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TRIAL CHAMBER IX

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

PUBLIC

Defence Motion on Defects in the Confirmation of Charges Decision: Defects in 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) (Part III of the Defects Series)

Source: **Defence for Dominic Ongwen**

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') is filing a series of motions on defects in the notice provided by the confirmation of charges decision ('CoC Decision').[1] The Defence is requesting that the Trial Chamber IX ('Trial Chamber') rule on this issue, pursuant 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 (four parts) 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 Three') address a) defects in notice in pleading of command responsibility under Article 28(a) of the Statute and b) defects in pleading of common purpose liability under Article 25(3)(d)(i) or (ii) of the Statute.

4. All these pleading defects violate Mr Ongwen's fair trial right to notice.[4] Hence, the Defence requests that these modes of liability – command responsibility and common purpose liability be dismissed, as a matter of law, based on facial deficiency and lack of notice.

5. Especially in light of the Trial Chamber's denial of the Defence request for leave to file a no-case-to-answer motion, there is a need – which should be obvious – to streamline the plethora of modes of liability against a single accused in this case. Dismissal of modes of liability based on lack of notice provides an avenue to pare down the "charge sheet."

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[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] Article 67(1)(a) of the Statute.

6. Other parts – Part One will address principles of fair trial and defects in notice; Part Two will address defects in pleading *mens rea* in respect to the modes of liability under Article 25(3)(a) of the Statute; and Part Four will address defects in charged crimes.[5]

II. SUBMISSIONS

A. Defects in notice in pleading of command responsibility under Article 28(a)

7. The CoC Decision confirms command responsibility as an alternative mode of liability for all of the counts, with the exception of counts 50-60 (individual criminal liability for sexual and gender-based crimes).

8. Article 28(a) of the Statute[6] lists the constituent elements which are a) effective command and control; b) knowledge; c) power to prevent or repress ('prevent or punish').

9. There are three defects in notice in pleading of the mode of liability a) the legal elements identified are incomplete; b) where cited, they simply track the language of the Statute; and c) there are no factual allegations in support of the legal elements of the mode of liability.[7]

1. Defect of pleading incomplete legal elements in the CoC Decision

10. In **paragraph 149** of the 1st section of the CoC Decision,[8] the Pre-Trial Chamber II *partially* repeats two of the elements of Article 28 of the Statute (effective command and control; and prevent or repress) but it *omits* two others: the *mens rea* element (knew, or owing to the

[5] All four parts will be filed simultaneously.

[6] Article 28 - responsibility of commanders and other superiors: In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her **effective command and control**, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person **either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;** and (ii) That military commander or person **failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.** (bold added)

[7] 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, para. 10 (Judge de Brichambaut criticized the CoC Decision for failing to link specific evidence to the elements of the mode of liability).

[8] CoC Decision, para. 149 reads: In 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, regardless of its own understanding of the relevant facts at this stage, to retain in those charges the alternative mode of liability of article 28(a) of the Statute as requested by the Prosecutor.

circumstances at the time, should have known) and "failed to take all necessary and reasonable measures to prevent or repress their commission…." (underlining added).

11. In **paragraph 13**, in the Charges section of the CoC Decision, the legal elements for *mens rea* (knowledge) and power to prevent and repress are missing.

2. Defect of no factual support for legal elements in the CoC Decision

12. In **paragraph 13** of the CoC Decision, under 'Statement of Facts Regarding Common Elements of Modes of Liability', the statutory language "effective command and control is repeated" with general allegations about power to issue orders and discipline subordinates. But these are general allegations – none of which are substantiated by factual allegations to support the charges against Mr Ongwen.

3. Defect of tracking statutory language in the CoC Decision

13. In the Charges part (2nd section of the CoC Decision), as well as, at the end of each section on the attacks on the IDP camps, and the SGBC and conscription – the three elements are identified: effective command and control, had requisite intent and knowledge and failed to take necessary and reasonable measures to prevent or repress, or failed to submit the matter to the competent authorities for investigation and prosecutions – but these phrases simply 'track the statutory language' and the elements are unsupported by factual allegations.

