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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. Joshua Arap Sang

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

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I. INTRODUCTION

1. On 15 June 2012, Trial Chamber V issued an *Order setting the deadline for submissions on Regulation 55 and Article 25(3)* (“Order”).¹ The Prosecution filed submissions on 3 July 2012,² the focus of which was the law of indirect co-perpetration under Article 25(3)(a) and the possible recharacterization of the form of individual criminal responsibility applicable to the co-accused Mr. William Samoei Ruto. The Defence for Mr. Joshua Arap Sang does not seek to comment on either of those issues. However, the Defence does hereby respond to a remark the Prosecution made with respect to Article 25(3)(d),³ as the Pre-Trial Chamber found that Mr. Sang’s role was best characterized under this mode of liability.⁴ Furthermore, this filing is responsive to the Trial Chamber’s initial request that the parties make written submissions on their interpretation in law of the modes of individual responsibility applicable to the present case.⁵

2. Article 25(3)(d) states:

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 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
- (ii) Be made in the knowledge of the intention of the group to commit the crime.

3. The Defence submits that the level or degree of contribution required under Article 25(3)(d) is greater than just “any” contribution, and must be a “significant”

¹ *Prosecutor v. Ruto and Sang*, ICC-01-09/01-11-426, Order setting the deadline for submissions on Regulation 55 and Article 25(3), 15 June 2012.

² *Prosecutor v. Ruto and Sang*, ICC-01-09/01-11-433, 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, 3 July 2012 (“Submissions”).

³ Submissions, para. 34 (setting the threshold level of contribution as “any” contribution).

⁴ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-1, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, para. 55.

⁵ *Prosecutor v. Ruto and Sang*, ICC-01-09/01-11-413, Order scheduling status conference, 14 May 2012, para. 5.

if not “substantial” contribution. The Defence’s position is supported in law and logic.

II. SUBMISSIONS

Hierarchy of Article 25(3) and the Core Requirements of Article 25(3)(d)

4. Article 25(3) envisages a hierarchical structure of the different modes of participation.⁶ As the majority of Trial Chamber I determined in the *Lubanga* Judgement:

Both Articles 25(3)(a) and (d) address the situation in which a number of people are involved in a crime. In the judgment of the Majority, the critical distinction between these provisions is that under Article 25(3)(a) the co-perpetrator “commits” the crime, whilst under Article 25(3)(d) the individual “contributes in any other way to the commission” of a crime by a group of individuals acting with a common purpose. The Majority’s view is that a systematic reading of these provisions leads to the conclusion that the contribution of the co-perpetrator who “commits” a crime is necessarily of greater significance than that of an individual who “contributes in any other way to the commission” of a crime.⁷

5. Pre-Trial Chambers I and II further explained that Article 25(3)(d) is “a residual mode of accessorial liability, which is triggered only when paragraphs (a)-(c) are not satisfied”.⁸ Article 25(3)(d) has been termed by Pre-Trial Chamber II as a “catch all form of liability, which applies when the suspect contributes to the commission of a crime ‘in any other way’”.⁹
6. The Defence submits that the Chamber must ensure that sub-paragraph (3)(d), as this highly-criticized “catch all” category of liability,¹⁰ does not have such a wide reach that it unfairly criminalizes lawful or trivial conduct. In order to ensure that

⁶ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (“Ruto and Sang Confirmation Decision”), para. 354.

⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgement, 14 March 2012, para. 996. But note Justice Fulford’s dissenting opinion, wherein he disagrees that Article 25(3) has any established hierarchy.

⁸ Ruto and Sang Confirmation Decision, para. 354; Mbarushimana Confirmation Decision, paras 278-9; see also, Lubanga Confirmation Decision, para. 347.

⁹ Ruto and Sang Confirmation Decision, para. 354.

