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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

Public

Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a)

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Pursuant to the order of Trial Chamber II of 1 October 2009, the Prosecution hereby files its Pre-Trial Brief on the interpretation of Article 25(3)(a).¹ Following the instructions of the Trial Chamber, this brief will set out why, in the Prosecution's view, the interpretation of the provision by Pre-Trial Chamber I in the "Decision on the confirmation of charges"² should largely be followed by the Trial Chamber.³

1. While the Prosecution submits that the Pre-Trial Chamber's theory of control over the crime and the overall structure of co-perpetration is the proper interpretation of the Statute, there are two particular elements which the Prosecution submits that the Trial Chamber should revisit or closely examine. The first of these is the nature of the contribution required of the co-perpetrator: the Prosecution only need prove that the accused made at least a substantial contribution to the commission of the crimes. Second, when considering the subjective elements of co-perpetration, the Prosecution only needs to prove that those accused co-perpetrators charged in this case were aware that the implementation of the plan would lead to the commission of crimes in the ordinary course of events,⁴ and that they had control over the commission of those crimes.⁵ The Prosecution does not need to prove such elements as to are other uncharged co-perpetrators.⁶

Background

2. In the Document Containing the Charges, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui (the Accused) with 13 counts of committing war crimes and crimes against humanity jointly with others under Article 25(3)(a), or for each ordering the commission of the crimes under Article 25(3)(b).⁷ The Prosecution alleged that the Accused each committed the crimes in question jointly with other commanders of the FNI and the FRPI by agreeing to a common plan to "wipe out" Bogoro. Such plan consisted in attacking indiscriminately civilians not taking part in hostilities as well as UPC soldiers

¹ ICC-01/04-01/07-T-71-Conf-FRA ET, p. 7, lines 8-24.

² ICC-01/04-01/07-717, 26 September 2008 ("Confirmation Decision"), paras. 487-539.

³ Since the findings of the Pre-Trial Chamber in the Confirmation Decision are largely based on the Decision on the confirmation of charges in the *Lubanga* case (ICC-01/04-01/06-796-Conf-tEN, 29 January 2007) ("*Lubanga* Confirmation Decision"), the Prosecution analyzes the Pre-Trial Chamber's findings also in light of the latter decision.

⁴ Confirmation Decision, para. 533.

⁵ Confirmation Decision, para. 538-539.

⁶ Contrast *Lubanga* Confirmation Decision, paras. 361-367.

⁷ ICC-01/04-01/07-649-Anx1A, 26 June 2008, pp 30-34.

located in a camp inside Bogoro. The Accused, as military chiefs of the FRPI and FNI and with the authority conveyed to each of them due to such positions, played an essential role in the implementation of the common plan which led to the commission of the underlying crimes.

3. The Prosecution further alleged that each Accused made an “essential” contribution to the common plan and the crimes it furthered.⁸ However, contrary to the Pre-Trial Chamber’s summary of the position of the Prosecution in the Confirmation Decision, the Prosecution did not assert that it is a legal requirement for co-perpetration that the Accused provides an essential contribution.⁹ The Prosecution asserted that the contribution of the Accused was in fact essential to the implementation of the Common Plan.¹⁰ In so doing, the Prosecution stated that the factual contribution of the Accused to the implementation of the common plan was more significant than the minimum requirement prescribed by law.
4. With respect to the mental element, the Prosecution alleged that in contributing to the common plan, the Accused were aware of their essential role and that such role gave them joint control over the implementation of the common plan. The Accused were, at a minimum, mutually aware and accepted that implementing their common plan “to wipe out” Bogoro may result in the commission of the crimes charged.¹¹
5. In the alternative, the Prosecution submitted that the Accused, each vested with power and authority as chiefs of all the FRPI and FNI, respectively, ordered the attack on the civilian population of Bogoro.¹²
6. In the Confirmation Decision, the Pre-Trial Chamber analysed the liability of the accused for the crime of using children under the age of fifteen years to actively participate in the hostilities under a theory of co-perpetration. For the remaining charges, the Chamber assessed the accuseds’ liability under a theory of “joint commission through another person”.¹³ This distinction follows the Chamber’s finding that the two accused personally performed the material elements of the child soldiers’ crime by including child soldiers in

⁸ ICC-01/04-01/07-649-Anx1A, 26 June 2008, paras. 90-92.

