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TRIAL CHAMBER II

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

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

CORRIGENDUM TO:
Public

Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute

Source: **Defence for Mr Germain Katanga**

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Introduction

1. At the Status Conference on 1 October 2009, the Trial Chamber ordered the parties to give their views on whether the interpretation given by the Pre-Trial Chamber of article 25(3)(a) should be retained or discarded.[1] Pursuant to this order from the Trial Chamber, the Defence for Mr. Germain Katanga ("Defence") hereby files its Pre-Trial Brief on the interpretation of article 25(3)(a) of the Rome Statute.
2. The Defence submits that the joint control theory created by Pre-Trial Chamber I is flawed and should not be adopted without appropriate adjustments. It will also set out reasons why the Trial Chamber should not adopt the Prosecution's suggested revisions to the joint control theory of criminal liability.

Common Plan Theory as designed by Pre-Trial Chamber I

3. At the confirmation hearing, the Defence challenged the concept of what it refers to as 'indirect co-perpetration through joint control over the crime' as a mode of criminal liability under article 25(3)(a), as developed by the Pre-Trial Chamber in the case against Mr. Lubanga.[2] The challenge was based on the following three grounds:[3]
   (a) It merges the liability modes of co-perpetration and indirect perpetration;
   (b) It defines the common plan in a broad and imprecise manner; and
   (c) It incorporates the concept of *dolus eventualis*.
4. The Pre-Trial Chamber dismissed the challenge. It found that "there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blame worthiness of "senior leaders" adequately."[4] The Pre-Trial Chamber added that "[a]n individual who has no control over the person through whom the crime would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual — one who controls the person

[1] ICC-01/04-01/07-T-71-CONF-ENG CT, 1-10-2009, pages 7-8.
[2] ICC-01/04-01/07-T-46-ENG ET WT 11-07-2008, pages 28-43;
Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, 28 July 2008, ICC-01/04-01/07-698, paras. 13-32.
[3] Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, 28 July 2008, ICC-01/04-01/07-698, para. 18.
[4] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 492.

used as an instrument —these crimes can be attributed to him on the basis of mutual attribution."[5]

5. The Pre-Trial Chamber found that, in order to hold an accused before the ICC liable under this joint control theory pursuant to article 25(3)(a), the Prosecution must establish a number of objective and subjective elements related to the act of commission of the crime through another person, as well as the act of commission of the crime with another person. These objective elements of the commission through another person are as follows, according to the Pre-Trial Chamber: (a) control over the organisation; (b) organised and hierarchical apparatus of power; (c) execution of the crimes secured by almost automatic compliance with the orders. Conversely, the objective elements of the commission with another person are: (a) existence of an agreement or common plan between two or more persons; (b) coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime.[6]

6. For their part, the subjective elements of the commission through or with another person are as follows:[7]

a. The suspects must carry out the subjective elements of the crimes. Intent can be established in the following two scenarios:

i. if the person means to engage in the relevant conduct with the intent to cause the relevant consequence, and/or is aware that it will occur in the ordinary course of events; or

ii. if the person is "[aware] that a circumstance exists or a consequence will occur in the ordinary course of events".

b. The suspects must be mutually aware and mutually accept that implementing their common plan will result in the realisation of the objective elements of the crimes

c. The suspects must be aware of the factual circumstances enabling them to control the crimes jointly. This requires that each suspect was 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

[5] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 493.
[6] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 494-526.
[7] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 527-539.

refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.

7. The Defence submits that this is a highly controversial, unnecessary and a novel theory of liability. It is not to be found in the Rome Statute, on customary international law, or on general principles of law derived from national laws of legal systems of the world in accordance with article 21(1) of the Rome Statute. Article 25(2) similarly requires that a person who commits a crime within the jurisdiction of the Court "shall be individually responsible and liable for punishment in accordance with this Statute".

8. As for its submissions raised earlier in respect of the definition of a common plan,[8] the Defence notes that the Pre-Trial Chamber found that the common plan must include the commission of a crime,[9] which resolves any ambiguity caused by the definition of common plan in the *Lubanga* confirmation decision.[10] Accordingly, the Defence considers it unnecessary to reiterate those submissions.

9. As regards *dolus eventualis*, the Pre-Trial Chamber held that it will not rely on this concept for the mental element in relation to the crimes charged. The Defence agrees in this regard with the Pre-Trial Chamber. The contention of the Defence that the Statute does not include the notion of *dolus eventualis* is thereby rendered moot.[11] The Defence thus only upholds its challenge in respect of the Pre-Trial Chamber's interpretation of article 25(3)(a) to the extent that it merges co-perpetration and indirect perpetration and attempts to create an independent form of liability not supported by custom or developments in the Rome Statute.

Indirect co-perpetration: not in the Statute

10. Article 25(3) of the Rome Statute provides:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

[8] Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, 28 July 2008, ICC-01/04-01/07-698, para. 29.
[9] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 523.
[10] *Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 344.
[11] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 531.

