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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

PUBLIC

**Defence Motion on Defects in the Confirmation of Charges Decision:
Defects in the Charged Crimes
(Part IV of the Defects Series)**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') is filing a series of motions on defects in the notice provided by the confirmation of charges decision ('CoC Decision').¹ The Defence is requesting that the Trial Chamber IX ('Trial Chamber') rule on this issue, pursuant to Article 64(2) of the Rome Statute ('Statute') and Rule 134(3) of the Rules of Procedure and Evidence ('RPE').²
2. The reason for a series format ('Defects Series') is practical: Mr Ongwen is charged with 70 counts and eight modes of liability in a 104 page-long CoC Decision. Since it is not possible to analyse the defects in the CoC Decision within the standard 20 page-limit, and a request for additional pages would result in an unwieldy document up to five times the standard page-limit, the series format is adopted for clarity and expediency of the proceedings.³
3. Hence, the present motion ('Part Four') identifies defects in the pleading of the crimes of persecution, forced marriage, enslavement, and conscription and use of child soldiers. All these pleading defects violate Mr Ongwen's right to notice. In addition, his fair trial rights are also violated by the confirmation of the jurisdictionally defective crime of forced marriage.
4. The Defence requests that these criminal allegations be dismissed, as a matter of law, based on facial deficiency and lack of notice, and – for forced marriage – additionally based on a jurisdictional defect.
5. Especially in light of the Trial Chamber's denial of the Defence's request to file a no-case-to-answer motion, there is a need – which should be obvious – to streamline the plethora of charges and modes of liability against a single accused in this case. Dismissal of defective charges and modes of liability based on notice and jurisdiction provides an avenue to pare down the 'charge sheet'.

¹ Prosecutor v. *Dominic Ongwen*, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, ICC-02/04-01/15-422-Red, 23 March 2016 ('CoC Decision').

² Article 64(2) of the Statute stipulates that "the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]"; and, Rule 134(3) of the Rules establishes that "after the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial".

³ Article 64(2) of the Statute obliges the Trial Chamber to ensure that a trial is fair and expeditious; and, Article 67(1)(c) of the Statute sets forth that the accused should be tried without undue delay.

6. Other parts – Part One will address principles of fair trial and defects in notice; Part Two will address defects in pleading *mens rea* in respect to the modes of liability under Article 25(3)(a) of the Statute; and Part Three will address defects in notice in pleading of command responsibility under Article 28(a) of the Statute and defects in pleading of common purpose liability under Article 25(3)(d)(i) or (ii) of the Statute.⁴

II. SUBMISSIONS

A. The pleading of the crime of persecution is facially deficient

7. The elements of the crime of persecution as a crime against humanity are identified in Article 7(1)(h) of the Elements of Crimes ('EoC').⁵ The conduct which needs to be alleged and its basis is defined in **paragraphs 1-3**. The contextual elements for the conduct are found in **paragraphs 4-5**. Lastly, the *mens rea* requirement is found in **paragraph 6** and builds upon the contextual elements.
8. As Judge de Brichambaut criticizes in his Separate Opinion, the CoC Decision fails to define the contextual elements of crimes against humanity, as well as war crimes and the references to evidentiary or factual support are "very vague".⁶
9. In respect to the crime of persecution for Pajule (Count 10), he opines that there is no evidence to support the crime of persecution.⁷ The language of Count 10 is repeated for each of the camps: count 23 (Odek); count 36 (Lukodi); and count 49 (Abok). All suffer from the same defect in pleading. The paragraphs on persecution for each camp, at **paragraphs 25,⁸ 39, 53, and 65** are identical and fail to offer factual support for the allegations or contextual elements.

⁴ All four parts will be filed simultaneously.

⁵ EoC, p. 10.

⁶ Prosecutor v. *Dominic Ongwen*, Judge Marc Perrin de Brichambaut, *Separate Opinion of Judge Marc Perrin de Brichambaut*, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016 ('Separate Opinion'), paras 20-21.

⁷ Separate Opinion, para. 24.

