

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **1 February 2019**

TRIAL CHAMBER IX

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

SITUATION IN UGANDA

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

PUBLIC

**Defence Motion on Defects in the Confirmation of Charges Decision:
Defects in Notice and Violations of Fair Trial
(Part I of the Defects Series)**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda
Caroline Walter
Orchlon Narantsetseg

States' Representatives

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. The Defence for Dominic Ongwen (‘Defence’) is filing a series of motions on defects in the notice provided by the confirmation of charges decision (‘CoC Decision’).¹ The Defence is requesting that the Trial Chamber IX (‘Trial Chamber’) rule on this issue, pursuant to Article 64(2) of the Rome Statute (‘Statute’) and Rule 134(3) of the Rules of Procedure and Evidence (‘RPE’).²
2. The reason for a series format (‘Defects Series’) is practical: Mr Ongwen is charged with 70 counts and eight modes of liability in a 104 page-long CoC Decision. Since it is not possible to analyse the defects in the CoC Decision within the standard 20 page-limit, and a request for additional pages would result in an unwieldy document up to five times the standard page-limit, the series format is adopted for clarity and expediency of the proceedings.³
3. Hence, the Defence respectfully proposes that in the Defects Series, the present motion (‘Part One’) will address a) the basic principles of fair trial and notice; b) where notice is to be found; c) timeliness of the motion; and d) prejudice. While it may appear legally counterintuitive not to address the procedural issue of timeliness first, this is based on the Defence view that the jurisprudence holds that the principle of fairness circumscribes the consideration of timeliness.
4. Subsequent parts – Part Two will address defects in pleading *mens rea* in respect to the modes of liability under Article 25(3)(a); Part Three will address defects in notice in pleading of command responsibility under Article 28(a) and defects in pleading of common purpose liability under Article 25(3)(d)(i) or (ii); and Part Four will address defects in charged crimes.⁴
5. The general remedy requested is that where the pleading of charges and modes of liability is deficient and does not provide notice, the defective charges and modes of liability should be dismissed.

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

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

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

⁴ All four parts will be filed simultaneously.

II. SUBMISSIONS

A. The basic principles of fair trial and notice

1. *The right to notice is fundamental to fair trial*

6. The cornerstone of fair trial is the right to notice. It is a fundamental, common principle within the international courts and tribunals that an accused has the “right to be informed promptly and in detail of the nature, cause and content of the charges [...]”.⁵
7. An accused’s right to a fair trial and to the presumption of innocence are principles embodied in a number of international instruments.⁶ This provision, in the Statutes for the ICC, ICTY, ICTR, and other judicial entities, mirrors the language of the ICCPR, and other international instruments.
8. The Appeals Chamber in the *Lubanga* case has held that the right to notice is a fundamental right and “[t]he right to be informed in detail of the ‘nature and cause’ of the charges” is embodied in the ICCPR, the ECHR, and the ACHR.⁷ The Appeals Chamber in the *Lubanga* case further stated that the facts “must be identified with sufficient clarity and detail.”⁸ Moreover, the same Appeals Chamber recognized the connection between the right to adequate notice and the right to prepare a defence.⁹
9. More recently, in the *Bemba* case, where the Defence for Mr Bemba averred that Mr Bemba did not have sufficient notice regarding specific criminal acts,¹⁰ the Appeals Chamber unequivocally found that:

[I]t considers axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge.¹¹

⁵ Article 67(1)(a) of the Statute.

⁶ Articles 66 and 67 of the Statute, Article 20 of the ICTR Statute, as well as, in international instruments including, *inter alia*: Article 11 of the Universal Declaration of Human Rights (‘UDHR’), Article 14(3)(a) of the International Covenant on Civil and Political Rights (‘ICCPR’), Article 8(2)(b) of the African Charter on Human and Peoples’ Rights (‘ACHR’), Article 6(3)(a) and 7 of the European Convention on Human Rights (‘ECHR’).

⁷ Prosecutor v. *Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red, 1 December 2014 (‘Lubanga AJ’), paras 118-130.

⁸ *Lubanga AJ*, para. 120.

⁹ *Lubanga AJ*, para. 121.

