (iv) the vulnerability and number of victims.¹³

It is essential to highlight that this list is not exhaustive, and the Chamber can consider other elements related to the conduct of the crime. In this sense, it was established by Trial Chamber I in the Civil Defence Forces (CDF) case, that the analysis of the gravity of the crime requires the contemplation of the particular circumstances of the case and the mode and degree of participation of the accused in the crime.¹⁴

In the Sentencing Judgment issued by Trial Chamber II in the Armed Forces of the Revolutionary Council (AFRC) case, it was considered that determining the gravity of the crime must be done in an individual asset, and that Chambers might examine: (i) the general nature of the underlying criminal conduct; ii) the form and degree of participation of the Accused; (iii) the degree of impact on the immediate victim, as well as the impact of the crime on the victim's relatives; (iv) the vulnerability of the victims and; (v) the number of victims¹⁵ when deciding upon the gravity of the crime.

In conclusion, it is reasonable to say that being a former child soldier (or any equivalent circumstance) does not affect the gravity of the crime, since the SCSL's chambers ever studied circumstances of similar nature when determining the gravity of the crime.

B) Should the Court consider this fact as part of the assessment of the gravity of the crimes or should they be considered as part of the criteria to determine the existence of aggravating or mitigating circumstances?

A. INTERNATIONAL CRIMINAL COURT

Neither the ICC Statute, nor the ICC RPE, explicitly state that being a former child soldier entails an aggravating or a mitigating circumstance. Additionally, the ICC has not examined in detail whether being a former child soldier constitutes an aggravating or a mitigating

¹³ SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Trial Chamber I, *Sentencing Judgement*, April 8, 2009, Case No.: SCSL-04-15-T. para 19

¹⁴ SCSL, the Prosecutor v. Moinina Fofana and Allieu Kondewa, Trial Chamber I, *Judgement on the Sentencing of Moinina Fofana and Allieu Kondwa*, October 9, 2007, Case No.: SCSL-04-14-T.

¹⁵ SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara and Santigie Borbor Kanu, Trial Chamber II, *Sentencing Judgement*, July 19, 2007, Case No.: SCSL-04-16-T. para 19

circumstance. In fact, Dominic Ongwen is the first defendant ever to request an ICC Trial Chamber to consider such circumstance as a factor of exclusion of criminal responsibility during the sentencing process.¹⁶

In the Ongwen case, the Defence argued in its *Pre-Trial Brief for the Confirmation of Charges Hearing* that, since the accused was abducted into the Lord's Resistance Army (LRA) and was made a child soldier, he should benefit from the international legal protections provided for children, that according to the Defence includes an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed while being a member of the LRA.¹⁷

Nevertheless, at the *Confirmation of the Charges Hearing*, Pre-Trial Chamber II dismissed entirely the Defence's argument because, according to the Chamber, such international legal protection does not include the type of exemption of criminal liability for international crimes claimed by the Defence.¹⁸ As a result, according to the Chamber, Ongwen's forced recruitment into the LRA when he was a child could not exclude him from criminal liability for the alleged crimes subsequently committed¹⁹.

Hence, the ICC's chambers have never analyzed whether being a former child soldier would constitute a mitigating factor throughout the sentencing process, especially considering that it is not a Pre-Trial Chamber's duty to analyze mitigating factors and issue a sentence for a convicted person.

Regarding the aggravating circumstances, the Judgment and Sentencing Decision issued by Trial Chamber VIII in the Al-Mahdi case stated that a Chamber must be convinced of the existence of aggravating circumstances beyond reasonable doubt when assessing them. Moreover, the Trial Chamber declared that aggravating circumstances must relate to the crimes for which a person was convicted or the convicted person itself. Furthermore, the absence of a mitigating circumstance does not serve as an aggravating circumstance.²⁰

¹⁶ ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Further Redacted Version of "Defence Brief for the Confirmation of Charges Hearing"*, filed on 18 January 2016, and March 3, 2016, Doc. No.: ICC-02/04-01/15, paras 36-49.

¹⁷ *Idem*. Para. 150.

¹⁸ ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, Doc. No.: ICC-02/04-01/15, para.150.

¹⁹ The Pre-Trial Chamber stated that: "The Defence has raised several times an argument that circumstances exist that exclude Dominic Ongwen's individual criminal responsibility for the crimes that he may otherwise have committed. One side of this argument is that Dominic Ongwen, who was abducted into the LRA in 1987 at a young age and made a child soldier, should benefit from the international legal protection as child soldier up to the moment of his leaving of the LRA in January 2015, almost 30 years after his abduction, and that such protection should include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed (Transcript T-22, p. 46; Defence Brief, paras 36-49). However, this argument is entirely without legal basis, and the Chamber will not entertain it further." See: ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, Doc. No.: ICC-02/04-01/15, para.150.

