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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 Document

Defence 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

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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 of Ambassador Francis Kirimi Muthaura (the “Defence”) submits its views and observations on the law of indirect co-perpetration and its response to the filing of the Prosecution on this subject dated 3 July 2012 (“Prosecution’s Submissions”).¹
2. At the outset, the Defence is compelled to state that it is not clear why the Prosecution has deemed it necessary, or otherwise appropriate to file its submissions at this time. For the reasons detailed in this response, the Defence respectfully submits that the Prosecution’s submissions are legally untenable and the Prosecution’s filing as a whole is completely devoid of merit.

II. Prosecution are estopped from seeking to depart from the elements of Indirect Co-Perpetration pleaded by it in this case

3. The Defence respectfully refers the Trial Chamber to the Prosecution Document Containing the Charges (“DCC”) and Amended DCC in the present case. The Prosecution has pleaded elements of indirect co-perpetration pursuant to Article 25(3)(a) which the Prosecution now, in the same case, seeks to deviate from.² This is unfortunate as it militates against legal certainty and the principle that parties should be expected to maintain consistent and principled positions in the same case throughout the process. The Prosecution is putting forward a position which is fundamentally different from its own stated position not just in other cases, but before the PTC in this very same case. The Prosecution should be estopped from pursuing this approach.³

¹ ICC-01/09-02/11-444.

² Amended DCC, ICC-01/09-02/11-280-AnxA, paras 77-93.

³ Issue estoppel clearly has a place in international law. See D.W. Bowett, “Estoppel Before International Tribunals and its relation to acquiescence”, 33 Brit. Y.B. int’L. 176 (1957); I. C. MacGibbon, “Estoppel in International Law”, ICLQ 7 (1958), pp. 468-513; *R v Hogan*, [1974] 2 All ER 142 (Justice Hogan offered this concise statement of law pertaining to the legal definition of issue estoppel: “Issue estoppel can be said to exist

4. The use of inherently factually contradictory theories violates one of the essential principles of due process and one that should cause the Prosecution grave misgivings as it involves ethical considerations on the part of the OTP.⁴

III. Prosecution submission is impermissible and premature pursuant to

Regulation 55

5. The Prosecution has a preliminary hurdle to overcome in order to have the merits of its filing judicially considered at all: namely, the express provisions and wording of Regulation 55 of the Regulations of the Court. Suffice it to say that the Defence submits that the Prosecution's filing is either tardy and/or premature. It is tardy because the Prosecution effectively expresses disagreements or otherwise alleges errors in the Pre-Trial Chamber's ("PTC") Confirmation of Charges Decision⁵ which should properly have been subject to Article 82 applications for leave to appeal, the time limits for which expired a considerable while ago.⁶ It is also premature because any arguments the Prosecution may wish to make on this issue should at least await completion of disclosure and presentation of its own case at trial. The Prosecution seek to gloss over the obligation of the Trial Chamber to strictly interpret the relevant legal instruments in accordance with their plain and ordinary meaning and

when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties.").

⁴In *Smith v Groose*, 205 F.3d 1045 (8th Cir. 2000), the Appeals Court addressed the issue of prosecutorial inconsistency and stated that "the use of inherently factually contradictory theories violates the principles of due process." Furthermore, "to violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime" (*Ibid.*). In *In re Sakarias*, 35 Cal. 4th 140 (2005) the Court held that "an inconsistent prosecutorial argument 'made in bad faith' could be misconduct [...] [unless] [...] 'based on the record and made in good faith'". In light of this, it is arguable that in the United States, a due process violation requires the inconsistency of two theories to be 'inherently factually contradictory' and pursued by the prosecution in 'bad faith'. This is consistent with Poulin, who argues that a prosecutor "who knowingly adopts inconsistent positions in separate proceedings without adequate justification acts unethically because she knows that at least one of those positions is wrong and therefore lacks a good faith belief in one or both of the positions." A. Poulin, "Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get its Story Straight", 89 Cal. L. Rev. 1423 (2001).

⁵ For example, see paragraph 17 of the Prosecution's Submissions.

⁶ The Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (ICC-01/09-02/11-382-Conf) was issued on 23 January 2012. Pursuant to Rule 155 of the Rules of Procedure and Evidence, an application for leave to appeal an issue arising out of a confirmation decision is within 5 days of notification of the decision.

the express terms of Regulation 55, which limits the Trial Chamber to modifying the legal characterisation of facts “during the trial”.

6. The Defence agrees that pursuant to Regulation 55(1), the Chamber has the authority, at the appropriate time and under certain conditions, to seek to re-characterise certain facts including the mode of liability of the accused. However, the Defence disagrees with the Prosecution that the conditions now exist for Regulation 55 to be implemented.

Right to be tried only on the basis of confirmed or amended charges

7. The purpose of the confirmation hearing is to screen those cases that are suitable to be certified for trial from those that should not proceed to trial. In that regard, the accused person should be tried for only those charges that have been confirmed against him. This was in fact the approach taken by the Trial Chamber in the *Lubanga* Judgement where the Chamber stated that:

The Pre-Trial Chamber decided, pursuant to Article 61(7) of the Statute, there was sufficient evidence to establish substantial grounds to believe that Mr. Lubanga committed the crimes charged, under Article 25(3)(a), as a direct co-perpetrator. The Chamber will limit its analysis of Mr. Lubanga’s responsibility to this mode of liability.⁷

8. In the instant case, the PTC confirmed the charges against Ambassador Muthaura under Article 25(3)(a) as an indirect co-perpetrator. Unless the mode of liability is amended by the PTC or re-characterised at the appropriate stage of proceedings, the accused is entitled to be tried on the basis of the confirmed mode of liability.

