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TRIAL CHAMBER IX

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

SITUATION IN UGANDA

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

Public

**Defence Motion on Defects in the Confirmation of Charges Decision:
Defects in the Modes of Liability
(Part II of the Defects Series)**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen (‘Defence’) is filing a series of motions on defects in the notice provided by the confirmation of charges decision (‘CoC Decision’).¹ The Defence is requesting that the Trial Chamber IX (‘Trial Chamber’) rule on this issue, pursuant to Article 64(2) of the Rome Statute (‘Statute’) and Rule 134(3) of the Rules of Procedure and Evidence (‘RPE’).²
2. The reason for a series format (‘Defects Series’) is practical: Mr Ongwen is charged with 70 counts and eight modes of liability in a 104 page-long CoC Decision. Since it is not possible to analyse the defects in the CoC Decision within the standard 20 page-limit, and a request for additional pages would result in an unwieldy document up to five times the standard page-limit, the series format is adopted for clarity and expediency of the proceedings.³
3. Hence, the present motion in the Defects Series addresses the defects in pleading of the modes of liability under Article 25(3)(a) and (b) of the Statute.
4. These defects violate Mr Ongwen’s right to notice under Article 67(1) of the Statute, and the modes of individual criminal liability – direct perpetration, indirect co-perpetration, and ordering – as a matter of law, should be dismissed.
5. Other parts of the Defects Series include: Part One which addresses principles of fair trial and defects in notice; Part Three which addresses defects in notice in pleading of command responsibility under Article 28(a) of the Statute and defects in pleading of common purpose liability under Article 25(3)(d)(i) or (ii) of the Statute; and Part Four which addresses defects in charged crimes.⁴

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. Overview of the pleading defects in notice of modes of liability

6. For every mode of liability, there are two parts: conduct (*actus reus*) and mental state (*mens rea*). Article 30 of the Statute⁵ defines the mental element required for a crime. There are two basic components of the *mens rea*: intent and knowledge. But different forms of modes of liability may have additional mental elements, and case law has interpreted what mental elements are required.⁶
7. In addition, some elements, for example ‘frustrating the crime’ or ‘essential contribution’ have a duality: they are both objective and subjective elements of the mode of liability charged.⁷
8. The Reasoning section of the CoC Decision fails to identify the *mens rea* elements for the modes of liability, especially in regard to Articles 25 (3)(a), 25(3)(b), and 28(a) of the Statute.
9. For example, while **paragraphs 39-41** of the CoC Decision expand on Article 25(3)(a) of the Statute by giving more detail on in-direct co-perpetration in terms of commission of a crime through another person, the CoC Decision fails to identify any *mens rea* for this mode of liability. Co-perpetration requires several *mens rea* elements, including that the defendant either *meant the crime or is aware that the crime will occur in the ordinary course of events*. The defendant also must *be aware* that he/she is making an essential contribution to the crime.⁸ Neither *mens rea* is defined or supported in this definition.

⁵ Article 30 Mental element 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with **intent and knowledge**. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

⁶ For example, in Prosecutor v. *Lubanga*, Trial Chamber I, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842 (‘*Lubanga TJ*’), para. 1018; Prosecutor v. *Lubanga*, Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red (‘*Lubanga AJ*’), para. 434: Both state that the accused must be “aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.” This was required because these are the contextual elements for the war crimes that Lubanga was accused of committing.

⁷ The terms objective elements and *actus reus* are used interchangeably in this pleading; the same holds for the terms subjective elements and *mens rea*.

⁸ These elements are laid out in the *Lubanga TJ* (para. 1013). As the Prosecution notes in their Pre-Trial Brief, the AC in *Lubanga* seemed to adopt or approve of these elements, although they do not state so directly.