⁸ Para. 25, for example, regarding Pajule, states: **Persecution** LRA fighters severely deprived, contrary to international law, the civilian residents of Pajule of their fundamental rights to life, to liberty and security of person, to freedom of movement, to private property, not to be subjected to torture or to cruel, inhumane or degrading treatment, and the right not to be held in slavery or servitude. The Pajule co-perpetrators, including Dominic

10. Thus, the defects in pleading are the missing contextual elements of crime against humanity, as well as the elements particular to the crimes identified in the counts of persecution.
1. *The allegations of and support for the individual mens rea of Mr Ongwen – the required persecution intent/animus – are missing from the CoC Decision, and are, at best, ‘barebones’ and insufficient for notice in the auxiliary documents*
11. In the first section of the CoC Decision, there is no statement about the *mens rea* elements of persecution. In the second part of the CoC Decision, it repeats the crimes comprising persecution, and there are conclusory paragraphs, such as **paragraph 44**, about “requisite intent and knowledge”⁹ in respect to the crimes but there are no specific allegations of elements of *mens rea* for persecution for Mr Ongwen and lacks any factual support.
12. The Prosecution’s pre-confirmation brief (‘PPCB’),¹⁰ at **paragraph 130**, in the section “Dominic Ongwen acted with special discriminatory intent” refers back to the evidence in **paragraphs 111-147** in support. But the evidence cited is about the policies of the LRA and Joseph Kony, and does not support allegations about Mr Ongwen’s intent.
13. To show that Mr Ongwen was aware of Joseph Kony’s persecutory campaign, the PPCB cites examples in **paragraphs 131-139**. **Paragraph 131** alleges awareness, but the evidence again is specific to a campaign “orchestrated by Kony” and not particular to Mr Ongwen. The allegation at **paragraph 131** that Mr Ongwen was “on the air when persecutory orders were issued or discussed during the period charged” is not footnoted, but followed by three paragraphs which support Joseph Kony’s and the LRA’s persecutory intent but not specifically Mr Ongwen’s.
14. Further allegations specific to Mr Ongwen are found in **paragraphs 137 to 139** in a section of “conduct at attacks other than those charged [...]”. This evidence is of “acts not charged” and should be excluded from trial. Even if accepted by the Trial Chamber, these examples are minimal

Ongwen, targeted this group of civilian residents based on political grounds, as they perceived them to be affiliated with and/or supporting the Ugandan government. They did so in connection with the crimes of attacks against the civilian population as such, murder, torture, other inhumane acts, cruel treatment, enslavement, and pillaging committed by the attackers at or near Pajule.

⁹ CoC Decision, para. 44.

¹⁰ Prosecutor v. *Dominic Ongwen*, Prosecution, *Public redacted version of “Pre-confirmation brief”*, 21 December 2015, ICC-02/04-01/15-375-Conf-AnxC, ICC-02/04-01/15-375-AnxC-Red2, 8 June 2016 (‘PPCB’).

and do not address allegations in respect to the attacks on crimes bases charged in the CoC Decision.

15. **Paragraphs 135 and 136** in the PPCB allege words uttered by Mr Ongwen over the radio in two instances, and evidence of witness P-0018 which is – at best – ambiguous as to its meaning. This is sparse and insufficient evidence of persecutory intent. Even accepting this evidence, *arguendo*, it does not meet even the low standard of sufficiency required for the CoC Decision in respect to animus for discriminatory intent.
16. The Prosecution’s pre-trial brief (‘PPTB’),¹¹ filed six months after the CoC Decision, describes an anti-government animus it attributes to the LRA,¹² but there are no allegations specific to Mr Ongwen’s animus. The LRA is not on trial here: Mr Ongwen is on trial.
17. The Defence argues that the organizational animus of the LRA, if accepted, cannot be imputed to an individual member on trial here. This proceeding is not guilt by association, based on forced membership in a criminal organization, the LRA.
18. The idea of culpability based *solely* on membership has been soundly rejected in modern international criminal case law. Based on the principles of criminal responsibility, there must be individual culpability based on the accused’s actions and mental state.
19. In **paragraphs 184 and 185** of the PPTB, under “DO acted with discriminatory intent”, it refers to elements of Article 30 without identifying them, and alleges awareness, but this is all conclusory. In sum, there are no specific allegations regarding required *mens rea*, and no detailed evidentiary support of Mr Ongwen’s alleged individual *mens rea*.

