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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

Prosecution Response the “Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial” dated 1 February 2019

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

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Introduction

1. On 1 February 2019, the Defence filed a document in four parts¹ (collectively, “Defence Submissions”) regarding “defects in the notice provided by the confirmation of charges decision”,² requesting that the Trial Chamber dismiss “the charges and modes of liability which are facially deficient and violate the fundamental fair trial right of notice to Mr Ongwen”.³

2. The Defence Submissions should be dismissed because they:

- I. are manifestly out of time,
- II. repeat arguments that have already been dismissed,
- III. incorrectly conflate “charges” with “evidence”,
- IV. do not identify any defects in the pleading of the modes of liability or charged crimes in the Decision on the confirmation of charges,⁴
- V. do not identify any error in the provision of notice regarding the evidence used to prove the material facts,
- VI. seek to bypass the appropriate procedure for a challenge to jurisdiction.

Submissions

I. The Defence Submissions are manifestly out of time

3. The Defence Submissions relate to purported “defects in the notice provided by the confirmation of charges decision”.⁵ Hence, they are objections regarding the

¹ ICC-02/04-01/15-1430, ICC-02/04-01/15-1431, ICC-02/04-01/15-1432, ICC-02/04-01/15-1433.

² ICC-02/04-01/15-1430, para. 1.

³ ICC-02/04-01/15-1430, para. 59.

⁴ Hereafter, “Confirmation Decision”.

conduct of pre-trial proceedings which could and should have been raised before the start of trial, as dictated by rule 134(2) of the Rules of Procedure and Evidence.⁶ This rule was included in the statutory framework of the Court precisely in order to prevent endless procedural challenges after the commencement of trial.⁷ To say the Defence Submissions are late is actually an understatement, since they are filed almost three years after the issuance of the decision on the confirmation of charges against Dominic Ongwen,⁸ and more than 2 years after the commencement of trial,⁹ at a stage where the Prosecution has completed the presentation of its evidence and where the Defence is well into the presentation of its own case. The Prosecution incorporates by reference its previous submissions regarding the above.¹⁰

4. The above ground, taken alone, would justify dismissal *in limine*. In the alternative, the Defence Submissions should be dismissed for the reasons discussed below.

II. The Defence Submissions repeat arguments that have already been dismissed

5. Several of the issues raised in the Defence Submissions have already been decided by the Trial Chamber. The Defence itself points this out in the Defence Submissions, when, for example, it complains of disclosure requests that have been

⁵ ICC-02/04-01/15-1430, para. 1.

⁶ Additionally, insofar as the Defence were unsatisfied with the charges as articulated in the document containing the charges submitted by the Prosecution, Rule 122(3) & 122(4) provided the appropriate procedural pathway for objections made regarding the same. *See also* Chamber's Practice Manual, p. 13 ("At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial").

⁷ Peter Lewis, Trial Procedure, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 543.

⁸ ICC-02/04-01/15-422-Red ("Decision Confirming Charges"), issued on 23 March 2016

⁹ 6 December 2016.

¹⁰ ICC-02/04-01/15-1436.

rejected by the Trial Chamber¹¹ and laments the Trial Chamber's denial of the Defence request for a no-case-to-answer motion at the end of the Prosecution's case.¹² Notably, in the filing requesting leave to file a no-case-to-answer motion, the Defence had set out arguments regarding "Lack of Notice"¹³, and "Defective Charges"¹⁴. When rejecting the Defence's request, the Trial Chamber noted that:

"The Defence has argued before that the accused lacks notice of the charges. [...] the Chamber has previously rejected such arguments both for being untimely and on their merits. In particular, both this Chamber and the Pre-Trial Chamber have emphasised the significant distinction between being informed of the *charges* and the confirmation decision's *reasoning*. The Defence arguments for evidentiary references and legal definitions fail to appreciate this distinction".¹⁵

6. The Defence now, in effect, seeks a reconsideration of the above finding, arguing that "notice includes both charges and reasoning; there is no wall between charges and reasoning".¹⁶ The Court's procedural framework does not allow this. If the Defence was dissatisfied with the above decisions of the Trial Chamber, the appropriate procedural vehicle was either a request for leave to appeal at the time of the issuance of the relevant decision or a motion for reconsideration. As observed by the Trial Chamber, "[c]onsiderations from past decisions do not arise anew simply because they are repeated – leave to appeal must be sought and resolved at the original pronouncement".¹⁷

7. Crucially, the Defence seeks to challenge the *sufficiency of the evidence* relied-on by the Pre-Trial Chamber in this case when confirming charges. In other words, it is questioning whether such evidence could have supported a decision, based on the

¹¹ ICC-02/04-01/15-1430, para. 54.

¹² ICC-02/04-01/15-1430, para. 57.

¹³ ICC-02/04-01/15-1300, paras. 23-26.

¹⁴ ICC-02/04-01/15-1300, paras. 27-32.

¹⁵ ICC-02/04-01/15-1309, para. 9 (footnotes omitted). The Chamber cited ICC-02/04-01/15-1147 and further citations therein.

¹⁶ ICC-02/04-01/15-1430, paras. 13-19.

¹⁷ ICC-02/04-01/15-1426, para. 8.

standard of proof of “substantial grounds to believe”, to confirm charges. For example, the Defence:

- J states that “[p]aragraphs 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.”¹⁸
- J relies on the critique of Judge de Brichambaut regarding the purportedly limited number of witnesses whose evidence relates to the attack on Pajule.¹⁹
- J notes regarding Judge de Brichambaut that “[i]n respect to the crime of persecution for Pajule (Count 10), he opines that there is *no evidence* to support the crime of persecution.”²⁰

8. This argument is misguided. The sufficiency of the evidence to prove the charges to the standard of substantial grounds to believe is now moot since the charges were confirmed three years ago. The time to challenge the sufficiency of the evidence to confirm the charges was January 2016, during the course of the confirmation hearing, or March 2016, immediately after the issuance of the Confirmation Decision. The current Defence Submissions are not an application seeking leave to appeal the Decision Confirming Charges, or a motion for reconsideration of the Decision Confirming Charges. Moreover, the question of *whether* and *how* the evidence was evaluated by the Pre-Trial Chamber in this case is now irrelevant, since at this stage of the case it is the Trial Chamber that is seized of the case. The precise weight given to an individual item of evidence by the Pre-Trial Chamber is of no relevance to the Trial Chamber, since the Trial Chamber is the ultimate trier of fact for the purposes of issuing a decision pursuant to article 74 of

¹⁸ ICC-02/04-01/15-1433, para. 15 (emphasis added).

¹⁹ ICC-02/04-01/15-1430, para. 45.

²⁰ ICC-02/04-01/15-1433, para. 9 (emphasis added) (footnotes omitted).

the Statute. Any such submissions should be made in the Defence's closing submissions.

9. Entertaining these submissions now, re-litigating matters that have already been decided, is against the principle of finality of decisions and the progressive nature of criminal proceedings; it also affects legal certainty. If such attempts at cyclic, repetitive litigation are allowed, nothing stops the Defence from raising the same grounds in a week, or a month or any other time prior to the close of the trial.

III. The Defence incorrectly conflates "charges" with "evidence"

10. From its submissions, it is clear that the Defence is conflating 1) the specificity of the charges with 2) the evidence underpinning the charges. For example, the Defence:

-) states regarding the Confirmation Decision that "*the specific evidence in support each charge is not identified.*"²¹
-) complains that "*the Pre-Trial Chamber concludes [...] that all the modes of liability are met at the end of each group of charges without any detail on how those elements are found based on specific testimony or records;*"²²
-) states that "*[t]he Defence requires details of the evidence upon which the Prosecution relied, and the PTC confirmed to mount a defence and to investigate thoroughly [...]*"²³
-) criticises the confirmation decision stating "*[a]s for Article 25(3)(b) and (d) of the Statute, there is no analysis of what evidence supports those theories.*"²⁴
-) states that the Defence "*highlights Judge de Brichambaut's criticism, in respect to the attacks on Pajule, that the CoC Decision cites no evidence of how Mr Ongwen contributed to the attack as an indirect co-perpetrator in regard to the common plan*"²⁵

²¹ ICC-02/04-01/15-1430, para. 43 (emphasis added).

²² ICC-02/04-01/15-1430, para. 49 (emphasis added).

²³ ICC-02/04-01/15-1430, para. 52 (emphasis added).

²⁴ ICC-02/04-01/15-1431, para. 10 (emphasis added).

²⁵ ICC-02/04-01/15-1431, para. 61 (emphasis added).

J argues, regarding the contextual elements, that the Confirmation Decision makes “*very vague references to ‘evidence.’*”²⁶

11. This argument is premised on a misunderstanding of the meaning and scope of the term “charge” and the role of the Confirmation Decision. This will become evident from the discussion below.

Content and specificity of the Charges

12. The charges contain (a) the material facts establishing the elements of the crime, modes of liability and contextual elements, and (b) a legal characterisation of those facts.²⁷ The ‘material facts’ must be distinguished from ‘subsidiary facts’, which are those facts that the Prosecution relies upon as part of its argumentation in support of the charges and, as such, are functionally *evidence*.²⁸ This understanding of the charges is consistent with regulation 52, which regulates the content of the document containing the charges (DCC).²⁹ Moreover, the “materiality” of a given fact cannot be established in the abstract, and depends on the nature of the Prosecution's case.³⁰ The Prosecution must prove the material facts beyond reasonable doubt in order to convict the accused.³¹

²⁶ ICC-02/04-01/15-1430, para. 44 (emphasis added).

²⁷ ICC-01/04-02/06-450, para. 37 (“charges’ include a description of the relevant ‘facts and circumstances’, as well as a legal characterisation of the facts.”). See also ICC-01/04-01/06-2205, fn. 163 (“the term “facts” refers to the factual allegations which support each of the legal elements of the crime charged”); ICC-02/04-01/15-T-6, p. 19, l. 25 to p. 20, l. 6; ICC-01/12-01/18-143, para. 30 (noting that the charges are fundamentally the “facts” which indicate, among others, when and where the crimes are committed and provide the legal and factual basis to prosecute the person). See also ICTY Practice Manual, p. 36, para. 9 (“the indictment should include the facts underlying each of the elements of the crimes charged, as well as the forms of responsibility alleged, i.e., the method by which the accused participated in the crime”);

²⁸ ICC-02/05-03/09-121-Corr-Red, paras. 36-37; Chambers Practice Manual, p. 12. See also ICC-01/05-01/08-3636-Anx2, para. 20 (defining ‘subsidiary facts’ as “intermediate findings that support the material facts”).

²⁹ ICC-01/12-01/18-143, para. 30.

³⁰ ICC-01/09-01/11-475, para. 11 (“In any given case, whether a particular fact or circumstance is one of the “facts and circumstances” will depend on the nature of the prosecution’s allegations”). See also, Prosecutor v. Blaškić, IT-95-14-A, Appeals Judgment, 29 July 2004 (“*Blaskic* AJ”), para. 210; Prosecutor v. Kvočka et al., IT-98-30/1-A, Appeals Judgment, 28 February 2005 (“*Kvočka* AJ”), para. 28; Prosecutor v. Perović et al., IT-05-87/1-A, Appeals Judgment, 27 January 2014 (“*Dordevic* AJ”), para. 332.

³¹ ICC-01/04-01/06-3121-Red, para. 22; ICC-01/04-02/12-271-Corr, paras. 124-125; ICC-01/05-01/13-2275-Red, para. 96; ICC-01/05-01/08-3636-Red, para. 42. See also Chambers Practice Manual, p. 12.

13. The charges must be articulated in a “clear, exhaustive and self-contained way”,³² and with a sufficient degree of specificity possible in the circumstances.³³ The required level of specificity will depend on the specific circumstances of a given case.³⁴ Details as to the date and location of the underlying acts and identity of the alleged victims must be provided “to the greatest degree of specificity possible in the circumstances”.³⁵ Relevant factors informing the degree of specificity required include:

-) The widespread nature and sheer scale of the alleged crimes charged, which may make it impracticable to require a high degree of specificity in such matters as the identity of each individual victims and the dates for the commission of each individual crime.³⁶
-) The proximity of the accused to the commission of the crimes and the related conduct of the accused: the closer the accused is to the crime, the higher the degree of specificity required.³⁷

³² Chambers Practice Manual, p. 12. *See also* p. 16 (the charges must be “clear and unambiguous”).