⁷ ICC-01/04-01/06-2842, para. 978.

9. The Prosecution argues that Regulation 55 notice may be given before the commencement of trial. The Defence submits that this position is incorrect. It is clear from the wording of Regulation 55(2) that the timing contemplated in that provision is “**at any time during the trial**” and not before or at the commencement of the trial prior to the calling of evidence.

Notice of intention to possibly re-characterise must be based on objective assessment of facts and evidence

10. For the Trial Chamber to come to a conclusion that there may be a possibility to re-characterise the facts or legal qualification of the crimes, it must engage in some form of assessment of the facts or evidence before it. It cannot do so in the abstract. However, as recognised in *Lubanga*, the Trial Chamber “will not ordinarily engage in questions involving a detailed examination and resolution of facts or evidence **before the commencement of the trial**”.⁸ Even though in *Lubanga* the Chamber provided notice to the parties that it may consider re-characterising the charges at the appropriate stage, the circumstances of the *Lubanga* case and the present one are quite different. In *Lubanga*, the issue that triggered the need for legal re-characterisation did not require an assessment of facts or evidence that may or may not change at the trial. It was a question of legal qualification of the nature of the armed conflict and was an issue that had been the subject of significant submissions by all the parties including a leave to appeal application. In the *Lubanga* case the issue of the need for re-characterisation was obvious and known to all parties even well before the commencement of the trial. However, in spite of all the different circumstances between the *Lubanga* case and that of Ambassador Muthaura, the *Lubanga* decision recognised that the powers given to the Trial

⁸ ICC-01/04-01/06-1084, para. 44.

Chamber with regards to re-characterising the charges commence only after trial has begun.⁹

IV. The Law of Indirect Co-perpetration

11. The Defence observes that the Prosecution ostensibly requests the Trial Chamber to give notice to the Defence pursuant to Regulation 55 that there is a possibility that the mode of liability may change from Article 25(3)(a) as alleged in the Amended DCC and as confirmed by the PTC. Indeed, whilst in the summons application the Prosecution alleged liability under Article 25(3)(a) and (d), and then proceeded to prosecute its case under an Article 25(3)(a) mode of liability, the Prosecution now seems even more unwilling to nail its colours to its mast, instead now submitting that the alleged conduct may fall within Article 25(3)(a), (b), (c) and/or (d) of the Statute.¹⁰ This hardly makes for legal certainty or affords the Defence proper notice.

12. Above, in part III of the present filing, the Defence addressed the issue of the ambit and purpose of Regulation 55. The Prosecution however are effectively attempting something else as well. Under the guise of its Submissions and its request for Regulation 55 notification, the Prosecution is seeking to redefine and actually change the settled law concerning Article 25(3)(a) of the Statute. The Defence submits that the Prosecution's approach to Regulation 55 has the effect of rendering it as a residual mechanism with the potential to subvert critical and carefully considered findings of a Pre-Trial Chamber in a way not contemplated by the drafters of the Statute. Uncertainty would replace certainty and the focusing of issues at trial which, in fact, is one of the very reasons why the drafters of the Statute created a Pre-Trial Chamber and confirmation of charges process.

⁹ ICC-01/04-01/06-1084, para. 42.

¹⁰ Prosecution's Submissions, para. 35.

The elements of indirect co-perpetration have been settled and consistently applied by chambers of the Court

13. The Defence observes that the law of indirect co-perpetration (including the law on the elements of co-perpetration that are subsumed within indirect co-perpetration) as applied by pre-trial chambers - including in the present case - as well as trial chambers of the ICC is largely settled.¹¹ Accordingly, the Defence sees no need for any “adjustments” of the elements of the law of indirect co-perpetration as laid out by the settled jurisprudence of this Court. The submissions of the Prosecution suggesting “adjustments” would have the effect of impermissibly altering the law to the prejudice of the accused. The principle that in case of ambiguity, the law shall be interpreted in favour of the accused is well established in international human rights law and reflected, in part, in Article 22(2) of the Statute. The Prosecution seeks to lessen its onus of proof by rendering important and significant evidentiary requirements under the law of indirect co-perpetration, unnecessary. The Prosecution has not provided any compelling reason why this Chamber should adopt a different course from previous Chambers on the matter or why it has chosen to depart from its own previous acceptance of the legally stated elements of Article 25(3)(a). This attempt by the Prosecution, if permitted, may not only result in uncertainty in the applicable law on the matter, but will cause confusion in the determination of the law by the parties, which should not be entertained. Significantly, it will also occasion unfairness to the accused persons in that they will be judged on the basis of significantly

¹¹ See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, Confirmation of Charges Decision, 29 January 2007, ICC-01/04-01/06-803; Judgment, 14 March 2012, ICC-01/04-01/06-2842; *Prosecutor v. Katanga and Chui*, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717; *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red; *Prosecutor v. Omar 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; *Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red.

less stringent requirements than other accused persons that have been tried before the ICC.

