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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public Document

Victims' Response to the "Prosecution's Submissions on the law of indirect co-perpetration under article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds' individual criminal responsibility"

Source: Victims' Legal Representative

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

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I. INTRODUCTION

1. During the Status Conference on 12 June 2012, the Trial Chamber directed the Prosecution to file submissions regarding the correct interpretation in law of Article 25(3), as well as any application for notice to be given under Regulation 55(2), by 3 July 2012.¹ The submissions were to take “into account the divergence of the jurisprudence of Article 25(3) and, in particular, [...] the interpretation of the Pre-Trial Chamber in this case.”² The Trial Chamber directed the Defence and the Legal Representative to respond to the Prosecution’s submissions within 21 days.³

2. The “Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds’ individual criminal responsibility” was filed on 3 July 2012.⁴ The Prosecution stated its view that the Trial Chamber could depart from the Pre-Trial Chamber’s interpretation of Article 25(3), including its eight-part test for co-perpetration, and should depart from the said test in “certain respects.”⁵ Consequently, the Prosecution requests that the Chamber “inform the parties that the Chamber may depart from the legal test laid down by the Pre-Trial Chamber in the Confirmation Decision.”⁶

3. In respect of its application for notice of re-characterisation to be given pursuant to Regulation 55(2), the Prosecution asserted the legitimacy of its application in light of the Court’s statutory provisions⁷ and requested that the Chamber “give formal notice, under Regulation 55(2), that the form of individual

¹ ICC-01/09-02/11-T-18-ENG ET WT, 12 June 2012, p. 37, lines 5-12. This oral order amended a prior written order by the Chamber on these issues. See, “Order scheduling a status conference,” ICC-01/09-02/11-422, 14 May 2012, paras. 2 and 5. See, also, “Submissions on the agenda of the status conference,” ICC-01/09-02/11-428, 28 May 2012, para. 31 (advising the Chamber of the Prosecution’s intention to “make an application for formal notice to be given to the parties and participants, under Regulation 55(2) that certain facts may be subject to legal re-characterization at the trial stage” and confirming that the application would be “made well in advance of trial”).

² ICC-01/09-02/11-T-18-ENG ET WT, 12 June 2012, p. 37, lines 5-12.

³ ICC-01/09-02/11-T-18-ENG ET WT, 12 June 2012, p. 37, lines 12-14.

⁴ “Prosecution’s Submissions on the law of indirect co-perpetration under article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds’ individual criminal responsibility,” ICC-01/09-02/11-444, 3 July 2012 (hereafter, “Prosecution’s Submissions”).

⁵ Prosecution’s Submissions, para. 7.

⁶ Prosecution’s Submissions, para. 48.

⁷ Prosecution’s Submissions, paras. 36-47.

criminal responsibility charged may be subject to legal re-characterisation under Articles 25(3)(b), (c) and (d)” and that such notice be given “before or on the first day of trial.”⁸

4. In compliance with the Trial Chamber’s order, the victims hereby submit their response to the Prosecution’s Submissions.

II. SUBMISSIONS ON THE INTERPRETATION IN LAW OF INDIRECT CO-PERPETRATION UNDER ARTICLE 25(3)(a)

5. The victims submit that the interpretation in law of the mode of individual criminal responsibility of indirect co-perpetration set out by the Pre-Trial Chamber in the “Decision on the confirmation of charges”⁹ reflects and is consistent with the established jurisprudence of the Court. However, and in light of recent developments in the Court’s jurisprudence, the victims respectfully propose that the Trial Chamber should depart from the Pre-Trial Chamber’s interpretation in some respects.

6. In the Confirmation Decision, the Pre-Trial Chamber relied on its own jurisprudence in the *Bemba* case in reiterating that the concept of co-perpetration embodied in Article 25(3)(a) of the Statute (whether direct or indirect) “must go together with the notion of ‘control over the crime’.”¹⁰ Relying on its jurisprudence in the *Bemba*, as well as on the jurisprudence of Pre-Trial Chamber I in the *Katanga and Ngudjolo* and *Al Bashir* cases, the Pre-Trial Chamber articulated the eight elements test that is reproduced in paragraph 5 of the Prosecution’s Submissions.¹¹

⁸ Prosecution’s Submissions, paras. 24 and 49.

