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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

PUBLIC Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing
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Source: Defence for Mr Germain Katanga

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

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Introduction

1. Pursuant to the Schedule of the Confirmation Hearing, issued by Pre-Trial Chamber I on 13 June 2008,¹ allowing the parties to address in writing matters addressed at the confirmation hearing,² the Defence for Mr. Germain Katanga (“the Defence”) hereby presents its *Public Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing*.

Admissibility Challenges

2. On 24 June 2008, the Defence for Mr. Germain Katanga filed its *Confidential Defence Written Submissions on Fact and Law pursuant to Rule 121(9)*,³ challenging the admissibility of certain proposed evidentiary materials included in the Prosecution’s list of evidence for the purpose of the confirmation hearing. On 2 July 2008, the Defence made oral submissions in respect of those items.⁴
3. The Defence reiterates these submissions and maintains that the items challenged should be excluded for the purpose of the confirmation hearing. The Defence does not intend to revisit the written and oral submissions, but submits that, in light of the written and oral submissions of the Prosecution and victim representatives,⁵ some further discussion on those matters is warranted.

*Procès-verbal d’audition*⁶

4. The Defence notes that the Prosecution has informed Pre-Trial Chamber I that it will not rely on the *procès-verbal d’audition* of 20 January 2006, one of the challenged documents, for the purpose of the confirmation hearing.⁷ The Prosecution has, therefore, not provided any argument on the admissibility of the said document. In light of this submission, the Defence reads the Prosecution’s written submission that it “relies on all of the evidence presented in its additional List of Evidence”⁸ to mean

¹ ICC-01/04-01/07-587-Anx 1.

² ICC-01/04-01/07-587-Anx 1, section n, page 4.

³ ICC-01/04-01/07-641-Conf.

⁴ ICC-01/04-01/07-T-41-ENG, pages 4-14 + 49-53.

⁵ ICC-01/04-01/07-692; ICC-01/04-01/07-689; ICC-01/04-01/07-690; ICC-01/04-01/07-691; ICC-01/04-01/07-693; ICC-01/04-01/07; ICC-01-04-01-07-T-41-ENG ; ICC-01-04-01-07-T-42-ENG.

⁶ DRC-OTP-0155-0318 and DRC-OTP-1016-0150.

⁷ ICC-01/04-01/07-T-41-ENG, page 15 lines 10-22.

⁸ ICC-01/04-01/07-692, para. 5.

that the Prosecution relies on all of its evidence listed in this List of Evidence save for the *procès-verbal d'audition*.

5. One of the victim representatives has contested the right of the Prosecution to withdraw evidence that is listed on its list of evidence, thereby relying on the Decision on the confirmation of charges in the case against Thomas Lubanga.⁹ The Defence respectfully submits that this conclusion is based on an incorrect interpretation of the quoted paragraph of this Decision in Lubanga which states that the Pre-Trial Chamber may rely on evidence listed in the Prosecution list of evidence irrespective of whether “the Prosecution decides to present it at the confirmation hearing” (para. 67). The Defence does not contest this. Indeed, this corresponds with the Prosecution’s submission that its oral presentation of the evidence focused on the most relevant pieces of evidence selected from the Prosecution’s List of Evidence, but that it relies on all of the evidence listed in its List of Evidence “to establish that substantial grounds exist to commit the two individuals to stand trial”.¹⁰
6. Given that the Defence has been given an opportunity to comment on any of the materials listed in the Prosecution’s List of Evidence, it accepts that it is proper for the Prosecution to rely on evidence listed in its List of Evidence even if not orally presented at the confirmation hearing. However, in respect of the *procès-verbal d'audition*, the Prosecution did not merely indicate that it would not refer to this document in its oral presentation but also that it would not rely on it for the purpose of the confirmation hearing.¹¹ Therefore, paragraph 67 of the above Decision in Lubanga is not applicable to the matter in question.
7. The Defence submits that the Prosecution should be entitled to withdraw evidence at any point prior to the deliberation stage of the Chamber. The Prosecution has the burden of proof. In the context of the confirmation hearing, this means that the Prosecution has the responsibility to present (orally or not) evidence sufficient in quality and quantity to persuade the Pre-Trial Chamber that there are substantial grounds to commit the suspect to stand trial.¹² In performing this task, the Prosecution must be given leeway to select what evidence it deems necessary to present at the

⁹ ICC-01/04-01/07-690, para. 35, referring to: ICC-01/04-01/06-803-tEN, para. 67.

¹⁰ ICC-01/04-01/07-692, para. 5.