¹⁰ Prosecutor v. *Jean-Pierre Bemba Gombo*, Appeals Chamber, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”*, ICC-01/05-01/08-3636-Red, 8 June 2018 (‘Bemba AJ’), paras 184-186.

¹¹ *Bemba AJ*, para. 186, and footnote 368.

10. Notably, the requisite level of detail of the charges – which is lacking in the *Ongwen* CoC Decision – has been addressed by the Grand Chamber in the *Pélissier and Sassi v. France* case at the ECHR:

The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the “accusation” to the defendant. Particulars of the offence play a crucial role in criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him [...]. Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed [Footnotes omitted.]¹²

11. The fair trial rights of an accused are embodied in Article 67 of the Statute. Under the ‘Rights of the accused’ in Article 67 of the Statute, the first section (a) 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 speak.” This right to notice, embodied in Article 67(1)(a) of the Statute, is also found in Article 61(3) of the Statute,¹³ and in the RPE.¹⁴
12. The remaining fair trial rights, especially Article 67(1)(e) of the Statute – the right to raise defences and to examine witnesses, including direct and cross examination – all emanate from the initial right to be informed of the charges, as enshrined in Article 67(1)(a) of the Statute. In addition, all these fair trial rights are interdependent.

2. *The right to notice is the linchpin of fair trial; notice includes both charges and reasoning; there is no wall between charges and reasoning*

13. An issue has already arisen in this trial as to what constitutes proper notice in the CoC Decision: Whether or not it is simply a recitation of charges, or does it include the reasoning of the Pre-Trial Chamber or Trial Chamber in the *Ongwen* case.¹⁵

¹² Case of *Pélissier and Sassi v. France*, ECHR, Grand Chamber, Application no. 25444/94, *Judgment*, 25 March 1999, para. 51, available at <https://www.legal-tools.org/en/doc/e092c3/>.

¹³ Article 61(3) of the Statute establishes that “within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) be informed of the evidence on which the Prosecutor intends to rely at the hearing.”

¹⁴ Rule 121(3) of the RPE: The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

¹⁵ Prosecutor v. *Dominic Ongwen*, Trial Chamber IX, *Decision on Defence Request for Leave to File a No Case to Answer Motion*, ICC-02/04-01/15-1309, 18 July 2018, para. 9.

14. In its rejection of the Defence's request to file a no-case-to-answer motion,¹⁶ the Trial Chamber emphasized "the significant distinction between being informed of the charges and the confirmation decision's reasoning."¹⁷ The Trial Chamber's distinction between the CoC Decision's reasoning and its charges violates Mr Ongwen's Article 67 fair trial rights.
15. In this regard, the Defence maintains that the distinction violates the notice requirement because part of being informed of the charges (and modes of liability) requires a presentation of the reasoning of the Pre-Trial Chamber, so that the defendant can comprehensively prepare his defence and exercise his right to a fair trial. The Defence request to file a no-case-to-answer motion includes many examples, *e.g.* the Pre-Trial Chamber II states that the evidence "overwhelmingly" shows the effective hierarchical structure of the LRA,¹⁸ but this conclusion is not supported by *any* reasoning which would explain the use of the term "overwhelmingly".
16. This point that notice includes both charges and reasoning is underscored by the Pre-Trial Chamber II's Judge de Brichambaut, in his partially dissenting opinion¹⁹ on Defence request for leave to appeal issues in CoC Decision.²⁰
17. Judge de Brichambaut further emphasized that fair trial is very connected to a well-reasoned opinion, and the problem with a poorly-reasoned CoC Decision is the lack of notice and its consequent impact on the fairness of the trial. In this regard, he found:

The fair conduct of the trial is seriously affected in the instant case because the weakness of the reasoning set out in the Bench's own decision restricts the rights of the defence. The way in which the Decision on the confirmation of charges was drafted *does not provide the Defence with details of what evidence was relied on or how the Chamber defined the crimes*. The principle of equality of arms is violated since the Defence is not in a situation to examine the legal and factual bases for the Bench's Decision on the confirmation of charges. The outcome of the trial may well be affected.²¹ (Italics added)

¹⁶ Prosecutor v. *Dominic Ongwen*, Defence, *Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment on Acquittal*, ICC-02/04-01/15-1300, 5 July 2018.

