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**International
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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

**Public Redacted Version of “Motions on Defects in the Confirmation Decision
Regarding SGBC”**

Source: Defence for Mr Dominic Ongwen

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

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I. INTRODUCTION

1. In the previously filed motions asserting defects in the Confirmation Decision ('Defects Series'), the Defence for Mr Dominic Ongwen ('Defence') addressed some defects in respect to notice for the sexual and gender based crimes ('SGBC').¹ The Defence reserved its right to amend the Defects Series.²
2. The Defence is now seeking leave of the Trial Chamber IX ('Chamber'), pursuant to rule 134(2) of the Rules of Procedure and Evidence ('Rules') to amend its Defects Series, particularly regarding defects in the Confirmation Decision in respect to SGBC, related to individual criminal responsibility (Counts 50-60).³ The Defence contends that the present Motion is timely because the lack of specificity in the allegations continues to impact on Mr Ongwen's fair trial rights and the conduct of the Defence presentation of evidence.
3. The focus of this Motion is defects in notice in regard to the element of the geographic parameters of the alleged crimes, which also impacts notice of the temporal aspect of the crimes.
4. It is the Defence position that only alleged crimes committed within Uganda are within the parameters of this case. Consequently, vague allegations about crimes committed in Sudan contribute to the lack of specificity as to where and when alleged crimes occurred in Uganda.
5. Even if the Court finds that alleged crimes in Sudan are within the parameters of this case (which the Defence contests), the lack of specificity as to which crimes occurred in Uganda or Sudan, and when they allegedly occurred, fails to provide adequate notice to the Defence.
6. In the Confirmation Decision, there is a statement in the first section (referred to by Pre-Trial Chamber II as the '**reasoning part**') regarding geographic parameters within the territory of Uganda.⁴ The second section (referred to by Pre-Trial Chamber II as the disposition or the '**operative part**'), for three persons in Counts 50-60, includes references to crimes which occurred both in northern Uganda and Sudan. There is only one reference in the Confirmation Decision in the reasoning part about the territory of Sudan/South Sudan. The

¹ *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), [ICC-02/04-01/15-1433](#), 1 Feb. 2019 ('**Part IV of the Defects Series**'), paras 34-53. The Defence files this Motion as Confidential because it discusses 'Article 56' closed session testimonies.

² Part IV of the Defects Series, para. 72.

³ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-497](#), 23 March 2016 ('**Confirmation Decision**').

⁴ Confirmation Decision, para. 2.

reference occurs in a highly general statement in the first paragraph of the background section that is indicating where the LRA engaged in fighting over the years with Ugandan government forces.⁵ There are no details in either part of the Confirmation Decision, the reasoning or the operative sections, as to which alleged crimes occurred at what location.

7. Similarly, the Prosecution Pre-Confirmation Brief ('PPCB')⁶ and the Prosecution Pre-Trial Brief ('PPTB')⁷ do not provide detailed notice as to location of the alleged crimes and cannot cure the defect. The inadequate notice of location is compounded by unclear temporal facts for each location.
8. The lack of specificity as to location results in defective notice, which violates Mr Ongwen's right to a fair trial, pursuant to article 67(1) of the Statute.
9. In sum, the pleading of the SGBC in respect to geographic parameters and specificity in respect to P-99, P-101 and P-214 is defective, and, as a matter of law, should be dismissed.

II. SUBMISSIONS

A. Notice, including geographic notice, is fundamental to fair trial

10. As previously argued in Part I of the Defects Series, notice of the charges and modes of liability is fundamental to a fair trial pursuant to article 67(1)(a) of the Statute.⁸
11. The first minimum guarantee to an accused is the right "to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks."⁹ The right to notice is the right from which the other specific rights under Article 67 of the Statute are derived.¹⁰

⁵ Confirmation Decision, para. 3.

⁶ *Ongwen*, Public redacted version of "Pre-confirmation brief", 21 December 2015, ICC-02/04-01/15-375-Conf-AnxC, [ICC-02/04-01/15-375-AnxC-Red2](#), 8 June 2016 ('PPCB').

⁷ *Ongwen*, Prosecution, Prosecution's Pre-Trial Brief, [ICC-02/04-01/15-533](#), 6 Sept. 2016 ('PPTB').

⁸ *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial (Part I of the Defects Series), [ICC-02/04-01/15-1430](#), 1 Feb. 2019, para. 6.

⁹ Article 67(1)(a) of the Statute.

