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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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

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 accused’s individual responsibility”

Source: Defence for Uhuru Muigai Kenyatta

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 Uhuru Kenyatta (“the Defence”) files this 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 accused’s’ individual criminal responsibility” (hereinafter “Prosecution’s submissions”).¹
2. The Prosecution submits that the legal test applied by the Pre-Trial Chamber in the Decision on the confirmation of charges was largely correct, but requires certain adjustments.² It is contended that the Prosecution’s submissions represents the law of indirect co-perpetration and should guide the Chamber’s adjudication of the case.
3. The Defence takes issue with the Prosecution’s interpretation of the law of indirect co-perpetration which attempts to create potential criminal liability based upon matters that do not fall within the legal concept of this mode of liability. In essence, the Prosecution is attempting to weaken the central requirements of indirect co-perpetration in order, *inter alia*, to permit the use of tenuous associations to prove its case.

¹ ICC-01/09-02/11-444.

² Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2.

³ ICC-01/09-02/11-382.

⁴ ICC-01/09-02/11-384.

⁵ ICC-01/09-02/11-406.

⁶ ICC-01/09-02/11-407.

⁷ ICC-01/09-02/11-414.

⁸ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2. ⁹ ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2. ¹⁰ ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2. ¹¹ ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2. ¹² ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2. ¹³ ICC-01/09-02/11-382-Red. Prosecution’s Submissions ICC-01/09-02/11-444, para 2.

¹¹ ICC-01/09-02/11-444.

¹² Prosecutor’s Application ICC-01/09-02/11-197-Conf-AnxA, para 163.

¹³ Decision on Prosecution’s Application for Summons to Appear for Francis Kimani

II. PROCEDURAL HISTORY

4. On 23 January 2012, Pre-Trial Chamber II issued its Decision on the Confirmation of Charges Hearing (“Confirmation Decision”), confirming for trial those charges set out therein against Ambassador Muthaura and Mr. Uhuru Muigai Kenyatta.³
5. On 30 January 2012, the Defence filed an application for leave to appeal the Confirmation Decision.⁴ Pre-Trial Chamber II subsequently rejected the Defence’s application on 9 March 2012.⁵
6. On 12 March 2012, the full record of proceedings before Pre-Trial Chamber II was transmitted to the Presidency, including the Confirmation Decision.⁶ Trial Chamber V (“the Chamber”) was constituted on 29 March 2012,⁷ and Judge Kuniko Ozaki was appointed as the Presiding Judge for the Chamber on 26 April 2012.⁸
7. On 12 June 2012, the Chamber held a status conference with the participants in the case. During this status conference, the Chamber asked the Prosecution to file submissions on the interpretation of Article 25(3)(a) of the Rome Statute and on the application of the initial notice requirement of Regulation 55(2) on or before 3 July 2012.⁹ The Chamber

³ ICC-01/09-02/11-382.

⁴ ICC-01/09-02/11-384.

⁵ ICC-01/09-02/11-406.

⁶ ICC-01/09-02/11-407.

⁷ ICC-01/09-02/11-414.

⁸ ICC-01/09-02/11-420.

⁹ ICC-01/09-02/11-T-18-ENG ET WT at page 37:11-16.

gave the Defence and the Victims' Legal Representative 21 days after the filing of the Prosecution's submission to file their responses.¹⁰

8. On 3 July 2012, the Prosecution filed its "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 accused's individual criminal responsibility."¹¹

III. SUBMISSIONS

(i) Individual Criminal Responsibility – Confirmation of Charges Under Article 25(3)(a)

9. The Prosecution originally requested a summons to be issued against Mr Muthaura and Mr Kenyatta under Articles 25(3)(a) and (d) of the ICC Statute as alternative forms of individual criminal responsibility.¹² Article 25(3)(d) is an alternative form of criminal responsibility to that expressed in Article 25(3)(a), (b), and (c) as it clearly states "In any other way contributes to the commission or attempted commission of such a crime..."
10. In considering the Prosecution's request, the Pre-Trial Chamber granted it against the suspects only under Article 25(3)(a)¹³ on the basis "that all the findings in the present section are without prejudice to further evidence at a later stage in the proceedings which would establish

¹⁰ ICC-01/09-02/11-T-18-ENG ET WT at page 37:11-16.

¹¹ ICC-01/09-02/11-444.