(ii) Be made in the knowledge of the intention of the group to commit the crime;
(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

11. Pursuant to article 25(3)(a) of the Statute, a person who has committed some, but not all, elements of the crime whilst the other elements were performed by one or more co-perpetrators, can be held liable as a 'co-perpetrator' (jointly with another). Article 25(3)(a) recognizes that if a person did not personally commit any crime under the jurisdiction of the Court, liability may nevertheless arise through the actions of another person.
12. Article 25(3)(b) to (e) refer to other forms of indirect liability; namely, ordering, soliciting, inducement, aiding and abetting, joint commission by a group of persons acting with a common purpose, and in the case of genocide, direct and public incitement. Further, commanders and other superiors may be held liable under the doctrine of command responsibility pursuant to article 28.
13. Thus, the drafters of the Statute, originating from a wide variety of legal backgrounds, reached agreement to include multiple modes of direct and indirect liability in an attempt to subsume under article 25, not only those who play an essential role in the foreground, but those behind the scenes as well.
14. Nonetheless, the Pre-Trial Chamber literally created yet another theory of liability, a form of 'indirect co-perpetration through control over the crime' pursuant to article 25(3)(a), in addition to the existing theory of commission liability of co-perpetration recognized under article 25(3)(a) and of common purpose under article 25(3)(d). The rationale in creating this joint control theory under article 25(3)(a) was to distinguish between on the one hand, persons who made an essential contribution to the common plan (and who can therefore be appropriately qualified as co-perpetrators), and, on the other hand, other persons who contributed to the common plan, but whose contribution was not so significant that they could be considered as co-perpetrators (but rather, as accessories).[12]

[12] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 480; with reference to the *Lubanga* Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 328.

15. The Defence submits that this joint control theory is not "in accordance with the Statute".[13] In essence, it mixes the mode of liability of co-perpetration with the recognition that commission may be indirect through another person, both of which are covered separately by article 25(3)(a). The Defence disagrees with the Pre-Trial Chamber that "or" should be read as "and". The word "or" in article 25(3)(a) means in plain language "either one or the other, but not both", and not "either one or the other, and possibly both".[14]
16. In accordance with article 31(1) of the Vienna Convention of the Law of Treaties, which the Appeals Chamber has held to govern the interpretation of the Rome Statute,[15] article 25(3)(a) must be interpreted in accordance with its *ordinary meaning* in its context, and in light of the object and purpose of article 25 of the Rome Statute.[16] The Cambridge English Dictionary provides that the word 'or' is 'used to connect different possibilities'.[17] The Oxford English Dictionary also describes 'or' as 'used to coordinate two (or more) sentence elements between which there is an alternative.'[18]
17. The interpretation given by the Pre-Trial Chamber to article 25(3)(a) extends its ordinary meaning, without clear justification from the context and purpose of the provision, and therefore violates the Vienna Convention principles of interpretation. Whilst the Pre-Trial Chamber relied on *Introduction to Logic* in arriving at its findings, this work carries no authoritative weight.
18. The debates that took place during preparatory and drafting stages of the Rome Statute do not offer much assistance in interpreting article 25(3)(a), as reveal that there was no detailed discussion occurred concerning the proper interpretation of the

[13] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 491; with reference to Article 25(2) of the Rome Statute.
[14] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 491.
[15] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, par 33.
[16] The International Court of Justice has also provided guidance on how a treaty should be interpreted in the *Libya/Chad* case, where it stated that: 'interpretation must be based above all upon the text of a treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty.' Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement, ICJ Reports 1994, p. 4, para. 41.
[17] Cambridge Advanced Learners Dictionary, < http://dictionary.cambridge.org/define.asp?key=55789&dict=CALD>
[18] Oxford English Dictionary, <http://dictionary.oed.com/cgi/entry/00333049?query_type=word&queryword=or&first=1&max_to_show=10&sort_type=alpha&result_place=9&search_id=4KzQ-4eaiQB-1286&hilite=00333049>.

three distinct modes of liability there-under.[19] This supports the proposition that there was no intention to create a new form of liability.

19. Moreover, to expand criminal liability under article 25(3)(a) beyond its ordinary meaning would be inconsistent with the view of the drafting committee that "specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles".[20] Article 22(2) of the ICC Statute gives effect to this view: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

20. Accordingly, it would appear that the drafters of the Rome Statute meant to incorporate only three concepts modes of liability under article 25(3)(a); These three concepts being acting individually, acting jointly with another and acting through another. These are less modes of liability in themselves than reflecting the reality of existing forms of liability including conspiracy, complicity, the doctrine of common purpose and command responsibility. Had the drafters intended to outline a fourth concept or create a new form of liability, they would have expressly included it. This conclusion is supported by Gerhard Werle, according to whom article 25(3)(a) sets out three forms of commission: "Commission warrants the highest degree of

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[19] The French delegation argued for the inclusion of criminal organisations within the jurisdiction of the Court (UN Doc A/CONF.183/C.1/L.3 (1998), 16 June 1998). Also, consideration of the applicable standards for responsibility of commanders and superiors (which was then part of Article 25 of the Rome Statute) took place on 15-17 June, with a text being adopted on 7 July 1998: see UN Doc A/CONF.183/C.1/WGGP/L.7/Rev.1, 25 June 1998), and UN Doc A/CONF.183/DC/R.89, 7 July 1998.