¹¹ Prosecutor v. *Dominic Ongwen*, Prosecution, *Prosecution’s Pre-Trial Brief*, ICC-02/04-01/15-533, 6 September 2016 (‘PPTB’). References herein to the PPTB do not waive arguments in Part One of the Defects Series as to why the PPTB cannot provide notice in this case.

¹² The factual allegations in the CoC Decision in respect to Persecution (paras 25, 39, 53, 65) are in support of the LRA, in general. The LRA is alleged to have the political animus/intent of discrimination on political grounds, while the confirmed modes of liability are all individual to the client. Moreover, there are no factual allegations of DO’s alleged discriminatory intent to support the charges. The animus is defined by “LRA perceived them to be affiliated with and/or supporting the Ugandan government.” (CoC Decision, pages 75-76, para. 25, pages 79-80, para. 39, page 84, para. 52, page 80, para. 65) But this does not have any specifics as to individuals or groupings in the camps which are cited. These are general phrases, and do not suffice for notice.

20. The following sections of the PPTB allege that Mr Ongwen implemented Joseph Kony's order by attacking four camps. Moreover, what is clear in the PPTB is that Joseph Kony issued the persecutory orders.¹³
21. The PPTB appears to repeatedly acknowledge that for the crimes of persecution (as well as others), Mr Ongwen was under orders from Joseph Kony. There are headings which explicitly state this: for example, at **page 89**, the PPTB heading is "DO implemented JK's persecutory orders by attacking Odek IDP camps" and there are similar headings for the other IDP camps.
22. Finally, one important requirement for *mens rea* is knowledge. This is fundamentally not alleged in respect to the crime of persecution for Mr Ongwen. In this regard, there are two conclusory paragraphs in the PPTB at **paragraphs 184-185** under the heading "DO acted with discriminatory intent".¹⁴ These read:
184. In addition to the mens rea under article 30, Dominic Ongwen acted with the intent to severely deprive the group of civilians of Abok, Lukodi, Odek, and Pajule IDP camps of fundamental rights and to target these groups on the basis of their perceived support for the Ugandan Government.¹⁵
185. As described below, Dominic Ongwen was aware of Kony's persecutory campaign against civilians perceived as Government supporters, endorsed that campaign, and implemented Kony's persecutory orders during the four charged attacks and on other occasions.¹⁶
23. What follows are a number of examples of Mr Ongwen "implementing Kony's persecutory orders" at the IDP camps of Pajule, Odek, Abok, and Lukodi. Even so, for pleading purposes of this Part Four of the Defects Series, as has been said earlier, the links between the evidence and Mr Ongwen's individual animus is simply missing.

¹³ PPTB, paras 174-177.

¹⁴ PPTB, paras 184-185.

¹⁵ PPTB, para. 184.

¹⁶ PPTB, para. 185.

2. *The pleading of persecution is defective because the elements of the underlying crimes are missing; Persecution is not a ‘catch all’ crime: the elements of underlying crimes must be enumerated, with supporting evidence*

24. The error of notice is a) there are no specific allegations to support the elements of the underlying, listed crimes; and b) these must be identified.
25. The Appeals Chamber in the *Kupreški* case points out that persecution is an ‘umbrella’ crime, meaning that it includes other crimes, and “in most instances, it comprises a course of conduct or a series of acts, even though a single act can constitute persecution, provided this act occurred within the necessary context.”¹⁷ It continues:

However, the fact that the offence of persecution is a so-called ‘umbrella’ crime does not mean that an indictment need not specifically plead the material aspect of the Prosecution’s case with the same detail as other crimes. Persecution cannot, because of its nebulous character, be used as a catch-all charge.¹⁸ (Underlining added).