¹² Prosecutor's Application ICC-01/09-02/11-197-Conf-AnxA, para 163.

¹³ Decision on Prosecution's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11 para 45.

individual criminal responsibility under different modes of liability.”¹⁴ The Pre-Trial Chamber in its Decision to confirm the charges against Mr Muthaura and Mr Kenyatta also did so under Article 25(3)(a) alone and did not find evidence to confirm the Prosecution case under any other form of criminal responsibility under Article 25.¹⁵ The Pre-Trial Chamber considered the issue of individual criminal responsibility in the proceedings under Article 25(3)(d) in relation to a further alleged suspect General Ali and refused to confirm charges against him.¹⁶

11. The Defence submits the evidence before the Trial Chamber is the same evidence that was before the Pre-Trial Chamber, save for the case specifically against General Ali, which has been rejected. Therefore the requirement of further evidence to establish further modes of liability has not been met by the Prosecution and the Regulation 55(2) submission on this issue does not apply and should be rejected.

(ii) The Law of Indirect Co-Perpetration

12. The Prosecution has made submissions upon the legal test it would like to be applied to establish criminal responsibility in this case that in some respects fundamentally changes the jurisprudence to be applied. Criminal liability of an individual can only be provided for by law as Articles 22, 23 and 24 of the ICC statute establish.

¹⁴ Decision on Prosecution’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11, para 52.

¹⁵ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382, para 428.

¹⁶ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382, para 430.

13. Article 30 affirms that to be criminally responsible a person is required to have committed the material elements of a crime with intent and knowledge. Intent requires that a person “means to engage in the conduct”¹⁷ and in relation to a consequence a “person means to cause that consequence or is aware that it will occur in the ordinary course of events.”¹⁸ Knowledge means “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”¹⁹

Existence of a Common Plan or Agreement

14. The Prosecution submits that the requirement to establish the existence of a common plan or agreement between two or more persons, which includes the Accused, only requires “a critical element of criminality, namely that **its implementation will, in the ordinary course of events, lead to the commission of a crime.**”²⁰ The Prosecution claims that it is “**not required to prove that the plan was specifically directed at committing a crime.**”²¹ The Defence submits this is in an incorrect interpretation of the law and the Prosecution is aiming to remove critical elements of criminal intent from the jurisprudence to be applied. This concept conflicts with Article 30(1) of the Rome Statute that requires specific intent and knowledge when committing crimes.
15. The Prosecution relies on an aspect of the reasoning developed in *Lubanga* to support its position. However, the *Lubanga* Pre-Trial Chamber needs careful scrutiny, as it reasoned in two conflicting ways:

¹⁷ Article 30(2)(a).

¹⁸ Article 30(2)(b).

¹⁹ Article 30(3).

²⁰ Prosecution’s Submissions ICC-01/09-02/11-444, para 9 (emphasis added).

²¹ Prosecution’s Submissions ICC-01/09-02/11-444, para 9 (emphasis added).

- a. that the common plan did not need to be specifically directed at the commission of a crime but the joint perpetrators were required to have as an essential component the agreement to commit a crime if certain conditions are met; alternatively
- b. awareness of the risk that a non-criminal plan will result in the commission of a crime and acceptance of such an outcome.²²

Whereas, category (a) is consistent with the Article 30(1) requirement that a person shall be criminally responsible for a crime “only if the material elements are committed with intent **and** knowledge”,²³ category (b) is in clear conflict with Article 30(1).

16. The interpretation created by Pre-Trial Chamber I in *Lubanga* has been altered by later Chambers to require an aim of the plan to “include the commission of a crime.”²⁴ In essence, the common plan must or “will” have as its overarching goal the commission of a crime.²⁵ Applying the critical elements of Article 30 to criminal responsibility as a co-perpetrator this is as follows:

²² See ICC-01/04-01/06-803-tEN para 344(i)-(ii).

²³ Emphasis added.

²⁴ See ICC-01/09-02/11-382-Red para 399 and ICC-01/09-02/11-373: “meaning that it must involve the commission of a crime with which the suspect is charged; *see also* ICC-01/04-01/07-717 para 523: “the common plan must include the commission of a crime”; *The Prosecutor v. Bemba*, “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 at para. 370 “co-perpetrators’ mutual awareness that implementing the common plan **will** result in the fulfillment of the material elements of the crimes.”