Defence Submissions on the legal elements of the law of indirect co-perpetration

14. Indirect co-perpetration is a recognised mode of responsibility at the ICC as provided for in Article 25(3)(a) of the Rome Statute. It was first applied by the Pre-Trial Chamber in the *Katanga* case,¹² though the Pre-Trial Chamber in *Lubanga* was the first to apply the subsumed co-perpetration mode of liability.¹³ In particular, the Lubanga Pre-Trial Chamber held that the concept of co-perpetration (and therefore indirect co-perpetration) is based on “joint control over the crime” and is anchored on the principle of sharing of *essential* tasks for the purposes of committing the crimes between two or more persons acting in a concerted manner. In this context, the participants depend on each other for the commission of the crimes and none of them has overall control. They all share control over the crimes and can each frustrate its commission.¹⁴

15. The Pre-Trial Chamber in the *Katanga* Decision on the Confirmation of Charges, building on the elements set out in the *Lubanga* Confirmation Decision for the concept of co-perpetration, laid out the 8 elements of indirect co-perpetration as follows:

- (a) the suspect must be part of a common plan or an agreement with one or more persons;
- (b) 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;
- (c) the suspect must have control over the organization;

¹² Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, paras 490-492.

¹³ Confirmation of Charges Decision, 29 January 2007, ICC-01/04-01/06-803, para. 326.

¹⁴ ICC-01/04-01/06-803, para. 342.

- (d) the organization must consist of an organized hierarchical apparatus of power;
- (e) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;
- (f) the suspect must satisfy the subjective elements of the crimes;
- (g) the suspect and other co-perpetrators must be mutually aware and accept that the implementation of the common plan will result in the fulfilment of the material elements of the crimes; and
- (h) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person.

16. These elements have been consistently applied by the Prosecution and upheld by various chambers of the Court including in *Prosecutor v. Jean Pierre Bemba Gombo* (co-perpetration),¹⁵ *Prosecutor v. Omar Hassan Al Bashir*,¹⁶ *Prosecutor v. Bahar Idriss Abu Garda*,¹⁷ *Prosecutor v. Calixte Mbarushimana* ('common plan or agreement' and 'essential contribution' elements),¹⁸ *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi et al*¹⁹ and finally, with respect to the elements of co-perpetration subsumed within the concept of indirect co-perpetration, the *Lubanga* Trial Judgment.²⁰

¹⁵ 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, 15 June 2009, ICC-01/05-01/08-424, para. 350.

¹⁶ Pre-Trial Chamber I, 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. 210 (noting four manifestations of the notion of control of the crime theory: (i) direct perpetration, (ii) perpetration through another person or indirect perpetration, (iii) co-perpetration based on joint control; and (iv) indirect co-perpetration).

¹⁷ Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, paras 152-157.

¹⁸ Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, paras 271, 279 (while Mr. Mbarushimana was charged pursuant to Article 25(3)(d), the Pre-Trial Chamber examined both the 'common plan or agreement' element as well as the 'essential contribution' element in their analysis. With respect to the latter it reiterated that "article 25(3)(a) [...] requires an essential contribution").

¹⁹ Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", ICC-01/11-01/11-1, paras 68-69.

²⁰ Trial Chamber I, ICC-01/04-01/06-2842 (footnote 2705 provides a comprehensive list of the cases on the matter).

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

17. According to the jurisprudence of the Court, the common plan must involve the *commission of a crime*²¹ or an element of criminality, but need not be specifically directed at the commission of a crime.²² As held by the Pre-Trial Chamber in the *Lubanga* confirmation of charges decision, it suffices that:

“(i) the co-perpetrators have agreed (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or

(ii) that the co-perpetrators (a) are aware of the risks that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) *accept such outcome*.”²³

18. In addition, the agreement or existence of the common plan may be inferred from the subsequent coordinated action of the co-perpetrators.

19. The Defence submits that the Prosecution, while largely correctly stating the requirements of the common plan or agreement, watered down some of its requirements. Specifically, the Defence submits that it is not sufficient for the prosecution to only prove that the common plan or agreement’s “implementation will, in the ordinary course of events, lead to the commission of a crime”.²⁴ In addition, and as clearly stated in the *Lubanga* confirmation decision, the Prosecution must also establish that the accused accepted the

²¹ *Prosecutor v. Katanga and Chui*, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 523 (hereinafter “*Katanga* Confirmation Decision”).

²² *Prosecutor v. Thomas Lubanga Dyillo*, Confirmation of Charges Decision, 29 January 2007, ICC-01/04-01/06-803, para. 344 (hereinafter “*Lubanga* confirmation Decision”).

²³ *Lubanga* Confirmation Decision, para. 344 (emphasis added).

²⁴ Prosecution’s Submissions, para. 9.

outcome that the crimes will be committed.²⁵ This is an important requirement and a significant evidentiary issue that should not be discarded.

(b) 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;

20. A critical element of indirect co-perpetration based on joint control over the crime requires co-ordinated **essential** contribution made by each co-perpetrator which results in the realisation of the objective elements of the crime.