¹⁷ Prosecutor v. *Dominic Ongwen*, Trial Chamber IX, *Decision on Defence Request for Leave to File a No Case to Answer Motion*, ICC-02/04-01/15-1309, 18 July 2018, para. 9.

¹⁸ CoC Decision, para. 56.

¹⁹ Prosecutor v. *Dominic Ongwen*, Judge Marc Perrin de Brichambaut, *Partially dissenting opinion of Judge Marc Perrin de Brichambaut*, ICC-02/04-01/15-428-Anx-tENG, 14 September 2016.

²⁰ Prosecutor v. *Dominic Ongwen*, Defence, *Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision*, ICC-02/04-01/15-423, 29 March 2016.

²¹ Prosecutor v. *Dominic Ongwen*, Judge Marc Perrin de Brichambaut, *Partially dissenting opinion of Judge Marc Perrin de Brichambaut*, ICC-02/04-01/15-428-Anx-tENG, 14 September 2016 ('Partially Dissenting Opinion'), para. 29.

18. Therefore, the issue at hand is whether the CoC Decision is facially deficient. In plain language, does the CoC Decision articulate or ‘make out’ the elements of the crimes and modes of liability charged against Mr Ongwen and support each element with factual allegations?
19. Especially in this case of 70 charges and eight modes of liability against one defendant, Mr Ongwen, it should be obvious that detailed notice, as mandated by the Article 67(1)(a) of the Statute, is required to conduct the trial in a fair manner. However, the CoC Decision falls far short of this.

B. Where notice is to be found

1. The CoC Decision is the authoritative document which provides notice

20. The CoC Decision constitutes “the authoritative document informing the accused of the charges ‘as confirmed’”²² and the Trial Chamber “is bound by the actual description of the charges” as confirmed by the Pre-Trial Chamber II in the CoC Decision.²³
21. The Trial Chamber is bound by the ‘four corners’ of the CoC Decision, as if it were an indictment in other legal systems.
22. Auxiliary documents, such as the Prosecution Pre-Confirmation Brief (‘PPCB’)²⁴ provided prior to the CoC Decision and hearing, under some circumstances, can hypothetically ‘fill in gaps’ – but it is the CoC Decision which is authoritative. But this auxiliary document (PPCB) is not a substitute for judicial review.
23. It is the Pre-Trial Chamber’s responsibility to evaluate and assess the evidence based on the CoC hearing, and to decide “if there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”²⁵ The Pre-Trial Chamber must decide whether the evidence presented by the Prosecutor is sufficient to proceed to trial based on the charges and modes of liability. This ensures a full judicial assessment of the evidence on which a defendant is prosecuted.

²² Prosecutor v. *Bemba et al.*, Trial Chamber VII, *Decision on the Submission of Auxiliary Documents*, ICC-01/05-01/13-992, 10 June 2015, para. 11.

²³ Prosecutor v. *Bemba et al.*, Trial Chamber VII, *Decision on the Submission of Auxiliary Documents*, ICC-01/05-01/13-992, 10 June 2015, para. 17.

²⁴ Prosecutor v. *Dominic Ongwen*, Prosecution, *Public redacted version of “Pre-confirmation brief”*, 21 December 2015, ICC-02/04-01/15-375-Conf-AnxC, ICC-02/04-01/15-375-AnxC-Red2, 8 June 2016 (‘PPCB’).

²⁵ Article 61(7) of the Statute.

24. Thus, the Pre-Trial Chamber's key function is the judicial assessment of evidence. However, where the PPTB which is submitted after the CoC hearing provides evidence missing in the CoC Decision, the Pre-Trial Chamber cannot make a judicial evaluation of this evidence, and whether it provides required notice for the standard of sufficiency. In the *Ongwen* case, the evidence presented by the Prosecution in the PPTB has not been properly evaluated and assessed by a judicial body, such as the Pre-Trial Chamber II, which issued the CoC Decision.
25. Hence, the 'filling in the gaps' after the CoC Decision undermines the Pre-Trial Chamber II's authority to assess evidence, and creates a situation where the Pre-Trial Chamber II cannot fulfil its role in the judicial process, as per Article 61 of the Statute.
26. In the *Ongwen* case, the PPCB was submitted prior to the CoC hearing.²⁶ However, the Prosecution Pre-Trial Brief ('PPTB')²⁷ came much later – six months after the CoC Decision.²⁸
27. Hence, 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.