¹⁰ *Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', [ICC-02/04-01/15-1562](#), 17 July 2019, para. 69: "The Appeals Chamber recalls that 'the right of the accused person to be informed of the charges is firmly grounded in the Statute' and it has already highlighted 'the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one's defence'."

12. Pre-Trial Chamber II's Judge Tarfusser recognized the importance of notice in the charging instrument during the Status Conference on 19 May 2015. Judge Tarfusser found:

First, the charges serve the purpose of informing Dominic Ongwen in details of the facts he's accused of and to which the Prosecutor proposes the legal characterisation; Second, in the event charges are confirmed by the Chamber, such charges as confirmed determine the factual parameters of the case at trial. The charging document is therefore the single most important procedural document. The Prosecutor shall state all the material facts of the charges brought against Dominic Ongwen that are the fact and circumstances as per Article 74(2) of the Statute that must be described in the charges; in other words, first, the temporal, **geographic and material parameters** of the acts that are alleged to qualify as crimes under the Statute; second, the conduct ascribed to Dominic Ongwen which is alleged to give rise to his individual criminal responsibility; and, three, the facts alleged to establish the contextual element of the alleged crimes. Of course, the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material element of the crimes. In any case, what is required is that the charges are clear and enable Dominic Ongwen to identify the historical events at issue and the criminal conduct alleged in order to prepare his defence.¹¹ (Bold added)

13. Here, the pleading of allegations in Sudan in respect to P-99, P-101 and P-214 is defective, uncured by the PPCB and PPTB,¹² and should be dismissed as a matter of law.

B. From the inception of the *Ongwen* case, the geographic parameter was the territory of Uganda, with no mention of Sudan

14. In a letter from the Chief Prosecutor to the ICC President, dated 17 June 2004, attached to the 'Decision Assigning the Situation in Uganda to Pre-Trial Chamber II', the Chief Prosecutor states:

The letter of referral made reference to the "situation concerning the Lord's Resistance Army". My Office has informed the Ugandan authorities that we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the **situation of northern Uganda** by whomever committed.¹³ (Bold added)

15. The arrest warrant lodged against Mr Ongwen on 8 July 2005, notes:

NOTING the Prosecutor's conclusion that "the scope of the referral encompassed **all crimes committed in Northern Uganda** in the context of the ongoing conflict

¹¹ Transcript of hearing, [ICC-02/04-01/15-T-6-ENG](#), 19 May 2015, pp 19(II 20-25) 20 (II 1-11).

¹² The Defence does not waive its previous arguments in the Defects Series that PPTB, filed post-Confirmation Decision, cannot cure the defects retroactively in the Confirmation Decision.

¹³ *Situation in Uganda*, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, [ICC-02/04-1](#), 6 July 2004, p. 4.

involving the LRA" and that the Prosecutor notified the Government of Uganda of his conclusion as referred to in paragraph 1 of the Prosecutor's application.¹⁴ (Bold added)

16. The Confirmation Decision confirms geographic notice of crimes taking place in republic of Uganda in the first part of the decision (the reasoning part):

The Prosecutor charges Dominic Ongwen with crimes against humanity under article 7 and war crimes under article 8 of the Statute (jurisdiction *ratione materiae*) **committed on the territory of the Uganda** (jurisdiction *ratione loci*) between 1 July 2002 and 31 December 2005 (jurisdiction *ratione temporis*, see ICC-02/04-01/15-3-Conf-AnxB), and which fall within the parameters of the situation referred by Uganda to the Prosecutor (ICC-02/04-01/15-3-ConfAnxA and ICC-02/04-1). Therefore, in accordance with article 19 of the Statute, the Chamber is satisfied that the Court has jurisdiction over the present case.¹⁵ (Bold added)

17. Yet the first time the territory of Sudan appears in the Confirmation Decision, other than a brief reference in the general background of the LRA conflict with Ugandan government forces, is in the second part (the operative part) at the end of the Confirmation Decision. This is the first time that any allegations about crimes occurring in Sudan are mentioned. The Confirmation Decision confirms crimes in northern Uganda and Sudan in respect to P-99, P-101 and P-214, without sufficient factual support, and there is no notice provided.
18. The error is twofold: (a) the Prosecution expanded the geographic parameters of the case by charging crimes in Sudan, contrary to the understanding of the initial referral; and (b) the Confirmation Decision is defective because it fails to provide specifics regarding the geographic parameters for criminal allegations in respect to P-99, P-101, and P-214.
19. The first error is a matter that will be argued at the end of the case; the Defence position is that all charges alleged to have occurred in Sudan should be dismissed as they are outside of the parameters of this case. The second error is the subject of this motion: alleged crimes in both Uganda and Sudan suffer the same defect of inadequate specificity and notice to the Defence as to which crimes occurred in which location and at what times.