²⁰ Bemba Sentencing Decision, ICC-01/05-01/08-3399, para. 18 and footnotes, in particular: Katanga Sentencing Decision, ICC-01/04-01/07-3484-tENG, para. 34; Lubanga Sentencing Decision, ICC-01/04-01/06-2901, para. 33.

Additionally, Rule 145 (2) (b) of the ICC RPE contains a non-exhaustive list of circumstances that can be considered as aggravating factors, such: (i) particularly defenceless victims; (ii) particular cruelty of the commission of the crime; (iii) motive involving discrimination; and (iv) abuse of power or official capacity. Thus, in order for a Trial Chamber to consider a particular circumstance (for instance, being a former child soldier) as an aggravating factor, it is required for it to be directly related to the crime for which the accused was convicted, or to the accused himself/herself.²¹

In the Sentencing Judgment issued by Trial Chamber VI in the Ntaganda case, it was stressed that certain factors may reasonably be considered under more than one category. It is the Chamber's job to identify all relevant factors, and to attach appropriate weight to them in its determination of the sentence. The Trial Chamber additionally established that the Chamber will not rely on the same factor more than once,²² and any factors assessed in relation to the gravity of the crime will not be considered as aggravating circumstances, and *vice versa*.²³

It is also important to note that neither in Al Mahdi's case nor in Lubanga's case is there any referral to being forcibly recruited as an aggravating circumstance. In the Lubanga case, Trial Chamber I examined the cruel treatment of children as part of an aggravating circumstance. This analysis, that sought the existence of circumstances beyond any reasonable doubt, was made based on the actions of those prosecuted against minors, rather than considering whether they were forcibly recruited or victimized as children.

Most of the aggravating circumstances found in the ICC cases are directly linked to the conduct of the crimes committed by the accused. As found in the Ntaganda case, besides the factors listed in Rule 145 of the ICC RPE, the aggravating circumstances analysed by the Trial Chamber VI were: (i) attacks against civilians which were not aimed as targets, (ii) repeated victimization of the victims, and (iii) alleged witness interference.²⁴ In light of the above-mentioned, it is reasonable to think that the fact of being a former child soldier would hardly constitute an aggravating circumstance.

In conclusion, it is unclear whether being a former child soldier would constitute a mitigating circumstance, since ICC jurisprudence has not addressed the issue at hand properly, due to the fact that it has not resolved cases involving former child soldiers. Nevertheless, considering Pre-Trial Chamber II's Confirmation of Charges Decision in the Ongwen Case, it is reasonable to think that being a former child soldier would not constitute an exclusion from criminal responsibility only because of an alleged international legal protection awarded to them.

²¹ ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, Doc. No.: ICC-01/04-02/06. para. 18.

²² Bemba et al. Sentencing Appeal Judgment, para. 112.

²³ ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, Doc. No.: ICC-01/04-02/06. para. 13.

²⁴ ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, Doc. No.: ICC-01/04-02/06. paras. 85, 122 and 202.

Furthermore, it is reasonable to think that being a former child soldier would hardly constitute an aggravating circumstance, given that the Prosecution has to prove it beyond a reasonable doubt, and that such circumstance has to have a sufficiently proximate link with the crimes that form the basis of the conviction.

B. SPECIAL COURT FOR SIERRA LEONE

Neither the Statute of the Special Court for Sierra Leone (SCSL Statute), nor its Rules of Procedure and Evidence (SCSL RPE), explicitly state that being a former child soldier entails an aggravating or a mitigating circumstance. Furthermore, the SCSL does not have a clear body of jurisprudence on this issue, as it has never tried former child soldiers, nor has it dealt with a defendant who has requested a Trial Chamber to consider such circumstance as a mitigating factor during the sentencing process.