²⁵ *The Prosecutor v. Bemba*, “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 at para. 370 “co-perpetrators’ mutual awareness that implementing the common plan **will** result in the fulfillment of the material elements of the crimes.”

- a. The co-perpetrators mean to engage in the conduct and mean to cause the consequences or are aware it will occur in the ordinary course of events, as defined by Article 30(2), to happen as the overarching goal of the common plan; and
- b. The co-perpetrators have the knowledge that, as defined by Article 30(3), the common plan's purpose is to commit a crime.

17. In its elaboration of the critical elements, Pre-Trial Chamber II in this case stated "the common plan must encompass an element of criminality, meaning that it must involve the commission of a crime with which the suspect is charged."²⁶ The Pre-Trial Chamber in *Katanga*, while referencing *Lubanga*, removed the condition of an "element of criminality" and held "the common plan must include the commission of a crime."²⁷ Nevertheless, both Chambers in their determinations held that there were substantial grounds to believe the common plan's overarching goal was the commission of a crime.²⁸

18. The Defence submits that the Prosecution must show that the common plan included not just an "element of criminality", but that the overarching goal of the common plan was to commit a crime with the prerequisite intent and knowledge as required by Article 30 of the Rome Statute. Any deviation from this requirement will undermine the concept that the indirect co-perpetrator commits the crime behind the

²⁶ ICC-01/09-02/11-382-Red, para 399 and ICC-01/09-01/11-373, para 301.

²⁷ ICC-01/04-01/07-717, para 523.

²⁸ ICC-01/09-02/11-382-Red, para 400; ICC-01/09-01/11-373 para 302; and ICC-01/04-01/07-717 para 549.

perpetrator.²⁹ The consequence of the diminution in the intent necessary to prove criminal responsibility as requested by the Prosecution will damage the inherent right of the Accused under Article 66(1) to have his case heard in accordance with applicable law.

The Accused's Individual Contribution

19. The Prosecution submits that the requirement to prove a co-perpetrator's contribution to a common plan was "essential" may be "unhelpful" and that the contribution need only be "substantial".³⁰ It is further submitted that the Majority in the *Lubanga* Trial Decision did not define the meaning of "essential contribution to the common plan that resulted in the commission of the relevant crimes."³¹ In the *Lubanga* Judgment, the Trial Chamber went into great detail to establish the threshold in relation to the liability of a principal party as opposed to an accessory in order to distinguish the need for an "essential contribution" from that of a "substantial contribution".³² As the *Lubanga* Majority held: "lowering [the] threshold [from an "essential" contribution] would deprive the notion of principal liability of its capacity to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern. Instead, a notion of co-perpetration that requires an essential contribution allows for the different degrees of responsibility to be properly expressed and

²⁹ The Rome Statute of the International Criminal Court: A Commentary Vol 1, p.794; Cassese, Gaeta and Jones, OUP, Chapter 20 Individual Criminal Responsibility by Albin Eser.

³⁰ Prosecution's Submissions ICC-01-09-02/11-444, para 12.

³¹ Prosecution's Submissions ICC-01-09-02/11-444, para 11.

³² ICC-01/04-01/06 2842, paras 989-1006.

addressed.”³³ There is a difference in the limbs of Article 25(3) in the modes of liability for the commission of a crime as found at (a), (d) and secondary responsibility as at (b), (c) and (f).

20. The Prosecution’s argument for a “substantial contribution” test was rejected, based upon the cogent reasoning that the joint parties must have “control over the crime”.³⁴ Joint control, which the Prosecution agrees is a necessary factor, is inherently inconsistent with their notion of a “substantial” contribution. This form being a lesser role than the individual “who commits such a crime” within Article 25(3)(a). The co-perpetrator must perform an essential role “in accordance with the common plan”.³⁵ It is submitted that the *Lubanga* Trial Chamber did not reject the need for an essential contribution to be measured as having “the power to frustrate the commission of the crime by not performing their tasks.”³⁶ The Trial Chamber stated the determination of the liability of the co-perpetrator is to be based upon an analysis of the common plan and the division of tasks. The contribution as it relates to the exercise of the role and functions assigned to him must be essential.³⁷ By definition if a role is less than essential, the plan may go ahead with or without the individual. If the role is essential, the plan cannot go ahead without that individual.

21. On this point, the Prosecution misinterprets Professor Roxin’s scholarship on the German law of co-perpetration. The Prosecution claim to agree with Roxin: “insofar as any qualitative assessment of the

³³ ICC-01/04-01/06-2842, para. 999.