³³ ICC-01/12-01/18-143, para. 30 (“le Procureur, dans son DCC, d’être précis et exhaustif que possible en ce qui concerne des faits”). *See also* ICC-01/05-01/08-3343, para. 31 (“[t]he affirmative duty to inform the Accused rests with the Prosecution”). *See also* Prosecutor v. Charles Ghankey Taylor, SCSL-2003-01-A, Appeals Judgment, 19 July 2012 (“Taylor AJ”), para. 40; Prosecutor v. Sesay et al., SCSL-04-15-A, Appeals Judgment, 26 October 2009 (“Sesay AJ”), para. 47; Prosecutor v. Brima et al., SCSL-2004-16-A, Appeals Judgment, 22 February 2008 (“Brima AJ”), para. 37.

³⁴ Chambers Practice Manual, p. 13; ICC-02/04-01/15-T-6, p. 20, l. 7-9; *Brima* AJ, para. 37 citing *Kupreskić* AJ, para. 89; *Taylor* AJ, para. 40 (stating that whether a non-exhaustive pleading of locations is adequate or defective depends on whether the indictment provides the accused with sufficient notice to enable him to prepare his defence).

³⁵ ICC-01/04-01/06-3121-Red, para. 123; ICC-01/04-01/10-465-Red, para. 82 (“[t]he DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances”); ICC-01/12-01/18-143, para. 30 (noting that the “facts” refer to when and where the crimes were committed). *See also* *Kvočka* AJ, para. 31 (“An indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, *unless there are special circumstances*, when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified”) (emphasis added).

³⁶ Prosecutor v. Kupreskić et al., IT-95-16-A, Appeals Judgment, 23 October 2001 (“*Kupreskić* AJ”), paras. 89-90; *Kvočka* AJ, para. 30; *Brima* AJ, para. 41; ICTY Practice Manual, p. 37, para. 10. Notwithstanding, as the identity of the victims is valuable to the preparation of the Defence case, if the Prosecution is in a position to name the victims, it should do so. *See Kupreskić* AJ, para. 90.

³⁷ ICC-01/04-01/06-3121-Red, para. 122 referring to *Blaskić* AJ, paras. 210, 211, 213; “*Sesay* AJ”, para. 831; citing *Kvočka* AJ, para. 65.

J) The type of criminality.³⁸ For example, the continuous nature of certain crimes, and the fact that the armed groups were continually on the move between various locations in a given area, might allow for more flexibility in the pleading of certain crimes, such as conscription, enlistment and use of children to participate in hostilities, sexual slavery and rape of child soldiers. In *Ntaganda*, the Pre-Trial Chamber permitted broader geographic and temporal timeframes for these crimes.³⁹ Similarly, SCSL Chambers have permitted broader geographic and temporal parameters for sexual slavery and child recruitment and use.⁴⁰

Role of the confirmation decision

14. The Confirmation Decision defines the parameters of the charges for the purposes of trial.⁴¹ Hence, it is supposed to inform the Defence of the material facts that have been confirmed for trial. It is *not* meant to provide a comprehensive overview of the evidence supporting each charge. As the Appeals Chamber held in the *Lubanga* case, “[...] the term 'facts' refers to the *factual allegations which support each of the legal elements of the crime charged*. These factual allegations must be *distinguished from the evidence* put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background

³⁸ ICC-01/12-01/18-143, para. 30 (referring to “la nature des crimes en question”).

³⁹ ICC-01/04-02/06-309, para. 83 (Ituri for all the period charged). *See also* ICC-01/04-02/06-450, para. 32.

⁴⁰ Prosecutor v. Charles Ghankey Taylor, SCSL-03-01-T, Trial Judgement, 18 May 2012 (“*Taylor TJ*”), para. 119 (“[...] the prolonged nature of these crimes, especially in the context of the Sierra Leone conflict where the perpetrators were often on the move between villages and districts over a significant period of time, may make pleading particular locations sometimes impracticable. [...] Moreover, the Defence has not specifically objected to the lack of specificity of locations relating to the crimes of sexual slavery, the enlistment, conscription and use of child soldiers or enslavement in Counts 5, 9 and 10.”). *See also* para. 1018 (“The Prosecution has not pleaded specific locations with regard to sexual slavery. In accordance with established jurisprudence, the Trial Chamber has found that due to the continuous nature of the crime of sexual slavery, the pleading of particular locations is impracticable. Therefore, the Trial Chamber has considered evidence of sexual slavery in all locations in Kono District, Kailahun District and Freetown and the Western Area.”).

⁴¹ ICC-01/04-01/06-3121-Red, para. 124. *See also* ICC-01/05-01/08-3343, para. 32 (“[t]he Confirmation Decision, taken as a whole, defines the scope of the charges”); ICC-01/09-01/11-522, para. 13 and authorities in fn. 18; ICC-01/05-01/08-836, para. 37; ICC-01/04-01/07-3436-tENG, para. 12; ICC-01/04-01/07-1547-tENG, paras. 22-23. *See also* Chambers Practice Manual, p. 16 (“the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial”).

or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.”⁴² The Appeals Chamber made it clear that what the confirmation decision has to be specific about, is the material facts, not the underlying evidence, stating that “[t]he Appeals Chamber emphasises that in the confirmation process, *the facts, as defined above*, must be identified with sufficient clarity and detail, meeting the standard in article 67 (I) (a) of the Statute.”⁴³ Similarly, the Trial Chamber in this case, too, has held that “the Chamber is also satisfied that Mr Ongwen has been fully informed of the incriminating conduct since the confirmation of charges decision *set out the facts of the case* with precision, together with their *legal characterisation*”.⁴⁴

Notice of the evidence to be led in support of the charges

15. In light of the above, the Defence’s complaint that, in the Confirmation Decision, the specific evidence in support each charge is not identified, has nothing to do with the pleading of the charges. Provision of notice regarding the evidence is entirely different from properly pleading the charges. While it is correct that the Defence should be given notice of the evidence to be led in support of the charges, other separate procedural mechanisms provide for notice of the evidence on which the Prosecution intends to rely. These include the list of evidence provided to the Defence prior to the confirmation hearing,⁴⁵ the Pre-Confirmation Brief,⁴⁶ the Pre-Trial Brief,⁴⁷ the list of witnesses⁴⁸ and the details provided during the course of INCRIM disclosure.⁴⁹

⁴² ICC-01/04-01/06-2205, fn. 163.

⁴³ ICC-01/04-01/06-2205, fn. 163.

⁴⁴ ICC-02/04-01/15-T-26-ENG CT WT, p. 18, lns 5-8.

⁴⁵ Rule 121(3) (“[t]he Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, [...] a list of the evidence which he or she intends to present at the hearing). *See further* ICC-02/04-01/15-375-Conf-AnxD, submitted simultaneously with the Document Containing the Charges on 21 December 2015.

⁴⁶ ICC-02/04-01/15-375-Conf-AnxC, submitted simultaneously with the Document Containing the Charges on 21 December 2015.

⁴⁷ ICC-02/04-01/15-533.

Role of auxiliary documents

16. Finally, and as a related matter, the Prosecution notes that “it is the Defence position that the PPTB, as a matter of law, cannot ‘fill in the gaps’ lacking in the notice provided in the CoC Decision”.⁵⁰ This argument does not conform to the settled law of the Court: the Appeals Chamber, in this context, has held that “*further details* about the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in *other auxiliary documents*”⁵¹ and added that “*all documents* that were designed to provide information about the charges, *including auxiliary documents*, must be considered to determine whether an accused was informed in sufficient detail of the charges”.⁵² The Appeals Chamber added, as a caveat, that “only information *made available before the start of the trial hearings* may be taken into account”⁵³ and noted that “[t]o the extent that further information is provided in the course of the trial, this can only go towards assessing whether prejudice, caused by the lack of detail of the charges, may have been cured”.⁵⁴ Notably, the Pre-Trial Brief was submitted months *prior* to the commencement of the trial and hence would constitute information “made available before the start of the trial hearings.”

⁴⁸ ICC-02/04-01/15-532-Conf-AnxB.

⁴⁹ For each item disclosed as “incriminating”, the Prosecution provided the Defence with an indication of the relevance of the evidence. The Prosecution identified various bases of relevance such as **1)** Structured, organised, and functioning armed groups; **2)** Existence of an armed conflict (not of an international character); **3)** Attack against a civilian population; **4)** The attack was widespread; **5)** The attack was systematic; **6)** War crime of Attacking Civilians; **7)** Murder; **8)** Inhuman acts/cruel treatment; **9)** Enslavement; **10)** Rape; **11)** Forced Pregnancy; **12)** Sexual Slavery; **13)** Pillaging; **14)** Sexual Violence; **15)** Destruction of Property; **16)** Conscripting or enlisting or using child soldiers; **17)** Any other information relating to the attacks against Pajule, Odek, Lukodi and Abok; **18)** Any other information relating to SGBC involving Ongwen or LRA fighters under his command; **19)** Article 25(3)(a); **20)** Article 25(3)(b); **21)** Article 25(3)(c); **22)** Article 25(3)(d); **23)** Art. 28 Command responsibility; **24)** Any other information relating to Ongwen’s individual criminal responsibility; **25)** Expert witness/chain of custody witness/intercept witness/intercept evidence; **26)** Persecution; **27)** Torture; **28)** Forced Marriage; **29)** Outrages upon Personal Dignity; **30)** Attempted murder; **31)** SGBC contextual; **32)** Information showing Dominic Ongwen was not under duress; **33)** Mental Capacity.

⁵⁰ ICC-02/04-01/15-1430, para. 27.

⁵¹ ICC-01/04-01/06-3121-Red, para. 124 (emphasis added).

⁵² ICC-01/04-01/06-3121-Red, para. 128 (emphasis added).

⁵³ ICC-01/04-01/06-3121-Red, para. 129 (emphasis added).

⁵⁴ ICC-01/04-01/06-3121-Red, para. 129.

17. Aside from the contrary appellate caselaw, the Defence argument is inherently unpersuasive. It is the essential function of the Pre-Trial Brief (PPTB in Defence nomenclature) to serve as a document providing notice of the nature of the Prosecution evidence and of the way the Prosecution seeks to relate that evidence to the charged crimes. If, as the Defence argue, the document cannot supplement the information contained in the Confirmation Decision in the way described above, then it is difficult to discern what function the Pre-Trial Brief actually performs. And yet it has been an important component in litigation before this Court since the very first trial, and the production by the Prosecution of a Pre-Trial Brief was the subject of a specific order by the Trial Chamber in the instant proceedings.⁵⁵

IV. Alleged defects in pleading modes of liability

i. Indirect Co-perpetration - Article 25(3) (a)

Mental element

18. Regarding indirect co-perpetration, the Defence claims that “the CoC Decision fails to identify any *mens rea* for this mode of liability”.⁵⁶ This is incorrect.

19. Pursuant to article 30(2), the Prosecution must prove that the accused meant to engage in the relevant conduct.⁵⁷ In relation to a consequence, the Prosecution must show that the accused (a) meant to cause the consequence; or (b) was aware that the consequence would occur in the ordinary course of events.⁵⁸ The concept of “awareness that a consequence will occur in the ordinary course of events” means that, based on the accused’s knowledge of how events ordinarily develop, he or she

⁵⁵ ICC-02/04-01/15-449, para. 8.

⁵⁶ ICC-02/04-01/15-1431, para. 9 (emphasis added).

⁵⁷ Article 30(2)(a) of the Statute.

⁵⁸ See article 30(2)(b.) See also, ICC-01/09-01/11-373, para. 335; ICC-01/04-01/06-803-tEN, paras. 350-352.

anticipated that the consequence would occur in the future.⁵⁹ In the context of indirect co-perpetration, the Prosecution must establish that the accused was aware that implementing the common plan will, in the ordinary course of events, result in the commission of the crimes charged.⁶⁰

20. In addition, for indirect co-perpetration through an organised and hierarchical apparatus of power, the Prosecution must establish that the accused was aware (a) that the common plan or agreement involved an element of criminality;⁶¹ (b) of the fundamental features of the organisation;⁶² and (c) of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise functional control over the crime.⁶³ This latter aspect is established by showing that the accused was aware of his or her critical role in the implementation of the common plan and his or her ability to control, jointly with others, the organised structure of power.⁶⁴

21. All the material facts relevant to the above legal requirements have been set out in the Confirmation Decision. For example, regarding the attack on Pajule IDP camp, the Confirmation Decision provides that:

“[t]he Pajule co-perpetrators, including Dominic Ongwen, *meant to engage in their conduct and intended to bring about the objective elements of the crimes of attacks against the civilian population, murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, and persecution or were aware that they would occur in the ordinary course of events in implementing the Pajule common plan.* The victims of these crimes were civilians taking no active part in

⁵⁹ ICC-01/04-01/06-2842, para. 1012.

⁶⁰ ICC-01/05-01/13-1989-Red, paras. 67, 70; ICC-01/04-01/06-2842, para.1008; ICC-01/05-01/13-1989-Red, para. 70; ICC-01/04-01/07-717, para. 533.