2. *What is meant by "notice of the charges to the accused"*

28. When the word 'charges' is used in Article 67 of the Statute, it means both crimes and modes of liability. Hence, notice includes two parts: the identification of the elements of the crimes and of the mode(s) of liability charged, as well as material facts in support of each of the elements of both.
29. This is reflected in the Regulation 52 of the Regulations of the Court ('RoC'), which details what is required in the Document containing the charges,²⁹ which forms the 2nd part of the CoC Decision.

²⁶ Confidential version of PPCB was filed on 21 December 2015.

²⁷ Prosecutor v. *Dominic Ongwen*, Prosecution, *Prosecution's Pre-Trial Brief*, ICC-02/04-01/15-533, 6 September 2016 ('PPTB').

²⁸ PPTB was filed on 6 September 2016. Confidential version of the CoC Decision was filed on 23 March 2016.

²⁹ Regulation 52 of the RoC reads: Document containing the charges "The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterization of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28."

30. Appellate jurisprudence from the *ad hoc* tribunals affirms that the indictment suffers from a material defect if it does not plead the Prosecution's case with sufficient detail.³⁰ The legal standard for sufficiency is whether an accused is informed clearly of the charges, so that he or she can prepare his/her defence. An indictment is defective if it fails to plead required material facts.³¹

31. What are material facts? Judge Dolenc answered the question:

In practical terms, the material facts of the crime answer the following seven questions, which guide any criminal investigation, prosecution and judgment: Who (is the alleged perpetrator); Where; When; What (was committed or omitted); Whom to (victim); What means; and Why (motive). Answers to these seven questions are necessary in order to individualize the Accused, the alleged crime, the modes of the Accused's participation, and the form of his criminal responsibility.³²

32. At this Court, confirmed charges and modes of liability are contained in the CoC Decision, issued by the Pre-Trial Chamber. The CoC Decision includes 2 sections: the first is the reasoning section and the second is the charges (*i.e.* crimes and modes of liability).

C. Timeliness

33. Prompt notice of the charges to the accused is mandated, for example, by Article 67(1)(a) of the Statute, Article 14(3)(a) of the ICCPR, Article 8(2)(b) of the ACHR, and Article 6(3)(a) of the ECHR.

34. However, none of these instruments include time bars for litigating defects in the notice. The Trial Chamber in the *Ntagerura* case holds that defects in the indictment are an issue of fair trial, which can be considered at all stages of the trial, including the post-trial phase.³³

³⁰ Prosecutor v. *Kupreški*, IT-95-16-A, *Appeal Judgment*, 23 October 2001 ('*Kupreški* AJ'), paras 114, 124, 246, available at: <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>; see also Rule 47 (c) of the ICTR Rules of Procedure and Evidence, and Article 18(4) of the ICTY Statute.

³¹ Prosecutor v. *Kvo ka*, IT-98-30/1-A, *Appeal Judgment*, 28 February 2005, para. 28, available at: <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf>; *Kupreški* AJ, paras 88, 114.

³² *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, *Judgement and Sentence*, Separate Opinion of Judge Dolenc, 25 February 2004, para. 21, available at: <https://www1.umn.edu/humanrts/instree/ICTR/IMANISHIMWE ICTR-97-36/IMANISHIMWE ICTR-99-46-T .pdf>.

³³ See, for example, *Kupreški* AJ, paras 114, 124, 246; Prosecutor v. *Ntagerura et al.*, ICTR-99-46-T, *Judgement and Sentence*, 25 February 2004 (judgment affirmed by the Appeals Chamber, 7 July 2006), paras 28-39: (Where the allegations are "grossly deficient" and violate a defendant's right to fair trial, defects in the indictment are post-trial issues), available at: <http://hrlibrary.umn.edu/instree/ICTR/IMANISHIMWE ICTR-97-36/IMANISHIMWE ICTR-99-46-T.pdf>.