10. As for Article 25(3)(b) and (d) of the Statute, there is no analysis of what evidence supports those theories. The Pre-Trial Chamber II uses stock language each time that “abovementioned crimes may be legally qualified under” these provisions.⁹
11. In respect to Article 25(3)(b) of the Statute, no *mens rea* is specified. **Paragraph 42** of the CoC Decision only identifies ordering in terms of the act.
12. And, in respect to Article 28(a) of the Statute, **paragraph 45** of the CoC Decision identifies no *mens rea* element for command responsibility.
13. These same defects in pleading are found in the Charges Section of the CoC Decision.
14. There is standard language in the Charges Section of a mental state in the conclusory statement of “meant to engage in their conduct and intended to bring about the objective elements of the crimes of...”¹⁰ There are also stock paragraphs in the Charges section that refer to “the requisite intent and knowledge under articles 25, 28 and 30, and under the elements of the respective crimes listed below.”¹¹ But these conclusory statements are not factually supported in the CoC Decision.
15. In respect to the allegations for Pajule,¹² and other camps, the CoC Decision lists conduct alleged to be Mr Ongwen’s contribution to a common plan. But there are, however, no elements listed for the *mens rea* for Articles 25(3)(a) or 28(a) of the Statute.
16. For the Lukodi allegations, the *mens rea* is conclusorily stated as “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,”¹³ with a narrative factual statement of his role in the specific attack. This same approach is repeated in **paragraphs 55, 119, and 126**. There is no evidentiary support for each of the elements of *mens rea*.

⁹ CoC Decision, paras 70, 75, 80, 85, 140, 145.

¹⁰ CoC Decision, paras 15, 27, 41, 119, and 126.

¹¹ CoC Decision, paras 19, 31, 44, 57, and 131.

¹² CoC Decision, para. 17.

¹³ CoC Decision, para. 42.

B. Defects in pleading *mens rea* in respect to the modes of liability under Article 25(3)(a)

17. Article 25 of the Statute concerns individual criminal responsibility for a) an individual's own conduct, acting alone; and b) in cases of individuals acting jointly with others.¹⁴
18. Mr Ongwen is charged under Article 25(3) of the Statute individual criminal responsibility with multiple forms of liability, including as a direct and in-direct perpetrator and as an in-direct co-perpetrator under Article 25(3)(a) of the Statute; for ordering under Article 25(3)(b) of the Statute and for common purpose under Article 25(3)(d) of the Statute. All these are charged in the alternative. There are also charges of aiding and abetting under Article 25(3)(c) of the Statute and attempt to commit a crime under Article 25(3)(f) of the Statute.
19. Mr Ongwen's right to notice was violated because in respect to the forms of liability confirmed, the elements under Article 25(3)(a) of the Statute were incomplete, and unsubstantiated in respect to *mens rea*.
20. The general defect in notice is that the CoC Decision confirmed *only part* of the legal elements of *mens rea* for most of the modes of liability under Article 25(3)(a) of the Statute, and then failed to connect factual support to these elements.
21. Hence, the full or complete *mens rea* element for liability under Article 25(3)(a) of the Statute was not identified or supported by factual allegations in the CoC Decision. Nor was it alleged and supported in either the Prosecution's pre-confirmation brief ('PPCB')¹⁵ or Prosecution's pre-trial brief ('PPTB')¹⁶ (collectively, 'Auxiliary Documents').
22. Thus, Mr Ongwen's right to be informed in detail of the charges under Article 67 of the Statute, which includes the modes of liability was violated.

C. Defects in the pleading of indirect co-perpetration

¹⁴ Article 25 of the Statute.

¹⁵ 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').

¹⁶ Prosecutor v. *Dominic Ongwen*, Prosecution, *Prosecution's Pre-Trial Brief*, ICC-02/04-01/15-533, 6 September 2016 ('PPTB'). The references herein to the PPTB do not waive arguments made in Part One that the PPTB cannot provide notice in this case.