³⁴ ICC-01/04-01/06 2842, para 994.

³⁵ ICC-01/04-01/06 2842, para 1000.

³⁶ Prosecutor v Lubanga, Pre-Trial Chamber, Decision on the Confirmation of Charges 29 January 2007 ICC-01/04-01/06-803, para 347.

³⁷ ICC-01/04-01/06 2842, para 1000.

contribution is required, it should be enough if the accused's contribution, assessed after the fact, was substantial."³⁸ In support, the Prosecution asserts that Professor Roxin's use of the word "*wesentlich*" indicates that a "substantial" contribution is sufficient.³⁹ However, the German word "*wesentlich*" translates into English, *inter alia*, as "essential", "material", "fundamental" and "integral" – as well as "important", "substantial", "considerable" and "substantive".⁴⁰ In this context, Roxin employs the word "*wesentlich*" as meaning "essential".⁴¹

22. The *Lubanga* Trial Chamber expressly agreed with the Pre-Trial Chamber that criminal liability in this context "is not limited to those who physically carry out the objective elements of the offence, but also includes those who, in spite of being removed from the scene of the crime, control or mastermind its commission, because they decide whether and how the offence is to be committed."⁴² The essential role of the indirect co-perpetrator is thereby established and as the *Lubanga* Trial Chamber held: "the accused provided an essential contribution to the common plan that **resulted** in the commission of the relevant crime."⁴³ The Pre-Trial Chamber in *Katanga* also expressed it consistently thus: "When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned - and who,

³⁸ Prosecution's Submissions ICC-01-09-02/11-444, para 12.

³⁹ Prosecution's Submissions ICC-01-09-02/11-444, n. 23.

⁴⁰ See Collins Concise German – English dictionary; see also <http://translate.google.com/#auto|en|wesentlich>.

⁴¹ See Roxin, C., *TÄTERSCHAFT UND TATHERRSCHAFT*, (7th ed., Walter de Gruyter 2000) 282, Roxin distinguishes a co-perpetrator (*Mittäter*), who performs an independent function (*selbständige funktion*) in a criminal group's division of labour (*arbeitsteiligen*), from an accessory (*Teilnahme*), whose contribution is "unimportant" (*unwichtigen*).

⁴² ICC-01/04-01/06 2842, para 1003.

⁴³ ICC-01/04-01/06 2842, para 1006 (emphasis added).

consequently, have the power to frustrate the commission of the crime by not performing their tasks - can be said to have joint control over the crime. Where such persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.”⁴⁴

23. The need for an “essential contribution” to prove the responsibility for a crime by an indirect co-perpetrator is well documented in the jurisprudence of the ICC. As supported by the references in footnote 2705 of the *Lubanga* Judgment, the Court has consistently held that the second objective requirement of co-perpetration based upon joint control over the crime is “the co-ordinated **essential** contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.”⁴⁵ Indeed, “the suspect and the other co-perpetrator(s) must carry out **essential** contributions in a coordinated manner which result in the fulfilment of the material elements of the crime.”⁴⁶ The person is a

⁴⁴ ICC-01/04-01/07, para 525.

⁴⁵ *The Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, para 346; *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of the charges, 30 September 2008, ICC-01/04-01/07-717, para 524; *Situation in the Libyan Arab Jamahiriya*, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi”, 27 June 2011, para 69; *The Prosecutor v. Banda and Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121- Corr-Red, para 136; and *The Prosecutor v. Gbagbo*, Warrant of Arrest for Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-01/11-1, para 10.

⁴⁶ *The Prosecutor v. Bemba*, Decision pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, ICC-01/05-01/08-424 para 350; *The Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01 para 40; *The Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, para 36; and Decision on the Confirmation of Charges against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 23 January 2012, ICC-01/09-02/11-382-Red, paras 297 and 401.

principal to the commission of a crime where he or she has along with others “control over the offence by reason of the **essential** tasks assigned to him” or her.⁴⁷ It has been held that “[t]he concept of co-perpetration based on joint control over the crime is **rooted** in the principle of division of **essential** tasks for the purpose of committing a crime between two or more persons acting in a concerted manner.”⁴⁸