⁶¹ ICC-01/04-01/06-803-tEN, paras. 361-365.

⁶² ICC-01/04-01/07-717, para. 534.

⁶³ ICC-01/04-01/06-2842, para.1008; ICC-01/04-01/06-803-tEN, para. 366; ICC-01/04-01/07-717, para. 538; ICC-01/04-01/07-3436-tENG, paras. 1399, 1414-1415.

⁶⁴ ICC-01/04-01/06-2842, para.1013; ICC-01/04-01/07-3436-tENG, para. 1415; ICC-01/04-01/06-803-tEN, para. 367; ICC-01/04-01/07-717, para. 539.

hostilities. Dominic Ongwen was *aware of the factual circumstances that established this status.*”⁶⁵

22. More generally, in the context of Dominic Ongwen’s awareness of the factual circumstances that enabled him, together with other co-perpetrators, to jointly exercise control over the crimes charged, the Confirmation Decision also sets out that:

“As commander, Dominic Ongwen was *aware of the powers he held*, and he took sustained action to assert his commanding position, including by the maintenance of a ruthless disciplinary system, [...].⁶⁶

“[t]he Pajule co-perpetrators implemented the Pajule common plan through the hierarchical apparatus of the LRA deployed for the Pajule attack, which they jointly controlled. Dominic Ongwen was *aware of the fundamental features of the LRA* and the *factual circumstances* that enabled him, together with other co-perpetrators, to *jointly exercise control over the crimes* charged in relation to Pajule.”⁶⁷

23. The above should be read together with the material facts regarding the structure and functioning of the LRA, the position of authority Dominic Ongwen held, and his own awareness of the same:

In the LRA, including the Sinia brigade, subordinates followed the orders of their superiors almost automatically. LRA fighters, conditioned by, and under threat of, physical punishment, obeyed superiors and followed orders. The LRA maintained a violent disciplinary system that guaranteed adherence to orders and rules. The LRA, including the Sinia brigade, was composed of a sufficient number of fungible individuals capable of replacement to guarantee that the orders of superiors were carried out, if not by one subordinate, then by another. *Dominic Ongwen was aware of the fundamental features of the LRA, including the Sinia brigade, as an organised and hierarchical apparatus of power.*⁶⁸

⁶⁵ ICC-02/04-01/15-422-Red, p. 73, para. 15 (emphasis added).

⁶⁶ ICC-02/04-01/15-422-Red, p. 27, para. 59 (emphasis added).

⁶⁷ ICC-02/04-01/15-422-Red, p. 74, para. 16 (emphasis added).

⁶⁸ ICC-02/04-01/15-422-Red, p. 73, para. 11 (emphasis added).

24. In light of the above, the Prosecution submits that the mental element relevant to the responsibility of Dominic Ongwen in the context of indirect co-perpetration has been comprehensively pleaded. Analogous sections exist in the Confirmation Decision regarding indirect co-perpetration in the context of the attack on Odek IDP camp,⁶⁹ sexual and gender based crimes (“SGBC”),⁷⁰ and the conscription/use of children under the age of fifteen.⁷¹ The Pre-Confirmation Brief⁷² and the Pre-Trial Brief,⁷³ provide additional detail regarding the above, summarizing and providing citations to the relevant evidence.

The power to frustrate

25. The Defence claims that “[t]he pleading of the mode of liability of “indirect co-perpetration” is defective because [...] the [...] objective element of “*power to frustrate the commission* of the crime” is not pleaded.⁷⁴ This claim is premised on an erroneous understanding of the elements of indirect co-perpetration. This is evident from the discussion below.

26. Firstly, in this context, the *relevant objective requirement* is that the accused must *make an essential contribution* to the implementation of the common plan⁷⁵ or

⁶⁹ ICC-02/04-01/15-422-Red, p. 77, paras. 27-28.

⁷⁰ ICC-02/04-01/15-422-Red, p. 99, paras. 119-120.

⁷¹ ICC-02/04-01/15-422-Red, p. 102, para. 126.

⁷² ICC-02/04-01/15-375-AnxC-Red2, paras 89 – 110 (general discussion of the position of authority of Dominic Ongwen and his awareness of the fundamental features of the organized structure of the LRA and Sinia brigade), paras 185-217 (Pajule), paras. 270-303 (Odek), paras. 576 – 610 (SGBC), paras. 648 - 661 (Conscription/use of child soldiers).

⁷³ ICC-02/04-01/15-533, paras 104-147 (general discussion of the position of authority of Dominic Ongwen and indirect co-perpetration) paras 209-211, 246–287 (Pajule), paras 289, 292, 303, 304, 321, 326, 332-370 (Odek) paras 502-503, paras 612-694 (SGBC) paras 704, 710, 712, 716, 730, 737, 739 – 753 (Conscription / use of child soldiers).

⁷⁴ ICC-02/04-01/15-1431, p. 8, title “3”.

⁷⁵ ICC-01/05-01/13-2275-Red, paras. 812, 824-825, 1307.

“within the framework” of the common plan.⁷⁶ Hence the factual allegations in the pleading must set out the nature of the essential contribution.

27. Secondly, when *assessing* whether an accused’s contribution is “essential to the implementation of a common plan”,⁷⁷ it is necessary to make normative assessments of the accused’s role in the implementation of the common plan, taking into account the division of tasks⁷⁸ and his or her individual contributions to the implementation of the plan.⁷⁹ This requires consideration of whether the accused’s contribution within the framework of the common plan was such that without it, “the crime would not have been committed or would have been committed in a significantly different way”.⁸⁰ However this latter aspect is merely a *result* of an essential contribution, and not a stand-alone objective legal element of indirect co-perpetration. At most, it is a factual indicator to demonstrate that the accused’s contribution was essential.

28. Where the accused is alleged to have acted through an organised and hierarchical apparatus of power, the accused’s power to frustrate the crime is also not a legal requirement to establish that he or she had control over the crime. Rather, the Prosecution must prove that the co-perpetrators had *joint* control over the crimes⁸¹ by controlling the organisation, which they could steer towards the

⁷⁶ ICC-01/05-01/13-2275-Red, paras. 818-820; ICC-01/04-01/06-3121-Red, paras. 445, 469.

⁷⁷ ICC-01/05-01/13-2275-Red, paras. 812, 824.

⁷⁸ ICC-01/04-01/06-3121-Red, para. 473; ICC-01/05-01/13-2275-Red, para. 820; ICC-01/05-01/13-1989-RED, para. 69; ICC-01/04-01/07-717, para. 525.

⁷⁹ ICC-01/05-01/13-2275-Red, para.1029.

⁸⁰ ICC-01/05-01/13-2275-Red, paras. 820, 825; ICC-02/11-02/11-186, para. 135. As to the assessment of the essential nature of a contribution to the common plan, *see* ICC-01/05-01/13-2275-Red, paras. 812, 824, 1029; ICC-01/04-01/06-2842, paras. 1000-1001.

⁸¹ ICC-01/04-01/07-3436-tENG, para.1399; ICC-01/04-01/07-717, para. 488. ICC-01/09-02/11-382-Red (indirect co-perpetration), para. 297; ICC-01/09-01/11-373 (indirect co-perpetration), para. 292.

implementation of the common plan.⁸² It is not necessary that each co-perpetrator was individually in a position to control the organisation. Control is exercised collectively by all co-perpetrators.⁸³

29. Accordingly the Appeals Chamber referred to the accused's power to frustrate the commission of a crime as an *indicator* to distinguish the principal perpetrators from accessories to the crime where it is alleged that the crime was committed by a plurality of persons.⁸⁴ However, this notion must be interpreted consistently with the actual legal requirements and in particular the notion of the accused's essential contribution to the common plan and the co-perpetrator's joint control over the organization and the crime. It is for this reason that the Appeals Chamber clarified that "what is required is a normative assessment of the role of the accused person in the specific circumstances of the case."⁸⁵

30. Taking a broader view, the idea that Dominic Ongwen should not have to face a detailed and well evidenced allegation that he was part of a common plan to commit grave crimes because the Confirmation Decision 'only' alleges that his contribution to those crimes was essential and 'fails' to mention that he therefore had the power to frustrate their commission is absurd. These two notions (the essential nature of the contribution and power to frustrate) are no more than (in photographic terms) the positive and negative expression of the same idea. To argue that the

⁸² ICC-02/11-02/11-186, para. 136; ICC-01/04-01/07-3436-tENG, paras. 1404; 1411-1412; ICC-01/04-01/07-717, para. 510; *see also* paras. 500-509, 514.

⁸³ ICC-02/11-02/11-186, para. 136. According to the Court's jurisprudence, "[n]one of the participants [in a common plan] exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such." *See e.g.* ICC-01/04-01/06-2842, para. 994; ICC-01/05-01/13-1989-RED, para. 62; ICC-02/11-02/11-186, para. 136; ICC-01/04-01/07-717, paras. 524 and 488(b), referring to "joint control over the crime" and control "together with others."

⁸⁴ ICC-01/04-01/06-3121-Red, para. 473.

⁸⁵ ICC-01/04-01/06-3121-Red, para. 473.

failure to articulate the negative expression confounds the entirety of the Chamber's inquiry into the truth of this issue, is to confuse form with substance.

31. The Defence also claims that "[t]he pleading of the mode of liability of "indirect co-perpetration" is defective because [...] the [...] subjective element of "*awareness of the power to frustrate the crime*" is not pleaded.⁸⁶ This claim too, is premised on a misunderstanding of the elements of indirect co-perpetration. The analysis in the paragraphs above regarding the purported objective element of the power to frustrate, apply with equal force to any purported mental element regarding the power to frustrate.

32. In any case, if the Chamber rejects the above submissions and finds that power to frustrate the commission of the crime is a material fact, the Prosecution submits that the same is provided with sufficient specificity in the Confirmation Decision. For example, it sets out that:

Dominic Ongwen had effective command and control, or authority and control, over his subordinates between 1 July 2002 and 31 December 2005. He mobilised his authority and power in the LRA, including the Sinia brigade, to secure compliance with his orders and cause his subordinates to carry out the conduct described in this document. This allowed him to exert control over the crimes charged as well as to *prevent or repress any conduct by his subordinates* of which he disapproved. His subordinates complied with his orders. He had the power, *inter alia*, to issue or give orders; to ensure compliance with the orders issued; to order forces or units under his command, whether under his immediate command or at a lower level, to engage in hostilities; to discipline any subordinate; and the authority to send forces to the site of hostilities and *to withdraw them at any time*.⁸⁷

33. These material facts are a clear assertion that Dominic Ongwen had the power, for example, to *prevent* his subordinates from engaging in any of the attacks

⁸⁶ ICC-02/04-01/15-1431, p. 8, title "3".

⁸⁷ ICC-02/04-01/15-422-Red, at p. 73, para. 13 (emphasis added).

on IDP camps that underpin the charged crimes, or carrying out any of the charged sexual and gender based crimes or conscripting/using children under the age of fifteen. He could also *withdraw* them from any attack or criminal episode that underpins the charges. In other words, he could ensure that the charged crimes would not have been committed or would have been committed in a significantly different way.

34. Moreover, in the context of the relevant mental element, the Prosecution notes that the Confirmation Decision sets out that that Dominic Ongwen was aware that he and the other co-perpetrators jointly exercised control over the crimes [see para. 22 above]. From this awareness, which is related to a subjective element of the mode of liability of indirect co-perpetration, it logically flows that he was aware of their joint power to frustrate the commission of the crime.

ii. Ordering - Article 25(3) (b)

35. The Defence claims, regarding article 25(3)(b), as a defect in pleading, that “no *mens rea* is specified”.⁸⁸ Here too, the Defence is mistaken. Because article 25(3)(b) does not prescribe any particular *mens rea*, the general requirements under article 30 apply. Accordingly, it must be established that the accused meant to engage in the conduct that constitutes an order, or an act of solicitation or inducement.⁸⁹ In addition, the Prosecution must show that the accused either meant to contribute to the crime,⁹⁰ or that he or she was aware that the crime would be committed in the ordinary course of events, as a consequence of the realisation of his or her act or

⁸⁸ ICC-02/04-01/15-1431, para 11.

⁸⁹ Article 30(2)(a).