1. The confirmation of indirect co-perpetration as a mode of liability is jurisdictionally defective and the pleading of indirect co-perpetration is defective

23. Mr Ongwen is charged with indirect co-perpetration in counts 1-23 and 61-70 – 33 counts, which is almost 50% of the counts against him.¹⁷
24. Indirect co-perpetration attributes the actions of those individuals under the control of one co-perpetrator to all other co-perpetrators in the common plan. The underlying notion of this mode of liability is the idea of joint control.
25. To illustrate: I am sitting at a table with two other people next to me. All three of us share a common plan and we are co-perpetrators. But, there is also a second table, where there are persons under control of each of the two people at my table. Under the theory of indirect co-perpetration, I am liable for the conduct of the persons at the second table, who are under the control of the two people at my table. This is based on the theory of joint control.
26. Does this sound attenuated, complicated, and convoluted? Yes. First, the theory of indirect co-perpetration is not identified in the Statute, and the Defence maintains the position that the theory is not authorized by the language of the Statute. Indirect co-perpetration as a mode of liability should be dismissed on this basis alone. Even if indirect co-perpetration is accepted as a mode of liability within the purview of the Statute, for purposes of notice of the mode of liability, there are multiple elements which must be pleaded to provide notice. And many elements are missing in the CoC Decision, as well as in the Auxiliary Documents.
27. As a matter of law, the mode of liability of indirect co-perpetration should be dismissed.

2. The confirmation of indirect co-perpetration is ultra vires, since it is not a theory within the statutory language of Article 25(3)(a)

28. The form of liability of indirect co-perpetration does not appear in the Statute (as the Prosecution concedes¹⁸), and it is the Defence position 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.

¹⁷ Mr Ongwen is charged with indirect perpetration in counts 24-49 and direct perpetration in counts 50-60.

¹⁸ PPTB, para. 140: “Article 25(3)(a) does not lay out the precise elements of indirect co-perpetration and the jurisprudence on this matter by the Court is not entirely consistent”.

29. The Pre-Trial Chamber rejected this argument, erroneously (in the Defence view) confirming the mode of liability of indirect co-perpetration and holding that the “the form of responsibility of “indirect co-perpetration” (in the sense of commission of crimes ‘jointly with’ another and ‘through’ another) is provided by the text of the Statute.”¹⁹
30. Judge Van den Wyngaert has opined that indirect co-perpetration is a “totally new mode of liability,”²⁰ and not properly within the interpretation of the Statute, which covers 1) perpetration; 2) joint perpetration; and 3) perpetration through another person.²¹ In her view, indirect co-perpetration is a theory about which the accused in the *Ngudjolo* case did not have notice, in order to be charged based on the language of Article 25(3) of the Statute.²² Article 22(2) of the Statute stipulates definitions of crimes should be strictly construed and if there is ambiguity in the definition, it should be interpreted in favour of the accused. This is based on the principle that an accused is entitled to notice of what is criminal conduct.
31. In addition, Judge Van den Wyngaert has pointed out that in order to come up with the mode of liability of indirect co-perpetration, the courts have artificially combined joint perpetration with perpetration through another person. This mode of liability is not expressly provided for in the Statute and is not a proper interpretation of the statutory language.²³

3. *The pleading of the mode of liability of “indirect co-perpetration” is defective because neither the (a) objective element of “power to frustrate the commission of the crime” and nor the (b) subjective element of “awareness of the power to frustrate the crime” are pleaded, and hence, there is no notice of the mode of liability to the Accused*

(a) Actus Reus

32. Both the CoC Decision, and the Prosecution rely on the holdings of *Lubanga* AJ in respect to the notion of co-perpetrator.²⁴ This is a fundamental concept, because the modes of liability charged against Mr Ongwen includes indirect co-perpetration, whose foundation elements are those of co-perpetration.

¹⁹ CoC Decision, paras 38-41.

²⁰ Concurring Opinion of Judge Van den Wyngaert, Prosecution v. *Ngudjolo Chui*, 18 December 2012 (‘Concurring Opinion of Judge Van den Wyngaert’), para. 61.

²¹ In the *Ongwen* case, the terminology used for joint perpetration is *co-perpetration*; and for perpetration through another person it is *indirect perpetration*.

²² Concurring Opinion of Judge Van den Wyngaert, paras 18-21: Judge Van den Wyngaert also viewed the “control over the crime” doctrine as outside what the accused could have known was criminalized in Article 25(3) (a) of the Statute.

²³ Concurring Opinion of Judge Van den Wyngaert, para. 7.