26. The Appeals Chamber in the *Kupreški* case also held that the Trial Chamber erred in law by returning a conviction on the count of persecution, where the amended indictment failed to plead the material facts against the two defendants.¹⁹ The Appeals Chamber reversed the convictions for persecution under count 1 against Zoran and Mirjan Kupreški, based on fair trial violations (including vagueness in the indictment) and discrepancies in evidentiary evidence related to ‘Witness H’.
27. In the *Ongwen* case, persecution is used as a ‘catch-all’. In the PPCB, at **paragraph 183**, the Prosecution states the underlying crimes of persecution:

183. The Prosecution submits that the facts described above under counts 1 (attack on civilians), counts 2-3 (murder), counts 4-5 (torture), count 6 (cruel treatment), and count 7 (other inhuman acts), count 8 (enslavement), and count 9 (pillaging) form the underlying conduct of the crime of persecution. See further, the submissions in the section on persecution, paragraphs 111 to 147, which are incorporated here by reference.²⁰

¹⁷ Prosecutor v. *Kupreški*, IT-95-16-A, *Appeal Judgment*, 23 October 2001 (‘*Kupreški* AJ’), para. 87, available at: <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>;

¹⁸ *Kupreški* AJ, para. 87.

¹⁹ *Kupreški* AJ, para. 124.

²⁰ PPTB, para. 183.

28. However, there is no pleading of the elements of the underlying crimes, nor can these elements be connected to the evidence alleged. Similarly, the same error is repeated in the PPTB at **paragraph 182**, which reads:

182.The charged crimes of attacking civilians, murder, attempted murder, torture/other inhumane acts/cruel treatment, enslavement, pillaging, destruction of property and outrages on personal dignity form the underlying conduct of the persecution of the civilian population on political grounds at Pajule, Odek, Lukodi and Abok IDP camps.²¹ (Footnotes omitted)

29. Here, the counts are footnoted in the PPTB – but again – no underlying elements of crimes are identified, nor is there any evidence connecting any legal element to provide notice.
30. For both pleadings, there are no references to, or allegations to the contextual elements for crimes against humanity – widespread or systematic attack directed against any civilian population, with knowledge of the attack.
31. Thus, there is no notice of underlying crimes allegedly supporting a ‘catch-all’ crime. In other words, if this were a trapeze act – and persecution was on the top rung, and the other crimes were each on the bottom, the trapeze artist would collapse.
32. This defect in pleading the elements of the crime is not cured by PPTB. In a section on Persecution, in **paragraphs 156-203**, there are evidentiary allegations. However, these are not linked to the elements of persecution, as enumerated in the EoC, nor are they linked to underlying crimes under the ‘umbrella’ of persecution.
33. For the reasons stated above, the pleading of the crime of persecution is facially deficient and violates Mr Ongwen’s right to notice under Article 67 of the Statute, and should be dismissed as a matter of law.

²¹ PPTB, para. 182.

B. The defects in CoC Decision in respect to the SGBC violate this Court’s jurisdiction and Mr Ongwen’s right to be informed “in detail of the nature, cause and content of the charges”

34. In respect to the pleading in the sexual and gender based crimes, the main defects are a) jurisdictional; b) failure to plead the elements of the crimes, especially *mens rea*; and c) failure to link the evidence to these elements.

1. The confirmation of the crime of forced marriage is jurisdictionally defective.

35. The CoC Decision acknowledges that “forced marriage” is not explicitly included as a crime within the Rome Statute.²² It is confirmed in the CoC Decision in the category of Article 7.1.k “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

36. **Paragraphs 87-95** of the CoC Decision discuss the *actus reus*, but do not identify the elements of the *mens rea* of the crime, which is also a defect in pleading. In addition, the Pre-Trial Chamber II fails to link the *mens rea* elements to Mr Ongwen specifically.²³

37. The Defence has previously litigated whether forced marriage is a separate crime.²⁴ The Defence position is that forced marriage is subsumed under sexual slavery; the Prosecution disagrees and says it is a separate charge. The CoC Decision holds that victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery or other crimes in the Statute.²⁵

38. The absence of adequate notice as to the elements of the crime, as well as which evidence is in support of which element makes it nearly impossible to resolve this issue comprehensively.

39. But, there are two predicate issues: a) does the CoC Decision, which holds there is sufficient evidence for Mr Ongwen to be tried for the crime of forced marriage, comply with Article 22(1) of the Statute; and b) who, or which body procedurally should be resolving this issue of essentially a new crime in the Rome Statute?