⁹ Confirmation Decision, para. 473.

¹⁰ ICC-01/04-01/07-649-Anx1A, 26 June 2008, para. 92. See also similar submissions of the Prosecution in the case against *Jean-Pierre Bemba* (ICC-01/05-01/08-169-Anx3A, 17 October 2008, paras. 62-64).

¹¹ ICC-01/04-01/07-649-Anx1A, 26 June 2008, paras. 92-93.

¹² ICC-01/04-01/07-649-Anx1A, 26 June 2008, para. 94.

¹³ Confirmation Decision, para. 489.

their personal escorts.¹⁴ The Chamber found that the material elements of the other crimes were performed by persons who were under the control of the accused.¹⁵

7. In relevant legal findings, the Pre-Trial Chamber explained that both modalities of participation applied by the Pre-Trial Chamber, namely “co-perpetration” through performance of the elements of the *actus reus* of a crime¹⁶ and “joint perpetration through another person”, were forms of “co-perpetration” under Article 25(3)(a).¹⁷ With respect to the former, the Pre-Trial Chamber relied on its own prior findings in the case against *Thomas Lubanga Dyilo*.¹⁸ With respect to the latter, the Pre-Trial Chamber explained how crimes committed by one of the co-perpetrators through another person or through an organized structure of power can be attributed to other co-perpetrators.¹⁹ In particular, it found that the crimes committed by a co-perpetrator through his or her control over an organized and hierarchical apparatus of power²⁰ may be attributed to other co-perpetrators if “the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan”.²¹
8. Having found substantial grounds to believe that the Accused are responsible for the crimes in question as principal perpetrators under Article 25(3)(a), the Pre-Trial Chamber declined to consider whether the Accused are also responsible under an accessory form of liability. The Pre-Trial Chamber therefore did not enter any finding as to whether the accused are responsible for ordering the crimes in question under Article 25(3)(b).²²

The Trial Chamber should follow the Pre-Trial Chambers’ approach to co-perpetration

9. Pre-Trial Chamber I carefully analysed, substantiated and defined the mode of liability of co-perpetration (including “joint perpetration through another person”), as set out in Article 25(3)(a).²³ This mode of liability has been repeatedly applied by Pre-Trial

¹⁴ Confirmation Decision, paras. 547(iv), 547(v) and 519.

¹⁵ Confirmation Decision, paras. 540-547.

¹⁶ In this case, the *actus reus* of the use of child soldiers in hostilities was committed by the accused co-perpetrators themselves. However, often the *actus reus* will be committed by other members of the common plan, as discussed below.

¹⁷ See Confirmation Decision, paras. 493 and 521.

¹⁸ See Confirmation Decision, footnote 618, referring to *Lubanga* Confirmation Decision, paras. 322-367.

¹⁹ Confirmation Decision, paras. 495-518.

²⁰ Confirmation Decision, paras. 500-518.

²¹ Confirmation Decision, para. 525.

²² Confirmation Decision, para. 471.

²³ *Lubanga* Confirmation Decision, paras. 317-367; and *Katanga* Confirmation Decision, paras. 466-539.

Chamber I, across different cases and situations,²⁴ and has also been adopted by Pre-Trial Chambers II²⁵ and III.²⁶ It is not a novel or controversial theory of liability.²⁷ Rather, it is founded on a detailed analysis of the Statute, in particular reading Article 25(3) as a whole.²⁸

10. The Statute prescribes the modes of liability. These must be interpreted and applied on their own merits:²⁹ in the context of the Statute as a whole and in light of its object and purpose, including effectively dealing with situations of crimes committed by armed groups, while always respecting the principle of legality.³⁰ Pre-Trial Chambers have undertaken this process and have interpreted co-perpetration in a manner which is particularly well suited for the purposes of defining the liability of those most responsible for the mass commission of international crimes by armed groups.³¹
11. The careful analysis and the authorities identified by the Pre-Trial Chambers in their decisions provide a solid foundation of the theory of co-perpetration. These decisions have also been widely supported by academic commentators³² who emphasise that this

²⁴ In addition to the *Lubanga* and *Katanga* confirmation decisions cited above, see also *Prosecutor v Al Bashir*, ICC-02/05-01/09-3, 4 March 2009 (*Bashir* Arrest Warrant Decision), paras. 210-214, 223.