[20] See Preparatory Committee on the Establishment of an International Criminal Court, Informal Group on General Principles of Criminal Law, Proposal of 26 August 1996 (A/AC.249/CRP.13), found at Prep comm. 1996 vol II page 101:

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

[3. A person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without mens rea.]

[Note. This article establishes the general principle regarding the liability of principal perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct and causation, are elaborated in articles *G* and H. IOther persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in articles B (c), I and J [and C] of this draft general part. A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles and avoids the need to elaborate defences within the Statute that merely constitute negations of the existence of essential mental or physical element.

individual criminal responsibility. Therefore, it must be strictly construed. This holds true particularly for joint commission."[21]

21. It cannot be denied that the Pre-Trial Chamber's expansive interpretation of article 25(3)(a) results in the adoption of a fourth new mode of liability. The Prosecution's contention that "[j]oint commission agrees with the Pre-Trial Chamber that the theory of joint commission through another person is not a distinct mode of liability", but "a form of co-perpetration",[22] is directly contradicted by the Pre-Trial Chamber in *Omar Hassan Ahmad Al Bashir*, recognizing indirect co-perpetration as the fourth form of liability under article 25(3)(a).[23] There was no need to create this fourth new form of liability, given that the notions of co-perpetration and indirect perpetration under article 25(3)(a), as well as the forms of accessory liability set out in article 25(3)(b)-(d) give sufficient options to charge a person in a manner that adequately fits his or her criminal responsibility for the alleged crimes committed.
22. As noted above, a similar notion of common purpose has been included in the Statute, not under article 25(3)(a), but rather, under article 25(3)(d). Unlike at the *ad hoc* tribunals, the drafters of the Rome Statute had given thought to common plan liability. Importantly, they rejected a notion of conspiracy, but incorporated a theory of liability similar to Variants I and II of the ICTY/ICTR notion of joint criminal enterprise and included it under article 25(3)(d).[24]
23. The Defence recognises that the Pre-Trial Chamber preferred to adopt a theory of liability where a person in a common plan can be held liable as a 'perpetrator', and not simply as an 'accessory'. Indeed, the drafting of article 25(3)(d) was apparently compromised and the result has been criticised.[25]
24. However, dissatisfaction of the judges with the Statute does not constitute a reason for including in it a provision otherwise not enumerated. This is particularly so in the

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[21] G. Werle, Individual Criminal Responsibility in Article 25 ICC Statute, Journal of International Criminal Justice, 5 (2007), 953-975, p.974.
[22] Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541, para. 20.
[23] 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 and further.
[24] Antonio Cassese: *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, JICJ 5 (2007) 109-133, at pages 132-133; Kai Ambos: *Article 25*, in: Roger S. Clark & Otto Triffterer (eds.): Commentary of the Rome Statute of the ICC, pages 475-492, at paras. 20-25; Albin Eser: *Individual Criminal Responsibility*, in Cassese et al (eds), The Rome Statute of the ICC, pages 802-803; Gerhard Werle: *Individual Responsibility in Article 25 ICC Statute*, JICJ 5 (2007) 953-975, at pages 970-971.
[25] For criticism in respect of Article 25(3)(d) liability, see Vincenzo Militello, *The Personal Nature of Individual Criminal Responsibility and the ICC Statute*, JICJ 5 (2007) 941-952, at page 950; also see: Gerhard Werle: *Individual Responsibility in Article 25 ICC Statute*, JICJ 5 (2007) 953-975, at page 970.

absence of an official amendment procedure by the Assembly of States Parties, as otherwise required. Were the judges themselves able to expand criminal liability, which suggests an inherent judicial power to modify at will the Statute, States would be discouraged from ratifying it. More importantly for the purposes of this discussion, Mr. Katanga would suffer undue prejudice as a result. The Trial Chamber must therefore reject an interpretation of article 25(3)(a) that permits a fourth – and highly prejudicial and controversial – mode of liability.

Indirect co-perpetration: a new and controversial concept

25. The Defence submits that co-perpetration requires a horizontal structure of responsibility, whereas indirect perpetration requires a vertical structure of responsibility. The combination thereof is controversial because it creates liability not only for crimes committed by persons under the direct control of the accused, but also, for crimes committed by persons under the direct control of his co-perpetrators. The Defence submits that this liability is more extensive than any similar theory of liability applied thus far.