⁹⁰ The term “cause” in article 30(2)(b) needs to be interpreted in light of the lower objective threshold of contribution to the crime under article 25(3)(b) and cannot mean that proof is required that the perpetrator intended his or her conduct to be a *conditio sine qua non* for the commission of the crime.

omission.⁹¹ Moreover, pursuant to article 30(3), the Prosecution must establish that the accused was aware that the circumstances relevant to the charged crimes existed, or that, in the ordinary course of events, the crimes would be committed.⁹² For ordering, the Prosecution must further establish that the accused was aware that he or she was in a position of authority *vis-à-vis* the perpetrator of the crime.⁹³

36. The following sections of the Confirmation Decision, detail, *inter alia*, the relevant mental element:

“The Odek co-perpetrators including Dominic Ongwen *meant to engage in their conduct and intended to bring about the objective elements of the crimes* of attacks against the civilian population, murder, attempted murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, outrages upon personal dignity and persecution or were *aware that they would occur in the ordinary course of events in implementing the Odek common plan*. The victims of these crimes were civilians taking no active part in hostilities. *Dominic Ongwen was aware of the factual circumstances that established this status.*⁹⁴

“The Odek co-perpetrators implemented the Odek common plan through the hierarchical apparatus of the LRA deployed for the Odek attack, which they jointly controlled. Dominic Ongwen was *aware of the fundamental features of the LRA and the factual circumstances that enabled him together with other co-perpetrators, to jointly exercise control over the crimes* charged in relation to Odek.

⁹⁵

“As commander, Dominic Ongwen was *aware of the powers he held, and he took sustained action to assert his commanding position, including by the maintenance of a ruthless disciplinary system, [...].*⁹⁶

37. Collectively, the sections of the Confirmation Decision above provide the matrix, in terms of material facts, for the mental element required for ordering under

⁹¹ ICC-01/05-01/13-1989-RED, para. 82; ICC-01/04-01/12-1-Red, para. 63; ICC-01/04-02/06-309, para.153.

⁹² Article 30(3).

⁹³ For “ordering”, the accused’s position of authority is a relevant circumstance within the meaning of article 30(3).

⁹⁴ ICC-02/04-01/15-422-Red, p. 77, para. 27 (emphasis added).

⁹⁵ ICC-02/04-01/15-422-Red, p. 77, para. 28 (emphasis added).

⁹⁶ ICC-02/04-01/15-422-Red, p. 27, para. 59 (emphasis added).

article 25(3)(b). The Pre-Confirmation Brief⁹⁷ and the Pre-Trial Brief,⁹⁸ provide additional detail regarding the above, summarizing and providing citations to the relevant evidence.

38. Analogous sections exist in the Confirmation Decision in the context of Pajule,⁹⁹ Lukodi,¹⁰⁰ Abok,¹⁰¹ SGBC¹⁰², and the conscription/use of children under the age of fifteen.¹⁰³ The Pre-Confirmation Brief and the Pre-Trial Brief also provide additional detail regarding the mental element of the mode of liability of ordering regarding Odek,¹⁰⁴ Lukodi,¹⁰⁵ Abok,¹⁰⁶ SGBC¹⁰⁷, and the conscription/use of children under the age of fifteen¹⁰⁸, summarizing and providing citations to the relevant evidence.

iii. Responsibility as a military commander - Article 28(a)

Mental element

39. According to the Defence, “[i]n paragraph 149 of the 1st section of the CoC Decision, the Pre-Trial Chamber II [...] *omits* [...] the *mens rea element* (knew, or owing to the circumstances at the time, should have known).”¹⁰⁹ The Defence adds that “[i]n paragraph 13, in the Charges section of the CoC Decision, the *legal elements for mens rea* (knowledge) [...] are *missing*.”¹¹⁰ Moreover, as per the Defence, the

⁹⁷ ICC-02/04-01/15-375-AnxC-Red2, paras 269 – 304.

⁹⁸ ICC-02/04-01/15-533, paras 246 – 277.

⁹⁹ ICC-02/04-01/15-422-Red, p. 73, paras. 15-16.

¹⁰⁰ ICC-02/04-01/15-422-Red, p. 81-82, paras. 40-44.

¹⁰¹ ICC-02/04-01/15-422-Red, p. 86, paras. 54-57.

¹⁰² ICC-02/04-01/15-422-Red, p. 99-101, paras. 118-124.

¹⁰³ ICC-02/04-01/15-422-Red, p. 102-103, paras. 125-131.

¹⁰⁴ ICC-02/04-01/15-375-AnxC-Red2, paras. 269 – 304, ICC-02/04-01/15-533, paras. 332 – 362.

¹⁰⁵ ICC-02/04-01/15-375-AnxC-Red2, paras. 343 – 367. ICC-02/04-01/15-533, paras. 400-420.

¹⁰⁶ ICC-02/04-01/15-375-AnxC-Red2, paras. 408 – 419. ICC-02/04-01/15-533, paras. 476 – 491.

¹⁰⁷ ICC-02/04-01/15-375-AnxC-Red2, paras. 576 – 611. ICC-02/04-01/15-533, paras. 656 – 695.

¹⁰⁸ ICC-02/04-01/15-375-AnxC-Red2, paras. 624-628, 633, 648-662, ICC-02/04-01/15-533, paras. 739 – 754.

¹⁰⁹ ICC-02/04-01/15-1432, para. 10 (emphasis added).

¹¹⁰ ICC-02/04-01/15-1432, para. 11 (emphasis added).

requisite mental element is identified elsewhere in the Confirmation Decision, but “...these phrases simply ‘track the statutory language’ and the elements are *unsupported by factual allegations*.”¹¹¹

40. It is important here to make a preliminary point: the Confirmation Decision must be read as a whole. It is erroneous to view a paragraph in isolation and draw broad conclusions from the presence or absence of a material fact in the same.

41. Secondly, the Defence’s claim that the mental elements for command responsibility are “unsupported by factual allegations” also does not survive close scrutiny. The relevant mental element under article 28(a) is that the accused must have known, or owing to the circumstances at the time, should have known that the relevant forces were committing or about to commit such crimes.¹¹² The “should have known” standard merely requires the commander to have “been negligent in failing to acquire knowledge” of their subordinates’ illegal conduct,¹¹³ when required to do so by the circumstances. The emphasis is on the failure of the superior to discharge their “active duty [...] to take the necessary measures to secure knowledge of the conduct of [their] troops.”¹¹⁴

42. The material facts relevant to the above legal requirements have been set out in the Confirmation Decision. For example, regarding the attack on Lukodi IDP camp, the Confirmation Decision provides that:

“Dominic Ongwen devised the plan to attack Lukodi”¹¹⁵

¹¹¹ ICC-02/04-01/15-1432, para. 13.

¹¹² ICC-01/05-01/08-424, para. 428.

¹¹³ ICC-01/05-01/08-424, para. 432.

¹¹⁴ ICC-01/05-01/08-424, para. 433.

¹¹⁵ ICC-02/04-01/15-422-Red, p. 36, para. 78.

“On or about 19 May 2004 at approximately 6.00 p.m. Dominic Ongwen attacked Lukodi IDP camp in Bungatira sub-county, Aswa county, Gulu district. Dominic Ongwen *meant to engage in his conduct and intended to bring about the objective elements of the crimes* of attacks against the civilian population, murder, attempted murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, destruction of property and persecution or was *aware that they would occur in the ordinary course of events* during the attack on Lukodi IDP camp. The victims of these crimes were civilians taking no active part in hostilities. Dominic Ongwen was *aware of the factual circumstances that established this status.*”¹¹⁶

“As the commander of the Lukodi attack, Dominic Ongwen exerted control over the crimes through the LRA fighters who carried out the attack. The attackers included members of the Sinia and Gilva brigades. These fighters complied with Dominic Ongwen’s orders in carrying out the material elements of the charged crimes. Dominic Ongwen committed the crimes through the hierarchical apparatus of the LRA by planning the attack, selecting fighters and appointing leaders for the attack, instructing the troops prior to the attack, and ordering and deploying troops to commit crimes in Lukodi. Dominic Ongwen was *aware of the fundamental features of the LRA and the factual circumstances which allowed him to exert control over the charged crimes.*”¹¹⁷

“The attackers were under the effective command and control, or effective authority and control, of Dominic Ongwen during the Lukodi attack. Dominic Ongwen failed, while being a military commander or person effectively acting as a military commander, to take necessary and reasonable measures within his power to prevent or repress the commission of the charged crimes or failed to submit the matter to the competent authorities for investigation and prosecution. Dominic Ongwen *knew or, owing to the circumstances at the time, should have known* that the LRA fighters were committing or were about to commit the crimes charged in relation to Lukodi.”¹¹⁸

43. As is evident from the above, the discussion of the mental element in the Confirmation Decision fully satisfies the requirements of article 28(a). In fact, the Confirmation Decision provides for a much broader, more comprehensive mental

¹¹⁶ ICC-02/04-01/15-422-Red, p. 82, para. 41 (emphasis added).

¹¹⁷ ICC-02/04-01/15-422-Red, p. 82, para. 42 (emphasis added).

¹¹⁸ ICC-02/04-01/15-422-Red, p. 82, para. 43 (emphasis added).

element, featuring, for example, an intent to bring about the objective elements of the crimes or an awareness that they would occur in the ordinary course of events during the attack on Lukodi IDP camp. As discussed above in the context of the legal elements, the mental element required to establish criminal liability under article 28(a) is of a *lesser* magnitude than this, and is subsumed within the more rigorous standards of the mental element set out in the Confirmation Decision.

44. Moreover, contrary to the allegations of the Defence, the excerpts above *are* “factual allegations” and do not merely repeat the Statute. They provide detail regarding the relevant crimes, the organizational structure used to commit the crimes, Ongwen’s awareness of the nature of the organizational structure, the units involved, and the acts/contributions of Dominic Ongwen at all stages of the attack. By ignoring the above excerpts, and claiming that elements are unsupported by factual allegations, the Defence appears to consider the phrase “factual allegations” to be interchangeable with the idea of “citations to specific items of evidence”. This is not merely wrong in terms of semantics; it fundamentally misconstrues the purpose of the Confirmation Decision.

45. Analogous sections exist in the Confirmation Decision regarding Command Responsibility in the context of Pajule,¹¹⁹ Odek,¹²⁰ Abok,¹²¹ SGBC,¹²² and the conscription/use of children under the age of fifteen.¹²³ The Pre-Confirmation Brief and the Pre-Trial Brief also provide additional detail regarding the mental element of command responsibility regarding Pajule,¹²⁴ Odek,¹²⁵ Lukodi,¹²⁶ Abok,¹²⁷ SGBC¹²⁸, and

¹¹⁹ ICC-02/04-01/15-422-Red, p. 73-74, paras. 14-19.

¹²⁰ ICC-02/04-01/15-422-Red, p. 77-78, paras. 27-31.

¹²¹ ICC-02/04-01/15-422-Red, p. 86, paras. 54-57.

¹²² ICC-02/04-01/15-422-Red, p. 99-101, paras. 118-124.

¹²³ ICC-02/04-01/15-422-Red, p. 102-103, paras. 125-131.

¹²⁴ ICC-02/04-01/15-375-AnxC-Red2, paras. 184-228, ICC-02/04-01/15-533, paras. 247 – 287.

¹²⁵ ICC-02/04-01/15-375-AnxC-Red2, paras. 233, 269-312. ICC-02/04-01/15-533, paras. 332 – 370.

¹²⁶ ICC-02/04-01/15-375-AnxC-Red2, paras. 316, 343 – 376. ICC-02/04-01/15-533, paras. 400 – 429.

the conscription/use of children under the age of fifteen,¹²⁹ summarizing and providing citations to the relevant evidence.

Prevent/repress

46. The Defence states that “[i]n paragraph 149 of the 1st section of the CoC Decision, the Pre-Trial Chamber II [...] omits [...]: [...] “failed to take all necessary and reasonable measures to prevent or repress their commission....”¹³⁰ Moreover, as per the Defence, the element of failure to take necessary and reasonable measures to prevent or repress is identified elsewhere in the Confirmation Decision, but “...these phrases simply ‘track the statutory language’ and the elements are *unsupported by factual allegations*.”¹³¹

47. Regarding the above, firstly, the Prosecution reiterates that the Confirmation Decision must be read as a whole. A single paragraph should not be analysed and criticized in isolation. Secondly, the Defence allegation that the “prevent or repress” aspect of command responsibility in the Confirmation Decision is “*unsupported by factual allegations*” is mistaken. In the words of the Pre-Trial Chamber in the Confirmation Decision:

“...the narrative of the relevant events as emerging from the available evidence is such that Dominic Ongwen’s conduct cannot be seen as a mere failure to prevent or repress crimes committed by other persons. To the contrary, as explained above, the Chamber finds that it is precisely the deliberate conduct of Dominic Ongwen that resulted in the realisation of the objective elements of the crimes. At the same time, the Chamber observes that, as a matter of fact, the narrative proposed by the Prosecutor, and accepted in the present decision, by which Dominic Ongwen intentionally

¹²⁷ ICC-02/04-01/15-375-AnxC-Red2, paras. 408 – 427. ICC-02/04-01/15-533, paras. 476 – 499.