Ability to cause the Organization to Contribute to the Crime

24. The Prosecution submits it is sufficient to prove that the Accused has the ability to cause the organization to **contribute** to the crime⁴⁹ and it is not necessarily required to show that the Accused had control over the organization. It is further contended that by showing the Accused had a veto power or the “capacity to hire, train impose discipline and provide resources to the subordinates” would suffice to prove one of the elements of indirect co-perpetration.⁵⁰ The Defence asserts that this is an improper interpretation of the law and it is inconsistent with the Court’s jurisprudence.
25. The Defence submits that proof of a mere contribution to the crime does not reflect the jurisprudence of the Court. The proper interpretation of the law of indirect co-perpetration requires that the Accused must have

⁴⁷ *The Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 153 fn. 237; *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, para 30.

⁴⁸ *The Prosecutor v. Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para 212.

⁴⁹ ICC-01/09-02/11-444, para 15.

⁵⁰ Prosecution’s Submissions ICC-01/09-02/11-444, para 15.

joint control over the organization and the ability to cause the organization to commit the alleged crimes.⁵¹ Not simply to contribute.

26. Firstly, as held by other Chambers, the Prosecution is required to prove that two or more persons, including the Accused, had joint control over the organization.⁵² The Prosecution must not merely demonstrate how the Accused, with other co-perpetrators, had the ability “to hire, train, impose discipline and provide resources to the subordinates”, but must prove that through these combined abilities, the Accused, in conjunction with the other co-perpetrators, was able to exact almost complete compliance from their subordinates.⁵³ This matter is further elaborated upon in paragraph 27 hereof.
27. Secondly, the Prosecution is required to show that the Accused, with the other co-perpetrators, had the ability to cause the organization **to commit** the crimes. Article 25(3)(a) requires the Accused “Commits such a crime...jointly with another or through another person”. This is distinguishable from Article 25(3)(b) which requires an order, solicitation, or inducement to the commission of the crime, Article 25(3)(c) which requires the facilitation or assistance (i.e. contribution) to the commission of the crime⁵⁴ and Article 25(3)(d) which requires the co-

⁵¹ ICC-01/09-02/11-382-Red paras 407-09; ICC-01/09-01/11-373 para 313-32; ICC-01/04-01/07-717 paras 500-10.

⁵² ICC-01/09-02/11-382-Red paras 407-09 and ICC-01/09-01/11-373 para 313-32 (stating in the first paragraphs that the Accused must have joint control over the organization and that the crimes must be executed with almost automatic compliance of the orders issued by the Accused); *see also* ICC-01/04-01/07-717 paras 500-10 (stating that the Accused must have joint control over the organization that committed the crimes). The Defence also notes that in *Lubanga* and *Abu Garda*, the Chambers there used the phrase “control over the crime”, which requires the co-perpetrators to have control over the persons (i.e. the organization) committing the crimes.

⁵³ ICC-01/04-01/07-717, para 513.

⁵⁴ Article 25(3)(c) of the Rome Statute.

perpetrators “In any other way contributes to the commission or attempted commission of such a crime...” The drafters of the Rome Statute clearly distinguished between the separate limbs of Article 25(3)(a) and 25(3)(b)-(d). The requirement that the co-perpetrators be linked to the commission of the crime, not by a contribution to the crime, has been followed by the Chambers of this Court.⁵⁵

The Execution of Crimes by Automatic Compliance with Orders

28. Citing no supportive authority, the Prosecution submits that it is not necessary to follow previous rulings of the Pre-Trial Chambers that in order to prove control over an organization there is a requirement whereby the indirect co-perpetrator was able to secure automatic compliance with orders.⁵⁶ The Prosecution contends that the only element it has to prove is that the organization is composed of “fungible” individuals and that the individual has the capacity to give orders. The submission focuses on “the attributes of the organization”⁵⁷ and merges this element with the separate concept of “the ability to cause the organization to contribute to the crime”.⁵⁸

⁵⁵ *The Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, para 346; *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of the charges, 30 September 2008, ICC-01/04-01/07-717, para 524; *Situation in the Libyan Arab Jamahiriya*, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi”, 27 June 2011, para 69; *The Prosecutor v. Banda and Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121- Corr-Red, para 136; and *The Prosecutor v. Gbagbo*, Warrant of Arrest for Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-01/11-1, para 10.

⁵⁶ Prosecution’s Submissions ICC-01-09-02/11-444, para 17.

⁵⁷ Prosecution’s Submissions ICC-01-09-02/11-444, para 16.