²⁵ *Prosecutor v Bemba*, ICC-01/05-01/08-424, 15 June 2009, (*Bemba* Confirmation Decision) paras. 346-350.

²⁶ *Prosecutor v Bemba*, ICC-01/05-01/08-14-tENG, 10 June 2008 (*Bemba* Arrest Warrant Decision), paras. 69-84.

²⁷ In particular *Katanga* Confirmation Decision, paras. 480-491; and *Lubanga* Confirmation Decision, paras. 333-340.

²⁸ In particular authorities cited in *Katanga* Confirmation Decision, paras. 484-485, also paras. 487, 495-527 and *Lubanga* Confirmation Decision, paras. 342-349 and 361-367.

²⁹ See generally *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-648, 25 June 2008, paras. 17-18, *Lubanga* Confirmation Decision, paras. 334-338, *Katanga* Confirmation Decision, paras. 481 and 508. See also Werle, "Individual Criminal Responsibility in Article 25 of the ICC Statute" (2007) 5 *Journal of International Criminal Justice* at 961; Weigend, "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges" (2008) 6 *Journal of International Criminal Justice* at 478; Jessberger and Geneuss, "On the Application of a Theory of Indirect Perpetration in *Al Bashir*" (2008) 6 *Journal of International Criminal Justice* at 858.

³⁰ Article 22.

³¹ See e.g. van der Wilt, "The Continuous Quest for Proper Modes of Criminal Responsibility" (2009) 7 *Journal of International Criminal Justice* at 312, describing it as a "potentially fruitful vision of the culpability of senior leaders".

³² The approach to "joint perpetration through another person", as set out in the *Katanga* Confirmation Decision, has been described as a "potentially fruitful vision of the culpability of senior leaders" (van der Wilt, "The Continuous Quest for Proper Modes of Criminal Responsibility" (2009) 7 *Journal of International Criminal Justice* at 312). The interpretation in *Lubanga* has also been considered "convincing" (Werle, "Individual Criminal Responsibility in Article 25 of the ICC Statute" (2007) 5 *Journal of International Criminal Justice* at 962), and hailed as "a plausible intermediate position" between competing doctrinal versions, which "is linked convincingly to the Chamber's overarching 'control' criterion, it draws a bright line between co-perpetrators and other, lesser forms of criminal responsibility, and it leaves less room for manipulation than any subjective test" (Weigend, "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges" (2008) 6 *Journal of International Criminal Justice* at 480). This fundamental principles underpinning this interpretation have similarly been accepted by Ambos ("Article 25" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2nd ed) (2009) p. 752, [9a]; "Critical Issues in the Bemba Confirmation Decision" (2009) *Leiden Journal of International Law*, pp. 5-7). See also Jessberger and Geneuss,

theory is not novel or without foundation.³³ This is consistent with international customary law, under which a perpetrator can be criminally responsible when the objective elements of the crimes are committed by a person who is not a member of that common plan.³⁴ As a result, the Trial Chamber will be on safe legal ground in following the basic interpretation of Article 25(3)(a) taken by Pre-Trial Chamber I. The Prosecution considers that there is no reason for the Chamber to abandon this well-considered and consistently applied jurisprudence of this Court.

12. While the Prosecution submits that the theory of control over the crime and the overall structure of co-perpetration is the proper interpretation of the Statute, there are two particular elements which the Prosecution submits that the Trial Chamber should revisit or closely examine. The first of these is the nature of the contribution required of the co-perpetrator. The Prosecution only need prove that the accused made a substantial contribution to the commission of the crimes. In addition, when considering the subjective elements of co-perpetration, the Prosecution only needs to prove that those accused co-perpetrators charged in this case were aware that the implementation of the plan would lead to the commission of crimes in the ordinary course of events,³⁵ and that they had control over the commission of those crimes.³⁶ However, the Prosecution does not further need to prove such elements as to other uncharged co-perpetrators.³⁷

“On the Application of a Theory of Indirect Perpetration in *Al Bashir*” (2008) 6 *Journal of International Criminal Justice* at 869.