²⁴ *Lubanga* AJ, paras 41-48.

33. A co-perpetrator is defined by the *Lubanga* AC as “one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime.”²⁵
34. Thus, with co-perpetration, two elements must be alleged for the *actus reus*: (a) an essential contribution; (b) which has the power to frustrate the commission of the crime (if the essential contribution were not made).
35. Although the CoC Decision refers to “power to frustrate the commission of the crime,” at paras 38 and 39, as an element of co-perpetration generally, there is no factual support for this objective element in respect to Mr Ongwen. Nor is there an evidentiary basis alleged elsewhere in the CoC to support the element of “power to frustrate the commission of the crime.”
36. Hence, based solely on an analysis in defects in pleading of the *actus reus* of indirect co-perpetration, the mode of liability should be dismissed based on facial deficiency.

(b) The pleading of indirect co-perpetration is defective because the *mens rea* element of “awareness of the power to frustrate the crime” is omitted, and there is no notice given

37. In the CoC Decision, in its remarks on modes of liability,²⁶ the Pre-Trial Chamber II at **paragraph 38**, citing the *Lubanga* AJ, discusses the legal criteria to determine whether a person “committed” the crime jointly with others. In this same paragraph 38, the Pre-Trial Chamber II purports to lay out the elements of Article 25(3)(a) of the Statute, but the error is that the Pre-Trial Chamber II fails to include the *mens rea* elements.²⁷

²⁵ *Lubanga* AJ, para. 469.

²⁶ CoC Decision, paras 34-45.

²⁷ CoC Decision, para. 38 reads: In general, co-perpetration (*i.e.* commission of a crime “jointly with another”) describes the situation in which two or more persons work together in the commission of the crime so that the sum of their co-ordinated individual contributions results in the realisation of the objective elements of a crime. As held by the Appeals Chamber, this requires an agreement between the co-perpetrators (whether express or implied, previously arranged or materializing extemporaneously) which ties them together and justifies the reciprocal imputation of their respective acts. In circumstances where a plurality of persons was involved in the commission of a crime within the jurisdiction of the Court, the most appropriate criterion to determine whether a person “committed” the crime jointly with others (rather than contributing to a crime committed by someone else) is “control over the crime”, which requires an evaluation of whether the person had control over the crime by virtue of his or her essential contribution within the framework of the agreement with the co-perpetrators and the resulting power to frustrate the commission of the crime. If the answer is in the affirmative, then it can be concluded that the person committed his or her crime, and did not contribute to the crime of another. (footnotes omitted)

38. For the *mens rea* for co-perpetration (in addition to the Article 30 of the Statute requirements to show that a person had intent or meant to commit the crime or is aware of the consequences of the conduct in the ordinary course of events) there are two requirements:

Awareness that “(i) his or her role is essential to the implementation of the common plan and hence in the commission of the crime, and (ii) that he or she can – by reason of the essential nature of his or her task – *frustrate the implementation of the common plan* by refusing to perform task assigned to him or her.”²⁸ (*Italics added*)

39. As to the *mens rea* for indirect co-perpetration, the element of “frustrating the commission of the crime” is also required. Hence, to provide notice to an Accused charged with indirect co-perpetration, this “frustration element” must be identified for both the *actus reus* and the *mens rea*.
40. The notion of indirect co-perpetration is also an extension of the basic idea of joint perpetration. As stated above, the elements of joint perpetration are drawn from the *Lubanga* and *Katanga* cases. What is most relevant to the defects issue is that the requirement of *mens rea* for indirect co-perpetration includes that “the accused was aware that he provided an essential contribution to the implementation of the common plan” and that the accused was aware, not only of his essential role, but his ability to frustrate the common plan.” (Underlying added).
41. Repeating the *Lubanga* case, the CoC holds that this “requires an evaluation of whether the person had control over the crime by virtue of his or his essential contribution within the framework of the agreement with the co-perpetrators and the resulting power to frustrate the commission of the crime.”²⁹

²⁸ Prosecutor v. *Lubanga*, Pre-Trial Chamber I, *Decision on the confirmation of charges*, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 367; *see also*, Prosecutor v. *Katanga*, Pre-Trial Chamber I, *Decision on the confirmation of charges*, ICC-01/04-01/07-717 (‘*Katanga CoC*’), paras 538-539. Note, the Ongwen Prosecution fails to cite the element of awareness of ability to frustrate the crime in its PPTB, at para. 140. *Katanga CoC*: 538. The third and final subjective element of the joint commission of a crime through another person is the suspects’ awareness of the factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person. 539. This requires that each suspect was aware: (i) of his essential role in the implementation of the common plan; (ii) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.

