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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. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG***

Public

**Defence Response to 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 William Samoei Ruto's individual criminal responsibility**

Source: Defence for Mr. William Samoei Ruto

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

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I. INTRODUCTION

1. At the status conference held on 11 June 2012, the Prosecution clarified its intention to file an application relating to modes of liability Article 25(3)(a) for the accused William Samoei Ruto. The Prosecution also indicated that it would ask for formal notice to be given to the parties under Regulation 55(2) that certain facts may be subject to legal re-characterization.¹
2. On 3 July 2012, the Prosecution submitted its filing *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 William Samoei Ruto's individual criminal responsibility*.²
3. In response, the Defence for William Ruto ("Defence") submits the following observations regarding the proper interpretation of the mode of liability as an indirect co-perpetrator under article 25(3)(a) of the Rome Statute and submissions on legal re-characterization under Regulation 55(2).

II. SUBMISSIONS ON ARTICLE 25(3)(A)

4. Pre-Trial Chamber I, which was assigned to both the *Lubanga* and the *Katanga & Ngudjolo* confirmation hearings, developed the concept and ingredients of indirect co-perpetration. The Pre-Trial Chamber determined that an individual could be held liable as an indirect co-perpetrator only if the following requirements were met:³
 - (i) The accused must be part of a common plan or an agreement with one or more persons;
 - (ii) The accused and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime;
 - (iii) The accused must have control over the organisation;
 - (iv) The organisation must consist of an organized and hierarchical apparatus of power;
 - (v) The execution of the crimes must be secured by almost automatic compliance with the orders issued by the accused;
 - (vi) The accused must satisfy the subjective elements of the crimes;
 - (vii) The accused and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements

¹ ICC-01/09-01/11-T-15-ENG, page 25 lines 21-25 and page 26

² ICC-01/09-01/11-433, 03-07-2012.

³ Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, 26-09-2008, paras. 495-593.

- of the crimes; and
- (viii) The accused must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).
5. At the confirmation hearing and in its brief, the Defence submitted that this mode of liability is new, has not been adhered to in any domestic or international jurisdiction, is not foreseen in the Statute and does not exist under customary international law.⁴ It can only be fair to apply it if the above requirements are stringently applied. This is consistent 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”.⁵ This also has academic support. For instance, Werle states that “[c]ommission warrants the highest degree of individual criminal responsibility. Therefore, it must be strictly construed. This holds true particularly for joint commission.”⁶
6. In particular, the Defence submitted that the relationship between the indirect co-perpetrator and the direct perpetrators must be one of effective control. Any other interpretation would be inconsistent with the control over the crime notion, which is the very essence of this mode of liability. If the control element is not complied with, the blameworthiness of the conduct risks being too far remote fairly to impute criminal liability to the indirect co-perpetrator. Ambos, a highly respected scholar, shares the view that indirect perpetration can only be consistent with customary international law if the indirect perpetrator dominates the direct perpetrator sufficiently “so as to justify attributing to him the latter’s conduct as though it were his own.”⁷
7. In addition, the Defence submitted that the general requirements under article 30 of intent and knowledge should be applied rigorously so as not to include liability for the commission by others of crimes that were merely foreseeable though not intended.⁸

⁴ William Samoei Ruto Defence Brief following the Confirmation of the Charges Hearing, ICC-01/09-01/11-355, paras. 78, 95; ICC-01/09-01/11-T-6-Red-ENG, 02-09-2011, pp. 154-161.

⁵ 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.

⁶ G. Werle, Individual Criminal Responsibility in Article 25 ICC Statute, *Journal of International Criminal Justice*, 5 (2007), 953-975, p. 974.

⁷ K. Ambos, Triffterer, *Commentary on the Rome Statute of the ICC (1999)*, pp. 479-80.

⁸ William Samoei Ruto Defence Brief following the Confirmation of the Charges Hearing, ICC-01/09-01/11-355, paras. 101-110.

8. In its various submissions relating to the mode of liability of indirect co-perpetration, the Defence was motivated by a concern that the requirements be watered down to such an extent that an individual can be held liable for the behaviour of persons over whom he has no control. Regrettably this is precisely what the prosecution seeks to do in suggesting significant modifications to the requirements as defined by Pre-Trial Chamber I. The Defence therefore requests the Chamber not to adopt those suggested modifications, but instead to adopt the Defence suggestions as set out below.