¹⁴ *Situation in Uganda*, Warrant of Arrest for Dominic Ongwen, [ICC-02/04-01/05-57](#), 8 July 2005 ('**Arrest Warrant**').

¹⁵ Confirmation Decision, page 4, para. 2.

C. Confirmation Decision is defective as to pleading of allegations in Sudan as regards P-99, P-101 and P-214

20. First, there is no discussion in the first part (the reasoning part) of Confirmation Decision about parameters in respect to the territory of Sudan; Sudan first appears in the ‘DCC section’ (the operative part), except for a very brief reference in the preliminary background description of the LRA and Ugandan government forces. There is no discussion of specific crimes occurring in Sudan in the reasoning part of the Confirmation Decision.
21. Nevertheless, the ‘DCC section’, the operative part of the Confirmation Decision, confirms crimes committed in Sudan in respect to P-99, P-101, and P-214.¹⁶
22. The defect is that it is impossible to discern location (Uganda or Sudan) where the alleged crimes occurred. There is no specificity as to the geographic location for each allegation described.
23. In respect to P-214, it is impossible to determine which factual allegations occurred “occasionally in Sudan” and the timing of these occasions.

1. The defects in respect to P-99 are not cured by the PPCB or the PPTB

PPCB

24. In respect to P-99, paragraph 67 of the Confirmation Decision states that the crimes took place in northern Uganda and Sudan prior to 1 July 2002 and “continued uninterrupted in northern Uganda after 1 July to her escape in September 2002.”
25. The Confirmation Decision, however, fails to identify which alleged crimes occurred where and exactly when.
26. In the PPCB, for P-99, the heading (i) above paragraph 433 states crimes were committed in northern Uganda and there is not mention of Sudan.
27. The only mention of Sudan is in reference to Joseph Kony:

¹⁶ **For P-99:** Confirmation Decision, para. 67, states: “Unless otherwise indicated, the conduct alleged below took place in northern Uganda and Sudan prior to 1 July 2002 and continued uninterrupted in northern Uganda after 1 July 2002 until [redacted]’s (P-0099’s) escape in September 2002.” **For P-101:** Confirmation Decision, para. 73 is the identical, but for the escape date of July. **For P-214:** Confirmation Decision, para 82, states: “All conduct described below from at least September 2002 to 31 December 2005 took place in northern Uganda and occasionally in Sudan when [redacted] (P-0214) was taken there during the LRA movements.”

P-099 was detained against her will in Joseph Kony's household in Jebellin, Sudan, where she was forced to work as a *ting ting* (a young girl not yet old enough to be a wife who was forced to perform domestic chores like babysitting).¹⁷

28. At the PPCB, paragraph 446, states:

P-0099 escaped in September 2002. From 1 July 2002, the date after which the Court has temporal jurisdiction, to her escape in September 2002, she was in northern Uganda.¹⁸

29. It is not clear at what time periods prior to 1 July 2002, P-99 was in Sudan.

30. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹

31. This transcript indicates that prior to the charged period of 31 July 2002, P-99 was in Sudan.

¹⁷ PPCB, para. 439.
¹⁸ PPCB, para. 446.
¹⁹ [REDACTED]

32. It also demonstrates that the geographical parameters, with the relevant dates/times are unclear and confused in the PPCB, and cannot cure the defects in the Confirmation Decision.

PPTB

33. [REDACTED]

34. Therefore, the PPTB cannot cure the defects in the Confirmation Decision.

2. *The notion of “continued uninterrupted” crimes of offences is not pleaded in respect to P-99, and this defects is not cured by the PPCB or the PPTB*

PPCB

35. The Confirmation Decision implicitly confirms a notion of “continuing uninterrupted” crimes or offences in respect to P-99, but there is no definition provided nor is there specific identification as to which crimes are supposed to be “continuing uninterrupted crimes”.
36. Thus, there are no factual allegations in support of the notion of “continuing interrupted” crimes and this conclusory formulation should be dismissed.
37. In the legal characterization of the facts on pages 97-98 of the Confirmation Decision, the following crimes are confirmed as committed against P-99: forced marriage, torture as a crime against humanity (‘CAH’) and torture as a war crime (‘WC’), rape as CAH and rape as WC, sexual slavery as CAH and WC, enslavement as CAH, and forced pregnancy as WC and forced pregnancy as CAH.
38. The Defence rejects that the crimes charged are continuing crimes. The notion of continuing crimes is inconsistent with the provisions of the Rome Statute, especially Articles 11, 21-24.
39. Based on the Defence’s understanding, the notion of “continuing crimes” has not been settled: it was debated during the Prep-Coms and continues to be debated.²⁰
40. The Defence reserves the right to respond to any Prosecution arguments on this point, if necessary, at a later date.