²² CoC Decision, para 8.

²³ CoC Decision, paras 87-95.

²⁴ ICC-02/04-01/15-T-23-CONF-ENG ET, pages 14-22.

²⁵ CoC Decision, para 94.

40. The Defence submits that the crime of forced marriage did not, and does not exist in the Statute.
41. Moreover, the Defence submits that the principle of Article 22(2) of the Statute²⁶ – strict construction – applies to the Rome Statute provisions, and that this Court has no jurisdiction to add crimes which were not included by the Assembly of the State Parties (‘ASP’).
42. Further, it is the ASP which is the only body that has the power or authority or legitimacy to amend the Rome Statute, through its internal processes, as outlined in the Rome Statute in Part 13 – Articles 119 and 121.
43. The Rome Statute, in Part 13, Article 119 of the Statute provides for settlement of disputes between States Parties related to the interpretation or application of the Statute; the Court’s role in this is limited under Article 119 of the Statute to “any dispute concerning the **judicial functions** of the Court.” (Bold added).
44. In addition, there is no amendment procedure under Article 121 of the Statute – again, it is focused on State Parties within the forum of the ASP.
45. Thus based on the Statute, the addition of crimes and the interpretation or definition of ‘other inhumane acts’ (under Article 7(1)(h) of the Statute) is up to the ASP to decide, and does not fall within the functions and powers of the Chamber.
46. In addition, neither the Trial Chamber nor the Pre-Trial Chamber has inherent jurisdiction to add new crimes, or interpret the Statute in respect to new crimes, *i.e.* those not identified in the Statute. To exercise jurisdiction over adding new crimes, or to interpret the Statute in respect to new crimes, would violate Article 22(1) and (2) of the Statute.
47. The legal functions and powers of the Court are articulated in the Statute, specifically Articles 4 and 64 of the Statute.

²⁶ In regard to Article 22 of the Statute, titled *Nullum crimen sine lege* “No crime without law” provision (1) provides that a person “shall not be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the Court.

48. The Regulations of the Court ('RoC') recognize that the Trial Chamber has inherent powers in Regulations 28(3) and 29(2) of the RoC, but these 'inherent powers' are not defined in the Regulations. Nor are these inherent powers identified in the Statute.
49. However, the inherent powers of the Trial Chamber are generally limited and defined, and are derived from judicial function.²⁷
50. At this Court, these powers have been relied upon in the function of making necessary alterations to documents issued by the Trial Chamber,²⁸ to stay proceedings,²⁹ and for reconsideration of decisions. In invoking this power to stay a proceeding, it must be done in a restrictive manner.³⁰
51. Nonetheless, the Trial Chamber has no 'inherent power' or 'inherent jurisdiction' to alter the wording of the Rome Statute, or to interpret its provisions through enlarging or expanding their meaning. As scholar Mr Schabas explains in his Commentary on Article 70, the reason is that, unlike the *ad hocs*, the Rome Statute explicitly provides jurisdiction to adjudicate these offences.³¹
52. Thus, it is *ultra vires* for the Pre-Trial Chamber II to confirm a charge of forced marriage and then for this Trial Chamber to undertake proceedings where this is a charge in the prosecution of Mr Ongwen.
53. For the reasons stated above, the crime of forced marriage should be dismissed as a matter of law as jurisdictionally defective. In addition, the pleading is facially deficient and violates Mr Ongwen's right to notice under Article 67 of the Statute.

²⁷ Shelton, Dinah (2009) "Form, Function and the Powers of International Courts," *Chicago Journal of international Law*: Vol. 9: No. 2, Article 8, pp. 545-546 at <http://chicagounbound.uchicago.edu/cjil/vol9/iss2/8>

²⁸ Prosecutor v. Kony *et al.*, Pre-Trial Chamber II, *Decision on the Prosecutor's Urgent Application Dated 26 September 2005*, ICC-02/04-01/05, 27 September 2005.

²⁹ Prosecutor v. Lubanga, Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"*, ICC-01/04-01/06-1486, 21 October 2008, para. 76; and Prosecutor v. Kenyatta, Trial Chamber V, *Decision on defence application pursuant to Article 64(4) and related requests*, ICC-01/09-02/11-728, 26 April 2013, para. 74.