⁹ “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,” ICC-01/09-02/11-382-Red, 23 January 2012 (hereafter, “Confirmation Decision”), paras. 296-297 and 398-419.

¹⁰ Confirmation Decision, para. 296, referring to Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo,” ICC-01/05-01/08-424, paras. 346-347. Pre-Trial Chamber I, “Decision on the Confirmation of Charges against Germain Katanga and Mathieu Ngudjolo Chui,” ICC-01/04-01/07-717, paras 500-514, 527-539; Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,” ICC-02/05-01/09-3, paras 209-213.

¹¹ See, Prosecution’s Submissions, para. 5. See, also, Confirmation Decision, para. 297 (“the mode of indirect co-perpetration consists of the following elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the

a) Objective elements

- (i) *the suspect must be part of a common plan or an agreement with one or more persons*

7. The victims concur with the interpretation put forth by the Prosecution regarding this objective element of indirect co-perpetration. The jurisprudence of the Court in this regard is consistent: Pre-Trial Chamber I in *Lubanga, Katanga and Ngudjolo*, and *Banda and Jerbo*, Pre-Trial Chamber II in *Bemba* and Trial Chamber I in *Lubanga* have all identified the existence of a common plan or agreement with one or more persons as one of the objective elements of co-perpetration.¹² As the Trial Chamber outlined in *Lubanga* “this provides for a sufficient connection between the individuals who together commit the crime and it allows responsibility to be established on a joint basis.”¹³ The jurisprudence of the different Chambers also converge with regard to the characteristics of this plan which, as the Prosecution rightly pointed out, must include an element of criminality¹⁴ and need not be explicit but can be inferred from circumstantial evidence, such as the subsequent concerted action of the co-perpetrators.¹⁵

- (ii) *accused's individual contribution*

suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s)”, citing Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-424, paras 350-351; Pre-Trial Chamber I “Decision on the confirmation of charges” against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, paras 500-514, 527-539; Pre-Trial Chamber I, “Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,” ICC-02/05- 01/09-3, paras 209-213.

¹² Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/06-803-tEN, 14 May 2007, para. 343; ICC-01/04-01/07-717, para. 523; Pre-Trial Chamber I, “Corrigendum of the “Decision on the confirmation of Charges””, ICC-02/05-03/09-121-Corr-Red, 8 March 2011, para. 128; ICC-01/05-01/08-424, para 350; Trial Chamber I, “Judgment pursuant to article 74 of the Statute”, ICC-01/04-01/06-2842, 14 March 2012, para. 981.

¹³ ICC-01/04-01/06-2842, para. 981.

¹⁴ ICC-01/04-01/06-803-tEN, para. 844; ICC-01/04-01/07-717, para. 523; ICC-02/05-03/09-121-Corr-Red, para. 129; ICC-01/04-01/06-2842, para. 984.

¹⁵ ICC-01/04-01/06-803-tEN, para. 345; ICC-01/04-01/07-717, para. 522; ICC-02/05-03/09-121-Corr-Red para. 129; ICC-01/04-01/06-2842, para.988.

8. The essential contributions of each co-perpetrator in a coordinated manner is the hallmark of the second objective element of indirect co-perpetration.¹⁶ The Pre-Trial Chamber defined “essential” as encompassing only those contributions whose absence would result in the frustration of the common plan to commit the crimes.¹⁷ In particular, the Pre-Trial Chamber relied on jurisprudence from Pre-Trial Chamber I in *Katanga and Ngudjolo* and maintained that “where the persons commit the crimes through others, their essential contribution may consist of activating mechanisms which lead to the automatic compliance with their orders and, thus, to the commission of the crimes.”¹⁸ Still drawing from *Katanga and Ngudjolo*, the Pre-Trial Chamber noted that the essential character of a contribution does not depend on its performance at the execution stage.¹⁹

9. The Prosecution’s Submissions argue that the concept of joint control over the crime is inconsistent with the requirement that each co-perpetrator must have had the power to stop or frustrate the commission of the crime,²⁰ and that “essential” cannot mean that the individual accused must have had the power to stop the crime or frustrate its commission.²¹ The Prosecution goes on to disagree with the requirement that the contribution be “essential,”²² maintaining instead that “it should be enough if the accused’s contribution, assessed after the fact, was *substantial*. This means that the crime may have been possible to commit absent the accused’s contribution, but such commission would have been significantly more difficult”²³ (emphasis added).