(i) The accused must be part of a common plan or an agreement with one or more persons

9. Inspired by the *Lubanga* judgment, the Prosecutor submits that the plan does not need to be specifically directed at committing a crime, provided that it includes “a critical element of criminality”.⁹ In the *Lubanga* Trial Chamber’s view, this requirement is met if the implementation of the common plan “embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed”.¹⁰
10. In light of article 30 of the Rome Statute, and as a matter of fairness to any individual charged as an indirect co-perpetrator, the Defence submits that the *Lubanga* Chamber has given too wide an interpretation to the common plan requirement.¹¹ The blameworthy conduct of an indirect co-perpetrator is not his or her personal participation in the commission of one or more crimes under the Rome Statute, but rather his or her involvement in a common plan. Clearly, then, the plan must be criminal; otherwise, what is his criminal conduct?
11. The *Lubanga* interpretation is also inconsistent with the requirements of knowledge and intent under article 30 of the Rome Statute. In this regard, the Defence agrees with the *Bemba* Pre-Trial Chamber that the words “will occur”, read together with the words “in the ordinary course of events” under article 30(2) of the Rome Statute, clearly indicate that the required standard of its occurrence is close to certainty. It must be a “virtual” or “practical certainty”, meaning that “the consequence will follow,

⁹ ICC-01/09-01/11-433, para. 9; relying on *Lubanga* Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 984.

¹⁰ ICC-01/04-01/06-2842, paras. 984, 987, 1021.

¹¹ Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, 26-09-2008, para. 523; ICC-01/04-01/06-803-tEN, para. 344.

barring an unforeseen or unexpected intervention that prevent its occurrence.”¹²

Article 30 does not use the words “may occur” or “might occur in the ordinary course of events”, and thus excludes a mere eventuality or possibility, and requires a “near inevitability or virtual certainty”.¹³

12. Therefore, although the specific intent may first and foremost be directed toward a legitimate aim, the plan itself must encompass the commission of one or more statutory crimes being the virtually certain consequence of the implementation of the plan. It is not sufficient that the crimes were foreseeable. This is in line with the view of many scholars, including some who participated in the drafting of article 30 of the Rome Statute, that article 30 does not encompass foreseeable consequences, e.g. *dolus eventualis*. Instead, the crimes must be intended.¹⁴
13. The drafters of article 30 of the Statute considered the inclusion of notions such as recklessness and *dolus eventualis*, but decided against it. This was a deliberate choice rather than an unintended omission.¹⁵
14. Accordingly, the *Lubanga* interpretation, merely requiring a sufficient risk that, in the ordinary course of events, the implementation of the common plan will result in the commission of one or more crimes recognized under the Rome Statute bypasses article

¹² 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, No. ICC-01/05-01/08 123/186 15 June 2009, paras 357-359, 362 (footnotes omitted).

¹³ *Ibid*, para. 363.

¹⁴ Gerhard Werle: Individual Criminal Responsibility in Article 25 ICC Statute, JICJ 5 (2007), pages 953-975, at page 963; Gerhard Werle and Florian Jessberger: Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law, JICJ 3 (2005), pages 35-55, at pages 41-42 and 52; Harmen van der Wilt: Joint Criminal Enterprise: Possibilities and Limitations, JICJ 5 (2007), pages 91-108, at page 100; Kai Ambos: Joint Criminal Enterprise and Command Responsibility, JICJ 5 (2007), pages 159-183, pages 168 and 170-171; Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, at 154; Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, 12 U. Miami Int'l & Comp. L. Rev. 57 (2004) 64-65; Kai Ambos, General Principles of Criminal Law in the Rome Statute, 10 Crim. L. Forum 1, 21-22 (1999).

¹⁵ For an in-depth discussion on these concepts and their differences, see, for instance: Ambos, *ibid*, at 21-22; John D. Van der Vyver, *ibid*, at 63- 64; Antonio Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, 5 J. Int'l Crim. Just. 109, 111 (March 2007); Bemba Decision on Charges, para. 366 ; ref. to Decisions Taken By the Preparatory Committee At Its Session Held in New York 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5(1997), Annex II, Report of the Working Group on General Principles of Criminal Law and Penalties, Article H, para. 4, pp. 27-28; Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), Article 23[H], para. 4, p. 60; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Criminal Law and Penalties, Article H, para. 4, pp. 27-28; Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), Article 23[H], para. 4, p. 60; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1 (1998), Article 29, para. 4, p. 66; Summary Records of the Meetings of the Committee of the Whole, 1st meeting, UN Doc. A/CONF.183/C.1/SR.1, para. 24.