²⁹ Prosecutor v. *Lubanga*, Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red, 1 December 2004, para. 473; Prosecutor v. *Charles Ble Goude*, Pre-Trial Chamber I, *Decision on the confirmation of charges against Charles Ble Goude*, ICC-02/11-02/11-186, para. 141.

42. Thus, there are no factual allegations in the CoC Decision in support of the full legal elements of the mode of liability of indirect co-perpetration, resulting in lack of notice to Mr Ongwen.

(c) Defective pleading of the element of ability to frustrate the commission of the crime, as part of *actus reus* and *mens rea*

43. The element of “frustrating the commission of the crime” is important because it is a key part of both the subjective elements of *mens rea* and of the objective elements of essential contribution and the concept of [joint] “control over the crime.”

44. However, except for the general reference in the Reasons section of the CoC Decision,³⁰ the rest of the CoC Decision (and its Charges section) does not address the element of frustrating the implementation of the commission of the crime, either as an objective or subjective element. Neither of the auxiliary documents cure the defect in the pleading of the element of frustrating the crime.

COC

45. The Pre Trial Chamber II’s CoC Decision fails to state, and thus fails to provide notice of the nature, cause and content of the full *mens rea* for liability under Article 25(3)(a) of the Statute. Although the Pre-Trial Chamber II recognized the objective element of an essential contribution by the accused or those under his control, the Pre-Trial Chamber II fails to identify a *mens rea* for liability under the Article 25(3)(a) of the Statute, or refers only to the awareness of control over the crime, without the full definition of awareness of making an essential contribution with the power to frustrate the crime.

46. For example, in examining the Pajule attack, the Pre-Trial Chamber II summarizes the mode of liability with only the objective elements, failing to identify any *mens rea*:

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.³¹

³⁰ CoC Decision, para. 38.

³¹ CoC Decision, Reasoning section, para. 70.

47. In the Charges section of the CoC Decision, the Pre-Trial Chamber II uses the language of the Prosecution, which refers to *mens rea*, but only the first part on exerting control. For example, with regard to the Pajule attack, the Pre-Trial Chamber II states:

Dominic Ongwen was aware of the fundamental features of the LRA and the factual circumstances which allowed him, together with other co-perpetrators, to jointly exert control over the crimes charged in relation to Pajule.³²

48. At no point does the Pre-Trial Chamber II use the standard from the *Lubanga* and *Katanga* case law that requires awareness that the accused's contribution was essential and could frustrate the completion of the crime.
49. Due to the failure of the CoC Decision to properly define the *mens rea* under Article 25(3)(a) of the Statute and the absence of any auxiliary document to provide the content and specificity of the *mens rea*, Mr Ongwen's right to notice was violated, and it has prejudiced his ability to prepare his defence.

(d) Neither the PPCB nor the PPTB cure the defects in pleading of *mens rea* in the CoC

PPCB

50. Under common elements for Article 25(3)(a) of the Statute for indirect perpetration (and indirect co-perpetration) there is no identification of the elements of frustrating the crime, nor any element of *mens rea* for the modes of liability. There are two paragraphs, one alleging that Mr Ongwen was aware of the fundamental features of the organized structure of the LRA and Sinia brigade because of his position³³ and a general allegation that he was aware of the organization's essential features.³⁴
51. But this does not satisfy the requirements of *mens rea* based on the *Lubanga* case law.
52. Elsewhere in the PPCB, there are sections with lists of factors that allege "control over the crime"³⁵ and intent and knowledge.³⁶ Yet, the element of frustrating the crime as part of the definition of "control over the crime" is nowhere to be found.