10. The distinguishing element between forms of “perpetration” and forms of “participation” has invariably and consistently been identified in the jurisprudence of the Court relative to “control over the commission of the crime.”²⁴ In the specific

¹⁶ Confirmation Decision, para. 297.

¹⁷ Confirmation Decision, para. 404.

¹⁸ Confirmation Decision, para. 402, referring to ICC-01/04-01/07-717, para. 525.

¹⁹ Confirmation Decision, para. 402, referring to ICC-01/04-01/07-717, para. 526.

²⁰ Prosecution’s Submissions, para. 11 and p. 7, f.n. 19.

²¹ *Ibid.*, para. 11.

²² Prosecution’s Submissions, para. 12.

²³ Prosecution’s Submissions, para. 12.

²⁴ ICC-01/04-01/06-803-tEN, para. 347;

context of co-perpetration, “control” has assumed the meaning of “control over the offence along with others by reason of the essential tasks assigned to each co-perpetrator.”²⁵ As such, the notion of joint control is a consequence of, and not inconsistent with, the requirement that each co-perpetrator must have provided an essential contribution.

11. In the victims’ view, the Prosecution’s position that a person should be held liable as a co-perpetrator if s/he provided a “substantial” contribution to the commission of the crime is at variance with the Court’s approach in considering control over the commission of the offence as the distinguishing factor between principals and accessories.²⁶ In *Lubanga*, the Trial Chamber held that “[t]he Statute differentiates between the responsibility and liability of those persons who commit a crime [...] and those who are accessories to it [...]. It would be impossible to expand the concept of principal liability [...] to make it more widely applicable, by lowering the threshold that the accused’s contribution be essential. [...] a notion of co-perpetration that requires an essential contribution allows for the different degrees of responsibility to be properly expressed.”²⁷

12. However, the victims agree with the Prosecution that an *ex post facto* determination of whether or not an accused’s contribution to an offence is “essential” entails a hypothetical judgment which implicates a speculative inquiry.²⁸ The approach recently adopted by Trial Chamber I in the *Lubanga* judgment solves this issue and, in the victims’ view, should be followed in this case by the Trial Chamber.

13. The Trial Chamber in *Lubanga* held that “whether the particular contribution of the accused results in liability as a co-perpetrator is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks. [...] what is decisive is whether the co-

²⁵ ICC-01/04-01/06-803-tEN, para. 347;

²⁶ ICC-01/04-01/06-803-tEN, paras 326-341; ICC-01/04-01/07-717, paras 484-486; ICC-02/05-01/09-3, para. 210; ICC-01/05-01/08-424, paras 347-348.

²⁷ ICC-01/04-01/06-2842, para. 999.

²⁸ Prosecution’s Submissions, para. 12, referring to Claus Roxin, “Taterschaft und Tatherrchaft”, Seventh Ed., (Berlin, New York, Walter de Gruyter, 2000), pages 282-283 and Thomas Weigend, “Intent, Mistake of Law, and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges”, (2008) 6 Journal of International Criminal Justice 3, page 480.

perpetrator performs an essential role in accordance with the common plan.”²⁹ Furthermore, the *Lubanga* Chamber observed that “the co-perpetrator’s role is to be assessed on a case-by-case basis. This involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case.”³⁰

14. The *Lubanga* Chamber’s approach is reflected in, and supported by, the legal doctrine. For instance, Thomas Weigend maintains that the “necessity of a contribution will have to be evaluated from the viewpoint of the 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 common plan, and the participant’s contribution was an essential part of that plan.”³¹

15. In light of the foregoing, it appears to the victims that the Prosecutor must establish that the tasks assumed by the accuseds, in order to ensure the commission of the crimes through the Mungiki organization, were essential, if considered within the framework of the concrete common plan allegedly agreed upon by the accuseds, and in light of the specific circumstances of the case. As has been consistently held in the Court’s jurisprudence, the Prosecution need not demonstrate that those tasks were performed at the execution stage of the crimes.³²

(iii) *control over the organization; organized and hierarchical apparatus of power; execution of the crimes secured by almost automatic compliance with the orders*

16. The victims are of the view that the objective elements relied upon by the Pre-Trial Chamber in establishing the responsibility of the accuseds as indirect co-perpetrators reflect the jurisprudence of the Court³³ and are consistent with the

²⁹ ICC-01/04-01/06-2842, para. 1000.