30 and introduces *dolus eventualis* through the backdoor. Such an interpretation has the effect that an individual who is geographically and temporally remote from the execution of the crime can be held liable for crimes that, though foreseeable, were not intended. The link between the accused and the actual crime with which he is charged then becomes extremely weak.

15. Also, absent criminality of the plan itself, it would render criminal any waging of war, including a war of liberation. The Court still has no jurisdiction to try the crime of aggression. Thus, initiating a war is still lawful even though it is clearly foreseeable that such conduct may result in the commission of war crimes.

16. The position of the Defence finds support in the determination of the Pre-Trial Chamber in *Katanga & Ngudjolo* and in *Lubanga* that the common plan “must include the commission of a crime”.¹⁶ Similarly, in order to be held liable under the concept of joint criminal enterprise at the *ad hoc* tribunals there must be a common plan, design or purpose which amounts to or involves the commission of one or more crimes provided for in the Statute.¹⁷ The Defence requests that the Chamber follows this approach rather than that applied by the *Lubanga* Trial Chamber.

(ii) The accused and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime

17. The Prosecutor proposes to replace the requirement of carrying out ‘essential’ contributions by ‘significant’ contributions.¹⁸ The Defence requests the Chamber not to adopt this proposition.

18. The requirement of an ‘essential’ contribution lies at the heart of indirect co-perpetration. The creation of indirect co-perpetration as a separate mode of liability pursuant to article 25(3)(a) is based on the rationale that principal perpetrators should

¹⁶ Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 01-10-2008, para. 523; ICC-01/04-01/06-803-tEN, para. 344; see also: Gerhard Werle: Individual Criminal Responsibility in Article 25 ICC Statute, JICJ 5 (2007), 953-975, p 963.

¹⁷ *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, para. 227, <http://www.un.org/icty/tadic/appeal/judgement/index.htm>; *Prosecutor v. Brdanin*, IT-99-36-A, Appeals Chamber Judgment of 3 April 2007, para. 364. <http://www.un.org/icty/brdjanin/appeal/judgement/brd-aj070403-e.pdf>

¹⁸ ICC-01/09-01/11-433, paras. 11-12.

be distinguished from accessories.¹⁹ An individual can only be qualified as one of the principal co-perpetrators if his or her contribution is essential. Other contributors can be charged only as accessories under article 25(3)(b) to 25(3)(e).

19. Any other interpretation would open the door for liability as a principal perpetrator to be extended to embrace very remote crimes committed by others. Criminal liability as an indirect co-perpetrator is justified on the basis that, though he or she has not personally committed the crimes charged, the individual in question controls the direct perpetrators in executing the common plan, thereby carrying out the crimes charged. An individual who does not personally commit the crimes charged can only be said to control their commission if his or her contribution was such that the commission would not have occurred without it. If the crimes would have occurred irrespective of the contribution made by the individual charged as an indirect co-perpetrator, he or she did not control their commission.

20. The prosecution submits that “[t]he concept of joint control over the crime is inconsistent with a requirement that each individual co-perpetrator has the power to frustrate its commission”.²⁰ The Defence disagrees. The control is joint in the sense that each co-perpetrator makes an essential and coordinated contribution. Only if each of the co-perpetrators carries out the essential tasks assigned to him or her will the crime(s) be committed. None of the co-perpetrators alone can effect the commission of the crime(s). They are inter-dependent. Each of them can frustrate the commission of the crime(s) as the contribution of all of them is essential for this to occur. There is no contradiction.

21. The Defence accepts that in reality it may be difficult to determine whether the contribution was essential, as it requires a hypothetical and thus speculative judgment about how events would have played out without the actor’s contribution.²¹ However, this does not then justify a lower standard of contribution. Contrary to what the Prosecutor appears to suggest, Roxin himself in fact goes further than the Pre-Trial Chamber in requiring that the contribution of any of the co-perpetrators must be made

¹⁹ ICC-01/04-01/07-717, paras. 482-486.

²⁰ ICC-01/09-01/11-433, para 11; footnote 23.