³³ The theory of co-perpetration under Article 25(3)(a) is mirrored in a number domestic jurisdictions. It has, to a limited extent also been applied by international courts and tribunals (*Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003 (“*Stakić* Trial Judgement”), paras. 440-442 and 468-498.

³⁴ The ICTY Appeals Chamber has held that a perpetrator who is part of a common plan may use a person outside of that common plan to carry out the *actus reus* of the crime: see *Prosecutor v. Brdjanin*, IT-99-36-A, Judgement, 3 April 2007, paras. 410, 411, 413; Separate Opinion of Judge Meron, paras. 6-7; Declaration of Judge van den Wyngaert, paras. 2-4 (in that case, the Prosecution referred to the accused using the physical perpetrators as “tools”, para. 412). See also *Prosecutor v. Krajisnik*, IT-00-39-A, Judgement, 17 March 2009, paras. 200, 225-226, 233-236, 598, 714 (for examples of the application, see paras. 256-283). While the Prosecution is conscious of the differences between the modes of liability in the ICC Statute and those in the ICTY/ICTR (in particular *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-648, 25 June 2008, paras. 17-18, *Katanga* Confirmation Decision, paras. 481 and 508), the finding referred to above, clarifying the status of international customary law on the matter, provides further confirmation of the legal correctness of the Pre-Trial Chamber’s approach to co-perpetration through another.

³⁵ Confirmation Decision, para. 533.

³⁶ Confirmation Decision, para. 538-539.

³⁷ This is consistent with the position in the Confirmation Decision, where the Pre-Trial Chamber required that “the suspects”, “both suspects” or “each suspect” are aware that the plan will result in the commission of the crimes and are aware of their essential role (see paras. 533, 534, 538, 539). However in the *Lubanga* Confirmation Decision, the Pre-Trial Chamber referred to a requirement that the Prosecution prove this knowledge for the suspect and other co-perpetrators (paras. 361-367). The Prosecution’s position is that the Trial Chamber should follow the more recent and developed jurisprudence in the Confirmation Decision in this case.

Elements of co-perpetration

13. The concept of co-perpetration is based on a division of tasks between the co-perpetrators with a view to implementing an agreement or common plan (Common Plan). It is further characterized by the possibility of the accused to exercise control over the crimes in implementing the Common Plan, and the fact that the material elements of the crime(s) are carried out by members³⁸ of the Common Plan.³⁹

a) Objective elements of co-perpetration

14. The Prosecution largely agrees with the findings of the Pre-Trial Chamber with respect to the objective elements of co-perpetration.

15. An accused will be responsible under the theory of co-perpetration where his or her contribution was essential to the implementation of the Common Plan.⁴⁰ Thus, the theory of co-perpetration applies where the accused made a substantial, though not demonstrably an essential, contribution to the plan's success.⁴¹ A contribution is "substantial" for this

³⁸ Members of the Common Plan are those who agree with the nature and the purpose of the Common Plan (see for instance *Prosecutor v. Brdanin*, IT-99-36-A, Appeals Judgement, 3 April 2007, para. 418).

³⁹ Claus Roxin, *Täterschaft und Tatherrschaft*, Berlin, New York, Walter de Gruyter, Seventh Edition, 2000 ("Roxin"), p. 280 and 282. See also *Lubanga* Confirmation Decision, paras. 338 and 341. *Stakić* Trial Judgement, para. 440. The Prosecution agrees with the Pre-Trial Chamber that a distinction must be made between the concept of co-perpetration under Article 25(3)(a) and the mode of liability defined in Article 25(3)(d) (see *Lubanga* Confirmation Decision, paras. 334-335).

⁴⁰ This is the standard imposed by Pre-Trial Chamber I - Confirmation Decision, paras. 524-526; see also *Lubanga* Confirmation Decision, paras. 346-348. A contribution is essential where the accused could at any time have frustrated the commission of the crime by not performing his or her task: Roxin, p. 280. In this instance, Roxin terms the contribution as "*unerlässlich*" (*essential*), which would qualify the accused's contribution to the commission of a crime as a *conditio sine qua non*. The *Stakić* Trial Judgement (para. 490) as well as the *Gacumbitsi* Separate Opinion Schomburg (para. 17) appear to limit its consideration to this scenario.