35. Even where the Trial Chambers – for example at the ICTR – have held that there are time limits on challenging preliminary motions, such as the form of an indictment, good cause to waive the limits may be found on a case-by-case basis, based on the violation of a fundamental right of the Accused.³⁴
36. In sum, the Defence position is that fairness to the accused is the determinative criterion in whether this motion should be entertained by the Trial Chamber, and that procedural rules, if any, should be subordinated to the fairness criterion.
37. In addition, the Defence submits that the arguments of defects in the pleading of the charges and modes of liability have not been previously litigated. In its appeal of the CoC Decision, the Defence raised an issue of the sufficiency of the reasoning of the CoC Decision.³⁵ In his Partially Dissenting Opinion annexed to Pre-Trial Chamber II's decision on Defence request seeking leave to appeal the CoC Decision, Judge de Brichambaut held that the issue of the lack of reasoning raised by the Defence was an appealable issue.³⁶
38. At the pre-trial hearing on 6 December 2015, Counsel Taku requested more specificity as to the charges.³⁷ Although both issues of reasoning and specificity are related to notice, they were not formulated specifically as pleading defects in the CoC Decision. Hence, the Defence is now raising new points in respect to lack of notice.
39. However, if the Trial Chamber takes the opposite view, then the Defence requests that the defects in pleading identified in the Defects Series be specifically addressed now. The Trial

³⁴ Prosecutor v. Zigiranyirazo, ICTR-2001-73-I, *Decision on the Defence Request for Extension of Time to File Preliminary Motions under Rule 72(G) of the Rules of Procedure and Evidence*, 17 December 2003: (Defence Motion granted based on need to translate Prosecution's disclosure into language of the Accused), available at: http://www.worldcourts.com/ictr/eng/decisions/2003.12.17_Prosecutor_v_Zigiranyirazo.pdf; Prosecutor v. Nahimana, ICTR-96-11-T, *Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment*, 30 August 1999: (Waiver of time limit granted by Trial Chamber, *sua sponte*, in the interests of justice), available at: http://www.worldcourts.com/ictr/eng/decisions/1999.08.30_Prosecutor_v_Nahimana.pdf.

³⁵ Prosecutor v. Dominic Ongwen, Defence, *Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision*, ICC-02/04-01/15-423, 29 March 2016.

³⁶ Partially Dissenting Opinion, paras 8-16.

³⁷ ICC-02/04-01/15-T-26-ENG, page 21 (7-14): "MR TAKU: May it please your Honours. We've carefully listened to the decision today and want just to say that in the course of the proceedings **we expect that specificity be given to aspects of some of the charges** which may--with regard to venue, northern Uganda, within a period of five years, is so huge. So we hope that in relation to the question of specificity as the proceedings proceed, in order to have appropriate notice of some of the charges, we will raise this as the occasion arises in the course of the trial." (Bold added).

Chamber was given notice, before the start of trial, that lack of specificity in the charging document was an issue, and that it would raise specifics as needed in the course of trial.³⁸

1. The Defence agrees with the criticism of Judge de Brichambaut of the CoC decision

40. The Defence concurs with Judge de Brichambaut's critique of the CoC Decision, although it is aware that he issued a Separate Opinion and not a Dissenting Opinion on this matter. This Separate Opinion is a guide for the Defence.³⁹ Hence, it incorporates its criticism.
41. The one criticism that permeates the CoC Decision is its lack of reasoning. Judge de Brichambaut addressed – at **paragraph 2** – the “regrettable shortcomings and approximations that beset the text of the decision and the insufficient indication of the reasons on which it is based in terms of both rationale and analysis of evidence.”⁴⁰
42. Endorsing Judge Kovács' analysis in a separate opinion in the *Al Mahdi* case,⁴¹ which underscores the importance of a thorough analysis even in a situation where the evidentiary standard is relatively low, he concludes the reasoning in the first part of decision – and the “judges' explanation of the whys and wherefores of their decision” are seriously deficient.⁴²
43. This first part of the CoC Decision is an outline of the evidence and questions of law as examined by the Trial Chamber. It is 73 pages long in the English version. In general, the charges are not explicitly defined and the specific evidence in support each charge is not identified.⁴³ For example, the elements of the crimes alleged during the attacks on the four camps and attributed to Mr Ongwen are not defined.⁴⁴
44. The CoC Decision also fails to define the contextual elements of war crimes and crimes against humanity and makes only “very vague references to ‘evidence’ or notorious facts mentioned” in four paragraphs.⁴⁵

³⁸ ICC-02/04-01/15-T-26-ENG, page 21 (7-14).