²¹ ICC-01/09-01/11-433, para. 12, footnote 26 reliance on T. Weigend, ‘Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’, (2008) 6 *Journal of International Criminal Justice* 3, at p 480.

at the execution stage. Planning, he asserts, is not sufficient for co-perpetration even if the planner(s) carried out tasks with a view to implementing the common plan.²²

22. Weigend, also cited by the prosecution in support of its claim that a significant contribution is sufficient,²³ does not suggest the lowering of the standard, notwithstanding his acknowledgement that some German authors would support such a proposition.²⁴ He, however, expresses the following opinion:²⁵

It seems that the Lubanga PTC has found a plausible intermediate position. It is linked convincingly to the Chamber's overarching 'control' criterion, it draws a bright line between co-perpetration and other, lesser forms of criminal responsibility, and it leaves less room for manipulation than any subjective test. Of course, whether or not a person's contribution to an offence is 'essential' requires an hypothetical judgment about how things would have turned out without the actor's contribution, and in that respect necessarily contains a speculative element. If, for example, a participant establishes contacts between a military leadership group and a firm that produces prohibited poisonous gas to be used in battle (cf. Article 8(b)(xvii) ICC Statute), one could argue that his contribution is not 'essential' because the necessary contacts could also have been established in some other way. But necessity of a contribution will have to be evaluated from the viewpoint of the concrete criminal plan; the fact that the crime could also have been committed in a way different from that planned by the participants cannot make a contribution 'inessential' as long as the participants relied on each other to act according to the agreed-upon plan, and the participant's contribution was an essential part of that plan.

23. The Defence agrees with Weigend in this regard and submits that the contribution must remain essential.

(iii) The accused must have control over the organisation

24. The Defence agrees with the prosecution that indirect co-perpetrators "may commit a crime through one or more persons, or acting through an organized and hierarchical apparatus of power."²⁶ If through an organisation, the Prosecutor must indeed demonstrate that this organisation is based on hierarchical relationships between superiors and subordinates.²⁷ This, however, is not sufficient to demonstrate that the accused controlled the organisation. For this, it is necessary for the Prosecution to

²² C. Roxin, *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 292 et seq.

²³ T. Weigend, 'Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges', (2008) 6 *Journal of International Criminal Justice* 3, at p 480.

²⁴ *Ibid*, p. 480 footnote 34.

²⁵ *Ibid*, p. 480.

²⁶ ICC-01/09-01/11-433, para. 14, relying on: ICC-01/04-01/07-717, paras. 495-498.

²⁷ ICC-01/09-01/11-433, para. 14, relying on: ICC-01/04-01/07-717, paras. 511-514.

produce evidence showing that he was the “mastermind” of the criminal plan.²⁸ It is not sufficient that the accused induces or solicits a person to commit a crime; the indirect perpetrator must have some controlling predominance over the direct perpetrator, irrespective of the means used to cause him to commit the crime, be it the use of force, or the exploitation of an error or handicap.²⁹

25. The Defence submits that this control aspect is an essential ingredient of indirect co-perpetration and should not be undermined. This requires that significantly high demands be placed on the hierarchical relation that needs to be demonstrated between the indirect and direct perpetrator. The Defence shares the view of distinguished scholars, including Ambos and Eser, that this relationship must be one of effective control similar to the relationship between a superior and subordinate under article 28 of the Rome Statute.³⁰ In order to establish that the indirect perpetrator had effective control over the indirect perpetrator, it does not suffice to demonstrate that the indirect perpetrator had substantial influence over the direct perpetrator.³¹ Rather, it must be shown that he had the material ability to prevent the crimes or punish the perpetrators subsequently.³² Clearly then, it is not sufficient to show that the indirect perpetrator had a power of veto within the organization, as is suggested by the prosecution.³³

26. The Defence accepts the definition given by Pre-Trial Chamber I to an “organized and hierarchical apparatus of power” and requests that this Trial Chamber adopts a similar definition. Pursuant to this definition, an organization must have a defined leadership

²⁸ K. Ambos ‘Article 25 Individual Criminal Responsibility’, in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes Article by Article* (Hart Publishers, Oxford 2008 at p. 750; Ambos, Kai. ‘Article 25’ In Otto Triffterer (ed) 1999. *Commentary on the Rome Statute of the International Criminal Court*. Baden-Baden: Nomos Verlagsgesellschaft, p. 479.

²⁹ Cassese, Antonio, Paola Gaeta and John R.W.D. Jones (eds). 2002. *The Rome Statute of the International Criminal Court: A Commentary, Vol. I*. Oxford University Press, p. 794.

³⁰ A. Eser: Individual Criminal Responsibility, in: 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, p. 795; K. Ambos: Joint Criminal Enterprise and Command Responsibility, 5 *Journal of International Criminal Justice*, March 2007, 159 at page 180. See also: K. Ambos, Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, (1999), pp. 479-80.