26. Whilst the Defence accepts that some forms of co-perpetration and indirect perpetration exist as theories of criminal liability in a number of, particularly, civil law jurisdictions,[26] it does not accept that the proposed mode of liability, combining co-perpetration and indirect perpetration through another, is applied in domestic or international legal jurisprudence. In fact, the Defence has not come across a single legal tradition where criminal liability exists on the basis of indirect co-perpetration.[27]

[26] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 495 with reference to: FLETCHER, O.P., Rethinking Criminal Law, New York, Oxford University Press, 2000, p. 639; WERLE, G., *Individual criminal responsibility under Article 25 of the Rome Statute*, 5 J. Int'l Criminal Justice 963 (2007). See also: Max Plank study: *Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion*, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor- Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans-Georg Koch, Jan Michael Simon, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany. According to this study, Chile, Israel, the Netherlands, Portugal, Spain, and Turkey have, for example, incorporated concepts of indirect perpetration. Australia, England, Canada, Greece, Korea (South), and the USA, on the other hand, have rejected such concept. See Part I page 18. Various forms of co- or joint perpetration can be found, for example, in Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cameroon, Chile, China (several primary perpetrators possible), Côte d'Ivoire, Croatia, the Czech Republic, England, Estonia, France, Germany, Greece, Iran, Israel, Japan, Korea [South], Macedonia, Mexico, Portugal, Serbia and Montenegro, Slovenia, South Africa (with a special theory of common purpose), Spain, Turkey, and in the USA. See Part I page 19.

[27] It should be noted that concepts of conspiracy or membership of a criminal organisation have been accepted by domestic jurisdictions, notably 31 jurisdictions. Nine jurisdictions have rejected liability in such circumstances. See *ibid*, Part II pages 143 - 144. See also pages 146-147.

Nor indeed does the Pre-Trial Chamber cite a single example of it having been applied anywhere.

27. If properly defined and applied, these theories of liability – separately and independently of each other – may correctly be considered suitable forms of liability to be relied upon by the Court. The elements, particularly of co-perpetration, do not give rise to great concern.

28. Werle has defined the *actus reus* and *mens rea* of co-perpetration as follows: The *actus reus* of co-perpetration requires "(i) a plurality of persons; (ii) a common plan involving the commission of a crime under international law; (iii) an essential contribution to the execution of the common plan." The *mens rea* of co-perpetration requires that "every co-perpetrator has to act with the requisite mental element himself.[28] The Defence sees no reason to dispute this definition of co-perpetration, which corresponds with the definition adopted by the Pre-Trial Chamber, as set out above.[29]

29. More controversial, however, is the definition given to "commission through another person", or indirect perpetration. This form of commission does not only cover situations where the person executing the crime bears no criminal responsibility, but also, where such a person is fully criminally liable as a direct perpetrator. In defining indirect perpetration, the Pre-Trial Chamber mainly relied on the early works of the German criminal law theorist Claus Roxin, who referred to this doctrine as 'perpetrator behind the perpetrator' (Täter hinter dem Täter).[30] The Pre-Trial Chamber defined this doctrine as follows:[31]

> The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator. As such, in some scenarios it is possible for both perpetrators to be criminally liable as principals: the direct perpetrator for his fulfilment of the subjective and objective elements of the crime, and the perpetrator behind the perpetrator for his control over the crime via his control over the will of the direct perpetrator.

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[28] Gerhard Werle: *Individual Responsibility in Article 25 ICC Statute*, JICJ 5 (2007) 953-975, at page 963.
[29] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 494-539.
[30] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 496; reliance on: ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht, 1963, pages 193-207.
[31] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 497-498; reliance on: ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht (1963), pages 193-207; AMBOS, K., La parte general del derecho penal internacional, Montevideo, Ternis, 2005, p. 240.

> [T]he cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of "control over an organisation" (Organisationsherrschaft).

30. In support of adopting this doctrine, the Pre-Trial Chamber only refers to two legal scholars who maintain that the idea of a perpetrator-by-means "is recognized by the world's major legal systems".[32] The Pre-Trial Chamber further referred to cases in Germany,[33] Argentina,[34] Peru, and Spain and concluded that "many national jurisdictions" use the notion of control over the organisation as a mode of criminal liability.[35]
31. A study conducted by the Max Planck Institute indicates that some six countries have adopted constructions involving an offender operating behind a fully responsible offender, but that such constructions were rejected by another six countries.[36] It can therefore hardly be argued that this theory of indirect perpetration is a widely accepted notion. In this light, it is not surprising that one scholar, Elise van Sliedregt, has held that "Article 25(3)(a) introduces to the international level a new form of perpetration: perpetration by means."[37]
32. Moreover, and as accepted by the Pre-Trial Chamber,[38] this doctrine has been widely criticised. For example, Kai Ambos has argued that attribution of guilt to an indirect perpetrator for the actions of the direct perpetrator may go further than customary law

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[32] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 495, citing only two authors: FLETCHER, O.P., Rethinking Criminal Law, New York, Oxford University Press, 2000, p. 639; WERLE, G., "Individual criminal responsibility under Article 25 of the Rome Statute", 5 J. Int'l Criminal Justice 963 (2007) – in Werle's article, he does not explain which are the major legal systems which have adopted this doctrine.