³⁹ Separate Opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016 (‘Separate Opinion’).

⁴⁰ Separate Opinion, para. 2.

⁴¹ Prosecutor v. *Al Mahdi*, Pre-Trial Chamber I, Separate Opinion of Judge Péter Kovács, ICC-01/12-01/15-84-Anx, 9 May 2016.

⁴² Separate Opinion, para. 16.

⁴³ See, Separate Opinion, para. 14. (The exception Judge de Brichambaut notes is the crimes of forced marriage.)

⁴⁴ Separate Opinion, paras 18-19.

⁴⁵ Separate Opinion, paras 20-21.

45. Judge de Brichambaut points out the small number of testimonies (3) with radio communications intercepts used to support the modes of liability for Pajule.⁴⁶ And, he underscores that “the decision refers only to a small amount of evidence in support of 5 or 6 modes of liability” for charges related to the attacks on the camps.⁴⁷
46. Hence, there are two general violations in respect to the notice of the criminal allegations related to the attacks: 1) the elements of the underlying crimes are not identified, nor linked to evidence; and 2) the elements which transform these ordinary crimes into international crimes, *i.e.* war crimes or crimes against humanity – the contextual elements – are missing.
47. In terms of modes of liability, Judge de Brichambaut cites these errors:
- At **paragraph 24**, Judge de Brichambaut points out, 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.⁴⁸
 - At **paragraph 149**, in respect to Article 28(a) of the Statute, the CoC “fails to demonstrate how each constituent element of the mode of liability charged can be proved on the available evidence.” **Paragraph 149** “restricts itself to a very general reference to the available evidence, without specifying any testimony or other evidence to establish the elements of command responsibility.”⁴⁹
48. Importantly, Judge de Brichambaut points out that “by circumventing that systematic analysis, the Chamber had undermined its decision and failed to hold the Prosecution to account for its highly ambitious goal (referring to the 70 charges/6 modes of liability).”⁵⁰
49. The Defence notes three additional generalized errors, which are rooted – in our view – in Judge de Brichambaut’s critique: a) the CoC Decision is replete with conclusory statements, alleging that “the evidence sufficiently demonstrates...”⁵¹ without references to factual support

⁴⁶ Separate Opinion, para. 22.

⁴⁷ Separate Opinion, para. 23 (“The decision refers to only a small amount of evidence in support of five to six modes of liability in the case of the charges brought in relation to the attacks on the camps. Only with regard to the mode of individual commission by DO in relation to charges 50 to 61 is reference made to a larger volume of evidence.”)

⁴⁸ Separate Opinion, para. 24.

⁴⁹ Separate Opinion, para. 149.

⁵⁰ Separate Opinion, para. 26.

⁵¹ Example of CoC Decision, para 70 in reference to Pajule: As concerns the individual criminal responsibility of Dominic Ongwen, the **evidence sufficiently demonstrates** that he, pursuant to a common plan with other

or footnotes. This is the defect in notice of ‘disconnect’; b) the Pre-Trial Chamber concludes in a repetitive and standard paragraph 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; and c) failure to give proper notice of the elements of the modes of liability charged.

50. Thus, notice is defective.

D. Prejudice

51. Specificity in notice is clearly linked to the fair trial right to present a defence. As Judge de Brichambaut has unequivocally stated:

The fair conduct of the trial is seriously affected in the instant case because the weakness of the reasoning set out in the Bench’s own decision restricts the rights of the defence. The way in which the Decision on the confirmation of charges was drafted *does not provide the Defence with details of what evidence was relied on or how the Chamber defined the crimes*. The principle of equality of arms is violated since the Defence is not in a situation to examine the legal and factual bases for the Bench’s Decision on the confirmation of charges. The outcome of the trial may well be affected.⁵² (Italics added)

52. The Defence requires details of the evidence upon which the Prosecution relied, and the PTC confirmed to mount a defence and to investigate thoroughly, and the Defence needs to know the legal elements against which the Trial Chamber has assessed the Prosecution evidence. Only with this information can the Defence make an informed decision as to its presentation of evidence.