¹¹ ICC-01/04-01/07-T-41-ENG, page 15 lines 10-22.

¹² ICC-01/04-01/07-692, para. 5.

confirmation hearing. Hence, where the Prosecution decides not to rely on a document that was initially listed as evidence, the Prosecution should be free to do so given that it is the Prosecution's rather than the Pre-Trial Chamber's responsibility to collect and produce the evidence. On the basis of the evidence produced by the parties, the Chamber must make a determination as to whether the applicable burden and standard of proof have been met. This is the nature of the adversarial proceedings envisaged in the ICC.

8. In the event that Pre-Trial Chamber I in the present proceedings finds that the Prosecution's withdrawal of the *procès-verbal d'audition* is insufficient reason not to rely on this document in determining whether substantial grounds exist to commit Mr. Katanga to stand trial, the Defence reiterates the arguments set out previously and maintains that the document should be rendered inadmissible due to a violation of the fundamental right to legal representation.

Deceased Witnesses

9. The Defence concedes that the Single Judge has held that, for the purpose of the confirmation hearing, documentary evidence may not be inadmissible per se on the mere ground that the declarant or author has not been called or is unavailable to testify.¹³ However, the Defence's concerns in relation to deceased witnesses 167 and 258 are not confined to their unavailability for questioning. This is only one of many grounds on the basis of which the Defence seeks the exclusion of their evidence.
10. As previously indicated, witness 258 is not only unavailable for questioning, he was also questioned in the absence of counsel and was an alleged co-perpetrator. These factors in accumulation, it is respectfully submitted, so significantly undermine the

¹³ ICC-01/04-01/07-692, para. 10. The Defence has previously challenged the admissibility of the interview of deceased witness 258 on the ground that he is not available for questioning (Defence Response Concerning the Admission of the Statement of Witness 12, filed on 31 March 2008, ICC-01/04-01/07-348). The Single Judge, however, dismissed the Defence's Response to the Prosecution's Observations regarding Admission for the Confirmation Hearing of the Transcript of Interview of Deceased Witness 12, filed on 20 March 2008 (ICC-01/04-01/07-336) in her Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, issued on 18 April 2008 (ICC-01/04-01/07-412), highlighting the difference between the confirmation hearing and the trial. The Single Judge also dismissed the Defence's subsequent Application seeking leave to appeal this Decision (Decision on the Defences' Applications for Leave to Appeal the "Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12 ICC-01/04-01/07-496, issued on 22 May 2008). In light of these decisions, the Defence does not proceed with its contest of the admissibility of evidence given by a deceased witness on that basis alone and considers it a lost battle.

weight of the evidence given by this witness that it should not be relied upon to confirm the charges.¹⁴

11. As regards witness 167, the Defence has clearly addressed the numerous problems with the manuscript documents allegedly stemming from this witness and maintains that these documents should be rendered inadmissible or not be relied upon to confirm the charges.¹⁵

Amendment to the Document Containing the Charges

12. The Defence concedes that, in the Prosecution's Consolidated Response to the Defences' Motions Regarding the Document Containing the Charges, the Prosecution indicated that only Katanga and Ngudjolo are alleged to be co-perpetrators pursuant to Article 25(3)(a).¹⁶ This is not an insignificant change and the Defence regrets that the Prosecution did not amend the Document Containing the Charges prior to the deadline to do so pursuant to Rule 121(4) of the Rules of Procedure and Evidence ("Rules") despite the fact that the Defence filed its Motion seeking the Amendment of the Document containing the Charges on 9 June 2008,¹⁷ three days prior to this deadline, in order to give an opportunity to the Prosecution to adjust its charging Document.¹⁸ Nonetheless, as it appears that the Single Judge accepted this change in her *Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document*,¹⁹ the Defence withdraws its objection made on 4 July 2008 on the ground that it was too late for the Prosecution to make such an amendment.

Challenge of the Mode of Liability of Joint Control

13. The Defence fully agrees with the Prosecution's submission that:²⁰

[A]ny legal finding made by the Pre-Trial Chamber in the context of the decision on the confirmation of the charges cannot produce any binding effect in the trial

¹⁴ The Defence concedes that it has submitted that the objection to the interview of witness 258 is a matter of weight to be attributed to the statement, and not its admissibility (ICC-01-04-01-07-T-41-ENG, page 49 lines 16-22; as quoted by the Prosecution in its written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, ICC-01/04-01/07-692, para. 35). The Defence nonetheless maintains that witness 258's interview should not be relied upon for the reasons stated in the Defence Written Submissions on Fact and Law pursuant to Rule 121(9), paras. 31-49; and presented orally on 2 July 2008.