³⁰ ICC-01/04-01/06-2842, para. 1001.

³¹ Thomas Weigend, “Intent, Mistake of Law, and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges”, (2008) 6 Journal of International Criminal Justice 3, page 480.

³² ICC-01/04-01/07-717, para. 526; ICC-01/04-01/06-803-tEN, paras 330, 348; ICC-01/04-01/06-2842, paras 1003-1005.

³³ ICC-01/04-01/07-717, paras 500-518; ICC-02/05-01/09-3, para. 211.

relevant legal doctrine. However, an additional consideration seems necessary at this juncture.

17. The rationale underlying the attribution of principal liability to an indirect perpetrator is constituted by his ability to “independently move the organization forward”³⁴ or, using the Prosecution’s wording, “to cause the organization to contribute to the crime,”³⁵ without being dependent on the will of the members of the organization. The control over the crime is, indeed, achieved via the control over the organization. Consistent with this rationale, one element that the Prosecution must establish is the so-called “mechanisation” of the organization: i.e., to demonstrate that the indirect perpetrator is capable of securing almost automatic compliance with her orders. The victims submit that this element may be established by a number of attributes which may characterise an organisation and which cannot be exhaustively identified *a priori*.

18. Accordingly, and when evaluating whether the Prosecution has proven the existence of the “mechanisation” element, the victims submit that the Chamber should carry out this evaluation on a case-by-case basis, taking into account the specific nature of the organization concerned. Taking as an example an organization which is guided by spiritual beliefs, such beliefs might suffice in ensuring automatic compliance with the leaders’ plans.

b) Subjective elements

(iv) *subjective elements of indirect co-perpetration*

19. The victims concur with the Prosecution’s interpretation in law of the subjective elements of indirect co-perpetration.³⁶

³⁴ Claus Roxin, “Claus Roxin on Crimes as Part of Organised Power Structures,” (2011) 9 Journal of International Criminal Justice 193, page 202.

³⁵ Prosecution’s Submissions, para. 12.

³⁶ Prosecution’s Submissions, paras 19-23.

III. SUBMISSIONS ON REGULATION 55 OF THE REGULATIONS OF THE COURT

20. The victims maintain that the Prosecution's application for notice to be given, prior to or at the beginning of trial, that the mode of liability of the accused may be subject to legal re-characterisation is consistent with the statutory provisions of the Court and would enhance the fairness of the trial. It is consequently in the interests of the parties and in the interests of justice, generally, that such notice be given.

21. That said, the process of giving notice to the participants of the possibility of re-characterisation involves a recurring exercise. Under Regulation 55(2), the obligation rests with the Trial Chamber to give such notice whenever the legal characterisation of facts may be subject to change, and such a consideration necessarily depends on what evidence is presented during the trial. Accordingly, the provision of notice at one point in time does not exclude the need for the Trial Chamber to give notice pursuant to Regulation 55(2) at other points during the trial proceedings.

IV. SUBMISSIONS ON POSSIBLE APPLICATIONS OF REGULATION 55(1)

22. In the victim's view, the most accurate and precise characterisation of the individual criminal responsibility of the accused in this case is that of indirect co-perpetration under article 25(3)(a). However, the victims concur with the Prosecution's position that based on the evidentiary record now before this Chamber, it remains possible to also characterise the individual criminal responsibility of the accused under articles 25(3)(b), (c) and/ or (d).

V. CONCLUSION AND RELIEF

23. The victims respectfully request that the Trial Chamber put the parties and participants on notice of the possibility that it may depart, in certain respects, from the interpretation in law of indirect co-perpetration as set out by the Pre-Trial Chamber in the Confirmation Decision. Additionally, the victims join the Prosecution's application in requesting that the Trial Chamber, prior to or at the

beginning of the trial, give notice in accordance with Regulation 55(2) that the individual criminal responsibility of the accuseds may be subject to re-characterisation under article 25(3)(b), (c) and/ or (d).

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 24th day of July 2012

At The Hague, The Netherlands.