14. These defects in the pleading of command responsibility – simply 'tracking the statutory language' can be found in CoC Decision's **paragraph 123** (section on SGBC); **paragraph 129** (section on conscription and use of child soldiers); **paragraph 29** (Odek); **paragraph 17** (Pajule); and **paragraph 56** (Abok).

4. Defects in notice in the CoC Decision are not cured by auxiliary documents

15. The Prosecution's pre-confirmation brief ('PPCB')[9] makes some factual allegations about discipline (at **paragraphs 97-101**) in relation to Article 25(3)(b) of the Statute (ordering) and Article 28(3)(a) of the Statute,[10] but significantly, the element of "prevent or repress" is only

[9] 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').
[10] PPCB, paras 97-101.

addressed here in terms of allegations of Mr Ongwen's power to discipline in relation to abductees, particularly escorts.

16. But, in terms of the IDP camps – for example Pajule – the allegations of "prevent or punish" in the PPCB track the statutory language[11] which refer back to paragraphs on common elements.[12] That said, the problem is: the specifics of "prevent or repress" do not relate specifically to the Pajule criminal allegations, so it is a factual and legal impossibility for these parts to support the elements of command responsibility in respect to the crimes associated with Pajule. And, the same argument holds true for the other IDP camp attacks.

17. Similarly, in the section on conscription and command responsibility, **paragraphs 664-666** of the PPCB on command responsibility are conclusory and essentially track the language of the Statute.

18. In the Prosecution's pre-trial brief ('PPTB'),[13] the phrase "prevent or repress" appears five times: at **paragraphs 154, 286, 369, 427**, and **746**. Although the PPTB makes references to other allegations that Mr Ongwen punished those who broke the rules, there are no specific allegations that he failed to prevent or repress the specific crimes for which he is charged.

19. Thus, neither the CoC Decision, PPTB, nor PPCB fully articulates the material elements of "prevent or repress" (the *actus reus* and *mens rea*) nor do they make specific reference in support of this evidence of the elements of command responsibility. Thus, the auxiliary documents do not cure the defect in pleading.

20. In sum, Mr Ongwen did not receive proper notice of the elements of Article 28(3)(a) of the Statute.

[11] PPCB, paras 226-228.
[12] PPCB, paras 75-110.
[13] Prosecutor v. *Dominic Ongwen*, Prosecution, *Prosecution's Pre-Trial Brief*, ICC-02/04-01/15-533, 6 September 2016 ('PPTB'). References made herein to PPTB do not waive arguments made in Defects Series, Part I as why the PPTB cannot provide notice in this case.

5. Prejudice

21. In the *Bemba* Appeal Judgment ('*Bemba* AJ'), the Appeals Chamber holds that failure to give proper notice results in prejudice to the defendant.[14] **This holding is in the context of lack of notice in respect to the element of command responsibility of "prevent and repress"** which is a notice defect in the *Ongwen* case. The Appeals Chamber interpreted the standard of what is "necessary and reasonable" from the standpoint of being "in the shoes of the commander."[15]

22. Appellate Chambers of the international *ad hoc* tribunals have also held that simply tracking statutory language of a mode of liability, without specifying the material allegations in support of the *mens rea* and *actus reus* is prejudicial to and violates the fair trial right of notice of the defendant. The leading case at the ICTR was the *Muvunyi* case,[16] followed by the *Nzuwonemeye* case in the *Ndindiliyimana et al*. ("Military II")[17] case. In the *Nzuwonemeye* case, the appellate holding was also decided in the context of the third prong of command responsibility – prevent or punish (for the ICC, prevent or repress).