[33] It referred to the Federal Supreme Court of Germany case concerning the prosecution of members of the East German *Politburu* for the policy carried out by border guards of shooting persons who tried to escape from East to West Germany.

[34] The Pre-Trial Chamber selectively only refers to the Federal Appeals Chamber of Argentina in the *Juntas Trial*, Case no 13/84, chap. 7/5. As will be discussed later, the Supreme Court in this case rejected the doctrine of indirect perpetration as being applicable in Argentina. This case therefore does *not* provide state support for the theory.

[35] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 504.

[36] See, *supra*, footnote 26, Part I page 19.

[37] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, The Hague (2003), p.70.

[38] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 499, footnote 660, where the Pre-Trial Chamber held: "Essentially, the possibility that a person may so control the will of another such that he can be said to perpetrate a crime through that other, seems incompatible with a meaningful notion of that other as a fully responsible actor. ROXIN, C. responded to these criticisms in "Organistionsherrschaft und Tatentschlossenheit", 7 Zeitschrift für Internationale Strafrechtsdogmatik (2006), p. 296. See also AMBOS, K., La parte general del derecho penal internacional, Montevideo, Temis, 2005, p. 220. Additionally, challenges to the application of this mode of liability have been particularly prevalent in jurisdictions where the law does not expressly proscribe the commission of a crime through another person, or, where such a modality is expressly recognised, the law nevertheless does not provide for the use of non-innocent persons as instruments."

"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."[39]

33. The Defence submits in light of the above, that the attribution of the crime of a fully responsible direct perpetrator to the indirect perpetrator behind him as though it were his own, can be justified only if there is some effective control by the indirect over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility pursuant to Article 28 of the ICC Statute.[40] Although direct perpetrators acting with full criminal responsibility cannot be considered mere 'interchangeable mediators of the act' as such, the 'system' provides for a practically unlimited number of replacements, and thus for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned.[41]
34. This suggested interpretation would exclude any reading that an accused could be held liable for persons who are not under his direct control but rather, under the control of his co-perpetrators. Such an interpretation would also find better connection with domestic legal systems, where liability can only be attributed to an indirect perpetrator if the physical perpetrator is identified as belonging to his group.[42] The Defence therefore disagrees with the Pre-Trial Chamber that the required control over the physical perpetrator may, in some circumstances, be less tight than that between a superior and his direct subordinates.[43]
35. In any event, for the purposes of international proceedings, the Defence submits that the application of Article 25 must strictly respect the principle of legality. One must stay firmly within the parameters of custom, save where the Statute has plainly developed that custom.

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[39] K. Ambos, Triffterer, Commentary on the Rome Statute of the International Criminal Court, (1999), pp.479-80.
[40] Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds): The Rome Statute of the International Criminal Court: A Commentary, Vol. I, Oxford University Press 2002, page 795. The key issue is whether the mastermind or *Hintermann* is able to exercise effective control over the direct perpetrators by means of the organizational apparatus created and dominated by him. The indirect perpetrator must thus be able to sufficiently dominate the direct perpetrator. See further: Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, March 2007, 159 at page 180. The Defence has raised this argument earlier in:
Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, 28 July 2008, ICC-01/04-01/07-698, para. 23.
[41] *Ibid*, para. 23; reliance on Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, March 2007, 159 at page 182.
[42] *Supra*, footnote 26, Part II page 91.
[43] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 511-517.

Indirect co-perpetration: rejected by domestic courts

36. As aforementioned, the Defence submits that the combined notion of indirect and co-perpetration leading to responsibility for subordinates not of the accused but of one of his alleged co-perpetrators is highly controversial and has rarely been applied and never confirmed by the highest court. Roxin's theory of control of the act through an "organized apparatus of power" was applied and confirmed by the Appeals Chamber in the Argentine Junta trial.[44] However, the Supreme Court rejected this theory, holding that it was not even accepted in Germany (the country of origin of this legal theory) and would lead to inequitable results by establishing a perpetrator behind the perpetrator. Accordingly, the "control over the crime" should not be considered by the courts of Argentina."[45] The Supreme Court went back to the traditional notion of instigation and held that a person cannot be criminally responsible for the

[44] See *Videla Judgment*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires (Camara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal) Buenos Aires, December 9, 1985. See H. Olasolo and A P Cepeda, The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case, Int Crim Law Review 4: 475-526, 2004, p.511, footnote 118.