21. According to the jurisprudence of the Court in both the *Lubanga* and *Katanga* confirmation decisions, “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 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.”²⁶ In addition, where the perpetrators commit the crime through others the essential contribution of the perpetrators may entail the activation of the “mechanisms” that lead to the automatic compliance with the orders of the perpetrator to commit the crimes.²⁷

22. Further, as stated above, the *essential contribution* of the co-perpetrators to the common plan must result in the commission of the relevant crime.²⁸ This position is in accord with that of the PTC which stated that the essential contribution must “result in the fulfilment of the material elements of the

²⁵ *Lubanga* Confirmation Decision, para. 344.

²⁶ *Lubanga* Confirmation Decision, para. 347 (emphasis added); see also *Katanga* Confirmation Decision, para. 525.

²⁷ *Katanga* Confirmation Decision, para. 525

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06, para. 1003 (hereinafter “*Lubanga* Trial Judgement”).

crime”.²⁹ In this regard, the co-perpetrators essential contribution must be directed to the material elements of the common plan. Thus, if the common plan involves legal and criminal aspects, the co-perpetrator cannot be held criminally responsible under Article 25(3)(a) in connection with contributions to the legal aspects of the common plan.

23. The *Lubanga* Trial Judgement makes it plain that “the Majority is of the view that the contribution of the co-perpetrator must be **essential**, as has been consistently and invariably established in this Court’s jurisprudence”.³⁰ The Majority was clear that “*what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential.*”³¹

24. The Defence submits that the law is clear, has been consistently articulated and applied in a multiplicity of cases and that no attempt to whittle down the legal elements should be entertained. Simply put, the Prosecution has not established why such a departure from its own stated submissions on this issue, supported as they are by the above cited jurisprudence, is warranted, let alone necessary.

(i) Prosecution’s proposed new heading

25. The Prosecution is offering a new heading entitled “the accused’s contribution”, departing from the non-ambiguous and approved language of the Court – i.e. that “*the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the*

²⁹ 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-Conf, para. 297.

³⁰ *Lubanga* Trial Judgement, para. 999 (emphasis in original).

³¹ *Lubanga* Trial Judgement, para. 1000.

material elements of the crime". The Prosecution has previously used this heading – which has likewise been used by the Chambers of the Court – *inter alia*, in *Abu Garda*,³² *Bemba*³³ and *Katanga*.³⁴ Why the Prosecution now wants a change, just in this case, is not clear. What is certain though is that the Prosecution is recasting the heading of this element in a way that avoids inclusion of the significant requirements of "ESSENTIAL contribution" and "power to FRUSTRATE" the crimes. The request of the Prosecution to significantly alter the elements of the Article 25(3)(a) mode of responsibility to its own advantage must be rejected outright. If the Prosecution is concerned that its evidence, in the present state, is not sufficient to meet the more onerous approved legal requirements of the criminal responsibility presently charged, the appropriate remedy would be to seek to withdraw the charges against Ambassador Muthaura, not to seek to change the law in order to ensure a conviction at all, or any cost. The Prosecution must at all times strive to maintain a balance and uphold the ideals of fairness and integrity that is expected of the Office.

(ii) *Essential Contribution does not mean the power to frustrate the commission of the crimes*

26. The Prosecution argues that the term "essential" as used by the *Lubanga* Trial Judgment Majority "cannot mean that the individual accused must have had the power to stop the crime or 'frustrate' its commission" and that the contribution of the accused need not be essential.³⁵ It suggests that

³² *Prosecutor v. Bahar Idriss Abu Garda*, Prosecutor's Application under Article 58 filed on 20 November 2008 now filed pursuant to the request of Pre-Trial Chamber I of 7 May 2009, 20 May 2009, ICC-02/05-02/09-16-Anx1, paras 140-161.

³³ Situation in the Central African Republic, Prosecutor's Application for Warrant of Arrest under Article 58, ICC-01/05-01/08-26-Red, 9 May 2008, para. 65.

³⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecutor's Pre_Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541, paras 2-4 and 13-20.

³⁵ Prosecution's Submissions, para. 11.

“significant” contribution of the accused is sufficient.³⁶ The Prosecution relied on the work of the German scholar Roxin to support its position.

27. However, Roxin himself recognised that the “essential role or tasks assigned” to the co-perpetrators give them the power to *frustrate* the commission of the crimes. According to Boas and Bischoff, citing Roxin:

“they can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act. Roxin goes on to say, [t]his type of ‘key position’ of each co-perpetrator describes precisely the structure of joint control over the act. Finally, he provides the following typical example:

*If two people govern a country together-are joint rulers in the literal sense of the word-the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can **frustrate** the action”.*³⁷

28. Accordingly, it is clear that the *essential contribution or central role or key position* of the co-perpetrators put them in a position to frustrate the commission of the crimes.

29. The Prosecution has in several cases accepted that “essential contribution” meant that the suspect or accused must have had the power to frustrate the commission of the crime. In at least five cases – *Abu Garda*,³⁸ *Banda & Jerbo*,³⁹

³⁶ Prosecution’s Submissions, para. 12.

³⁷ G. Boas and J. Bischoff, *Forms of Responsibility in International Criminal Law* (Cambridge University Press, 2007), p. 107 (emphasis added).