23. The ICTR Appeals Chamber, in the Military II case, reversed the Trial Chamber's conviction of Major Nzuwonemeye under Article 6(3) of the ICTR Statute for the killing of the Belgian peacekeepers at Camp Kigali, based on lack of notice. The Appeals Chamber held that the indictment was defective and uncured, because it failed to plead any specific conduct to support the second and third elements of superior responsibility (knowledge and failure to prevent or punish) pursuant to Article 6(3) of the ICTR Statute,[18] and that "simply restat[ing] the language of Article 6(3) […] does not set out material facts underpinning the relevant criminal conduct

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[14] 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 186-188.

[15] *Bemba* AJ, para. 167: ([A] commander cannot be blamed for not having done something he or she had no power to do); para 168 (consideration of measures at his or his disposal in the circumstances at the time); and para. 170 (Article 28 is not a form of strict liability).

[16] Prosecutor v. *Muvunyi*, ICTR-2000-55A-A, Judgement, 29 August 2008, available at: http://www.worldcourts.com/ictr/eng/decisions/2008.08.29_Muvunyi_v_Prosecutor.pdf ('*Muvunyi* AJ'), para 44: ("The Prosecution further argues that Muvunyi's assertion that this provides deficient notice goes to the evidence and not to the material facts.91 The Appeals Chamber does not agree. The above-quoted language mainly repeats the legal elements of superior responsibility, but fails to set out the underlying material facts. The Indictment is therefore defective in this respect. For these elements, proper notice requires the Prosecution to plead: the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.").

[17] Prosecutor v. *Ndindiliyimana* et al., ICTR-00-56-A, Judgement, 11 February 2014, available at: http://www.europeanrights.eu/public/provvedimenti/ICTR_-_Military_II_Case.pdf ('*Ndindiliyimana* AJ').

[18] *Ndindiliyimana* AJ, paras 237-241, 254.

of his subordinates, his knowledge and the failure to punish specifically with regard to the killing of the Belgian peacekeepers."[19] Since Nzuwonemeye was not adequately informed of the allegations against him, it "was not open to the Trial Chamber to convict him pursuant to 6(3)."[20]

24. The prejudice of this error is that failure to provide specific detailed notice to the defendant of the charges and modes of liability for which he is being prosecuted harms his preparation and presentation of his defence. It is obvious that in order to prepare and present a defence, the accused must be informed of all the allegations, including modes of liability, for which he is being prosecuted.

Failure to give proper notice is also prejudicial because it leads to an incorrect legal standard of strict liability

25. In the *Bemba* AJ, the Appeals Chamber held that Article 28 of the Statute is not a form of strict liability.[21]

26. In addition, the *Delalić* Appeals Chamber held that the *mens rea* standard is not based on strict liability and the element of knowledge has to be proved:

> […] Command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he 'knew or had reason to know' about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine insofar as vicarious liability may suggest a form of strict imputed liability.[22]

27. Particularly, the elements of *mens rea* – intent and knowledge – must be properly pleaded and proved by the Prosecution beyond a reasonable doubt. To do anything less would result in supporting an incorrect legal standard of strict liability in respect to command responsibility, and holding the Prosecution to an incorrect burden of proof.

28. Applied to our case, this means that even if someone is in a position of a commander, the required elements of the mode of liability of command responsibility must be properly pleaded, and then proved beyond a reasonable doubt. Effective control cannot be presumed; knowledge

[19] *Ndindiliyimana* AJ, para. 238.
[20] *Ndindiliyimana* AJ, para. 240.
[21] *Bemba* AJ, para. 170.
[22] Prosecutor v. *Delalić et al*., IT-96-21-A, Judgement, 20 February 2001, available at: http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf ('*Delalić et al.* AJ'), para. 239.

cannot be presumed; and ability to prevent and repress, or failure to prevent and repress cannot be presumed. Where these elements are not pleaded with supporting evidence for each element, it is a fair trial violation and prejudicial to the Defence.

29. To apply a standard of strict liability is a legal error which arises from judicial determinations made on defective notice and this affects the legitimacy of the judgments.

30. Therefore, the Defence concludes that the pleading of command responsibility in the *Ongwen* case, is facially deficient and that, as a matter of law, the mode of liability should be dismissed.