⁴¹ Weigend, "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges", *Journal of International Criminal Justice* 2008 6(3), at p. 480: "Of course, whether or not a person's contribution to an offence is 'essential' requires an hypothetical judgment about how things would have turned out without the actor's contribution, and in that respect necessarily contains a speculative element. If, for example, a participant establishes contacts between a military leadership group and a firm that produces prohibited poisonous gas to be used in battle (cf. Article 8(b)(xvii) ICC Statute), one could argue that his contribution is not 'essential' because the necessary contacts could also have been established in some other way. But necessity of a contribution will have to be evaluated from the viewpoint of the implementation of a concrete criminal plan; the fact that the crime could also have been committed in a way different from that planned by the participants cannot make a contribution 'inessential' as long as the participants relied on each other to act according to the agreed-upon plan, and the participant's contribution was an essential part of that plan." See also, for instance, BHGSt 39, 1 – Mauerschützen I, (section III, 1(b), para. 72, <http://www.servat.unibe.ch/dfr/bs039001.html>). In this case, the German Supreme Court examined a case where two former boarder guards of the German Democratic Republic acted pursuant to a common plan to hinder the victim from crossing the boarder and to kill him if that is necessary to achieve the purpose. The accused *intentionally* shot the victim only into the knee, while the other co-perpetrator shot the victim in the head and thereby caused the death of the victim. The accused was nevertheless convicted for the killing as a co-perpetrator, although he did not kill the victim and did not intend to kill at the moment of the shooting, contrary

purpose where the crime might have been committed without it, but its completion would have been significantly more difficult.⁴² In this scenario, and as found by the Pre-Trial Chamber, control over the crime remains a requirement for liability as a co-perpetrator.⁴³

16. The primary focus of the judicial determination should be the individual criminal responsibility of the accused person(s) and his or their role in the crime.⁴⁴ As a result, the Prosecution submits that once it has established the existence of a Common Plan, there is no need to prove that uncharged co-perpetrators may also have been assigned essential roles in its implementation and made a substantial contribution.⁴⁵ The (direct or indirect) acts of such persons are attributed to the accused on the basis that the crimes are committed in pursuance of the Common Plan, the implementation of which is controlled by the accused.
17. The Pre-Trial Chamber further explained that it is not necessary to establish that the objective elements of an offence have been personally committed by persons having joint control over the crime.⁴⁶ Rather, what must be established is that “the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan”.⁴⁷

to the previous agreement and the role initially assigned to him. The Court found that each of the co-perpetrators signaled to the other co-perpetrators through their respective behaviour that they were willing to cause the death of the victim.

⁴² See Tröndle/Fischer, 54th ed, Art 25, para. 12a; *Leipziger Kommentar*, Vol. I, 12th ed., Art 25, para. 188: “wesentlich erschwert”.

⁴³ *Lubanga* Confirmation Decision, paras. 332(iii) and 347; Confirmation Decision, para. 525.

In the case against *Katanga and Ngudjolo*, the Prosecution pleads that the accused exercised control over the crime as a result of the role assigned to them in the implementation of the Common Plan and that they both made an essential contribution to the implementation of the Common Plan (see ICC-01/04-01/07-692, para. 40; see also ICC-01/04-01/07-T-38-ENG, 27 June 2008, p. 20, lines 3-12). However, contrary to the Pre-Trial Chamber’s summary of the position of the Prosecution in the Confirmation Decision (para. 473), the Prosecution did not argue that it is a legal requirement for co-perpetration that the accused provides an essential contribution.

⁴⁴ The role of other co-perpetrators is relevant only to the extent that it is instrumental to determine the role of the accused. The concepts of “joint control” or “mutual awareness” of all co-perpetrators are developed in academia, where no distinction is made between charged and uncharged co-perpetrators and where the phenomenon is examined in abstract and not in relation to an accused person.

⁴⁵ This departs from the suggestion of Pre-Trial Chamber I that the Prosecution must prove these elements in respect of *every* alleged co-perpetrator: Confirmation Decision, paras. 524-525. See also *Lubanga* Confirmation Decision, paras 346-348. However, commentators have interpreted the Pre-Trial Chamber’s decision as only requiring that “the suspects must be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime” (see Ambos, “Article 25”, in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2nd ed) (2009) p. 752, [9a], emphasis added, and going on to consider that this “states the obvious”).