¹²⁸ ICC-02/04-01/15-375-AnxC-Red2, paras. 430 – 432, 576 – 616. ICC-02/04-01/15-533, paras. 656 – 700.

¹²⁹ ICC-02/04-01/15-375-AnxC-Red2, paras. 620-621, 624-625, 633, 648-666. ICC-02/04-01/15-533, paras. 739 – 758.

¹³⁰ ICC-02/04-01/15-1432, para. 10.

¹³¹ ICC-02/04-01/15-1432, para. 13 (emphasis added).

committed the crimes charged *does, by definition and by necessary logic, include as a corollary that Dominic Ongwen did not “prevent” or “repress” the crimes that he himself committed jointly with others and making use of his subordinates over whom he had indeed, at the relevant time, effective command and control*’.¹³²

“[i]n these circumstances, and considering that, as stated above, the *evidence does indicate that, as a matter of fact, Dominic Ongwen did not take action to prevent or repress the commission by forces under his effective command and control of the crimes under charges 1 to 49 and 61 to 70, the Chamber considers it appropriate [...] to retain in those charges the alternative mode of liability of article 28(a) of the Statute as requested by the Prosecutor*”.¹³³

48. The Prosecution adopts the above position taken by the Pre-Trial Chamber. Additionally, the Prosecution notes that the sections of the Confirmation Decision on Pajule, Odek, Lukodi, Abok, SGBC and the conscription/use of children under fifteen, each feature explicit allegations about how Dominic Ongwen did not take action to prevent or repress the commission by forces under his effective command and control of the relevant charged crimes. For example, the Confirmation Decision sets out that the conduct of Dominic Ongwen, regarding the attack on Pajule, included: “...failing, while being a military commander or person effectively acting as a military commander, to take necessary and reasonable measures within his power to prevent or repress the commission of the charged crimes or failing to submit the matter to the competent authorities for investigation and prosecution.”¹³⁴ Analogous language features in the context of Odek,¹³⁵ Lukodi,¹³⁶ Abok,¹³⁷ SGBC¹³⁸ and the conscription/use of children under fifteen.¹³⁹

¹³² ICC-02/04-01/15-422-Red, p. 65, para. 147 (emphasis added).

¹³³ ICC-02/04-01/15-422-Red, p. 66, para. 149.

¹³⁴ ICC-02/04-01/15-422-Red, p. 74, para. 17.

¹³⁵ ICC-02/04-01/15-422-Red, p. 78, para. 29.

¹³⁶ ICC-02/04-01/15-422-Red, p. 82, para. 43.

¹³⁷ ICC-02/04-01/15-422-Red, p. 86, para. 56.

¹³⁸ ICC-02/04-01/15-422-Red, p. 101, para.123.

¹³⁹ ICC-02/04-01/15-422-Red, p. 103, para. 129.

49. Moreover, the Pre-Confirmation Brief¹⁴⁰ and the Pre-Trial Brief¹⁴¹ also provide additional detail regarding the above inaction of Dominic Ongwen, summarizing as well as providing citations to the relevant evidence.

iv. Common Purpose - Article 25(3)(d)

There has been no change of case theory regarding common purpose

50. The Defence claims that “[i]n the PPCB, the Prosecution concluded that Mr Ongwen’s contribution to the common plan in relation to the charges for child soldiers was “substantial”. However, nine months later in the PPTB, it appears as if the Prosecution has *changed its legal mind*, [...]. At paragraph 152 of the PPTB, the Prosecution concludes that there is no threshold requirement with regard to the contribution under common purpose—thus any contribution is sufficient.¹⁴² Building on this assumption above, the Defence reasons that “...the change in theory in the Prosecution’s case means that a) the *legal standard* it has for the burden of proving this mode of liability is *unclear*; and b) the accused and his Defence are *not informed against what level of contribution* it must defend.¹⁴³

51. The Defence claim of lack of clarity and consequent lack of notice here is built on an incorrect premise. The Prosecution did not change its legal theory. The reference to a “substantial contribution” in the Pre-Confirmation Brief was merely a description or summary of the relevant evidence. On the other hand, the statement in the Pre-Trial Brief that there is no threshold requirement is a *statement of the*

¹⁴⁰ ICC-02/04-01/15-375-AnxC-Red2, paras. 184-228 (Pajule), paras. 233, 269-312 (Odek), paras. 316, 343 – 376. (Lukodi), paras. 408 – 427 (Abok), paras. 430 – 432, 576 – 616 (SGBC), paras. 620-621, 624-625, 633, 648-666 (conscriptio / use of child soldiers).

¹⁴¹ ICC-02/04-01/15-533, paras. 247 – 287 (Pajule), paras. 332 – 370 (Odek), paras. 400 – 429 (Lukodi), paras. 476 – 499, (Abok), paras. 656 – 700 (SGBC), paras. 739 - 758 (conscriptio / use of child soldiers).

¹⁴² ICC-02/04-01/15-1432, para. 38 (emphasis added).

¹⁴³ ICC-02/04-01/15-1432, para. 40 (emphasis added).

relevant law and not an allegation of fact or summary of evidence. There is no logical reason to conflate these different statements, made in different contexts, and which serve different purposes. Hence the allegation of lack of clarity by the Defence is unreasonable.

The Confirmation Decision correctly identifies a common purpose

52. The Defence argues that “[i]n the CoC Decision, the Reasoning part (paragraphs 1-74) *fails to identify any common purposes* that would be pertinent to liability under Article 25(3)(d) of the Statute.”¹⁴⁴ The Defence adds that “[i]n the Charges part of the CoC Decision [...], there is a list of alleged conduct for Mr Ongwen’s contribution to the common plan under Article 25(3)(a) of the Statute liability, but *there is no mention of common purpose* for Article 25(3)(d) liability or his *contribution* to that specific criminal purpose.”¹⁴⁵ The Defence is mistaken. While the legal concept of a “common plan” is not identical to the legal concept of a “common purpose”,¹⁴⁶ the *facts* set out when sketching out the common plan in the Confirmation Decision easily suffice to establish a “common purpose” within the meaning of article 25(3)(d). For example, in the section on Pajule, it provides:

“[o]n or about 10 October 2003, between 05:00-06:00 approximately, Dominic Ongwen together with other senior members of the LRA, including Vincent Otti, Raska Lukwiya, and Bogi Bosco (“Pajule co-perpetrators”) put into action a *common plan to attack Pajule and Lapul IDP camps (“Pajule IDP Camp”),*

¹⁴⁴ ICC-02/04-01/15-1432, para. 42 (emphasis added).

¹⁴⁵ ICC-02/04-01/15-1432, para. 43 (emphasis added).

¹⁴⁶ While the concept of common purpose within the meaning of article 25(3)(d) is similar to the statutory requirement of common plan under article 25(3)(a), they are not identical. The relevant material fact to be established under article 25(3)(d) is not the existence of an *agreement* among specific individuals, but the *collective or shared intent* of a group of persons (ICC-01/04-01/07-3436-tENG, paras.1626-1627, fn. 35920. This is consistent with article 25(3)(d)(ii) that refers to the “intention of the group”. It follows that a common purpose — contrary to a common plan under article 25(3)(a)—does not justify the reciprocal attribution of the respective acts among its members (ICC-01/04-01/07-3436-tENG, para.1619, as opposed to ICC-01/05-01/13-2275-Red, para. 818). The group’s collective intent may be established without focussing on the intent of each individual member of the group and may be inferred, *inter alia*, from “the group’s collective decisions and actions or its omissions” (ICC-01/04-01/07-3436-tENG, para. 1627), its “concerted action” (ICC-01/04-01/07-3436-tENG, para. 1626), or from the intention of the leaders of the group, provided that they played a major role in that group, such as being significantly involved in creating the group, leading the group, or organising its criminal activities (ICC-01/09-01/11-373 para. 352).

then located in Aruu county, Pader district, its environs including the trading centre, barracks and Catholic mission (“Pajule common plan”). The Pajule co-perpetrators, including Dominic Ongwen, meant to engage in their conduct and intended to bring about the objective elements of the crimes of attacks against the civilian population, murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, and persecution or were aware that they would occur in the ordinary course of events in implementing the Pajule common plan.”¹⁴⁷

53. Indeed, the Defence have failed to identify any aspect of the common purpose that has *not* been described in the passage above. Hence the material facts, which establish the existence of a common purpose have been pleaded.

54. With regard to the *contribution* of Dominic Ongwen to the common purpose, the Decision Confirming Charges adds that:

“Dominic Ongwen contributed to the planning and implementation of the Pajule common plan and to the commission of the charged crimes in relation to Pajule by:

-) participating in a pre-attack meeting together with other senior LRA members;
-) leading a group of LRA fighters to attack the trading centre at the camp;
-) personally committing acts of violence against civilians;
-) ordering LRA fighters under his command to pillage items from shops and homes within the camp;
-) encouraging LRA fighters through his presence to commit crimes;
-) threatening to kill civilians that had been abducted if they did not move as the LRA fighters retreated from the attack and returned to their meeting point;
-) failing, while being a military commander or person effectively acting as a military commander, to take necessary and reasonable measures within his power to prevent or repress the commission of the charged crimes or failing to submit the matter to the competent authorities for investigation and prosecution. [...]”¹⁴⁸

¹⁴⁷ ICC-02/04-01/15-422-Red, p. 73, para. 15 (emphasis added).

¹⁴⁸ ICC-02/04-01/15-422-Red, p. 74, para. 17.

55. Again, while the legal concept of a contribution to a common plan (as envisioned in Article 25(3)(a)) is not identical to the legal concept of a contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose (as envisioned in Article 25(3)(D)), the *factual allegations* set out when sketching out Dominic Ongwen's contributions above suffice to establish a contribution to the common purpose within the meaning of article 25(3)(d). The Confirmation Decision features analogous language in the context of Odek,¹⁴⁹ SGBC¹⁵⁰ and the conscription/use of children under fifteen.¹⁵¹

56. The Defence also argues that the "notice as to the level of contribution for common purpose liability required is vague in the CoC Decision".¹⁵² This is the case, according to the Defence, since the Pre-trial Chamber "explains the elements of 'common purpose' liability [...], and holds that [...] the contribution under Article 25(3)(d) of the Statute is not required to be ""significant" or reach a certain minimum degree."¹⁵³ The Defence claims that this interpretation "violates the basic principles of criminal law."¹⁵⁴ This is a disagreement with regards to the legal definition of a mode of liability. Hence the Prosecution submits that the appropriate procedural vehicle for such an argument, is the Defence's closing brief. It is not an argument that can support a request for dismissal of charges on the basis of the lack of specificity of charges or the lack of notice regarding particular items of evidence.

57. In any case, the Defence's position on the law is incorrect. The Defence argues that "[i]f any level of contribution suffices, liability could attach for almost any

¹⁴⁹ ICC-02/04-01/15-422-Red p. 77, para 27, p. 78, para 29.

¹⁵⁰ ICC-02/04-01/15-422-Red, p. 99, para 119, page 100, para. 123.

¹⁵¹ ICC-02/04-01/15-422-Red, p. 102, para 126, page 103, para. 129.

¹⁵² ICC-02/04-01/15-1432, p. 9, title "I".

¹⁵³ ICC-02/04-01/15-1432, para. 32.

¹⁵⁴ ICC-02/04-01/15-1432, para. 33.

act”.¹⁵⁵ This is not the case. There are a number of safeguards against such unlimited criminal liability. To show that an accused contributed to the commission of a group crime, it needs to be established that his or her conduct influenced or had a bearing on its occurrence or the manner of its commission.¹⁵⁶ The threshold under article 25(3)(d) excludes contributions that are “inconsequential”, “immaterial”, or “neutral” to the commission of the crime.¹⁵⁷ Also, contrary to co-perpetration under article 25(3)(a), an accused is liable pursuant to article 25(3)(d) only for those crimes to whose commission he or she contributed, and not for all crimes committed by the group of persons acting with a common purpose.¹⁵⁸

V. Alleged defects in pleading charged crimes

i. Persecution - Article 7(1)(h)

The mental element for Persecution has been correctly pleaded

58. The Defence alleges that “[t]he allegations of and support for the individual *mens rea* of Mr Ongwen– the *required persecution intent/animus*–are missing from the CoC Decision [...]”¹⁵⁹ The Defence adds that “[i]n 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, [...] about “requisite intent and knowledge” in

¹⁵⁵ ICC-02/04-01/15-1432, para. 34.

¹⁵⁶ ICC-01/04-01/07-3436-tENG, paras.1632-1633.