B. Defects in pleading of common purpose liability under Article 25(3)(d) (i) or (ii)

1. The notice as to the level of contribution for common purpose liability required is vague in the CoC Decision, and further convoluted by the Prosecution's change in theory

31. In the CoC Decision, the Pre-Trial Chamber II confirms common purpose liability for the crimes alleged at each IDP camp, and counts 61- 68, and for counts 69-70 (conscription and use of child soldiers). Under Article 25 of the Statute, this is a form of individual criminal responsibility.

32. The Pre-Trial Chamber II explains the elements of 'common purpose' liability at **paragraph 44**,[23] and holds that under the Statute, the contribution under Article 25(3)(d) of the Statute is not required to be ""significant" or reach a certain minimum degree."[24] The Statute does not specify what level of contribution is required, so it is a question of interpretation.

33. The Pre-Trial Chamber's II interpretation violates the basic principles of criminal law. Specifically, criminal law is based on the principle that individuals cannot be punished for thoughts alone. In other words, a mental state of intending a crime is not sufficient for criminal liability.

34. If any level of contribution suffices, liability could attach for almost any act. For example, if an accused hands a perpetrator a glass of water and that action hydrates the perpetrator before he commits the crimes, the accused has now 'contributed' to a crime. This result is both absurd and contravenes basic criminal law principles.

[23] CoC Decision, para. 44.
[24] CoC Decision, para. 44.

35. Thus, it is inconsistent with basic criminal legal theory to allow *any* level of contribution to suffice for liability under Article 25(3)(d) of the Statute.

36. When a statutory provision is unclear, as in this case, criminal law principles provide for lenity,[25] which is found in Article 22 of the Statute.[26] This requires interpreting the Statute in favour of the accused.

37. In addition to the CoC Decision's vagueness as to the nature of the contribution required, and its failure to define contribution, the lack of notice is exacerbated by the changing theory of the Prosecution in respect to contribution.

38. In the PPCB, the Prosecution concluded that Mr Ongwen's contribution to the common plan in relation to the charges for child soldiers was "substantial".[27] However, nine months later in the PPTB, it appears as if the Prosecution has changed its legal mind, citing jurisprudence from a Dissenting Opinion by the Appeals Chamber Judge Fernandez.[28] 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.

39. The Prosecution's change in theory indicates that it does not "know its case".[29]

40. The prejudice of these defects in notice if two-fold: the vagueness of the CoC Decision means there is no definition, which is inconsistent with criminal law, as to the level of contribution; and 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.

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[25] Legality is *ex post facto* or *nullum crimen sine lege* idea. Lenity is the idea of strict construction or taking the interpretation in favour of the defendant--in essence, a statutory construction principle based on fairness in giving notice of what is criminal.
[26] Article 22 of the Statute: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."
[27] PPCB, para. 613.
[28] PPTB, para. 152.
[29] *Muvunyi* AJ, para. 18; Prosecutor v. *Ntagerura*, ICTR-99-46-A, Judgment, 7 July 2006, available at: http://hrlibrary.umn.edu/instree/ICTR/BAGAMBIKI_ICTR-97-36/BAGAMBIKI_ICTR-97-36_appeals_judgment.pdf (*Ntagerura* AJ) para. 27 ("The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfold").

2. Neither the CoC Decision, nor the auxiliary documents provide proper notice to the accused of common purpose liability

CoC Decision

41. The Pre-Trial Chamber II in the CoC Decision seems to have skipped over the requirement that elements of the mode of liability must be alleged, and factual allegations in support of each element provided, and that these should be connected to each other.

42. In 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. In fact, the Pre-Trial Chamber II only refers to the Article 25(3)(d) of the Statute in a cursory fashion in the Reasoning part of the CoC Decision.

43. In the Charges part of the CoC Decision (for example, **at paragraph 29**), 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.