⁴⁶ Of course, liability for co-perpetration clearly arises when two accused, acting pursuant to a Common Plan, perform material elements of the *actus reus* of a crime themselves, acting with the requisite intent. This is precisely what Pre-Trial Chamber I found the accused in this case had done in relation to the crime of actively using children in hostilities (Confirmation Decision, paras. 547(iv), 547(v) and 519)

⁴⁷ Confirmation Decision, para. 525. Paragraphs 525 and 521 of the Confirmation Decision must be read together. Paragraph 525 clarifies that the group of people is not limited to the co-perpetrators, but extends to

b) Subjective elements of co-perpetration

18. With respect to the mental element for co-perpetration, the Prosecution largely agrees with the findings of the Pre-Trial Chamber.
19. The Prosecution, however, need only prove the *mens rea* of the accused(s) and not also of other uncharged co-perpetrators.⁴⁸ Thus, and contrary to the finding of the Pre-Trial Chamber in *Lubanga*, to the extent that certain alleged co-perpetrators are not charged in a given case, then the Prosecution considers that it need not establish their awareness and acceptance that the Common Plan amounts to or involves the commission of a crime, so long as the charged co-perpetrator has sufficient knowledge.⁴⁹

Elements of joint commission through another person

20. The Prosecution agrees with the Pre-Trial Chamber that the theory of joint commission through another person is well grounded in the Rome Statute.⁵⁰ Joint commission through another person is not a distinct mode of liability. Rather it is a form of co-perpetration, wherein the members of the Common Plan use other persons or an organised structure of power as a tool or instrument to carry out the objective elements of the crimes(s).⁵¹ The concept of joint commission through another is based on a division of tasks between the co-perpetrators with a view to implementing a Common Plan. It is further characterized by the possibility of the accused to exercise control over the crimes by reason of the task or role assigned to him or her in the implementation of that plan. In addition, this form of co-perpetration is distinguished by the fact that the material elements of the crime(s) are carried out by persons who are not members of the Common Plan, but whose will is controlled by any member of the Common Plan, or through an organized structure of power.⁵²

anyone who shares the Common Plan and acts in pursuance of the Common Plan. See also *Lubanga* Confirmation Decision, para. 347.

⁴⁸ The Prosecution must establish the objective element that the accused and other persons were members of a Common Plan. The subjective elements of the crime as specified in Article 30 require that the accused acted with intent and knowledge. Article 30 does not require proof of the mental element of any other members of the Common Plan.

⁴⁹ *Lubanga* Confirmation Decision, paras. 361-365; Confirmation Decision, paras. 533-537; see also para. 16 above.

⁵⁰ Confirmation Decision, paras. 490-493.

⁵¹ Confirmation Decision, paras. 492 and 521.

⁵² Confirmation Decision, para. 525; *Lubanga* Confirmation Decision, para. 347.

21. In addition to the objective elements required for co-perpetration, this form of co-perpetration also requires that the Prosecution establish that the members of the common plan use another person or an organized structure of power as a tool or an instrument to commit the crime. The Prosecution agrees with the findings made by the Pre-Trial Chamber in this respect.⁵³
22. Concerning the subjective elements of joint commission through another person or through an organized structure of power, the subjective elements of co-perpetration described above apply *mutatis mutandis*. In addition, the Prosecution must show that the accused was aware of the factual circumstances enabling him or her to exercise control over another person or an organized structure of power. The Prosecution agrees with the Pre-Trial Chamber's findings in this respect.

Conclusion

23. For the above reasons, the Trial Chamber should largely follow the approach of Pre-Trial Chamber I and other Pre-Trial Chambers on the interpretation of co-perpetration under Article 25(3)(a), including co-perpetration through another. While the Prosecution does not necessarily agree with the precise interpretation of each and every element as defined by the Pre-Trial Chambers, the fundamentals of this theory of liability are sound. Endorsement of the Pre-Trial Chamber's interpretation by the Trial Chamber will ensure that the trial proceeds on the basis of a theory of liability that is clear, adequate and consistent with the existing jurisprudence of the Court.



Luis Moreno-Ocampo, Prosecutor

Dated this 19th day of October 2009
At The Hague, The Netherlands

⁵³ Confirmation Decision, paras. 495-518.