³¹ See, for instance: *Prosecutor v. Delalic et al.*, Appeal Judgment, paras 258-266; also see, *Prosecutor v. Kordic*, Trial Judgment, February 26, 2001, para. 415; *Prosecutor v. Brima et al*, Trial Judgment, June 20, 2007, para. 784; *Prosecutor v. Fofana & Kondewa*, Trial Judgment, August 2, 2007, para. 238; *Prosecutor v. Brima et al*, Appeal Judgment, February 22, 2008, para. 289 ; *Prosecutor v Ntagerura et al*, Trial Judgement, February 25, 2004, para. 628; *Prosecutor v. Nahimana et al*, Appeal Judgment, November 28, 2007, para. 882; *Prosecutor v Karera*, Judgement and Sentence, December 7, 2007, paras. 564, 567-568; *Prosecutor v Oric*, Trial Judgement, June 30, 2006, para. 311; *Prosecutor v Hadzihasanovic & Kubura*, Trial Judgement, March 15, 2006, para. 80.

³² *Prosecutor v. Brima et al*, Appeal Judgement, February 22, 2008, para. 257; also see: *Prosecutor v. Semanza*, Trial Judgement, May 15, 2003, para. 402; *Prosecutor v Kajelijeli*, Judgment and Sentence, December 1, 2003, para. 774.

³³ ICC-01/09-01/11-433, para 15.

structure, and a culture of compliance/obedience such that if one person fails to implement an order, that person will automatically be replaced by another who will.³⁴ 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.³⁵ The Prosecutor does not seem to disagree.³⁶ Accordingly, the Defence requests that the Chamber adopt a similar definition.

(iv) The execution of the crimes must be secured by almost automatic compliance with the orders issued by the accused

27. By virtue of his position of control over the organisation, the indirect perpetrator is able to secure the commission of crimes because he has a sufficient number of subordinates who are willing to comply with his orders. If one subordinate drops out, another subordinate nearly automatically takes his place in carrying out the orders of the indirect perpetrator. Each individual subordinate, though personally criminally liable, is regarded by the indirect perpetrator as “a mere gear in a giant machine” who, where necessary, can be automatically replaced by another.³⁷
28. The prosecution suggests that it should not be necessary for the prosecution “to establish the subordinates’ almost automatic compliance with “orders” of a superior.” It suggests that mere compliance with an order, rather than automatic compliance may be sufficient to demonstrate that the organization is composed of fungible individuals. In addition, the prosecution submits that “[a]ctions and attributes other than orders ... may also be capable of establishing this element”.³⁸
29. Compliance, rather than automatic compliance with an order, can be sufficient only if the relationship between the actual perpetrator and the indirect perpetrator has been clearly established. The perpetrator should then not be replacing another subordinate but be compliant with the indirect perpetrator’s orders because the latter issues these orders directly to the perpetrator who is one of his subordinates. The Defence disagrees that actions and attributes other than orders may be sufficient to demonstrate

³⁴ ICC-01/04-01/07-717, paras 511-514.

³⁵ ICC-01/04-01/07-717, para. 519.

³⁶ ICC-01/09-01/11-433, paras 15-16.

³⁷ ICC-01/04-01/07-717, para. 515; C. Roxin, *Täterschaft und Tatherrschaft*, 8* ed., Berlin, De Gruyter, 2006, p. 245.

³⁸ ICC-01/09-01/11-433, para 17.

that the indirect perpetrator has control over a large number of individuals within an organisation. This proposition would have the effect of watering down this requirement, and thus the element of control over the crimes, by controlling the perpetrators carrying them out. The Defence requests that the Chamber follows Pre-Trial Chamber I's suggested approach rather than the Prosecutor's.

- (v) **The accused must satisfy the subjective elements of the crimes;**
- (vi) **The accused and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and**
- (vii) **The accused must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).**

30. The Defence submits that the existence of these subjective ingredients go to show that the common plan to which the indirect co-perpetrator is a participant must itself be criminal. The Prosecutor seeks to limit the required knowledge to knowing that the common plan has an element of criminality. The Defence submits that the knowledge requirement goes further in demanding that the indirect perpetrator has knowledge that the implementation of the common plan will, in the ordinary course of events, result in the commission of one or more crimes recognised under the Rome Statute. The Defence has already discussed the requirements of knowledge and intent under article 30 and how they relate to the criminal nature of the common plan. That the plan must be criminal also follows from the seventh and eighth requirement which are clearly based on article 30. In particular the seventh requirement, of mutual awareness and acceptance that implementing the common plan will result in the fulfillment of the material elements of the crimes, indicates that the common plan must encompass the commission of these crimes.