¹⁰ 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 p. 950; also see: Gerhard Werle: *Individual Responsibility in Article 25 ICC Statute*, JICJ 5 (2007) 953-975, at p. 970; Albin Eser, ‘Individual Criminal Responsibility’ in ‘The Rome Statute of the International Criminal Court: A Commentary’, pp. 767, 802. See also, K. Ambos, Article 25: Individual Criminal Responsibility, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, (Hart Publishing 2nd ed. 2008) at pp. 743, 754, 759; and Ohlin, *Joint Criminal Confusion*, p. 417.

only persons who deserve to be brought to international justice, as a result of their individual, intentional, blameworthy conduct, can be held liable under the Rome Statute, there must be some threshold degree of involvement inherent in Article 25(3)(d).

7. In any event, Article 25(3)(d) of the Statute sets out specific requirements that must be met in order to trigger the responsibility of Mr. Sang under this mode of liability. As both Pre-Trial Chamber I¹¹ and Pre-Trial Chamber II¹² have noted, the Chamber must ascertain in light of the required evidentiary threshold that:

- (i) a crime within the jurisdiction of the Court was attempted or committed;
- (ii) a group of persons acting with a common purpose attempted to commit or committed this crime;
- (iii) the individual contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute (objective elements);
- (iv) the said contribution was intentional; and
- (v) was made either (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime (subjective elements).

8. The core areas of contention arising from this mode of liability are in relation to the threshold level of contribution required and the intentional nature of the contribution. In both regards, the Defence suggests that the Trial Chamber adopt the approach of Pre-Trial Chamber I, as articulated in the *Mbarushimana* decision on the confirmation of charges.

Level of Contribution Must be "Significant", if not "Substantial"

9. In its written submissions following the confirmation of charges hearing, the Defence for Mr. Sang argued that the required level of contribution under Article 25(3)(d) must be "substantial".¹³ This threshold was rejected by Pre-Trial Chamber II in its 23 January 2012 decision on the confirmation of charges.¹⁴ However, the Defence submits that it is within the discretion of this Trial Chamber

¹¹ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16, December 2011, ("Mbarushimana Confirmation Decision").

¹² Ruto and Sang Confirmation Decision, para. 351.

¹³ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-354, Joshua Arap Sang Defence Brief following the Confirmation of Charges Hearing, 24 October 2011, pp. 23-24, 26. The Defence incorporates these arguments by reference herein.

¹⁴ Ruto and Sang Confirmation Decision, para. 354.

to revisit that ruling and to determine that the correct interpretation and application of Article 25(3)(d) requires a contribution that is “substantial”. Alternatively, the Trial Chamber should find, as did Pre-Trial Chamber I, that the required level of contribution must at least be “significant”.¹⁵ It is not tenable to suggest, as the Prosecution now does,¹⁶ that “any” contribution, with no threshold consideration, is sufficient to impute liability pursuant to this mode.

10. At the outset, the Defence notes that based on a plain reading of the Statute, the term “any” refers to the *type* of contribution, rather than the threshold *degree* of contribution. This is clear given that the Statute reads “in any other way” contributes to the commission of a crime. Therefore, despite the residual nature of Article 25(3)(d) liability, the Chamber should not take an “anything goes” approach to determining the required degree of contribution.
11. There is no guidance from the confirmation period in this case regarding the question of whether a contribution must be “significant”. Pre-Trial Chamber II did not directly address the question when confirming the charges against Mr. Sang; it simply listed how Mr. Sang “intentionally contributed to the commission of the crimes”.¹⁷
12. However, the question of requiring a “significant” contribution was addressed by Pre-Trial Chamber I in the *Mbarushimana* Confirmation Decision¹⁸ and in a separate opinion¹⁹ on the substantive appeal from that decision. The Defence urges

¹⁵ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 16 December 2011 (“Mbarushimana Confirmation Decision”, para. 285).