³⁸ Prosecution’s “DOCUMENT CONTAINING THE CHARGES SUBMITTED PURSUANT TO ARTICLE 61(3) OF THE STATUTE” filed on 10 September 2009, ICC-02/05-02/09-91-Red, para. 131.

³⁹ PUBLIC REDACTED VERSION OF DOCUMENT CONTAINING THE CHARGES SUBMITTED PURSUANT TO ARTICLE 61(3) OF THE STATUTE FILED ON 19 OCTOBER 2010, 11 November 2010, ICC-02/05-03/09-79-Red, para. 119.

Bemba,⁴⁰ *Lubanga*⁴¹ and *Katanga*⁴² – it maintained that position. It is remarkable that the Prosecution now, has changed its own previous stand despite the fact that all Chambers of the Court have accepted that stance as representing the correct position as a matter of the law.

(iii) The Contribution need not be essential, it suffices that it is substantial

30. With regards to the qualitative nature of the contribution, the Prosecution also propounds a new position. It has oscillated between supporting the “essential contribution” approach (the correct position of the law) or requiring: (a) that the accused is given a central position/role in the implementation of the common plan **AND** (b) it appears in retrospect that his contribution was substantial though not essential.⁴³ This two-prong approach (central role and significant contribution) postulated by the Prosecution in *Abu Garda* and labelled “functional control” in *Lubanga*⁴⁴ is a watered down requirement of co-perpetration and indirect co-perpetration. It has not been approved in any of the cases before the Court.

31. Worse still, this new position advanced by the Prosecution (which does not include the centrality of the co-perpetrator’s role) is in fact even more diluted.

⁴⁰ Prosecution’s Summary of Presentation of Evidence, 4 November 2009, ICC-01/05-01/08-595-AnxA-Red, para. 88.

⁴¹ Prosecution’s Closing Brief, 21 July 2011, ICC-01-04-01/06-2748-Red, footnote 109.

⁴² Prosecutor’s Pre-Trial Brief on the interpretation of Article 25(30(a), 19 October 2009, ICC-01/04-01/07-1541, footnote 40.

⁴³ *Prosecutor v. Bahar Idriss Abu Garda*, Prosecutor’s Application under Article 58 filed on 20 November 2008 now filed pursuant to the request of Pre-Trial Chamber I of 7 May 2009, 20 May 2009, ICC-02/05-02/09-16-Anx1, para. 148.

⁴⁴ There the Prosecution stated that “Mirroring the requirements for a central role to be assigned to the accused, responsibility under the theory of co-perpetration will clearly be made out where an accused has actually made an essential contribution to the implementation of the common plan. In addition, the theory of co-perpetration also applies to cases where, although the role assigned to the accused *ex ante* was central to the implementation of the plan, it appears in retrospect that his or her contribution was substantial though not essential, to the implementation of the common plan. A contribution is “substantial” where the crime might still have occurred absent the contribution of the Accused, but not without great difficulty. Thus, functional control remains a requirement for this second scenario, as it is determined *ex ante* and on the basis of the role assigned to the Accused and not the basis of his actual contribution.” Prosecution’s Closing Brief, 21 July 2011, ICC-01-04-01/06-2748-Red, para 65.

The Prosecution states “...if any qualitative assessment of the contribution is required, 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.”⁴⁵

32. In none of the cases before the ICC has the Prosecution’s diluted positions on the qualitative assessment of the contribution been approved. The judges have so far unequivocally expressed a preference for the “essential contribution” requirement, as apparent in the PTC’s approach in the present case as well as in *Prosecutor v. Katanga and Ngudjolo*, *Prosecutor v. Bemba*, *Prosecutor v. Abu Garda*, *Prosecutor v. Banda and Jerbo*, *Prosecutor v. Calixte Mbarushimana*, *Prosecutor v. Omar Al Bashir*, *Prosecutor v. Ruto, Kosgey and Sang* and in the recent *Lubanga* Trial Judgement.⁴⁶

33. It is therefore somewhat surprising, that the Prosecution, now adopts a progressively diluted position that has been rejected or not applied in all the previous cases before the Court.

34. It is clear that the *essential contribution* to and leading role in the enterprise is a *sine qua non* in the established requirements of the law of indirect co-perpetration. Even in the ICTY case of *Stakic*, the Trial Chamber found that for indirect co-perpetration, the accused must be aware that his own role is *essential* for the achievement of the common goal.⁴⁷ The suggestion by the

⁴⁵ Prosecution’s Submissions, para 12.

⁴⁶ *Katanga* Confirmation Decision, para. 525; *Bemba* Confirmation Decision, para. 350; *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 180; *Prosecutor v. Banda & Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 36; *Prosecutor v. Omar 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. 213; *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 305; *Lubanga* Trial Judgement, para. 999.

⁴⁷ *Prosecutor v. Milomir Stakic*, Case No. IT-97-31-T, Trial Judgment, 31 July 2003, para. 442.

Prosecution of changing this requirement from *essential* contribution to *significant* contribution, without more, will effectively lower the stringent requirements of indirect co-perpetration to the level of *aiding and abetting* (Article 25(3)(c)) or even *common purpose* (Article 25(3)(d)), both of which are lesser levels of culpability.