¹⁵ Defence Written Submissions on Fact and Law pursuant to Rule 121(9), paras. 60-66; and presented orally on 2 July 2008.

¹⁶ ICC-01/04-01-590, para. 11.

¹⁷ ICC-01/04-01-574.

¹⁸ See para. 1 of this Motion.

¹⁹ ICC-01/04-01-07-648, para. 23.

²⁰ ICC-01/04-01/07-692, para. 44.

proceedings. The Trial Chamber has full authority to make fresh and independent determinations on matters concerning the interpretation of co-perpetration in Article 25(3)(a) or the mental elements prescribed in Article 30, and the Defence will have the opportunity to adduce legal and factual arguments before that Chamber in due course.

14. For that reason, the Defence initially had no intention to challenge the mode of liability at this stage. The Defence, however, submits that the Pre-Trial Chamber in the case against Lubanga defined the concept of co-perpetration in a manner inconsistent with the intention of the drafters of the ICC Statute.²¹ Given that in the instant case, it was the Pre-Trial Chamber, not the Prosecution, which added the mode of co-perpetration to the warrant of arrest issued against Germain Katanga, thereby following the reasoning in the Lubanga confirmation Decision,²² the Defence has reasonable ground to believe that this Pre-Trial Chamber may adopt the same concept of co-perpetration as set out in Lubanga.

15. The Prosecution may well be right that any discussion on the theory of liability is more appropriate at the level of trial. However, in the event that the charges are confirmed, the Defence is interested to know the theory of liability pursuant to which they are confirmed in order to determine the scope of liability charged and whether any challenge to the liability mode adopted and confirmed is warranted at the trial level. Thus, the Defence primarily requests the Pre-Trial Chamber to set out the theory of liability as a co-perpetrator pursuant to Article 25(3)(a) of the ICC Statute.

16. The Defence further requests that the Pre-Trial Chamber does not adopt the concept of co-perpetration set out in Lubanga. On the grounds discussed at length during the hearing of 11 July 2008 and further detailed below, the Defence submits that this concept of co-perpetration is not supported by domestic, customary, or international law.

17. The Defence further notes that the Single Judge expressed her serious concern as regards Defence's submission in a footnote that an improper interpretation was given to the notion of co-perpetration pursuant to Article 25(3)(a) in Lubanga but that it

²¹ ICC-01/04-01/06-803-tEN, paras 316-367.

²² ICC-01/04-01/07-4.

would, at present, leave this matter alone.²³ The Defence accepts this criticism and has subsequently decided to present arguments explaining why it maintains that the Lubanga Pre-Trial Chamber has given an incorrect interpretation to Article 25(3)(a). This is no challenge to jurisdiction and does not prevent any party from raising those or similar issues at the trial stage.

18. As stated during its oral submissions given on 11 July 2008, the Defence objects to the theory of joint control as a notion of co-perpetration as developed in Lubanga on three grounds:

- (1) It merges the liability modes of co-perpetration and indirect perpetration;
- (2) It defines the common plan in a broad and imprecise manner;
- (3) It incorporates the concept of *dolus eventualis*.

(1) Co-perpetration mixed with indirect perpetration

19. The Defence reiterates the arguments raised orally on 11 July 2008. The Defence stresses that the concept of joint control is a new concept thus far not accepted by any Court, domestic or international.²⁴ The Defence further submits that co-perpetration suggests that there is a horizontal structure of responsibility and indirect perpetration suggests that there is a vertical structure of responsibility. However, in Lubanga these two concepts appear to have been merged in a manner extending even the theory of joint control liability as initially created by criminal law theorist Claus Roxin.

20. Claus Roxin elaborated on the notion of control of the crime by highlighting its three main manifestations: (i) direct or immediate perpetration based on the “control of the action”; (ii) indirect perpetration based on the “control of the will”; and (iii) co-perpetration based on “functional control.”²⁵

²³ ICC-01/04-01-07-648, para. 15.

²⁴ As the Pre-Trial Chamber has clearly indicated, the notion of joint control must be distinguished from joint criminal enterprise, see ICC-01/04-01/06-803-tEN, in particular, paras 335-338.

²⁵ C. Roxin: *Täterschaft und Tatherrschaft*, 7th ed., 2000, p. 122 et seq. As referred to in: Héctor Olásolo: *Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement*, *International Criminal Law Review* 7 (2007) 143-161, at page 145; Héctor Olásolo and Perez Cepeda, A: *The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakić Case*, 4 *International Criminal Law Review* 474 (2004), pages 488-489. This Review and these two articles can be accessed through the library subscription on the ICC intranet.