⁵⁸ Prosecution’s Submissions ICC-01-09-02/11-444, para 16.

29. The Defence submits the Prosecution is confusing the means by which a principal may exercise control over a “fungible” or “tool” to commit the crime on his behalf with the level of authority or power the principal is required to have over the “fungible” or “tool”. The submission of the Prosecutor does not distinguish sufficiently between commission under Article 25(3)(a) from ordering, soliciting or inducing under Article 25(3)(b) or aiding and abetting under Article 25(3)(c). Indirect co-perpetration under Article 25(3)(a) requires an individual to commit a crime, through someone else or others “as though it was his own” and “can only be justified 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.”⁵⁹ The existence of control enabling automatic compliance with orders is consistent with the legal theory of the “perpetrator behind the perpetrator” (*Täter hinter dem Täter*) advanced by Professor Roxin.⁶⁰ “The leader must use his control over the apparatus to execute crimes, which means that the leader as the perpetrator behind the perpetrator mobilizes his authority and power within the organization to secure compliance with his orders. Compliance must include the commission of any crimes within the jurisdiction of this court.”⁶¹

⁵⁹ The Rome Statute of the International Criminal Court: A Commentary Vol 1, p.795; Casese, Gaeta and Jones, OUP, Chapter 20 Individual Criminal Responsibility by Albin Eser.

⁶⁰ See Weigend, T., “Perpetration through an organization: the unexpected career of a German legal concept”, J. INT. CRIM. J 2011, 9(1) 96-97 citing Roxin, C, ‘Organisationsherrschaft und Tatentschlossenheit’, *Zeitschrift für internationale Strafrechtsdogmatik* (2006) 293 : Roxin “suggested that a person who is in charge of a hierarchically structured criminal organization whose members carry out orders without asking questions can rightly be said to ‘dominate’ the criminal acts committed by his subordinates, even though these subordinates are themselves perpetrators of the crimes.”

⁶¹ ICC-01/04-01/07, para 514.

30. The “attributes of the organization” test suggested by the Prosecution may have nothing to do with the individual. In *Katanga*, it was described that “attributes of the organization – other than the replaceability of subordinates – may also **enable** compliance with the senior authority’s orders.”⁶² The test now posited by the Prosecution attempts to avoid the issue of power and authority over the organization and which is the essential concept required to establish the indirect co-perpetrator was able to cause the crimes to be committed.⁶³

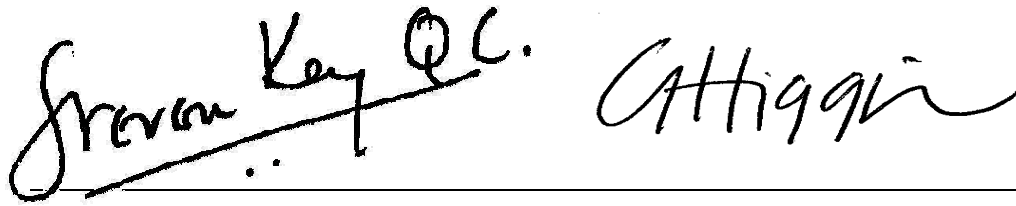
IV. CONCLUSION

31. The Prosecution’s submissions on its interpretation of indirect co-perpetration contain several inherent flaws. It is neither consistent with the Rome Statute nor the jurisprudence of the Court. For the aforementioned reasons, the Defence for Uhuru Kenyatta requests the Trial Chamber to reject the Prosecution’s interpretation of Article 25(3)(a).

Respectfully submitted,

⁶² ICC-01/04-01/07, para 518 [emphasis added].

⁶³ ICC-01/09-02/11-382-Red at paras. 407-09; ICC-01/09-01/11-373 at paras. 313-19; *The Prosecutor v. Katanga*, ICC-01/04-01/07-717 at para. 500-18; *The Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red at n. 246; *The Situation in The Libyan Arab Jamahiriya*, “Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi””, ICC-01/11-01/11-1 at para. 69, *The Prosecutor v. Gbagbo*, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”, ICC-02/11-01/11-9-Red, at para. 75(iii) (noting that the Prosecution argued control over the crime and not control over the organisation).



Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature of Steven Kay QC is on the left, and the signature of Gillian Higgins is on the right. A horizontal line is drawn below the signatures.

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 24 July 2012

London, England