35. Indeed, the Defence submits that the words ‘*in any other way contributes to the commission ... of such a crime...*’ under Article 25(3)(d) would bring non-essential, but significant contributions to a criminal enterprise squarely under the scope of the common purpose encapsulated under Article 25(3)(d).

36. The Defence further submits that the suggestion of the Prosecution to lower the qualitative assessment of the contribution from ‘essential’ to “significant” blurs the lines between principal and accessorial liability and renders meaningless the graduating scale of blameworthiness enshrined in the Statute.

37. In fact, the majority in the *Lubanga* Trial Judgement observed that principal liability requires a greater contribution than accessorial liability.⁴⁸ It went further to state that “*The Statute differentiates between responsibility and liability of those who commit a crime (at Article 25(3)(a)) and those persons who are accessories to it (at Article 25(3) (b) to (d)). It would be possible to expand the concept of principal liability (or “commission” or “perpetration”), to make it more widely applicable, by lowering the threshold that the accused’s contribution be essential. However, lowering the threshold would deprive the notion of principal liability of its capacity to express blameworthiness of those persons who are the most responsible for the most serious crimes of international concern. Instead, a notion of co-perpetration*

⁴⁸ *Lubanga* Trial Judgment, para. 998.

that requires an essential contribution allows for the different degrees of responsibility to be properly expressed and addressed”.⁴⁹

38. The position postulated by the Prosecution is also contrary to the fundamental basis of *control over the crime* doctrine upon which the mode of responsibility of indirect co-perpetration is predicated. For all these reasons, the Prosecution’s proposal to water down the requirements of indirect co-perpetration by lowering the threshold of the contribution of the co-perpetrators from “essential contribution” to significant contribution ought to be rejected.

(c) the suspect must have control over the organization;

39. This element requires the co-perpetrator to have control over the organization or part of it.⁵⁰ To illustrate the point, the Trial Chamber in the *Stakic* Trial Judgement cited an example provided by Roxin, which is cited at paragraph 27 above.⁵¹ This scenario implies that the co-perpetrator must be at the apex of the hierarchy of the organisation, and decides and issues orders. The powers of the co-perpetrator should be such that he is usually the ‘mastermind’ of the criminal plan.⁵²

40. In describing the suspects role in the organization, Kai Ambos observed that:

⁴⁹ *Lubanga* Trial Judgment, para. 999.

⁵⁰ *Katanga* Confirmation Decision, paras 513-514 and 540-541; see also H. Olasolo, “The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes”, in *Studies in International and Comparative Criminal Law*, Vol. 4 (Hart Publishing, Oxford, 2009), p. 124; F. Jessberger and J. Geneuss, “On the Application of a Theory of Indirect Perpetration in Al Bashir”, *Journal of International Criminal Justice* 6 (2008), 853-869 at p. 860; K. Ambos, “Article 25: Individual Criminal Responsibility”, in O. Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishers, Oxford, 2008), p. 752.

⁵¹ *Prosecutor v. Milomir Stakic*, Case No. IT-97-31-T, Trial Judgment, 31 July 2003, para. 440; see also *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Judgment, 7 July 2006, Separate Opinion of Judge Schomburg, para. 17; *Prosecutor v. Blagoje Simic*, Case No. IT-95-9-A, Appeals Judgment, 28 November 2006, Dissenting Opinion of Judge Schomburg, para. 15.

⁵² K. Ambos, ‘Article 25: Individual Criminal Responsibility’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishers, Oxford, 2008), p. 750.

*the leadership level represents the state in a particular way and as such bears the overall responsibility for possible violations of fundamental human rights; all other power is derived from this highest authority and thus in its exercise attributable to it. Only the leader's power and authority can neither be blocked nor disturbed in any way from above. As a consequence, control over the act by virtue of Organisationsherrschaft can only vest in those persons, whose orders and instructions cannot be revoked or cancelled without any further ado, i.e. those, who, in this sense, can rule and control without any interference whatsoever. This only applies to the leadership level of the formally established government and, in exceptional cases, to the top hierarchy of the military, police and intelligence forces. Obviously, their ability to exercise Organisationsherrschaft is self-evident when they are ruling themselves or form part of the government.*⁵³

41. The Defence submits that the degree of control over the organization as gleaned from the jurisprudence of the Court is much more profound than a mere “ability to cause the organization to contribute to the crime” as postulated by the Prosecution.⁵⁴

42. Furthermore, the Defence observes that the Prosecution's submissions on the issue in other cases including, for example, in *Abu Garda*,⁵⁵ are much more on point and more accurately reflect the position of the law as compared to its current baseless attempt at recasting the law and thereby causing unnecessary obfuscation and confusion. This attempt should be rejected as it makes no

⁵³ K. Ambos, “The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus”, *Journal of International Criminal Justice* 9 (2011), 137-158, at pp. 151-152.

⁵⁴ Prosecution's Submissions, para. 15.

⁵⁵ In its DCC in the *Abu Garda* case, the Prosecution felt it necessary to allege that the suspect, who the Prosecution described as holding a “leadership position” in the movement in question, had “total control” of the military forces in question “through a direct military command”, instead of simply alleging that the suspect, by virtue of his “leadership position” – had the “ability to cause the organization to contribute to the crime”. ICC-02/05-02/09-91-Red, paras 134-143.

meaningful contribution or “adjustments”, as it were, to the law as it currently stands.