21. Dr. Olásolo and Perez Cepeda define the notion of co-perpetration based on “functional control” as follows:²⁶

[T]he contribution of several people to the commission of a crime amounts to the co-performance on the basis of the principle divisions of tasks. As a result, the sum of the individual contributions considered as a whole amount to the completion of the *actus reus* of the crime. The control of each co-perpetrator over the crime is based on the division of functions without which it would be impossible to complete the *actus reus* of the crime. The co-perpetrators can only implement the common plan in as much as they act jointly, and each co-perpetrator may ruin the implementation of the common plan by withholding his contribution to the crime. This key position of each co-perpetrator is the basis of their shared control of the crime. The key element of functional control is that, due to the division of the essential functions for the commission of the crime, none of the co-perpetrators alone controls the execution of the crime, but all co-perpetrators share such control.

22. Thus, the notion of co-perpetration based on “functional control” implies that the co-perpetrators jointly control the execution of the crime. Roxin’s theory of control through an “organised apparatus of power” further suggests that the effective control of a person acting within such an organised apparatus of power over the commission of crimes extends to crimes directly committed by fully responsible perpetrators.²⁷

23. The attribution of the crime of a fully responsible direct perpetrator to the indirect perpetrator behind him as though it were his own, can be justified only if there is a sufficiently tight control by the indirect over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility pursuant to Article 28 of the ICC Statute.²⁸ Although direct perpetrators acting with full criminal responsibility cannot be considered mere ‘interchangeable mediators of

²⁶ Héctor Olásolo and Perez Cepeda, A: The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakić Case, 4 International Criminal Law Review 474 (2004), pages 498-499.

²⁷ See further: Christiane Wilke: Dissertation: A Belated Vindication of Rights: Criminal Trials for Massive Human Rights Violations, Chapter 5 – The Spider’s Head: The 1985 Trial of the Juntas, September 2005, section III. www.geocities.com/christianewilke/chapter5finalept05.pdf

²⁸ Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds): The Rome Statute of the International Criminal Court: A Commentary, Vol. I, Oxford University Press 2002, page 795. The key issue is whether the mastermind or *Hintermann* is able to exercise effective control over the direct perpetrators by means of the organizational apparatus created and dominated by him. The indirect perpetrator must thus be able to sufficiently dominate the direct perpetrator. See further: Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, March 2007, 159 at page 180. This journal and article can be accessed through the library subscription on the ICC intranet.

the act’ as such, the ‘system’ provides for a practically unlimited number of replacements and thereby for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned.²⁹

24. The notion of ‘joint control’ as developed in Lubanga merges these different theories of liability. Although Article 25(3)(a) of the ICC Statute has incorporated both the notion of co-perpetration (jointly with another) and indirect perpetration (through another person, regardless of whether that other person is criminally responsible), it has clearly not incorporated the notion of indirect co-perpetration. Article 25(3)(a) states “jointly with another **or** through another person” , not “jointly with another **and** through another person”.

25. The notion of control as applied in Lubanga appears to reflect a joint application of: (i) indirect perpetration in its variant of the perpetrator behind the perpetrator/actor, which is applicable when crimes are committed through the use of an organised structure of power, such as an army unit, a police unit or an organized armed group; **and** (ii) co-perpetration based on functional control of the crime (also known as joint control of the crime).³⁰

26. As aforementioned, the Defence submits that this combined application is highly controversial and has rarely been applied and never confirmed by the highest court. It was applied by the Trial Chamber in the ICTY case against *Stakic*,³¹ but rejected on appeal.³² Roxin’s theory of control of the act through an “organized apparatus of power” was also applied and confirmed by the Appeals Chamber in the Argentine Junta trial. However, the Supreme Court rejected this theory because it held that this theory was not even accepted in Germany (the country of origin of this legal theory) and would lead to inequitable results by establishing a perpetrator behind the

²⁹ Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, March 2007, 159 at page 182.

³⁰ Héctor Olásolo: Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the *Stakić* Appeal Judgement, International Criminal Law Review 7 (2007) 143-161, at page 149.

³¹ *Prosecutor v. Stakic*, IT-92-24-T, TC Judgment of 31 July 2003, paras. 438-442, 741-742, 774, 818, 822 and 826. <http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf> See also *ibid*.