53. Absent this specific information, the Defence is prejudiced in its ability to defend against each and every element of the crimes charged and the modes of liability.

54. The prejudice is particularly illustrated in the joint modes of liability. As we entered and continue to present the Defence case, the Defence is still not informed of all the evidence of

senior LRA leaders, undertook action which was essential for the commission of crimes, and that he contributed to these crimes not only personally but also through the LRA fighters under his command. As such, the evidence enables the conclusion that there are substantial grounds to believe that Dominic Ongwen committed the above mentioned crimes jointly with others and through others within the meaning of article 25(3)(a) of the Statute, as charged by the Prosecutor. Alternatively, Dominic Ongwen’s contribution to the abovementioned crimes may be legally qualified under article 25(3)(b) (charges 8 to 10 only, as presented by the Prosecutor), under 25(3)(c) (charges 1 to 9 only, as presented by the Prosecutor), as well as under article 25(3)(d)(i) and (ii) of the Statute, as charged by the Prosecutor. (Bold added)

⁵² Partially Dissenting Opinion, para. 29.

elements of the various joint modes of liability charged under Article 25(3)(a) of the Statute. Requests for disclosure of material concerning those who are jointly involved in a ‘common plan,’ or in a ‘common purpose,’ or in any form of joint liability with the Accused is necessary to ascertain the role of the Accused, if any, in the mode of liability. Yet, disclosure requests for this material have been rejected by the Trial Chamber.⁵³

55. Similarly, as we entered and continue to present the Defence case, the specific evidence of elements of command responsibility is lacking. The Defence is not informed, for example, of the evidence, if any, in support of the element of ‘repress and punish’. Hence, the Defence cannot mount a defence against the specific allegations, if any, and most certainly is prevented from investigating the Prosecution evidence, if any, on this element.
56. The Defence position is that the Prosecution has not met its burden of sufficiency for these modes of liability (and others) to be charged against the Accused, and for which the Defence must present a Defence.
57. However, the Trial Chamber’s denial of the Defence request for a no-case-to-answer motion at the end of the Prosecution’s case,⁵⁴ means that the Defence has been left in a position of not knowing exactly what must be addressed, if it so chooses, in its Defence in respect to the modes of liability.
58. This argument is repeated in the Defence’s Defects Series for defects in missing elements of the crimes charged and also for missing elements of other modes of liability.

III. RELIEF SOUGHT

59. As a guarantor of the right to a fair trial,⁵⁵ and especially in light of the denial of a no-case-to-answer motion – what should be an obvious need to streamline the plethora of charges and

⁵³ Prosecutor v. *Dominic Ongwen*, Single Judge, *Decision on Defence Request for Disclosure and Remedy for Late Disclosure*, ICC-02/04-01/15-1351, 29 September 2018, paras 34-39. *See also*, Prosecutor v. *Dominic Ongwen*, Defence, *Corrected version of ‘Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure’*(ICC-02/04-01/15-1329-Conf), filed 4 September 2018, 17 September 2018, paras 40-42.

⁵⁴ Prosecutor v. *Dominic Ongwen*, Defence, *Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment on Acquittal*, ICC-02/04-01/15-1300, 5 July 2018; Prosecutor v. *Dominic Ongwen*, Trial Chamber IX, *Decision on Defence Request for Leave to File a No Case to Answer Motion*, ICC-02/04-01/15-1309, 18 July 2018.

⁵⁵ Article 64(2) of the Statute: The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...].

modes of liability against a single accused – the Defence requests that the Trial Chamber rule on the remedy proposed in the Defects Series:

TO DISMISS the charges and modes of liability which are facially deficient and violate the fundamental fair trial right of notice to Mr Ongwen.

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

Respectfully submitted,



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

Dated this 1st day of February, 2019

At The Hague, Netherlands