³² CoC Decision, Charges section, para. 42.

³³ PPCB, para 107.

³⁴ PPCB, para 108.

³⁵ PPCB, paras 212, 301, for example.

³⁶ PPCB, para. 303.

53. For example, the PPCB alleges with regard to the Pajule attack:

Dominic Ongwen's knowledge of the factual circumstances that enabled him to exercise control over the crimes jointly with his co-perpetrators can be established from the following facts:

- he was aware that he exercised de jure and de facto command authority over a group of LRA fighters in Pajule IDP camp; his knowledge that other co-perpetrators who espoused the Pajule common plan were willing to implement it and also exercised command and control over the LRA troops;
- his role in planning the attack;
- his coordination of the attack on the ground;
- his knowledge that the LRA had an effective structure and hierarchy;
- his knowledge of the size and structure of the LRA, and its composition of trained fighters with obedience to hierarchy.³⁷

54. The facts alleged by the Prosecution for knowledge of control over those individuals executing the crimes fail to identify facts with any specificity or clarity that would support an allegation that Mr Ongwen had knowledge that the actions of those under his control were an essential contribution in the sense that, without them, the crime would be frustrated.

55. As a result, the partial pleading fails to provide the nature, cause and content of the *mens rea* for Article 25(3)(a) of the Statute liability in terms of the awareness by the accused of his essential contribution and power to frustrate the implementation of the crimes.

56. Thus, the PPCB, as an auxiliary document, fails to provide notice of the complete elements of *mens rea* in respect to the modes of liability based on co-perpetration.

PPTB

57. If the Trial Chamber is inclined to accept that the PPTB could provide notice, the Defence points out that at **paragraph 140**, the Prosecution has alleged some elements of *mens rea*, but has omitted the element of frustrating the crime. Thus, there is an incomplete identification of the *mens rea* elements in the PPTB, and the PPTB does not cure the defect in the CoC.

58. Although the PPTB, at **paragraph 140**, purports to quote the *Lubanga* Trial Chamber and Appeals Chamber Judgments (including **paragraph 473**), the Prosecution has omitted the “power to frustrate” element in its definition of elements of indirect co-perpetration.

³⁷ PPCB, para. 215.

59. But more importantly, in its reliance on the *Lubanga* case law, it selectively omits an element: frustrate the crime.
60. For the reasons stated above, neither the PPCB nor the PPTB can cure the omission of the *mens rea* element of “frustrating the crime” in the CoC Decision.
61. In addition, 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.³⁸
4. *The legal notion of “joint control over the crime” is defectively pleaded because the underlying elements of essential contribution and power to frustrate the crime are missing, in violation of the Accused’s right to notice*
62. The underlying notion of indirect co-perpetration as a mode of liability is the idea of joint control.
63. The legal notion of ‘joint control over the crime’ is tied to the elements of essential contribution and the resulting power to frustrate the crime. Citing the *Lubanga* AJ, the Pre-Trial Chamber II held that the “appropriate criterion to determine whether a person ‘committed’ the crime jointly with others [...] is ‘control over the crime’ [...] by virtue of [...] essential contribution [...] and the resulting power to frustrate the commission of the crime.”³⁹
64. Thus, the Pre-Trial Chamber II holds that control over the crime rests on two elements: essential contribution and power to frustrate the crime. Where these two composite elements are defectively pleaded, “control over the crime” is also defectively pleaded.
65. In respect to the essential contribution as an element of the *actus reus*, the “resulting power to frustrate the crime” must be pleaded. This is not found in the Charges section of the CoC Decision, where “control over the crime” is alleged at **paragraphs 13, 16, 28, 42 and 55**, there are no allegations of the element of “essential contribution.”
66. Similarly, there is no mention of “power to control the crime” as part of the *actus reus*.

³⁸ Separate Opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016 (‘Separate Opinion’), para 24.

³⁹ CoC Decision, para. 38.