³² *Prosecutor v. Stakic*, IT-92-24-A, Appeals Chamber Judgment of 22 March 2006, in particular, paras 439-441. <http://www.un.org/icty/stakic/appeal/judgement/sta-aj060322e.htm>

perpetrator.³³ The Supreme Court went back to the traditional notion of instigation and held that a person cannot be criminally responsible for the subordinates of others.³⁴

27. The Lubanga theory of joint control goes even further than that attempted in the Argentine Junta trial in that it attributes criminal liability to a co-perpetrator for alleged unintended but foreseeable crimes committed neither by his co-perpetrators nor by his subordinates, but by the fully responsible subordinates of his co-perpetrator. This theory of liability for indirect perpetration, it is respectfully submitted, represents the worst case scenario for persons accused and extends beyond Roxin's already controversial theory of functional control.³⁵

28. On these grounds and the submissions presented orally on 11 July 2008, the Defence requests that Pre-Trial Chamber I adjusts this theory of liability in the present proceedings.

(2) Common Plan

29. The Defence reiterates that the common plan agreed upon by more than one co-perpetrator must include more than an element of criminality; it must be a common plan involving the commission of a crime under the ICC Statute.³⁶ As it stands now, the common plan is way broader than even the common purpose or plan within the already controversial concept of joint criminal enterprise, applied by the ad hoc tribunals. In accordance with the theory of liability under joint criminal enterprise, the Prosecution must establish that a common plan, design or purpose exists which amounts to or involves the commission of a crime provided for in the Statute.³⁷

³³ Corte Suprema de Justicia de la Nación, Resolución, Causa 13/84, 30 December 1986, para. 20.

www.nuncamas.org/juicios/juicios.htm

³⁴ *Ibid*, in particular para. 14. See further: Christiane Wilke: Dissertation: A Belated Vindication of Rights: Criminal Trials for Massive Human Rights Violations, Chapter 5 – The Spider's Head: The 1985 Trial of the Juntas, September 2005, sections IV and V. www.geocities.com/christianewilke/chapter5finalsept05.pdf

³⁵ Indeed, the Pre-Trial Chamber in Lubanga explicitly departs from Roxin's theory of liability in holding that the ability to exercise joint control over the crime extends to those who contribute only to the commission of a crime at the preparatory stage as long as they carry out essential tasks with a view to implementing the common plan. ICC-01/04-01/06-803-tEN, para. 348 and footnote 425.

³⁶ Gerhard Werle: Individual Criminal Responsibility in Article 25 ICC Statute, JICJ 5 (2007), 953-975, page 963. This Review and article can be accessed through the library subscription on the ICC intranet.

³⁷ *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, para. 227, <http://www.un.org/icty/tadic/appeal/judgement/index.htm>; *Prosecutor v. Brdanin*, IT-99-36-A, Appeals Chamber Judgment of 3 April 2007, para. 364. <http://www.un.org/icty/brdjanin/appeal/judgement/brd-aj070403-e.pdf>

30. The Defence further submits that the common plan as described in paragraph 344 of the Lubanga confirmation decision is very imprecise. In particular, it is unclear what type of conditions paragraph 344(i) refers to.

(3) Dolus Eventualis

31. The Defence reiterates its arguments presented orally on 11 July 2008 and relies, *inter alia*, on the following legal scholars in support of its submission that Article 30 of the ICC Statute does not include the notion of *dolus eventualis*:

- Gerhard Werle: Individual Criminal Responsibility in Article 25 ICC Statute;³⁸
- Gerhard Werle and Florian Jessberger: Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law;³⁹
- Harmen van der Wilt: Joint Criminal Enterprise: Possibilities and Limitations;⁴⁰
- Kai Ambos: Joint Criminal Enterprise and Command Responsibility.⁴¹

32. On these grounds, the Defence requests that the Pre-Trial Chamber determines the scope of liability under the notion of co-perpetration with which Mr. Katanga is charged in the Document Containing the Charges and, in the event it intends to apply the theory of joint control, that it revisits the theory of joint control as set out in Lubanga, which appears to be paramount to a theory of indirect co-perpetration.

Conclusion

33. The Defence prays Pre-Trial Chamber I to carefully consider the arguments set forth by the Defence in the aforementioned oral and written applications in its determination of whether there are substantial grounds to commit Mr. Katanga for trial.

³⁸ JICJ 5 (2007), pages 953-975, at page 963.

³⁹ JICJ 3 (2005), pages 35-55, at pages 41-42 and 52. This Review and article can be accessed through the library subscription on the ICC intranet.

⁴⁰ JICJ 5 (2007), pages 91-108, at page 100. This Review and article can be accessed through the library subscription on the ICC intranet.

⁴¹ JICJ 5 (2007), pages 159-183, pages 168 and 170-171.

Respectfully submitted,



David HOOPER

Dated this 28th July 2008

At The Hague, London