¹⁵⁷ ICC-01/04-01/07-3436-tENG, para.1632; ICC-01/04-01/10-514, paras. 8-15.

¹⁵⁸ ICC-01/04-01/07-3436-tENG, paras.1619, 1632, 1634; ICC-01/04-01/10-465-Red, paras. 282, 284-285. By contrast, for co-perpetration under article 25(3)(a), the Appeals Chamber clarified that it is not required that the accused made an intentional contribution to each of the specific crimes or criminal incidents that were committed on the basis of the common plan. By making an intention an essential contribution to the common plan, the accused co-perpetrator is liable for all the crimes that occur within the framework of the common plan (ICC-01/05-01/13-2275-Red, paras. 812, 821, 1307, 1029. See also ICC-01/05-01/13-1989-RED, para. 62. According to the Appeals Chamber the common plan or agreement ties the co-perpetrators together and justifies the reciprocal imputation of their respective acts: ICC-01/04-01/06-3121-Red, para. 445; ICC-01/05-01/13-2275-Red, paras. 818, 824, 1307; ICC-01/04-01/06-2842, paras. 1000, 1004).

¹⁵⁹ ICC-02/04-01/15-1433, p. 5, title “1” (emphasis added).

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*.”¹⁶⁰

59. The Defence is mistaken. Each section of the Decision Confirming Charges which features a charge of Persecution (that is, the sections relating to the attacks on Pajule, Odek, Lukodi and Abok IDP camps) sets out the material facts that establish the relevant mental element. For example, the section on Pajule provides that “[t]he *Pajule co-perpetrators, including Dominic 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.*”¹⁶¹ Similarly the section on Lukodi provides that “*Dominic Ongwen targeted this group of civilian residents based on political grounds, as he perceived them to be affiliated with and/or supporting the Ugandan government.*”¹⁶² The Decision Confirming the Charges features analogous language in the context of Odek,¹⁶³ Abok.¹⁶⁴

60. Moreover, the Prosecution, in the Pre-Confirmation Brief, provided notice regarding the evidence it intended to lead regarding the persecutory intent of Dominic Ongwen, stating for example:

“[i]n addition to the evidence brought forward in relation to the four camp attacks described immediately below, Dominic Ongwen *expressed his discriminatory intent on several occasions*. For instance, in P-0018’s presence, an abductee recruited into the LRA and involved in the Lukodi attack under Dominic Ongwen, Dominic Ongwen said that the camps should be attacked as, “people of Acholi supports Museveni [...] and then should all be killed.”¹⁶⁵

“P-0018 also said that Dominic Ongwen gave a speech to new recruits in which he ordered them to attack Gwendia and to “kill everyone and that no

¹⁶⁰ ICC-02/04-01/15-1433, para. 11 (footnotes omitted) (emphasis added).

¹⁶¹ ICC-02/04-01/15-422-Red, p. 76, para. 25 (emphasis added).

¹⁶² ICC-02/04-01/15-422-Red, p. 84, para. 52 (emphasis added).

¹⁶³ ICC-02/04-01/15-422-Red, p. 80, para. 39.

¹⁶⁴ ICC-02/04-01/15-422-Red, p. 88, para. 65.

¹⁶⁵ ICC-02/04-01/15-375-AnxC-Red2, para. 135 (footnotes omitted) (emphasis added).

one should remain” because “the government had sent helicopters to kill our leaders”. Similarly, on 29 September 2004, Dominic Ongwen said that “civilians always keep singing that LRA should all come out of the bush if they don’t want to get finished”, presuming that they supported the government. “He said as they keep saying that, he will organise more atrocities.”¹⁶⁶

61. The Prosecution provided notice of evidence regarding the persecutory intent of Dominic Ongwen in the context of Pajule,¹⁶⁷ Odek,¹⁶⁸ Lukodi¹⁶⁹ and Abok¹⁷⁰. The Prosecution also provided notice regarding Dominic Ongwen’s conduct at attacks other than those charged which demonstrated his general discriminatory intent.¹⁷¹ Analogous references were provided in the Pre-Trial Brief.¹⁷² In light of the extensive notice provided, it is clear that the Defence’s allegations of “barebones” notice regarding persecutory intent are entirely unfounded.

There is no defect in the pleading of the underlying crimes

62. The Defence also argues that “[t]he 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.”¹⁷³ The Defence adds that “[t]he 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.”¹⁷⁴ The precise nature of the Defence’s complaint is unclear. The Defence’s complaint, in the relevant title, is that the *elements* (presumably legal elements) of the underlying crimes are missing.¹⁷⁵ In the body of the text, it is that

¹⁶⁶ ICC-02/04-01/15-375-AnxC-Red2, para. 136 (footnotes omitted)

¹⁶⁷ ICC-02/04-01/15-375-AnxC-Red2, paras. 140, 141.

¹⁶⁸ ICC-02/04-01/15-375-AnxC-Red2, paras. 142, 143.

¹⁶⁹ ICC-02/04-01/15-375-AnxC-Red2, paras. 144, 145.

¹⁷⁰ ICC-02/04-01/15-375-AnxC-Red2, paras. 146, 147.

¹⁷¹ ICC-02/04-01/15-375-AnxC-Red2, paras. 137-139.

¹⁷² ICC-02/04-01/15-533, paras 177-203. 245, 331, 399, 475.

¹⁷³ ICC-02/04-01/15-1433, p. 8, title “2” (emphasis added).

¹⁷⁴ ICC-02/04-01/15-1433, para. 24.

¹⁷⁵ ICC-02/04-01/15-1433, p. 8, title “2”.

there are “*no specific allegations* (presumably factual allegations) to support the elements”. In any case, none of the above is accurate. The “underlying crimes” are the crimes that were charged in connection with the attacks on the Pajule, Odek, Lukodi and Abok IDP camps and their elements are set out front and centre in the Confirmation Decision, directly linked to the charge of Persecution.

63. For example, the factual allegations underlying the Persecution charge for Pajule read, “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 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.”¹⁷⁶

64. The *factual allegations* underlying the elements of each of the offences cited above, regarding Pajule, are also set out in the same section of the Confirmation Decision. Discrete, free-standing paragraphs of factual allegations feature, regarding attacks against the civilian population,¹⁷⁷ murder,¹⁷⁸ torture/cruel treatment/other inhumane acts,¹⁷⁹ enslavement,¹⁸⁰ and pillaging.¹⁸¹ Hence, there is no discernible

¹⁷⁶ ICC-02/04-01/15-422-Red, p. 75-76, para. 25 (emphasis added).

¹⁷⁷ ICC-02/04-01/15-422-Red, p. 74-75, para. 20.

¹⁷⁸ ICC-02/04-01/15-422-Red, p. 75, para. 21.

¹⁷⁹ ICC-02/04-01/15-422-Red, p. 75, para. 22.

¹⁸⁰ ICC-02/04-01/15-422-Red, p. 75, para. 23.

¹⁸¹ ICC-02/04-01/15-422-Red, p. 75, para. 23.

defect in how the charges have been pleaded in the context of Pajule. There is no lack of specificity.

65. Similarly, the *evidence* underlying factual allegations cited above, regarding Pajule, is also set out in the section on Pajule in the Pre-Confirmation Brief. Discrete, free-standing summaries of evidence feature, regarding attacks directed against the civilian population,¹⁸² murder,¹⁸³ torture/cruel treatment/other inhumane acts,¹⁸⁴ enslavement,¹⁸⁵ and pillaging.¹⁸⁶ The Pre-Confirmation Brief also makes it clear that these summaries of evidence relate to the acts or crimes¹⁸⁷ that underlie the charge of Persecution, stating that “[t]he 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 inhumane acts), count 8 (enslavement), and count 9 (pillaging) form the underlying conduct of the crime of persecution.”¹⁸⁸ The Pre-Trial Brief contains analogous submissions.¹⁸⁹ The Prosecution has also taken the above approach with regard to the attacks on Odek, Lukodi, and Abok IDP camps.

ii. Enslavement - Article 7(1)(h)

66. The Defence argues that “[i]n the CoC Decision, the Pre-Trial Chamber II *fails to identify the full definition of enslavement*.”¹⁹⁰ This is profoundly unclear. It does not

¹⁸² ICC-02/04-01/15-375-AnxC-Red2, paras. 157-158.

¹⁸³ ICC-02/04-01/15-375-AnxC-Red2, paras. 159-164.

¹⁸⁴ ICC-02/04-01/15-375-AnxC-Red2, paras. 165-174.

¹⁸⁵ ICC-02/04-01/15-375-AnxC-Red2, paras. 175-178.

¹⁸⁶ ICC-02/04-01/15-375-AnxC-Red2, paras. 179-182.

¹⁸⁷ See element 4 of the crime against humanity of Persecution (Article 7 (1) (h)) in the Elements of Crimes: “The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court”.

¹⁸⁸ ICC-02/04-01/15-375-AnxC-Red2, para. 183.

¹⁸⁹ ICC-02/04-01/15-533, paras. 216 –217 (Count 1 - attacks directed against the civilian population), paras. 218-224 (Counts 2-3 – murder), paras. 225 – 233 (Counts 4-5 – torture), paras. 234-240 (Count 8 – enslavement), paras. 241- 244 (Count 9 - pillaging). See further para. 245 (The Pre-Trial Brief also makes it clear that these summaries of evidence relate to the acts or crimes that underlie the charge of Persecution).

¹⁹⁰ ICC-02/04-01/15-1433, para. 55 (emphasis added).

identify what it means by a “full definition” of enslavement. Nor does it identify a particular lacuna in the analysis of the Chamber. The Defence then claims “[a]t most, the Pre-Trial Chamber II uses selectively only parts of the language from the Elements of Crimes for enslavement [...] when describing facts in a conclusory manner *instead of tying specific witnesses’ testimony to each element*.¹⁹¹ Regarding the Pre-Trial Chamber purportedly not “tying specific witnesses’ testimony to each element” as pointed out earlier above, this argument is premised on a misunderstanding of the purpose of the Confirmation Decision. The Confirmation Decision is supposed to inform the defence of the material facts that have been confirmed for trial. It is not meant to provide a comprehensive overview of the evidence supporting each charge.

67. The Defence argues additionally that:

“[t]he CoC Decision, in the charges section, [...] is, [...], *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 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.*”¹⁹²

68. According to the Defence, “[n]one of these legal elements, and factual support for them is to be found in the CoC Decision.¹⁹³ This allegation is manifestly incorrect, as will become evident from the discussion below.

69. The Confirmation Decision made the nexus between the charged crimes and the relevant LRA attack directed against the civilian population in northern Uganda abundantly clear, setting out that:

¹⁹¹ ICC-02/04-01/15-1433, para. 55 (emphasis added).

¹⁹² ICC-02/04-01/15-1433, para. 57 (emphasis added).

¹⁹³ ICC-02/04-01/15-1433, para. 58.

“From at least 1 July 2002 to 31 December 2005, the overall objective of the LRA was to overthrow the government of Uganda through armed rebellion. In order to achieve this objective and to sustain its activities, the LRA adopted a number of policies that were implemented throughout the organisation. *The LRA adopted a policy of launching attacks on civilians, including those living in protected internally displaced persons’ camps (“IDP camps”) and abducting civilians; male abductees to be conscripted and used as soldiers and female abductees to serve primarily as domestic servants, sex slaves and forced exclusive conjugal partners.*”¹⁹⁴

“[...] from 1 July 2002 to 31 December 2005, the LRA carried out an attack directed against the civilian population of northern Uganda. Such attack was widespread as it extended over a wide geographical area and a considerable period of time, and involved a large number of acts of violence victimising a large number of civilians, as well as systematic, as it was planned and the violence followed a discernible pattern. [...] it is *sufficiently established that the acts with which Dominic Ongwen is charged as amounting to crimes against humanity share common features in terms of their characteristics, nature, aims, targets and alleged perpetrators, as well as times and locations, with the other acts forming the basis of the LRA attack directed against the civilian population in northern Uganda.*”¹⁹⁵

70. The Confirmation Decision provided explicitly that this was the case in the context of the charge of enslavement, providing: “[...] the contextual elements of the crimes against humanity with which Dominic Ongwen is charged under charges [...] 8, [...] 20, [...] 33, [...] 46, [...] 57 [...] 68 are established.”¹⁹⁶

71. The relevant mental element is equally clear in the Confirmation Decision:

“The conduct that forms the basis for the charges in this document was committed as part of a widespread or systematic attack directed against the civilian population of northern Uganda. *As a long-term member of the LRA who held a number of command positions, and due to his participation in numerous LRA operations, Dominic Ongwen knew that his conduct was part of this widespread or*

¹⁹⁴ ICC-02/04-01/15-422-Red, p. 71, para. 3 (emphasis added).