¹⁶ The Defence notes that during the confirmation hearing, the Prosecution referred to “significant” contributions allegedly made by Mr. Sang. This may be an indication that the Prosecution assumed that they had to meet a threshold contribution of “significant” in order for Article 25(3)(d) liability to stick. See, *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-T-6, 2 Sept 2011, p. 61 (“Sang was able to make *significant contributions* to the crimes because he was a popular broadcaster on the Kalenjin–language radio station Kass FM where he hosted his regular morning programme “Lene Emet.” Access to the airwaves was inherently valuable, as radios were cheap and very common. Radio broadcasts were a very effective way to disseminate information quickly to large groups of people”); p. 62 (“This prominent position allowed Sang to make *significant contributions* to the crimes charged both during the pre-election period and during the execution of the crimes following the announcement of the presidential election results.”).

¹⁷ Ruto and Sang Confirmation Decision, para. 355.

¹⁸ ICC-01/04-01/10-465-Red.

¹⁹ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514 OA4, Judgement on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the Confirmation of Charges”, Separate Opinion of Judge Silvia Fernandez de Gurmendi, 30 May 2012 (“Separate Opinion”). The Majority of the Appeals Chamber did not address the question of whether the Pre-Trial Chamber erred when finding that, under Article 25(3)(d) of the Statute, the contribution of the person must be “significant” since the error would

the Trial Chamber to adopt Pre-Trial Chamber I's reasoning and ultimate determination that "it would be inappropriate for [Article 25(3)(d)] liability to be incurred through *any* contribution to a group crime".²⁰ By reference to the drafting history of the Rome Statute requiring a "case" to be of sufficient gravity,²¹ the intention of the drafters to exclude "infinitesimal" contributions which would otherwise overextend the scope of the liability,²² the logical downgrading of control over the crime as one moves down the sub-paragraphs of Article 25(3),²³ and the modified principles established by the *ad hoc* tribunals with respect to somewhat analogous modes of liability,²⁴ Pre-Trial Chamber I concluded:

the Chamber finds that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise. On the other hand, given the "residual" nature of article 25(3)(d) and its focus on group criminality, the Chamber finds that a contribution to the commission of a crime by a group acting with a common purpose be at least significant.²⁵

[...]

The extent of the person's contribution is determined by considering the person's relevant conduct and the context in which this conduct is performed.²⁶

13. The Defence submits that this conclusion is necessary in order to ensure that Article 25(3)(d) does not infringe on the fundamental principles of fairness, in particular the principle of *in dubio pro reo*, requiring that the interpretation to be given is the one which most favours the prospective defendants; and the principle of legality, requiring the law to be clear, ascertainable and non-retrospective.
14. Pre-Trial Chamber I then enumerated several criteria which could be considered, as part of a case-by-case assessment, to examine whether a person's conduct in the proper context resulted in a contribution with a larger or smaller effect on the crimes committed. The Defence submits that this individualized approach to

not have materially affected the decision. Appeal Judgement, para. 65. However, Judge Gurmendi believed that the Pre-Trial Chamber did effectively apply the significant contribution standard and felt obliged to address the merits. Separate Opinion, paras 4-6.

²⁰ Mbarushimana Confirmation Decision, para. 276.

²¹ Mbarushimana Confirmation Decision, para. 276.

²² Mbarushimana Confirmation Decision, para. 277.

²³ Mbarushimana Confirmation Decision, para. 279.

²⁴ Mbarushimana Confirmation Decision, paras 279-282.

²⁵ Mbarushimana Confirmation Decision, para. 283.

²⁶ Mbarushimana Confirmation Decision, para. 285.

assessing criminal responsibility of an accused is critical, especially in light of the tendency to tie some notion of organizational or collective responsibility to Article 25(3)(d) liability.²⁷ Indeed, in Kai Ambos's submissions before Pre-Trial Chamber I, he stressed, "the individual contribution to the criminal result is the indispensable prerequisite of any kind of criminal liability".²⁸

15. The factors enunciated by Pre-Trial Chamber I are:

- (i) the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose,
- (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes,
- (iii) whether the person creates or merely executes the criminal plan,
- (iv) the position of the suspect in the group or relative to the group, and
- (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes.²⁹

16. The Defence submits that these criteria adequately address the concerns of Judge Silvia Fernandez de Gurmendi as expressed in her Separate Opinion at paragraphs 11 and 12, namely that "the normative and causal links between the contribution and the crime" be the primary analysis, rather than the level of contribution itself.³⁰ Indeed, it is the normative and causal links between the contribution and the crime that would assist the trier of fact in determining whether a contribution is "significant".