(d) the organization must consist of an organized hierarchical apparatus of power;

43. As far as indirect co-perpetration based on joint control over the crime is concerned, the Chambers of the Court have repeatedly recognised that there must be an organized hierarchical apparatus of power or an organized structure of power. In the *Katanga and Ngudjolo* confirmation decision, the Pre-Trial Chamber set out the following parameters for an organised and hierarchical apparatus of power:⁵⁶

“511. There are several aspects of an organisational apparatus of power that allow it to serve the object and purpose of enabling the perpetrator behind the perpetrator to commit crimes through his subordinates.

512. The Chamber finds that the organisation must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors’ orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.

513. In the view of the Chamber, it is critical that the chief, or the leader, exercises authority and control over the apparatus and that his authority and control are manifest in subordinates’ compliance with his orders. His means for exercising control may include his capacity to hire, train, impose discipline, and provide resources to his subordinates.

514. The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court.”

⁵⁶ *Katanga* Confirmation Decision, paras 511-514.

44. In this regard, the organisation must: (a) have an organized structure of power, and (b) a culture of compliance/obedience such that if one person fails to implement an order, that person will be automatically replaced by another who will. There must also be a method of ensuring compliance through the structures of the organization – i.e. through disciplinary measures, installing compliance through military training/indoctrination, providing significant financial incentives or disincentives.

(e) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;

45. The Defence takes issue with the new position contained in the submissions of the Prosecution that “automatic compliance with orders” is not required.⁵⁷ The defence submits that “fungibility” alone is not sufficient. Indeed, as observed by the Pre-Trial Chamber in the *Katanga* confirmation decision, “[t]he main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders.”⁵⁸

46. This element is a function of the organized and hierarchical apparatus of power, which enables the leader’s orders to be executed by almost automatic compliance.⁵⁹ Essentially, the leader must have the power to utilise his subordinates in order to produce the criminal result automatically.⁶⁰ In this context, the “direct and physical perpetrator is nothing but a *cog in the wheel* or a *mere gear in a giant machine* that can be replaced immediately.”⁶¹ As found by the German Federal Supreme Court in the *Politbüro* case, if the defendant

⁵⁷ This position is different from the Prosecution’s approach in *Abu Garda*; see ICC-02/05-02/09-91-Red, at para. 148.

⁵⁸ *Katanga* Confirmation Decision, para. 517.

⁵⁹ Van der Wilt, “The Continuous Quest for Proper Modes of Criminal Responsibility”, *Journal of International Criminal Justice* (2009), at p. 5.

⁶⁰ *Katanga* Confirmation Decision, para. 515.

⁶¹ *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Judgment, 7 July 2006, Separate Opinion of Judge Schomburg, para. 20.

“exploits the direct perpetrator’s unconditional willingness to bring about the constituent elements of the crime, and if he wills the result as that of his own actions, then he is a perpetrator by indirect perpetration”.⁶²

47. According to the *Katanga* confirmation decision, “this mechanisation” seeks to ensure that the successful execution of the plan will not be compromised by failure of a subordinate to comply with orders, as such a subordinate is replaced by another who complies with the order. In this regard, the executor of the order is “fungible”. As such, the organization must have sufficient replaceable members (physical perpetrators).

48. According to Kai Ambos, “*attribution in these cases may go too far if the indirect perpetrator cannot dominate the direct perpetrator sufficiently so as to justify attributing to him the latter’s conduct as though it were his own. Generally speaking, perpetration by means requires a sufficient tight control by the “Hintermann” over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility.*”⁶³

49. In this regard, exercise of effective control by the co-perpetrator over the physical perpetrators, and that the actions of the physical perpetrators were causally linked to the common plan, as opposed to being triggered by independent events or through the individual volition of the physical perpetrator, are critical. Acts which will fall outside the scope of indirect co-perpetration include the actions of the physical perpetrator which are occasioned by personal antipathy towards the victims or desire for personal economic gain.

⁶² *Politbüro* case (BGHSt, 40, pp. 236ff, 26 July 1974), cited by Judge Schomburg in his Separate Opinion in *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Judgment, 7 July 2006, at footnote 91.

⁶³ K. Ambos, ‘Article 25: Individual Criminal Responsibility’, in Commentary on the Rome Statute of the International Criminal Court, O. Triffterer (ed.) (Hart Publishers, Oxford 2008), at p. 751.

50. For the above reasons, the proposed tinkering with the element as suggested by the Prosecution should be dismissed.

(f) the suspect must satisfy the subjective elements of the crimes;

51. According to the jurisprudence of the Court, co-perpetration based on joint control over the crime requires that the co-perpetrator fulfils all the subjective elements of the crime.⁶⁴ Article 30 of the Statute provides general subjective elements of “intent and knowledge” in respect of all crimes within the jurisdiction of the court unless those subjective elements are specifically stated.

52. The jurisprudence of the court recognises that the cumulative reference to intent and knowledge in Article 30 implicates a volitional element on the part of the co-perpetrator.⁶⁵ In addition, intent and knowledge under Article 30 does not include the notion of *dolus eventualis* which, together with the concept of recklessness, were deliberately excluded from the Statute.