¹⁹⁵ ICC-02/04-01/15-422-Red, p. 29, para. 63 (emphasis added). *See further* ICC-02/04-01/15-422-Red, p. 71, para. 3.

¹⁹⁶ ICC-02/04-01/15-422-Red, p. 29, para. 64.

systematic attack against the civilian population pursuant to, or in furtherance of the organisational policy."¹⁹⁷

72. In light of the above, it is evident that there is no lacuna in the pleading of the contextual elements for crimes against humanity in the context of the offence of enslavement, in terms of both objective and subjective elements.

iii. Conscription/use of children - Article 8(2) (e)(vii)

There is no defect in how the contributions orders of Dominic Ongwen have been pleaded

73. The Defence claims that "[p]aragraph 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*."¹⁹⁸ Moreover, according to the Defence, "[i]n the 2nd portion of the CoC Decision, the section on conscription and use of child soldiers [...] 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*. In addition, the section in paragraph 129 on command responsibility *simply tracks the language of the Statute, 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*."¹⁹⁹

74. None of the above Defence claims are supportable. In the Confirmation Decision, the factual allegations regarding Ongwen's contributions to the relevant common plan, including orders to abduct children are clear. The Confirmation, Decision provides, for example:

¹⁹⁷ ICC-02/04-01/15-422-Red, p. 71, paras. 3-4 (emphasis added).

¹⁹⁸ ICC-02/04-01/15-1433, para. 62 (emphasis added).

¹⁹⁹ ICC-02/04-01/15-1433, para. 66 (footnotes omitted) (emphasis added).

“Dominic Ongwen contributed to the realization of the common plan by: [...]

- J “ordering his subordinates to abduct children to replenish the ranks of his troops, who proceeded to abduct and conscript children under 15 into Sinia brigade as a result of his orders [...]
- J having operational control over the implementation of the child soldiers common plan in the units he commanded [...]
- J Dominic Ongwen knew or, owing to the circumstances at the time, should have known that the LRA fighters were committing or were about to commit the crimes of conscription and use of child soldiers. Dominic Ongwen had effective command and control, or authority and control, over LRA fighters that committed these crimes.”²⁰⁰

75. Further detail is provided in the Pre-Confirmation Brief, including, for example:

“[...] abduction orders, which remained in force at least to the start of peace talks in 2006, were transmitted to LRA brigade and battalion commanders, including Dominic Ongwen, via radio. *The brigade and battalion commanders were entrusted with executing orders, thereby securing the influx of new fighters. P-0205 recalled Dominic Ongwen ordering his units to abduct civilians aged 10 years and older to replenish their ranks.*”²⁰¹

“*Adhering to Dominic Ongwen’s orders, fighters under his command continuously abducted boys and young men across northern Uganda in the relevant period to serve as fighters. P-0224 said that abductions occurred daily; children were abducted from their homesteads as well as from the side of the roads. P-0205 and P-0245 explained that boys were abducted as long as they looked healthy and able to fight, even when they were only 10 or 12 years old.*”²⁰²

“*Dominic Ongwen regularly ordered his troops to abduct. By way of example: Dominic Ongwen organised an abduction mission to Acet, in which P-0233 took part. Its objective, among others, was to abduct boys between 13 and 15 years of age. Boys in that age range were abducted from Acet and conscripted into the Sinia brigade. During the briefing prior to the attack on Odek IDP camp on or about 29 April 2004, Dominic Ongwen instructed his fighters that if they find “good boys or girls” they should return with them. As explained by P0205 who was present at the briefing, this instruction meant those capable of being soldiers, with 12*

²⁰⁰ ICC-02/04-01/15-422-Red, p. 103, para. 129.

²⁰¹ ICC-02/04-01/15-375-AnxC-Red2, para. 625 (footnotes omitted) (emphasis added).

²⁰² ICC-02/04-01/15-375-AnxC-Red2, para. 626 (footnotes omitted). (emphasis added)

being the preferred starting age. Boys under 15 were subsequently abducted in the Odek attack and conscripted into Sinia brigade, including P-0252 who was 11 years old at the time and P-0275 who was nine years old. Ongwen reported abducting eight boys from Odek in an intercepted radio communication on 30 April 2004.”²⁰³

No lacuna in the pleading of the contextual element

76. The Defence claims that the Confirmation Decision “fails to identify and define the contextual elements of war crimes for each of these counts.”²⁰⁴ This is incorrect. The Confirmation Decision provides that:

“[t]he Prosecutor charges Dominic Ongwen with [...] war crimes [...]. The evidence provided by insider witnesses, the statements of civilians who came in contact with the LRA during its attacks or otherwise, and of persons associated with the Ugandan government, as well as the records of intercepted LRA radio communications are all relevant to establish the contextual elements of the war crimes [...].”²⁰⁵

“In particular, it is a notorious fact, referred to abundantly in the evidence, that in the time period relevant to the charges brought against Dominic Ongwen (i.e. between 1 July 2002 and 31 December 2005) in northern Uganda *there was protracted armed violence between the LRA on the one side and the Ugandan government, principally its armed forces, the UPDF, together with associated local defence units (LDUs) on the other side.* Such protracted armed violence, due to its intensity and its broad geographical scope covering the entire northern Uganda, *amounted to an armed conflict not of an international character within the meaning of article 8 of the Statute.* Also, due to the time, place and nature, it is satisfactorily established that *the conduct with which Dominic Ongwen is charged as amounting to war crimes was closely linked to the hostilities between the LRA and the Ugandan government.* Accordingly, the Chamber is satisfied that *the contextual elements of the war crimes with which Dominic Ongwen is charged under charges [...] 69 and 70 are established.*”²⁰⁶

“From at least 1 July 2002 to 31 December 2005 a *protracted armed conflict* not of an international character between the LRA and armed forces of the government of Uganda together with associated local armed units existed in

²⁰³ ICC-02/04-01/15-375-AnxC-Red2, para. 627 (footnotes omitted). (emphasis added)

²⁰⁴ ICC-02/04-01/15-1433, para. 67.

²⁰⁵ ICC-02/04-01/15-422-Red, at p. 27-28, para. 60.

²⁰⁶ ICC-02/04-01/15-422-Red, at p. 28, para. 61 (emphasis added).

northern Uganda. The armed hostilities exceeded, in intensity, internal disturbances and tensions such as riots, isolated and sporadic acts of violence.²⁰⁷

77. The Confirmation Decision also makes it clear that the above applies to all charges, providing that:

“[t]he statements of material facts and circumstances and legal characterisations in each category of charges should be read in conjunction with this section.”²⁰⁸

No lacuna in the pleading of the mental element

78. As per the Defence, in the context of counts 69 and 70, there are no “specific allegations as to Mr Ongwen’s *mens rea* [...] the elements of intent and knowledge are not detailed and specified.”²⁰⁹ The Defence appear to be ignoring the following passages in the Confirmation Decision, which provide:

“Between at least 1 July 2002 and 31 December 2005 Dominic Ongwen, Joseph Kony, and the Sinia brigade leadership (“child soldiers coperpetrators”) *pursued a common plan* to abduct children in the territory of northern Uganda and conscript them into the Sinia Brigade in order to ensure a constant supply of fighters (“child soldiers common plan”). The co-perpetrators *meant to engage in their conduct and intended to bring about the objective elements of the crimes* of children under the age of 15 years being conscripted into the LRA and used to participate actively in hostilities or were *aware that they would occur in the ordinary course of events* in implementing the child soldiers common plan.”²¹⁰

“Dominic Ongwen *knew or should have known* that the children conscripted into the LRA and used to actively participate in hostilities pursuant to the common plan were younger than 15.”²¹¹

²⁰⁷ ICC-02/04-01/15-422-Red, p. 71, para. 5 (emphasis added).

²⁰⁸ ICC-02/04-01/15-422-Red, p. 72, para. 8 (emphasis added).

²⁰⁹ ICC-02/04-01/15-1433, para. 65 (footnotes omitted).

²¹⁰ ICC-02/04-01/15-422-Red, p. 102, para. 126 (emphasis added).

²¹¹ ICC-02/04-01/15-422-Red, p. 103, para. 130 (emphasis added).

79. The Defence adds that “there are *no allegations, and no factual support, in either portion of the CoC Decision*” as to “*awareness of the factual circumstances that established the existence of an armed conflict*”.²¹² A glance at the Confirmation Decision shows that this claim is manifestly inaccurate. The Confirmation Decision provides that:

“[t]he conduct that forms the basis for the charges in this document took place in the context of and was associated with this armed conflict. As a long term member of the LRA who held a number of command positions, and due to his participation in numerous LRA operations, Dominic Ongwen was aware of the factual circumstances that established the existence of this non international armed conflict.”²¹³

80. Notably, at the start of the section on child soldier crimes, the Confirmation Decision refers back to the above statement, stating “The factual allegations set out in Chapter 3 (contextual elements) [...] are incorporated herein by reference.”²¹⁴

81. The Pre-Confirmation brief provides additional context, setting out 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.”²¹⁵

“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 [...] 69 and 70, which are charged 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.”²¹⁶

No lacuna in pleading of common plan

²¹² ICC-02/04-01/15-1433, para. 64 (footnotes omitted) (emphasis added).

²¹³ ICC-02/04-01/15-422-Red, p. 72, para. 7 (emphasis added).

²¹⁴ ICC-02/04-01/15-422-Red, p. 102, para. 125.

²¹⁵ ICC-02/04-01/15-375-AnxC-Red2, para. 23.

²¹⁶ ICC-02/04-01/15-375-AnxC-Red2, para. 23 (emphasis added).

82. According to the Defence, “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 these unnamed persons”.²¹⁷

83. The Prosecution notes that the co-perpetrators were specified in the Confirmation Decision as “Dominic Ongwen, Joseph Kony, and the Sinia brigade leadership”.²¹⁸ This is sufficiently specific for the purposes of pleading the material facts of the common plan in this case. *Firstly*, Dominic Ongwen’s role in and contributions to the common plan have been demarcated clearly and in detail.²¹⁹ *Secondly*, Joseph Kony, an obviously significant co-perpetrator, has been identified by name.²²⁰

84. *Thirdly*, the other co-perpetrators have been identified as members of a discrete category of persons: “Sinia brigade leadership”. Considering the nature, organization, and functioning of the Sinia brigade, this is a sufficiently concrete way to identify the co-perpetrators. Given the length of the charged period and the change of persons who held these leadership positions, it is also the most practical way to do so. Contrary to what the Defence asserts, the role of the co-perpetrators *is* defined within the term used – they are the individuals, holding leadership positions within the brigade. The Sinia brigade was a discrete, identifiable military unit, which had a formal structure, a clearly discernible internal hierarchy, and standard procedures of operation during the entire charged period. Persons holding each of the leadership positions within Sinia at the brigade and battalion level changed regularly due to promotions, demotions, death or escape/capture. However, the discrete, identifiable nature and organization of the brigade, the formal structure,

²¹⁷ ICC-02/04-01/15-1433, para. 62 (emphasis added).

²¹⁸ ICC-02/04-01/15-422-Red, p. 102, para. 126.

²¹⁹ *See*, for example, ICC-02/04-01/15-422-Red, p. 103, para. 129.

²²⁰ ICC-02/04-01/15-422-Red, p. 102, para. 126.

and internal hierarchy *remained stable and unchanged*. Hence, the concept of “Sinia brigade leadership”, which is embedded in these latter, enduring aspects of the Sinia brigade, is, in this particular case, a sufficiently concrete and practical way to identify co-perpetrators other than Dominic Ongwen and Joseph Kony in light of the characteristics and functioning of the LRA during the period of the charges. The Confirmation Decision provides additional detail in this context:

“[t]he Sinia brigade, as one of the four LRA brigades, consisted of a *brigade headquarters and a number of battalions and companies*. Joseph Kony was the commander-in-chief of the LRA. *Orders were generally communicated from Joseph Kony and other leaders to the brigade commander, who communicated them to the battalion commanders, who in turn passed them to their subordinates*”²²¹

“In the LRA, *including the Sinia brigade*, subordinates followed the orders of their superiors almost automatically. LRA fighters, conditioned by, and under threat of, physical punishment, *obeyed superiors and followed orders*. The LRA maintained a violent disciplinary system that guaranteed adherence to orders and rules. The LRA, *including the Sinia brigade*, was composed of a sufficient number of fungible individuals capable of replacement to guarantee that the orders of superiors were carried out, if not by one subordinate, then by another. Dominic Ongwen was aware of the fundamental features of the LRA, including the Sinia brigade, as an organised and hierarchical apparatus of power.”²²²

“Between 1 July 2002 and 31 December 2005 Dominic Ongwen was a military commander in the LRA, commanding units first at the battalion, and then at the brigade level. He spent the majority of this time in Sinia brigade, but also served for some time within the LRA headquarters, Control Altar. He *commanded a battalion in Sinia brigade* for much of mid-2002 to March 2004. *On or about 5 March 2004, Dominic Ongwen became the commander of the Sinia brigade.*”²²³

²²¹ ICC-02/04-01/15-422-Red, p. 72, para. 10 (emphasis added).