³⁰ Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Trial Chamber IV, *Decision on the defence request for a temporary stay of proceedings*, ICC-02/05-03/09, 26 October 2012, para. 78 (exercise of inherent power to stay proceedings can be perceived as frustrating the administration of justice).

³¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2010, pp. 854-855.

2. *The pleading of the crime of enslavement is defective*

54. Judge de Brichambaut in his Separate Opinion identifies the crime of enslavement as one of the eight crimes he lists for which the CoC Decision provides no definition of its elements.³²
55. In the CoC Decision, the Pre-Trial Chamber II fails to identify the full definition of enslavement. In the majority of places in the CoC Decision where the Pre-Trial Chamber II refers to enslavement, it is simply enumerated on a list of crimes. At most, the Pre-Trial Chamber II uses selectively only parts of the language from the Elements of Crimes for enslavement under Article 7(1)(c) of the Statute when describing facts in a conclusory manner instead of tying specific witnesses' testimony to each element.
56. Examples of how the elements of enslavement are partially stated in the CoC Decision charges section include **paragraphs 23,**³³ **36,**³⁴ **48,**³⁵ and **62.**³⁶ These paragraphs are almost identical in wording, but for references or names of IDP camps.
57. The CoC Decision, in the charges section, does not identify the elements of enslavement and it is, therefore, silent on the *mens rea* and contextual elements required for a crime against humanity. Specifically, the contextual element is that the "conduct was committed as part of a widespread or

³² Separate Opinion, para. 18.

³³ CoC Decision, para. 23: "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 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."

³⁴ CoC Decision, para. 36: "LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. Civilian men, women and children were abducted and forced to carry away the looted food from Odek IDP camp. Children were tied together with ropes and dragged away from their homes. 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."

³⁵ CoC Decision, para. 48: "LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. Men, women and children were abducted, many of whom were forced to carry away looted goods from Lukodi IDP 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."

³⁶ CoC Decision, para. 62: "LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. Before attacking the camp, LRA fighters abducted a number of camp residents. During the attack, attackers abducted approximately 26 men, women and children and forced them to carry looted goods away from the camp under threat of death. The attackers exercised any or all of the powers attaching to the right of ownership over these abductees including by depriving them of their liberty and exacting forced labour, reducing them to a servile status."

systematic attack directed against a civilian population” and the *mens rea* is “the perpetrator knew that the conduct was part of, or intended the conduct to be part of a widespread or systematic attack directed against the civilian population.”³⁷

58. None of these legal elements, and factual support for them is to be found in the CoC Decision.
59. The PPCB does not cure the defects in the CoC Decision. First, there are no allegations of, and factual support for the required *mens rea* or contextual elements for a crime against humanity. Where there are factual allegations in support of conduct, there are references to the Prosecution’s statements, for example at **paragraphs 334-336**, but the important specifics to support “LRA fighters under Dominic Ongwen’s command” in **paragraph 334**³⁸ are missing in the PPCB.
60. Thus, the pleading of the crime of enslavement is facially deficient and should be dismissed.

C. The pleading of charges in counts 69 and 70 is facially deficient

61. In the CoC Decision, the Pre-Trial Chamber II confirmed count 69 (conscription of children under age of 15) and count 70 (use of children under age of 15 in hostilities) under a theory of a systematic practice and policy of the LRA to abduct and conscript children.³⁹ As to Mr Ongwen’s individual criminal responsibility, he is alleged to have contributed to the crimes through a common plan, and “also through the LRA fighters under his command.” Mr Ongwen is charged under Article 25(3)(a) of the Statute (jointly with others and through others), and in the alternative, under Articles 25(3)(b) and 25(3)(d) (i and ii) of the Statute. In addition, he is charged, in the alternative under Article 28(a) of the Statute – command responsibility.
62. The first part of the CoC Decision discusses these charges, at **paragraphs 141 – 145**, but only **paragraph 143** alleges any conduct for Mr Ongwen. The allegations of “an explicit plan of the LRA leadership, including Joseph Kony and senior commanders, among them Dominic Ongwen” is conclusory and there are no footnotes to indicate on what factual allegations the conclusions rely. Similarly, although some collective conduct is alleged which includes Mr Ongwen, there is no indication as to who the other alleged “senior commanders” are, or what are the alleged roles of

³⁷ EoC, p. 5.