III. SUBMISSIONS ON REGULATION 55

31. At paragraph 24 of its Submissions, the prosecution requests that the Chamber give notice, before or on the first day of trial, that the Chamber may invoke Regulation 55(1) in the course of the proceedings to re-characterize the form of individual criminal responsibility in relation to William Ruto under Articles 25(3)(b), (c), or (d). The prosecution essentially argues that the notice requirement under Regulation 55 is

triggered already, given the factual record now before the Chamber, and that Ruto's individual criminal responsibility may be subject to multiple legal characterizations.³⁹

32. The Defence objects to the prosecution's request for the Chamber to provide notice of recharacterization of Ruto's liability. If the Prosecution is apprehensive as to the appropriateness of the present characterisation then it should make a decision now and apply, on clear grounds, for recharacterisation. It should not seek to have the Chamber refer, in a general manner, to the Chamber's capacity to recharacterise. That adds nothing to the plain words of Regulation 55 and assists neither the Chamber nor, most importantly, the accused. The Prosecution's approach is contrary to the rights of the accused and judicial economy and should not be condoned as a legitimate use of the Chamber's Regulation 55 powers.
33. Article 67(1)(a) affords the accused the right 'to be informed promptly and in detail of the nature, cause and content of the charge'. This is one of the fundamental rights of the accused and as such is reflected in customary international law, the provisions of major human rights instruments and all constitutive documents of international criminal courts and tribunals. The right constitutes an integral part of the right to a fair trial. The fairness of the trial depends on the accused being able to investigate in advance of the trial, and confront during the trial, the charges against him in a manner which does not leave scope for surprise or the moulding of the case by the prosecution as the evidence unfolds. It is submitted that this right requires that the nature of the charge is communicated to the Accused in a manner which is clear and unambiguous, as well as complete. The Defences anticipate that the Prosecution will do so in their amended document containing the charges.
34. Regulation 55 provides the necessary power to the Trial Chamber to change the legal characterization of the facts, after notifying the participants and after giving them an opportunity to be heard. The fairness of recharacterization must be determined on a case-by-case basis,⁴⁰ depending for example on the timing of the notice and the nature and extent of the possible modification. However, the Prosecution's submissions are too hypothetical to be helpful. They are inappropriate in that they are of little

³⁹ Submissions, paras 27-28.

⁴⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA15 OA 16, Judgement on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, 8 December 2009, para. 85.

assistance to the Chamber in specifying what mode of liability it submits may be most appropriate, given the Prosecution's knowledge of its own evidence and case theory.

35. The prosecution, at paragraphs 30-32, gives a few examples of how certain facts on the record may tend to show guilt under other forms of liability, including ordering (Article 25(3)(b)), aiding and abetting (Article 25(3)(c)), and/or contributing (Article 25(3)(d)). But this broad assertion of possible liability is contrary to the fair trial safeguards enshrined in Article 67(1)(a), namely that the accused is entitled to be informed promptly and in detail of the nature, cause and content of the charges against him.
36. Furthermore, Regulation 52 requires that the document containing the charges include, *inter alia*, "A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28." The Prosecution's approach to recharacterization undermines the utility of this provision. Though the DCC might contain a precise form of participation under Article 25, the Accused would effectively be on notice for, and have to defend himself against, all forms of participation under Article 25. This results in inappropriate uncertainty as to the charges and considerably lengthens the trial process as each of the modes of liability would need to be addressed by the Defence and be subject to further Defence evidence.
37. As one scholar notes, a broad interpretation of Regulation 55

requires control to protect the integrity and clarity of indictments and the rights of the accused. The risk associated with a broad interpretation of Regulation 55 is that the OTP will be tempted to draft the document containing the charges as broadly as possible, leaving the facts and circumstances at a level of generality that will then allow for evidence that emerges at trial to easily fit within them and thus allow for legal recharacterization. Such a situation would be harmful not only to the rights of the accused but also for the integrity of the Court and the management of cases.⁴¹

38. Consequently, the Trial Chamber should be vigilant in ensuring that Mr. Ruto is not subjected to uncertainty as to the mode in which he is alleged to have participated in the crimes. The prosecution's request that the Defence be put on notice of a possible

⁴¹ Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, Crim. L Forum, 311 (2011), p. 343.

recharacterization of the charged mode of liability should therefore fail.

Respectfully submitted,



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On behalf of William Samoei Ruto
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In The Hague