44. These defects in notice are not cured by the PPCB.

PPCB cannot cure the CoC Decision because it alleges no *mens rea* element, and simply tracks statutory language

45. In the PPCB, filed prior to the CoC Decision (on 21 December 2015), references to "common purpose" appear at **paragraphs 222, 305, 368, 420, 612,** and **663**.

46. In the PPCB, at least two defects are found, which means that the PPCB cannot – as an auxiliary document – supplement the CoC Decision to provide adequate or proper notice of common purpose liability:

- Defect #1 – at **paragraph 663**, for example, the PPCB alleges common purpose liability under Article 25(3)(d)(i) and (ii) of the Statute for the crime of conscription of children, but there are no elements of *mens rea* identified.
- Defect #2 – the last sentence of the **paragraph 663** of the PPCB "He did so with the aim of furthering the criminal activity or criminal purpose of the group or, at least,

knowing of the group's intention to commit the crimes" simply[30] tracks the Statute, the language of Article 25 of the Statute, and does not provide notice of Mr Ongwen's *mens rea*. The requirements for *mens rea* include that the conduct alleged was deliberate or intentional, that all the participants had the same intent, and that the person was aware the conduct contributed to the activities of the group. **Paragraph 663** of the PPCB references Joseph Kony and "other senior commanders", but they are not named, so it is impossible to ascertain whether Mr Ongwen had the same alleged intent with unnamed other persons.

47. In the PPCB, references are found to the common purpose at each of IDP camps,[31] but there are no elements of *mens rea* identified. The only exception is in reference to Lukodi at **paragraphs 363-365** which alleges the elements of knowledge and intent, but the elements additional to common purpose are still missing.

48. Thus, at most, there may be an instance of partial pleading and the majority examples of no pleading of *mens rea*.

PPTB

49. The Defence does not waive its objection to the PPTB as a source of notice. However, if the Trial Chamber were to hold differently, the Defence points out that the pleading of common purpose liability for the crime of conscription of children[32] suffers from the same defects as the PPCB – no elements of *mens rea* alleged and no identity of others in the group.

50. At **paragraph 755** of the PPTB, the Prosecution alleges that Mr Ongwen contributed to the commission of crimes by a group of persons including Joseph Kony and "other Sinia commanders," who were acting with a common purpose. Except for Mr Ongwen and Joseph Kony, there are no other identities provided, and no footnotes.

51. Another example of the defective pleading are allegations of conscription of children found at **paragraphs 749-751** of the PPTB. There is still no *mens rea* for the common plan liability during the charged period, but in addition, the allegations at **paragraph 751** – as the

[30] The Defence notes that this sentence also appears at paragraphs 223, 306, 369, 421, 613 of the PPCB.
[31] PPCB, para. 222, (fn. 558); for the section on the Pajule Common Plan at paras 185-198. At para. 305 (fn. 755) refers to the section on the Odek Common Plan, paras 270-278. At para 368 (fn. 889) refers to section on DO's control over the crime, at paras 344-362 in reference to Lukodi. At para 420 (fn. 988) refers to DO's control over the crime, para 409-411, referring to Abok.
[32] PPTB, para. 755.

Prosecution itself acknowledges in the paragraph – give an example of intent based on events outside the temporal jurisdiction (2006) of the crimes alleged.

52. In **paragraph 751**, the PPTB states that witness P-0189 provided a telling description of Mr Ongwen's knowledge and intent with regard to child soldiers. Even accepting, for the purposes of argument, the description summed up as showing Mr Ongwen's knowledge and intent in **paragraph 751**, this example is from the peace-talks in 2006 – outside of the temporal jurisdiction of the crimes charged and cannot legally or factually support intent and knowledge for events charged in the years prior 2002-2005 (which is the charged period).

3. There is confusion in the PPCB between common purpose and common plan, and the elements of common plan are not pleaded

53. There is also a persistent and consistent confusion in respect to common purpose liability in Article 25(3)(d) of the Statute and the notion of common plan in Article 25(3)(a) of the Statute.