(g) the suspect and other co-perpetrators must be mutually aware and accept that the implementation of the common plan will result in the fulfilment of the material elements of the crimes;

53. Indirect co-perpetration requires that the co-perpetrators are aware that the implementation of the common plan *will* result in the fulfilment of the material elements of the crime. They must also undertake such activities with the specific intent of bringing about the objective elements of the crime, or are aware that the realisation of the objective elements will occur in the ordinary course of events.⁶⁶ There should be almost a virtual certainty that the objective

⁶⁴ See *Lubanga* Confirmation Decision, ICC-01/04-01/06-803–tEN, paras 118, 349.

⁶⁵ *Lubanga* Trial Judgement, para. 1009.

⁶⁶ See *Lubanga* Confirmation Decision, ICC-01/04-01/06-803–tEN, paras 351-355.

elements of the crime will occur; a possible or even probable consequences will not suffice.⁶⁷

54. This is consistent with the fact that, as was confirmed in the *Bemba* confirmation decision, the notion of intent under the ICC Statute does not extend to *dolus eventualis* (i.e. advertent recklessness).⁶⁸ Thus, in contradistinction to the *ad hoc* Tribunals, a defendant cannot be held responsible for crimes, which were a foreseeable consequence of the initial common plan, but which were not part of the initial common plan.

55. In this regard, indirect co-perpetration “is not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities”.⁶⁹

(h) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person

56. This element requires that co-perpetrators are aware of the factual circumstances that enabled them to exercise joint control over the commission of the crimes through another person. According to the PTC in the Katanga confirmation decision, “this requires that each suspect is aware (i) of his essential role in the implementation of the common plan; (ii) of his ability-by reason of the essential nature of his task-to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes”.⁷⁰

⁶⁷ Lubanga Trial Judgment, para. 1012.

⁶⁸ *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, 15 June 2009, ICC-01/05-01/08-424, paras 357-369.

⁶⁹ *Katanga* Confirmation Decision, para. 537.

⁷⁰ *Katanga* Confirmation Decision, pp. 181-182.

57. In addition, although the indirect co-perpetrator need not be aware of the specific identity of the physical perpetrator, he must be aware of the role of the physical perpetrator in implementing the common plan, and the means by which the compliance of the physical perpetrator is obtained.

58. This position was also approved in the Luabnga Trial Judgement where the majority states that the Prosecution must prove in relation to each charge that:

- (i) “there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented WILL result in the commission of the relevant crime in the ordinary course of events; (*emphasis added*)
- (ii) the accused provided essential contribution to the common plan that resulted in the commission of the relevant crime;
- (iii) the accused meant to [...] or he was aware that by implementing the common plan these consequences ‘will occur in the ordinary course of events’;
- (iv) the accused was aware that he provided essential contribution to the implementation of the common plan; and
- (v) the accused was aware of the factual circumstances that [in this case - widespread or systematic attack against a civilian population] establish the link between these circumstances and his conduct.”⁷¹

59. The Defence submits that the position advanced by the Prosecution in its Submissions is radically different from that advanced by the Prosecution in previous cases. The present filing by the Prosecution disregards the important requirement for: (a) a virtual certainty of the outcome of the objective elements of the crime, (b) the essential contribution of the accused, and (c) the

⁷¹ Lubanga Trial Judgment, para. 1018.

factual circumstances which enabled him/her to exercise control over the crime.

60. The Defence submits that all the above elements are critical in establishing the elements of indirect co-perpetration. In this regard, it urges the Chamber to adopt the definition of the elements as contained in the established jurisprudence of the court and to dismiss the wholly oversimplified approach postulated by the Prosecution.

V. Conclusion

61. A decade after the coming into force of the Rome Statute, chambers of the ICC have successfully clarified the law on indirect co-perpetration. It is clear and unambiguous. It should not be disturbed or set aside without good reason and certainly not as a function of prosecutorial difficulties on the facts of the present case. The Defence recalls the wisdom of Judge Shahabuddeen that *“The desiderata of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection [...] The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions.”*⁷² The unnecessary tinkering with the law suggested by the Prosecution under the guise of “adjustments” only brings about uncertainty and confusion.

62. For the above reasons, the Defence requests the Chamber to disregard in their entirety the submissions of the Prosecution on the law of indirect co-perpetration and to adopt the settled and established jurisprudence of the Court as contained in its previous decisions – including the recent *Lubanga* Trial Judgement – and in the submissions of the Defence contained herein.

⁷² Shahabuddeen, *Precedent in the World Court* (1996), p. 238.

Relief Requested

For the reasons detailed above, the Defence prays that the Trial Chamber:

- (a) Disregard and/or dismiss the submissions of the Prosecution on the elements of indirect co-perpetration;
- (b) Adopt and affirm the established jurisprudence of the Court on the law of indirect co-perpetration as contained in these submissions and the plethora of cases identified in these submissions, in particular the *Katanga* Confirmation Decision and (as appropriate) the *Lubanga* Trial judgement; and
- (c) Dismiss summarily the Prosecution's application for notice to be given pursuant to Regulation 55(2) as premature.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for Ambassador Francis K. Muthaura

Dated this 25th day of July 2012

At Kuala Lumpur, Malaysia