[45] See Corte Suprema de Justicia de la Nación, *Resolución*, *Causa 13/84*. December 30, 1986. www.nuncamas.org/juicios/juicios.htm. The decision contains the following paragraphs (unofficial translation):
Par 20. The Supreme Court considered that the criminal legislation has not accepted yet the formula of the 'control of the facts' as decisive to distinguish perpetrators from participants. In Spain, Italy and France the 'Formal Objective' doctrine prevails, according to which perpetrator is the person that executes all the acts established in the typified conduct for the consummation of the crime. All the Supreme Courts of those countries have rejected the doctrine of the control of the facts to determine whether a person is perpetrator or participant. Germany is the country in which this doctrine initially originated and it has gotten serious critics. The German Supreme Court has applied it in very limited ways rejecting the application of this doctrine in a case in which a person killed someone although he did it under the influence and in the presence of the person interested in the commission of the crime. Even in the cases of the crimes committed during the socialist regime, the German Court has rejected to condemn as perpetrators those that gave orders for the commission of the crimes, they have been rather condemned as accomplices.
…
Par 22. A numeric minority of scholars in Germany (amongst them, Roxin) has extended the concept of the non-immediate perpetrator as it has also been done by the Appeals Chamber in order to cover the case of the person that acting as an intermediate in the execution of the unlawful decision, forms part of an organization of power. This person does not act under force or mistakenly, although he is fungible. The superior member in the power scale is considered as the non-immediate perpetrator. …
Par 23. According to the formula of the 'control of the facts', the immediate executor of the crime is considered as the immediate perpetrator and his responsibility coexists with that of the non-immediate perpetrator. This produces an incongruence of methodology because of the irrefutable presumption that the immediate perpetrator dominates the fact and also because the non-immediate perpetrator becomes a perpetrator without having performed any typified conduct. ... Such definition of perpetrator would contravene the principle of legality because perpetrator could only be the person that executes or consummates the crime. According to the Penal Code of Argentina (articles 43 and 45) perpetrator is the person that executes (ejecución) and consummates (consumación) the crime. Therefore the Court considers that the criterion of the 'control of the facts' should not be considered to determine whether a person is perpetrator of the crime or not. The Court considers that a perpetrator is that who adjusted his conduct to that described on the typified crime. The Court finally established that those that imparted the orders and provided the material means for the executors to accomplish the crime ought to be considered as participants (necessary co-operators) but not as authors.

subordinates of others.[46] Thus, Argentina provides no authority to support an argument that either indirect perpetration or indirect co-perpetration exist in customary law.

37. The Argentinean Supreme Court was correct in finding that Germany does not apply a theory of indirect co-perpetration. In relation to the different possible modes of perpetration in German law, Judge Hamdorf held that a "person will only be liable as a principal if he can be regarded as a direct perpetrator, a co-perpetrator or an indirect perpetrator, each of the three modes of liability having their own prerequisites. … In all other cases, the participant could only be regarded as an aider or instigator".[47] Thus there is no state practice in Germany, the birthplace of the 'control over the crime' approach to perpetration, to support the Pre-Trial Chamber's theory of indirect co-perpetration. Indeed, even Claus Roxin himself does not suggest that different modes can be combined. His approach is that perpetration "develops in three different ways: (i) in the direct or immediate perpetration as 'control over the action'; (ii) in the indirect perpetration as 'control of the will'; and (iii) in co-perpetration as 'functional control'."[48]
38. The Defence accepts the Pre-Trial Chamber's reasoning that "[r]ejection by an Argentine court can hardly be said to preclude the International Criminal Court from resorting to the notion of criminal responsibility if it finds compelling reasons to do so".[49] However, given that there are no other examples of state practice whereby this form of responsibility is used, the explicit rejection of this liability mode by a major legal system is of great significance. In this regard, the Defence already noted that the Pre-Trial Chamber has not given any examples of state practice other than in respect of either indirect or co-perpetration; and has provided no other basis for its conclusion

[46] *Ibid*, in particular para. 14. See further: Christiane Wilke: Dissertation: A Belated Vindication of Rights: Criminal Trials for Massive Human Rights Violations, Chapter 5 – The Spider's Head: The 1985 Trial of the Juntas, September 2005, sections IV and V. www.geocities.com/christianewilke/chapter5finalsept05.pdf
[47] K. Hamdorf, The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime, Journal of Int. Crim. Justice 5 (2007), 208-226, at p.224-5. Article 25 of the German Criminal Code (Strafgesetzbuch, StGB) (as promulgated 13 November 1998 Federal Law Gazette I, p.945, p.3322) provides:
(1) Whoever commits the crime himself or through another shall be punished as a perpetrator.
(2) If more than one person commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator).
[48] H. Olasolo and A P Cepeda, The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case, Int Crim Law Review 4: 475-526, 2004, p.488, referring to *Roxin*, Taterschaft und Tatherrschaft, 7th ed, 2000, pp.122 et seq.
[49] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, par 504.

that "joint commission of crime through one or more persons is therefore a mode of liability".[50]

39. The Defence submits that a Chamber should only feel compelled to accept a form of responsibility in circumstances where "extensive and uniform"[51] state practice demonstrates the existence of the mode. If there are no, or insufficient, examples of state practice then neither a principle of customary international law (for which state practice is an essential requirement), nor a general principle of law derived from national laws of legal systems of the world can be defined on which the Chamber may rely pursuant to Articles 21(1)(b) and (c) of the Rome Statute in support of its theory of indirect perpetration.
40. This conclusion is in accordance with Judge Bonomy's view, as expressed in his separate opinion in the ICTY case against *Milutinovic*, holding that in determining norms of international criminal law, "[r]eference must not be made to one national legal system only—for example, either common law or civil law to the exclusion of the other—although the distillation of a general principle does not require a comprehensive survey of all legal systems of the world. It is also important to avoid "mechanical importation or transposition" from national law into international criminal proceedings."[52]