67. In respect to *mens rea*, **paragraphs 16, 28, 42 and 55** allege that Mr Ongwen was aware of the factual circumstances that enabled him to exercise control over the crimes, with other co-perpetrators, but the element of awareness of frustrating the crime is missing.
68. This means that the failure to identify the subjective element of awareness of frustrating the crime, as well as the failure to factually support the objective element of frustrating the crime leads to defective pleading of ‘joint control over the crime’.
69. In the CoC Decision, there are two allegations that Mr Ongwen was “aware of [...] the factual circumstances that enabled him, together with other co-perpetrators, to jointly exercise control over the crimes” at Pajule⁴⁰ and at Odek.⁴¹ But, there is no discussion of the element of frustrating the crime.
70. In the PPTB, at **paragraph 274**, there is a listing of factors to establish joint control; similarly, at **paragraphs 358, 419, 490 and 753**. The paragraphs are not identical in substance: some factors are repeated and a few are omitted. But all refer back to **paragraphs 89-155** in the PPTB. What is singularly important is that in all of these allegations to establish joint control over the crimes, the elements of frustrating the crime and awareness of frustrating the crime are missing. Hence, the PPTB, cannot cure the defect in the pleading in the CoC Decision.
71. In respect to the PPCB, both the objective element of “power to frustrate the commission of the crime” and the subjective element of “awareness of the power to frustrate” is missing.
72. Hence the pleading of element of “control over the crime” is defective.
73. In sum, the Prosecution has alleged the first part of the *mens rea* analysis identified by the Pre-Trial Chamber in the *Katanga CoC* on the awareness of the factual circumstances enabling joint control. The Prosecution has failed, however, to allege the second part that completes the *mens rea* analysis of awareness by the accused of his essential role, meaning his ability to frustrate the implementation of the common plan.

Awareness of joint control is not the same as awareness of the ability or power to frustrate the crime

⁴⁰ COC, para 16.

⁴¹ COC, para 28.

74. Awareness of joint control is not the same as being aware of the ability to frustrate the crime. For instance, an accused might be aware that he and his co-perpetrators are together able to implement the crime and yet, might not be aware that, without his particular role either by himself or through those he controls, he could frustrate the completion of the crime.
75. An example of this would be: A is aware that his troops and B's troops will attack a camp. Thus, A is aware that A's and B's troops are necessary to implement the crime. But, A might also believe that if A withdrew his troops, then the attack would still be implemented successfully by B's troops. Thus, A is not aware that he, A, has the power to frustrate the crime (since A thinks that B's troops alone can implement the attack).
76. As a result of its partial pleading, the Prosecution in its PPCB and in its PPTB alleges content and detail of the *mens rea* for the mode of liability under Article 25(3)(a) of the Statute only with regard to knowledge of factual circumstances that show an awareness of control over the crime. But there are no allegations or support for the *mens rea* element of awareness of the power to frustrate the crime.
77. In sum, the defect in pleading is that the element of frustrating the commission of the crime is nowhere to be found in the confirmed charges section of the CoC Decision, or in the PPCB, or PPTB. Hence, the legal elements of both the *actus reus* and *mens rea* of indirect co-perpetration for Article 25(3)(a) of the Statute identified are incomplete, and not pleaded.
78. Therefore, Mr Ongwen's right to notice under Article 67(1)(a) of the Statute is violated. Hence, the mode of liability of indirect co-perpetration should be dismissed as a matter of law.

III. RELIEF SOUGHT

79. For the reasons stated above, the Defence requests that the Trial Chamber:

DISMISS the modes of liability under Article 25(3)(a) (direct perpetration, indirect co-perpetration) and (b) (ordering) which are facially deficient and violate the fundamental fair trial right of notice to Mr Ongwen.

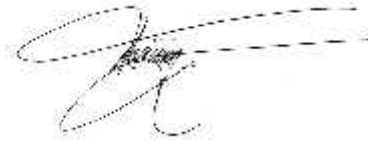
80. The Defence reserves the right to amend this motion.

Respectfully submitted,

No. ICC-02/04-01/15

16/17

1 February 2019



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 1st day of February, 2019

At The Hague, Netherlands