54. These two concepts are not fungible: one, common purpose is a mode of liability; and the other, common plan, is an element of a different mode of liability for individual criminal responsibility.

55. Yet, the Prosecution appears to confuse these legal concepts and treat them as interchangeable. This is a legal error.

56. This error is illustrated in the common purpose references, which are footnoted with additional references to 'common plan' at various IDP camps. At **paragraph 222**, for example, the PPCB, alleges common purpose liability under Article 25(3)(d) of the Statute. Yet, the footnote[33] is to 'common plan', which is found under Article 25(3)(a) of the Statute. And this confusion is repeated for other IDP camps.

57. A similar error and confusion appears at **paragraphs 612-613**, in respect to SGBC. The PPCB alleges common purpose for SGBC, and refers back to **paragraphs 588-606**. At **paragraphs 588-606**, the Prosecution characterizes the contribution of the accused to the common plan as

[33] PPCB, fn. 558.

essential. The Defence notes, however, there are no charges regarding abducting women as alleged in **paragraph 612**. And, there are no allegations of *mens rea* in this section.[34]

58. Moreover, the elements of common plan are not pleaded, contrary to the appellate jurisprudence in the *Lubanga* case.

59. The Appeals Chamber in the *Lubanga* case found that:

> [I]n order to be able to prepare an effective defence, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators"[35] and that this must be provided in the confirmation decision.[36]

60. In the CoC Decision, but for the facially deficient, conclusory allegations in the 2nd part, in sections on the IDP camps,[37] the CoC Decision fails to allege the elements of the *mens rea* required and fails to link these elements to specific factual allegations.

61. **Paragraph 70** of the CoC Decision addresses common plan,[38] but fails to detail any of the requirements of the *Lubanga* AJ. Similarly worded paragraphs are found at **paragraphs 75, 140,** and **145**. None meet the requirements of notice as to the elements of the common plan alleged.

62. Thus, in respect to both common purpose liability and the liability which includes the element of a common plan – the requirements of notice are not met, and the CoC Decision is facially deficient.

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[34] a) Awareness of an essential contribution, and b) Awareness that he or she can frustrate the implementation of the common plan by refusing to perform task assigned to him or her.
[35] Prosecutor v. *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against conviction, ICC-01/04-01/06-3121-Red (*Lubanga* AJ), 1 December 2004, para. 123.
[36] *Lubanga* AJ, para. 124.
[37] *See*, for example, para. 19 (Pajule) and para 31 (Odek).
[38] CoC Decision, para. 70 (Pajule) reads: As concerns the individual criminal responsibility of Dominic Ongwen, the evidence sufficiently demonstrates that he, pursuant to a common plan with other 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.

63. In sum, common purpose liability suffers from the facial deficiency as a form of liability without specified legal parameters and factual allegations in support of these parameters. Common purpose is not a 'catch-all' – a defendant accused of contributing through common purpose doctrine, must be informed of the objectives, the means must be alleged, the temporal framework as well as the alleged co-members of the common purpose. Labelling members of the group as "Sinia commanders" is not specific notice to an accused. Allegations of systematic pattern or policy must be supported by evidence. Additionally, in terms of pleading, the evidentiary support must be provided; however, this is not the case here.

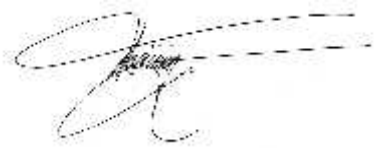
III. RELIEF SOUGHT

64. For the reasons stated above in this section of the Defects Series, the Defence requests that the Trial Chamber, as a guarantor of the right to a fair trial:[39]

> **DISMISS** all allegations of the modes of liability of command responsibility (Article 28(a)) and common purpose liability (Article 25(3)(d)(i) and (ii)) in the CoC Decision. The pleading of these modes of liability throughout the CoC Decision is facially deficient and violates the fundamental fair trial right to notice of Mr Ongwen.

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

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 1st day of February, 2019

At The Hague, Netherlands

[39] 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 […].