Nevertheless, there is one ruling involving forced recruitment: Trial Chamber I Sentencing Judgment in the RUF case, which concerned the three convicted persons (Issa Hassan Sesay, Morris Kallon and Augustine Gbao). In this decision, the Trial Chamber I noticed that Sesay was forcibly recruited at the age of nineteen years by RUF and considered whether such circumstance constitutes a mitigating factor for the imposition of the sentence.²⁵ Likewise, the chamber analyzed whether Kallon's forced recruitment into the RUF mitigates the crimes which he later committed.²⁶

Notwithstanding the argumentation of the defence, the Trial Chamber I established that being forcibly recruited could not mitigate the crimes which Sesay and Kallon later committed, since they, in the chamber's view, could well have chosen another path. Hence, the Trial Chamber dismissed entirely this argument, and concluded that being forcibly recruited (even at a young age, such as nineteen) could not constitute a mitigating factor throughout the sentencing process.²⁷

On the other hand, the SCSL has jurisprudentially developed a number of aggravating factors that a Trial Chamber ought to consider when determining the sentence for a convicted person. First and foremost, the Prosecution must prove beyond a reasonable doubt all aggravating factors, in accordance with Rule 101 of the Rules of Procedure and Evidence.²⁸ In other words, only circumstances directly related to the commission of the offence charged, and for which the accused was convicted, can be considered to be aggravating.²⁹

²⁵ SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon And Augustine Gbao, Trial Chamber I, *Sentencing Judgment*, April 8, 2009, Case No.: SCSL-04-15-T, para. 220.

²⁶ *Ibid.*, para. 250.

²⁷ *Ibid.*, para. 220, 250.

²⁸ SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Sentencing Judgment*, May 30, 2012, Case No.: SCSL-03-01-T, para. 24; ICTY, the Prosecutor v. Mucić et al., Appeals Chamber, *Judgment*, February 20, 2001, Case No.: IT-96-21, para.763.

²⁹ SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon And Augustine Gbao, Trial Chamber I, *Sentencing Judgment*, April 8, 2009, Case No.: SCSL-04-15-T, para.24.

Thus, in order for a Trial Chamber to consider a particular circumstance (such as being a former child soldier) as an aggravating factor, it is required for it to be directly related to the commission of the crime for which the accused was convicted. Therefore, being a former child soldier cannot be taken into account as an aggravating factor,³⁰ unless it is directly related to the commission of the underlying crime.

Furthermore, it has been extensively clarified in the SCSL's jurisprudence that when a factor has already been taken into account in deciding the gravity of the offence, it cannot be considered additionally as an aggravating factor and *vice versa*.³¹ Similarly, if a factor is an element of the underlying offence, then it cannot be considered as an aggravating factor.³²

In conclusion, the Special Court for Sierra Leone has not addressed the issue at hand since it has not resolved cases involving former child soldiers. Nevertheless, considering its jurisprudence, it is reasonable to think that being a former child soldier would not constitute either a mitigating circumstance or an aggravating one. Moreover, a circumstance can only be assessed once by a Chamber - either as part of the gravity, or as an aggravating circumstance.

C) Which option is best suited in the context of the statutory provisions of the ICC?

It is a difficult task to answer this question, since neither the Statute of any international criminal tribunal, nor a set of Rules of Procedure and Evidence, explicitly state or determine that being a former child soldier entails an aggravating or mitigating circumstance, nor if it should be appropriate to consider this circumstance in light of the gravity of the offence.

It is important to highlight that there is not a clear body of jurisprudence on this issue, as most of the international criminal tribunals have not tried former child soldiers - Dominic Ongwen is the only former child soldier ever to be tried by the International Criminal Court³³ - nor have they dealt with a defendant who has requested a Trial Chamber to consider such circumstance as an exclusion of criminal liability during the proceedings. In fact, circumstances of this nature - being a former child soldier - have never been studied by the

³⁰ *Idem*.

³¹ ICTY, the Prosecutor v. Miroslav Deronjić, Appeals Chamber, *Judgment*, July 20, 2005, Case No.: IT-02-61, paras 106-107.

³² ICTY, the Prosecutor v. Thomir Blaškić, Appeals Chamber, *Judgment*, July 29, 2004, Case No.: IT-95-14, paras. 69.

³³ Dino Panji Pananjung and Sigar Aji Poerana, "Former Child Soldiers Status: How the International Criminal Court Considers Its Significance in the Sentencing Process", *Padjadjaran Journal of International Law*, Volume 3, Number 2, June 2019.

ICC nor the SCSL when determining the gravity of the crime,³⁴ nor have they been studied when determining mitigating and aggravating factors.

Nevertheless, and despite the enormous uncertainty, it is reasonable to say that being a former child soldier (or any equivalent circumstance where a child is forced to commit crimes) does not affect the gravity of the crime, since the ICC's chambers have not studied circumstances of similar nature when determining the gravity of the crime.