Indirect Co-perpetration: rejected by the Ad hoc Tribunals

41. The notion of indirect co-perpetration does not find any support in the jurisprudence of the *ad hoc* international criminal tribunals.
42. The Trial Chamber in the ICTY case against *Stakic* convicted Mr. Stakic on the basis of a co-perpetratorhip mode of liability which is strikingly similar to the mode of indirect co-perpetration accepted by the ICC.[53] Olasolo and Cepeda, proponents of indirect co-perpetration at the ICC, analysed the Stakic Trial Chamber Judgement and concluded that the Chamber had applied a 'combined theory' of "indirect perpetration" (perpetratror behind the perpetrator), "co-perpetration based on

[50] *Katanga/Ngudjolo* Confirmation Decision, par 490.
[51] ICJ, Case of North Sea Continental Shelf, pp. 74.
[52] *Prosecutor v Milutinovic*, Trial Chamber, Decision On Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, Separate Opinion of Judge Iain Bonomy, par 27.
[53] *Prosecutor v. Stakic*, IT-92-24-T, TC Judgment of 31 July 2003, paras. 438-442, 741-742, 774, 818, 822 and 826. http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf.

functional control", and the "joint application of [perpetratror behind the perpetrator] and functional control".[54]

43. On appeal, although neither party had appealed the issue of co-perpetratorship, the Appeals Chamber was clearly concerned by the Trial Chamber's approach and addressed the issue *proprio motu*, holding that it was "an issue of general importance warranting the scrutiny of the Appeals Chamber *proprio motu*. The introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal as well as in the application of the law by Trial Chambers. To avoid such uncertainty and ensure respect for the values of consistency and coherence in the application of the law, the Appeals Chamber must intervene to assess whether the mode of liability applied by the Trial Chamber is consistent with the jurisprudence of this Tribunal."[55]
44. The Appeals Chamber then determined that the notion of co-perpetratorship as defined in the *Stakic* Trial Judgement "does not have support in customary international law or in the settled jurisprudence of this Tribunal".[56] Accordingly, it set aside those portions of the Trial Judgement applying co-perpetratorship.[57]
45. Following the example of the Stakic Trial Judgement, the Prosecution in Milutinovic attempted to use indirect co-perpetration as a mode of liability. This mode was challenged by the Defence on the basis that it did not exist in the ICTY Statute nor under customary international law.[58] In its decision of 22 May 2006 the Trial Chamber analysed the Stakic Trial Judgement and held that, it appeared, "the Stakic Chamber did not rely on sources of customary international law actually defining and applying some conception of 'co-perpetration', to arrive at the language in paragraph 442".[59] The Chamber then concluded that "even if Roxin or other authorities did provide clear evidence that the very specific definition of co-perpetration in paragraphs 440 and 442 of *Stakic* exists in German or other national law, such

[54] H. Olasolo and A P Cepeda, The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case, Int Crim Law Review 4: 475-526, 2004, page 479; also see pages 513-516 where they explain in detail how the Stakic Trial Judgement used a theory of indirect co-perpetration.
[55] *Prosecutor v Stakic*, Appeals Chamber, Judgment, 22 March 2006, par 59.
[56] *Prosecutor v Stakic*, Appeals Chamber, Judgment, 22 March 2006, par 62.
[57] *Prosecutor v. Stakic*, IT-92-24-A, Appeals Chamber Judgment of 22 March 2006, in particular, paras 439-441. http://www.un.org/icty/stakic/appeal/judgement/sta-aj060322e.htm.
[58] See General Ojdanic's Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration, 7 October 2005.
[59] *Prosecutor v Milutinovic*, Trial Chamber, Decision On Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, par 38.

evidence would not support a conclusion that there is state practice and *opinio juris* demonstrating the existence of the *Stakic* definition in customary international law. Neither *Stakic* nor the Prosecution has cited any authority that convincingly establishes state practice or *opinio juris* for the *Stakic* definition."[60] Accordingly, the Trial Chamber rejected the mode of indirect perpetration.

46. Judge Schomburg, who appears to prefer that a theory of control over the crime could replace the notion of joint criminal enterprise at the *ad hoc* tribunals, does not conflate the notions of co-perpetration and indirect perpetration. To do so, he acknowledges, would mean that the defendant would not have effective control over the perpetrator under the theory of indirect co-perpetration, and would not be able to frustrate the commission of crimes committed by subordinates of his co-accused.[61]

47. From this analysis of domestic and international jurisprudence, it is evident that the notion of indirect co-perpetration is novel, unsupported by any principles of international law, or general principles of law derived from national laws of legal systems. Moreover, the concept is controversial and contradicts the rational behind it, namely that the persons who do not physically carry out the actual objective elements of the crimes charged can nonetheless be held liable as principle perpetrators "because they decide *whether* and *how* the offence will be committed."[62] This crucial requirement of control is clearly absent in a situation where an accused may be held liable for the actions of the subordinates of one of his alleged co-perpetrators.