³⁸ CoC Decision, para. 334.

³⁹ CoC Decision, paras 141-145.

these unnamed persons. **Paragraph 143** of the CoC Decision concludes that Mr Ongwen ordered abductions of children to be used as child soldiers, but there are not factual allegations to support this.

63. Whether this supports a “systematic practice and a policy choice of the LRA”⁴⁰ is a matter of evidence within the context of a prosecution against the LRA. But this is a prosecution against Mr Ongwen, not the LRA and therefore the pleading of these counts must be specific to him, in order to provide notice. Clearly, this is not the case in the CoC Decision.
64. Nor are there specific allegations as to Mr Ongwen’s *mens rea*: there is a conclusory allegation of “deliberate conduct [...] that resulted in the realization of the objective elements of the crime.”⁴¹ Yet, the elements of intent and knowledge are not detailed and specified.
65. Moreover, the specific *mens rea* for conscription and use of child soldiers as war crimes is awareness of the factual circumstances that established the existence of an armed conflict. However, there are no allegations, and no factual support, in either portion of the CoC Decision as to this *mens rea*.
66. In the 2nd portion of the CoC Decision, the section on conscription and use of child soldiers (Counts 69 and 70)⁴² is replete with generalisations, unsupported factual allegations and simply recites the legal requirements. For example, **paragraph 129** alleges Mr Ongwen’s contributions to the common plan, but includes no specific factual allegations to support these contributions.⁴³ In addition, the section in **paragraph 129** on command responsibility simply tracks the language of the Statute,⁴⁴ with no factual allegations in support. **Paragraphs 130** and **131** allege knowledge as to age, and “requisite intent and knowledge” but there is no support for these allegations.⁴⁵

⁴⁰ CoC Decision, para. 142.

⁴¹ CoC Decision, para. 147.

⁴² CoC Decision, pp 102-104.

⁴³ CoC Decision, para. 129.

⁴⁴ CoC Decision, para. 129.

⁴⁵ CoC Decision, paras 130-131.

67. In addition, the CoC Decision fails to identify and define the contextual elements of war crimes for each of these counts, as J. de Brichambaut points out.⁴⁶
68. While more details are provided in the PPCB, these are not even referred to in the CoC Decision, so that it is unclear which factual allegations support which elements of the crimes. But the PPCB provides no notice of the *mens rea* required for conscription and use of child soldiers, and cannot cure this same defect in the CoC Decision.
69. The Defence notes that the PPTB is essentially the same as the PPCB for these two charges, but for the addition of a few witnesses, and the absence of the evidence of witness P-0198, since the CoC Decision confirms no charges against Mr Ongwen for witness P-0198.
70. For the above stated reasons, the pleading of counts 69 and 70 are facially deficient and violate Mr Ongwen's right to notice under Article 67(1)(a) of the Statute and should be dismissed as a matter of law.

III. RELIEF SOUGHT

71. For the reasons stated above in this section of the Defects Series, the Defence requests that the Trial Chamber, as a guarantor of the right to a fair trial,⁴⁷ rule on the following remedies:

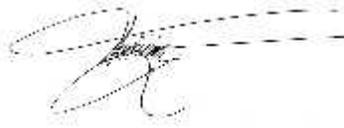
TO DISMISS the criminal charges of persecution as a crime against humanity (counts 10, 23, 36, 49), forced marriage as a crime against humanity (counts 50, 61), enslavement as a crime against humanity (counts 8, 20, 33, 46, 57, 68), conscription of children under 15 years of age into an armed group, as a war crime (count 69), and use of children under the age of 15 to participate actively in hostilities, as a war crime (count 70).

72. The Defence reserves the right to amend this motion.

Respectfully submitted,

⁴⁶ Separate Opinion, para. 20.

⁴⁷ Article 64(2) of the Statute: The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...].



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 1st day of February, 2019
At The Hague, Netherlands