²²² ICC-02/04-01/15-422-Red, p. 72, para. 10 (emphasis added).

²²³ ICC-02/04-01/15-422-Red, p. 73, para. 12 (emphasis added).

85. Additional details which render “Sinia brigade leadership” a discrete and identifiable category of persons, is provided in the Pre-Confirmation Brief, which sets out:

“The Sinia brigade consisted of three battalions: Oka, Terwanga, and Siba. It also had a brigade headquarters composed of various departments [...]. [...]. Each battalion had a commander, a deputy commander, [...]. Each battalion was composed of three companies. Each company had a commander and a deputy commander. Orders were communicated from Joseph Kony to the brigade commander by radio, who communicated them to the battalion commanders, who in turn would pass them to the fighters in their respective battalion.”²²⁴

86. The Pre-Confirmation Brief also identified various members of Sinia brigade leadership by name.²²⁵

87. The Prosecution notes, additionally, that the *Special Court for Sierra Leone* has held, that “the identities of all participants and the continuing existence of the joint criminal enterprise over the entire time period alleged in the Indictment are not elements of the *actus reus* of the joint criminal enterprise that need to be proven beyond reasonable doubt by the Prosecution.”²²⁶ Similarly, the Chambers of the ICTY have found that “[t]he first element is the participation of a plurality of persons in a common purpose. It is not required that each member in the JCE is identified by name: it can be sufficient to refer to categories or groups of persons.”²²⁷ The Prosecution notes, as a related matter, that the Trial Chamber in this case has rejected requests from the

²²⁴ ICC-02/04-01/15-375-AnxC-Red2, para. 85.

²²⁵ ICC-02/04-01/15-375-AnxC-Red2, para. 91 (“Kony said on the radio that Dominic Ongwen was a battalion commander in Sinia brigade, under the command of Buk Abudema and Lapanyikwara, second-in-command of Sinia brigade”), para. 92 (“On or about 5 March 2004, Dominic Ongwen became the commander of Sinia brigade. He took over the brigade from Labongo, who had been acting commander after Buk Abudema was transferred”), para. 93 (“Okello Franco Kalalang was initially the brigade Major in Sinia brigade headquarters and then Terwanga battalion commander.”) para. 652 (“Tabuley on 21 July 2002 reported that Lapanyikwara, who was the second-in command of Sinia brigade, had abducted school children”, “On 18 August 2002, Lukwiya [...] reported that Pokot, a battalion commander in Sinia, abducted many recruits”).

²²⁶ SCSL, *Sesay, Kallon and Gbao* Trial Judgment 2 March 2009, para. 353.

²²⁷ ICTY, *Prosecutor v. Popović et al. ("Sebrenica")*, "Judgment", IT-05-88-T, 10 June 2010, para. 1023 (emphasis added).

Defence for disclosure of certain materials relating to “*other co-perpetrators, contributors or parties of the crimes of which Mr Ongwen is accused.*”²²⁸

88. Additionally, to hold Dominic Ongwen criminally responsible for the charged crimes committed by other members of the Sinia brigade and its leadership, it does not matter who these leaders were at a given point in time. This is because the Sinia brigade and its leadership were part of an organized structure of power - the LRA - that was controlled by Kony, and whose members were fungible. Because Kony and Dominic Ongwen shared a common plan and because Dominic Ongwen provided an essential contribution to that plan, Dominic Ongwen is responsible for the specific crimes that were committed by the Sinia brigade in pursuance of this specific common plan.²²⁹

VI. Challenges to jurisdiction

i. The Defence is seeking to bypass Article 19

Forced Marriage

89. The Defence argues that “the present motion [...] identifies defects in the pleading of the crimes of [...] *forced marriage*, [...]. 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.²³⁰ The Defence adds that “the crime of forced marriage did not, and does not exist in the Statute”.²³¹

²²⁸ ICC-02/04-01/15-1351, p. 11-12, title (“ii”) paras. 30-33.

²²⁹ This does not make Ongwen responsible for all the crimes that Kony may have committed, but only for those that fall within the scope of the specific common plan that he has with Kony.

²³⁰ ICC-02/04-01/15-1433, para. 3 (emphasis added).

²³¹ ICC-02/04-01/15-1433, para. 40.

90. To argue, as the Defence does above, that forced marriage does not fall within the category of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”²³² under article 7, is to argue that the court has no jurisdiction over forced marriage as a crime. Hence, this is a jurisdictional challenge. It has nothing to do with the specificity of charges. Neither does it have anything to do with the provision of notice regarding the evidence to be used at trial.

91. This distinction is important since the procedural pathway for a jurisdictional challenge is different from a challenge to the specificity of a charge or a challenge regarding notice provided regarding an item of evidence. Moreover, the Defence needs to meet certain threshold pre-requisites before making a challenge to jurisdiction. For example, article 19(4) of the Statute provides that “[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once [...] [by an accused]. The challenge shall *take place prior to or at the commencement of the trial*. In *exceptional circumstances*, the Court may *grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial*.” Even if leave is granted, it is then necessary for the trial chamber to then “decide on the procedure to be followed” and “take appropriate measures for the proper conduct of the proceedings.”²³³

92. All of the above pre-requisites were simply ignored by the Defence: No leave was sought, no exceptional circumstances shown, despite the fact that the jurisdictional challenge is being made more than *two years* after the commencement of trial. Moreover, it is important to note that the *consequences* of a jurisdictional challenge differ from that of a challenge to the specificity of a charge or the provision

²³² Article 7(1)(k).

²³³ Rule 58(2).

of notice regarding the use of an item of evidence. A decision regarding the latter can only be appealed after obtaining leave pursuant to article 82(1)(d). A decision about the former can be appealed as a right pursuant to Articles 19 (6) and 82 (1) (a).²³⁴ In addition, the procedures set out in rules 58 and 59 apply. Hence, this jurisdictional challenge cannot be entertained merely because it has been “packaged” as part of a filing on specificity of charges/notice regarding evidence.

93. However, should the Chamber decide to entertain the merits of this jurisdictional challenge, the Prosecution submits that forced marriage is a crime within the meaning of article 7(1)(k). The Prosecution incorporates by reference the arguments made in the Pre-Confirmation Brief²³⁵ and the Pre-Trial Brief.²³⁶

94. Additionally, the Prosecution notes the analysis of the Pre-Trial Chamber in *Ongwen*, which provided that:

“[...] forcing another person to serve as a conjugal partner may, per se, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify as “other inhumane acts” under article 7 of the Statute rather than being subsumed by the crime of sexual slavery”.²³⁷ The PTC added that “[...] forced marriage as another inhumane act differs from the other crimes with which Dominic Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests. [...]”²³⁸

95. According to the Pre-Trial Chamber, the central element of forced marriage:

“[...] is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife”. The fact that

²³⁴ ICC-01/04-02/06-1225, para. 18 (“Articles 19(6) and 82(1) (a) allow the parties a right of appeal without leave for decisions in respect of jurisdiction”).

²³⁵ ICC-02/04-01/15-375-AnxC-Red2, paras. 433-437.

²³⁶ ICC-02/04-01/15-533, paras. 506-511.

²³⁷ ICC-02/04-01/15-422-Red, para. 91.

²³⁸ ICC-02/04-01/15-422-Red, para. 92.

such “marriage” is illegal and not recognised by, in this case, Uganda, is irrelevant. What matters is that the so-called “marriage” is factually imposed on the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which Dominic Ongwen is charged. As held by the SCSL, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is “not predominantly a sexual crime.”²³⁹

96. The Pre-Trial Chamber agreed with the Prosecution that the victims of forced marriage:

“[...] suffer separate and additional harm to those of the crime of sexual slavery, or other crimes under the Statute. Indeed, forced marriage as defined above violates the independently recognised basic right to consensually marry and establish a family.³² This basic right is indeed the value (distinct from e.g. physical or sexual integrity, or personal liberty) that demands protection through the appropriate interpretation of article 7(1)(k) of the Statute.”²⁴⁰

97. More recently, in the case of *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*,²⁴¹ the Pre-Trial Chamber found that “there are reasonable grounds to believe that [...] other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health, including forced marriage [...], under article 7(1)(k) of the Statute, were committed [...].”²⁴²

98. In light of the above, the Prosecution submits that the Defence’s jurisdictional arguments regarding forced marriage have no merit.

²³⁹ ICC-02/04-01/15-422-Red, para. 93.

²⁴⁰ ICC-02/04-01/15-422-Red, para. 94 (footnotes omitted).

²⁴¹ ICC-01/12-01/18-2-tENG, para. 9, 12.

²⁴² ICC-01/12-01/18-2-tENG, para. 12.

Article 25(3)(a) – Indirect Co-perpetration

99. The Defence argues, that “[a]s a matter of law, the mode of liability of indirect co-perpetration should be dismissed”²⁴³ and adds that “neither the Pre-Trial Chamber nor the Trial Chamber has inherent power to simply add it to the Statute and to proceed with it as a charged mode of liability.”²⁴⁴ Following the same logic as with regard to forced marriage above, it is clear that this is a challenge to jurisdiction. The same procedural concerns arise here. Hence, here too, this jurisdictional challenge cannot be entertained merely because it has been “packaged” as part of a filing on specificity of charges/notice regarding evidence.

100. However, should the Chamber decide to entertain the merits of this jurisdictional challenge, the Prosecution submits that indirect co-perpetration is a valid mode of liability, derived from the Statute, and part of the settled (appellate) law of the Court. As noted by the Appeals Chamber in *Lubanga*:

“in circumstances where a plurality of persons was involved in the commission of crimes under the Statute, the question of whether an accused ‘committed’ a crime – and therefore not only contributed to the crime committed by someone else – cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct. Rather, what is required is a normative assessment of the role of the accused person in the specific circumstances of the case. The Appeals Chamber considers that the most appropriate tool for conducting such an assessment is an evaluation of whether the accused had control over the crime”²⁴⁵

101. The Prosecution notes in this context, that indirect co-perpetration has not been “added to the Statute”. Rather, in the words of the Appeals Chamber, the mode

²⁴³ ICC-02/04-01/15-1431, para. 27.

²⁴⁴ ICC-02/04-01/15-1431, para. 28.

²⁴⁵ ICC-01/04-01/06-3121-Red, para. 473. Notably, although Mr. Lubanga was convicted as co-perpetrator, the Appeals Chamber found that article 25(3) (a) also included indirect co-perpetration.

of liability is the product of “*interpreting and applying* article 25(3)(a) of the Statute”.²⁴⁶ Moreover, the Appeals Chamber considered and dismissed the possibility that such an approach to co-perpetration would result in a breach of article 22 of the Statute or the principle of *in dubio pro reo*.²⁴⁷

102. Finally, on this point, the Prosecution notes that indirect co-perpetration has been universally adopted by chambers of this Court, without any exception.²⁴⁸ Indeed, as noted by the Pre-Trial Chamber in this case, when the Defence first challenged the existence, under the Statute, of the mode of liability of indirect co-perpetration, “in previous cases, similar challenges have also consistently been rejected.”²⁴⁹

²⁴⁶ ICC-01/04-01/06-3121-Red, para. 470 (emphasis added).

²⁴⁷ ICC-01/04-01/06-3121-Red, para. 470 (emphasis added).

²⁴⁸ For example, the Court has recognized the existence of indirect co-perpetration in *Bemba* (ICC-01/05-01/08-424, paras. 346 -350); *Bashir* (ICC-02/05-01/09-3, para. 223); *Kenyatta et al* (ICC-01/09-02/11-382-Red, paras. 296-8); *Abu Garda* (ICC-02/05-02/09-243-Red, paras. 156 and 157) and *Gbagbo* (ICC-02/11-01/11-656-Red, , *see* paras. 230-241) cases.

²⁴⁹ ICC-02/04-01/15-422-Red, p. 20, para. 41, citing the *Katanga* and *Ngudjolo* Confirmation Decision, ICC-01/04-01/07-717 paras. 490 et seq; and the *Ruto et al.* Confirmation Decision, ICC-01/09-01/11-373 paras. 286-290.

Conclusion

103. For the reasons set out above, the Prosecution requests the Chamber to dismiss the Defence Submissions.



Fatou Bensouda, Prosecutor

Dated this 25th day of February 2019
At The Hague, the Netherlands