48. Accordingly, the Defence submits that the Pre-Trial Chamber's interpretation of Article 25(3)(a) should be rejected. Instead, the Prosecution may rely on indirect or co-perpetration pursuant to Article 25(3)(a); rely on any of the accessory modes of liability under Article 25(3)(b) to (d); or rely on command responsibility pursuant to Article 28. The Defence will now proceed to consider whether the Prosecution's suggested amendments should be incorporated.

Reasons for not following Prosecution's suggestions

49. The Prosecution's suggestion to substitute the requirement of making an essential contribution with the requirement of making a substantial contribution is wholly

[60] *Ibid*.
[61] *Prosecutor v. Gacumbitsi Appeals Judgement*, 7 July 2006, Schomburg dissenting opinion, paras 17, 18 and 26; also see *Prosecutor v. Martic*, Appeals Judgement, 8 October 2008, Schomburg dissenting opinion, para. 7.
[62] Confirmation Decision, par 485; citing *Prosecutor v. Lubanga*, Lubanga Confirmation Decision, ICC-01/04-01/06-803-tEN, 29 November 2006, par 330.

unmerited.[63] This suggestion finds no support in domestic or international jurisprudence and is in contravention of the views of many scholars, and is not supported by Weigend himself, who is cited by the Prosecution in support of its suggested amendments.[64]

50. The rationale behind holding co-perpetrators liable as principal perpetrators notwithstanding that they have not carried out all objective elements of the alleged crime, is that each of them can frustrate the implementation of the plan by withdrawing his or her contribution to it. This contribution must, therefore, be essential, not substantial, in that "the common purpose cannot be achieved without it."[65]

51. Claus Roxin himself, whose doctrine is at the roots of the Pre-Trial Chamber's interpretation of Article 25(3)(a), requires that each co-perpetrator can frustrate the action, holding: "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."[66] Also, anyone who expressed support for the theory of indirect co-perpetration has held that the contribution of each co-perpetrator must be essential.[67]

52. Indeed, as defined by the Pre-Trial Chamber, in order to hold a person who has not personally perpetrated all elements of the crime nonetheless liable for the full crime, the Prosecution must establish, in addition to the general requirements of *mens rea* pursuant to Article 30 of the Rome Statute, that the accused were aware of the factual circumstances enabling them to control the crimes jointly. This requires that each accused was 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

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[63] Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541, paras. 14-17.

[64] Weigend T., Intent, Mistake of Law and Co-perpetration in the Lubanga Decision on Confirmation of Charges, in JICJ 6 (2008), pages 471-487 at page 480; also see: G. Werle, Individual Criminal Responsibility in Article 25 ICC Statute, Journal of International Criminal Justice, 5 (2007), 953-975, at page 962; Olásolo, H. / Perez Cepeda, A.: The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakic' Case, 4 International Criminal Law Review 474 (2004), page 485, at pages 498-499.

[65] G. Werle, Individual Criminal Responsibility in Article 25 ICC Statute, Journal of International Criminal Justice, 5 (2007), 953-975, at page 962.

[66] Claus Roxin, cited in: *Prosecutor v. Gacumbitsi Appeals Judgement*, 7 July 2006, Schomburg dissenting opinion, para. 17.

[67] *Ibid*, paras. 17-18; also: Olásolo, H. / Perez Cepeda, A.: The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakic' Case, 4 International Criminal Law Review 474 (2004), page 485, at pages 498-499.

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.[68]

53. This theory of liability would be wholly frustrated were the Chamber to accept that it is sufficient that the contribution made by each co-perpetrator was substantial rather than essential. In addition, were the essential contribution to be reduced to substantial contribution, then there is no longer a clear distinction between the joint control theory of criminal liability under Article 25(3)(a) and the criminal purpose theory of criminal liability under Article 25(3)(d). The intention of creating this new mode of liability under Article 25(3)(a) was exactly the reverse, namely to clearly distinguish the liability of perpetrators and accessories.[69] Accordingly, the Prosecution's suggestions should be rejected.

Relief Sought

1. Accordingly, the Defence requests that the Trial Chamber does not adopt the interpretation given to Article 25(3)(a) by the Pre-Trial Chamber but rather reads this provision as it states: jointly with another or through another person. The Prosecution may charge the accused on either mode of liability or any other set out in Articles 25 and 28.

2. The Defence further requests that the Chamber rejects the Prosecution's suggested amendments to the theory as created by the Pre-Trial Chamber.

Respectfully submitted,

[Enter name and title of person signing]

[Enter name and title of person on behalf of whom the document is signed, if applicable]

Dated this 30th October 2009

At The Hague, The Netherlands

[68] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 527-539.
[69] Confirmation Decision, para. 480.