Thereupon, it would be prudent to use the only two rulings remotely related to the issue in question when drawing a conclusion: (i) the decision on the confirmation of charges against Dominic Ongwen issued by the Pre-Trial Chamber II of the ICC of March, 2016;³⁵ and (ii) the Sentencing Judgment issued by Trial Chamber I of the SCSL in the RUF case in 2009.³⁶

These decisions established two important things in relation to the issue in question: (i) that the sole argument of the existence of an alleged international protection for former child soldiers does not constitute an exemption for criminal liability³⁷; and (ii) that being forcibly recruited at a young age (such as nineteen years old) could not constitute either a mitigating circumstance, nor an aggravating one.³⁸

Thus, and considering also that being a former child soldier could not constitute an aggravating circumstance, the only reasonable options left in the context of the statutory provisions of the ICC, is to consider this as an individual circumstance of the convicted person and a mitigating factor in accordance with Article 78 of the Rome Statute of the ICC, as well as Rule 145 of the Rules of Procedure and Evidence.

It would be reasonable to consider this option since ICC statutory provisions do not have an exhaustive list of individual circumstances of a convicted person for a Chamber to consider. In other words, a Chamber has a sizable discretion when determining the weight attached to all the relevant factors and circumstances, and their effect in the final sentence.

Additionally, in the Judgment and Sentencing Decision of the Al-Mahdi case, Trial Chamber VIII studied and analyzed Mr Al Mahdi's individual circumstances. In this section, the Chamber addressed all relevant circumstances that were not directly related to the crime committed or to Mr Al Mahdi's culpable conduct, circumstances such as: (i) his age, his

³⁴ See 'A) 'How does being a former child soldier (or any equivalent circumstances where a child is forced to commit crimes or subjected to any type of victimisation), affect the gravity of the crime?' numeral A and B, of this memorandum.

³⁵ ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15, para. 1.

³⁶ SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Trial Chamber I, *Sentencing Judgment*, April 8, 2009, Case No.: SCSL-04-15-T, paras. 220 and 250.

³⁷ ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15, para. 150.

³⁸ SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon And Augustine Gbao, Trial Chamber I, *Sentencing Judgment*, April 8, 2009, Case No.: SCSL-04-15-T, para. 220.

education and background, his social and economic condition, as well as his conduct in detention; and (ii) his admission of guilt, amongst others.

It would be fairly reasonable to assert that the above-mentioned circumstances - his age, his education and background - are more related to a former child soldier status, than any other ICC statutory provision.

In conclusion, the Law Clinic's team contends that a circumstance such as being a former child soldier should not be assessed in light of the gravity of the crime, nor in light of any aggravating circumstances, especially considering the ICC and SCSL's case law previously mentioned. It would be prudent to analyze such fact as an individual circumstance of the convicted person and a mitigating factor in accordance with Article 78 of the Rome Statute of the ICC and Rule 145 of the Rules of Procedure and Evidence.

Table of Jurisprudence

A. International Criminal Court

ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute*, July 10, 2012, Doc. No.: ICC-01/04-01/06.

ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, Doc. No.: ICC-01/04-02/06.

ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, Doc. No.: ICC-02/04-01/15.

ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Fourth Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing"*, filed on 18 January 2016, January 18, 2016 and August 7, 2020, ICC Doc. No: ICC-02/04-01/15.

ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber, *Public Redacted Version of 'Corrected Version of "Defence Closing Brief"'*, filed on 24 February 2020, February 24, 2020, Doc. No.: ICC-02/04-01/15, paras 535-674.

ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, Case Information Sheet, Updated in December 2020, ICC Doc. No.: ICC-02/04-01/15.

ICC, the Prosecutor v. Ahmad Al Faqi Al Mahdi, Trial Chamber VIII, Judgment and Sentence, September 27, 2016, Doc. No.: ICC-01/12-01/15.

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C. Special Court for Sierra Leone

SCSL, the Prosecutor v. Norman et al., Appeals Chamber, *Decision on the applications for a stay of proceedings and denial of right to appeal*, November 4, 2003, Case No.: SCSL-2003-09-PT.

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SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara and Santigie Borbor Kanu, Trial Chamber II, *Sentencing Judgement*, July 19, 2007, Case No.: SCSL-04-16-T.

SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Sentencing Judgment*, May 30, 2012, Case No.: SCSL-03-01-T, para. 24; ICTY, the Prosecutor v. Mucić et al., Appeals Chamber, *Judgment*, February 20, 2001, Case No.: IT-96-21