²⁰ See, for example, Global Rights Compliance Submissions on Behalf of the Victims, 30 May 2018, [ICC-RoC46\(3\)-01/18-9](#) and Alan Nissel, [Continuing Crimes in the Rome Statute](#), 25 Mich. J. Int’l L. 653 (2004).

41. But, the threshold issue is: Is there specificity regarding “continuing crimes” in the PPCB or PPTB? The answer is ‘no’.
42. All that can be found in these documents is the reference to a continuing crime of conscription in the PPTB.²¹ And here, the elements of a continuing crime are not identified. But there is nothing specific in the PPCB or PPTB in reference to the SGBC.
43. In sum, the pleading of geographic parameters, as well as the notion of “continuing, uninterrupted crimes” is defective, and these defects are uncured by the PPCB or the PPTB.

3. The defects in respect to P-101 are not cured by the PPCB or the PPTB

44. For P-101, the Confirmation Decision alleges in the second part (the operative part), at paragraph 73 that the conduct took place in northern Uganda and Sudan before 1 July 2002 and continued uninterrupted after 1 July 2002 in northern Uganda until P-101’s escape in July 2004.
45. The arguments as to lack of specificity as to what happened when and where, as well as the objections to the characterization of “continued uninterrupted” crimes discussed *supra*. regarding P-99 apply to the defects in the charges in respect to P-101.

PPCB

46. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

²¹ PPTB, para. 707.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²²

47. The PPTB, like the PPCB, relies on T-13 for P-101, so that no additional information as to specifics of location is alleged.

48. Thus, the defects in respect to P-99 are not cured by the PPCB or the PPTB.

4. The defects in respect to P-214 are not cured by the PPCB or the PPTB

49. For P-214, the conduct alleged took place “from at least September 2002 to 31 December [in] northern Uganda and occasionally in Sudan.”²³

PPCB

50. However, the heading in the PPCB on page 183 above paragraph 475 states the location of the crimes as northern Uganda and indicates that P-214 was distributed by Kony to Mr Ongwen in Uganda in September 2002:

P-0214 was abducted in June 2000 from Laliya by LRA fighters from the Sinia Brigade commanded by Pope and Kidega. She was abducted with about 50 others. P-0214 and the other abductees were forced to carry pillaged items. **They walked to Kony’s base in Abatulanga, Sudan.** (Bold added)

Kony distributed P-0214 to Dominic Ongwen’s household in about September 2002. When P-0214 arrived at Dominic Ongwen’s household, she met [REDACTED] (P-

²² [REDACTED]

Confirmation Decision, p. 92, para. 82.

0226), who was part of Dominic Ongwen’s household and was carrying out domestic duties for him, including cooking and washing clothes.

51. There is no notice provided as to which crimes, if any, took place in Sudan, and when; nor is there any specification of “occasionally.”

52. The only mention of Sudan is in paragraph 475, and exactly when the abductees walked to Kony’s base in Sudan is undefined.

53. [REDACTED]
[REDACTED]
[REDACTED]²⁴ [REDACTED]²⁵

54. The witness’s evidence as to the dates is clearly inconsistent and unreliable. It would be fair to assume that her recollection of places – whether Sudan or Uganda – cannot be relied upon as well.

55. Thus, the defect as to location of alleged conduct is not cured by the PPCB.

PPTB

56. [REDACTED]
[REDACTED]
[REDACTED]

24 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

25 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

III. REMEDY SOUGHT

57. The defects in pleading regarding the location of allegations for the crimes confirmed against Mr Ongwen for P-99, P-101 and P-214 violate his right to fair trial and specifically to notice of the charges and modes of liability against him, as per article 67(1) of the Statute.
58. For the reasons stated above, the Defence respectfully requests that the SGBC confirmed and legally characterized in counts 50 through 60 **BE DISMISSED**.
59. The Defence reserves the right to amend this Motion.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Mr Dominic Ongwen

Dated this 14th day of October, 2019
The Hague, Netherlands