Subjective Elements of Article 25(3)(d)

²⁷ When Kai Ambos, who was part of the German delegation in Rome and helped negotiate this provision, testified before Pre-Trial Chamber I, he explained that Article 25(3)(d): presents a compromise between those States' delegations which tried to oppose any form of anticipated or organisational/collective responsibility and it tried to strike a compromise between this position and the position of other State Parties which tried to involve some collectivity element in Article 25(3). Still, this compromise resulted in a provision which focused -- which stresses the individual participations, the individual contribution of the person which in any way may be linked to a common plan, a common criminal purpose. This was the interpretation which was deemed then in Rome in 1998 in accordance with general principles of criminal law, especially the principle of culpability and the principle of legality. *See generally* his testimony before Pre-Trial Chamber I during the *Mbarushimana* confirmation of charges hearing, ICC-01/04-01/10-T-8, 20 Sept 2011, p. 4-32.

²⁸ *Ibid.*

²⁹ Mbarushimana Confirmation Decision, para. 284.

³⁰ Separate Opinion, para. 12.

17. The Pre-Trial Chamber confirmed the charges against Mr. Sang on the basis of Article 25(3)(d)(i) liability.³¹ Articles 25(3)(d)(i) and (ii) embody the subjective elements of the crime. These provisions require knowledge, not only of the general criminal purpose of the group, but also knowledge that the group had the intention of committing specific crimes under the ICC Statute; as well as the intent to contribute to the commission of these specific crimes. As Pre-Trial Chamber I acknowledged, the intentionality of the contribution must be linked to the crimes alleged.³²
18. These provisions clearly exclude 'foreseeability'. Indeed, Article 25(3)(d) seems to require that the contribution be directed toward a crime that is specifically contemplated by the criminal group. That would rule out being held liable for contributing to an unplanned but foreseeable crime. This reading of Articles 25(3)(d)(i) and (ii) is consistent with Article 30, which requires generally that defendants before the Court had the knowledge of and the intent to commit the crimes charged under the ICC jurisdiction, unless otherwise provided.³³ Intentional conduct is defined in Article 30(2)(a) of the Statute such that a person must "mean[] to engage in the conduct." As Pre-Trial Chamber I has noted, however, this should not be extended to impose criminal liability on persons whose intentional actions have an unintended, significant effect on a group that is acting with a common purpose.³⁴

III. CONCLUSION

19. Thus, the Defence submits that a person can be held liable under Article 25(3)(d) only if the conduct constituted a significant, if not substantial, contribution to a crime under the ICC jurisdiction; that there was a nexus between his conduct and the actual commission of a crime under the ICC jurisdiction; and that he intended to contribute to a crime under the ICC jurisdiction. In determining the interpretation in law of the modes of individual responsibility applicable to Mr.

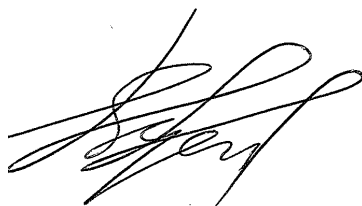
³¹ Ruto and Sang Confirmation Decision, para. 366.

³² Mbarushimana Confirmation Decision, para. 288.

³³ Article 30 only incorporates *dolus directus* in the first degree (intention directed towards commission of crimes charged) or second degree (intention directed towards other purpose, but with knowledge that crimes charged will occur in the ordinary course of events), but not *dolus eventualis* (crimes were foreseeable).

³⁴ Mbarushimana Confirmation Decision, para. 288.

Sang, the Defence refers the Trial Chamber primarily to the assessment of Pre-Trial Chamber I in the *Mbarushimana* Confirmation Decision.



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On behalf of Mr. Joshua Arap Sang
Dated this 25th day of July 2012
In Nairobi Kenya