SEPARATE OPINION OF JUDGE ADRIAN FULFORD

1. I write separately to explain my views on the scope of Article 25(3)(a) of the Statute, as regards an individual who is alleged to have committed a crime "jointly with another".

2. I wish to make clear at the outset that I agree with my colleagues that the tests described in paragraphs 1013 and 1018 of the Judgment are to be applied at this stage of this case. Focussing on the requirements of Article 25(3)(a) of the Statute, with minor modifications to ensure compliance with the Statute, the test described at paragraph 1018 mirrors the approach of the Pre-Trial Chamber in the Decision on the Confirmation of Charges,[1] which established (certainly in this context) the principles of law on which the trial has been prosecuted and defended. No substantive warning has been given to the parties that the Chamber may apply a different test, and as a matter of fairness it would be wrong at this late stage to modify the legal framework of the case. In short, it would be unjust to the present accused to apply a different, and arguably lesser, test.

3. Generally, it is my view that the test laid down by the Pre-Trial Chamber is unsupported by the text of the Statute and it imposes an unnecessary and unfair burden on the prosecution.

[1] ICC-01/04-01/06-803-tEN, paras 322-367.

The Pre-Trial Chamber's reading of Article 25(3)(a) of the Statute

4. In its decision on the confirmation of charges, the Pre-Trial Chamber held that under Article 25(3)(a) of the Statute, liability for committing a crime "jointly with another" attaches only to individuals who can be said to have control over the crime.[2] It adopted a five-part test for co-perpetrator liability under this theory, which, as just indicated, is directed at those who "have control over the commission of the offence".[3] The five elements are:

    i. The "existence of an agreement or common plan between two or more persons";[4]
    ii. The "co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime;"[5]
    iii. "[T]he suspect [must] fulfil the subjective elements of the crime with which he or she is charged";[6]
    iv. "[T]he suspect and the other co-perpetrators (a) must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it";[7] and

[2] ICC-01/04-01/06-803-tEN, paras 326 – 338.
[3] ICC-01/04-01/06-803-tEN, para. 332.
[4] ICC-01/04-01/06-803-tEN, para. 343.
[5] ICC-01/04-01/06-803-tEN, para. 346.
[6] ICC-01/04-01/06-803-tEN, para. 349.
[7] ICC-01/04-01/06-803-tEN, para. 361.

v. "[T]he suspect [must be aware] of the factual circumstances enabling him or her to jointly control the crime."[8]

5. The Pre-Trial Chamber, in essence, provided two reasons for adopting the control of the crime[9] approach to co-perpetration. First, to "distinguish[] between principals and accessories".[10] Second, to ensure that the liability of principals extends to individuals who, notwithstanding their absence from the scene of the crime, exercised control over its commission because they were in a position to decide whether and, if so, how the offence was to be committed.[11] I will first address the basis of this theory, and thereafter explain my approach to joint perpetration under Article 25(3)(a) of the Statute.

The control of the crime theory is unsupported by the text of the Statute

6. As set out above, the Pre-Trial Chamber's adoption of the control of the crime theory was founded, in the first place, on the perceived necessity to establish a clear dividing line between the various forms of liability under Article 25(3)(a) – (d) of the Statute and, in particular, to distinguish between the liability of "accessories" under Article 25(3)(b) and that of "principals" under Article 25(3)(a) of the Statute.[12] I respectfully disagree with this view.

[8] ICC-01/04-01/06-803-tEN, para. 366.
[9] ICC-01/04-01/06-803-tEN, para. 322 *et seq*.
[10] ICC-01/04-01/06-803-tEN, paras 327, 330, 335, 338 and 340
[11] ICC-01/04-01/06-803-tEN, para. 330.
[12] ICC-01/04-01/06-803-tEN, paras 327 – 340.

7. In my judgment, the plain text of Article 25(3) defeats the argument that subsections (a) – (d) of Article 25(3) must be interpreted so as to avoid creating an overlap between them. Article 25(3)(a) establishes the concept of committing a crime through another, whilst Article 25(3)(b) focuses on ordering, soliciting and inducing the commission of the offence. These concepts, which appear in separate subsections, will often be indistinguishable in their application vis-à-vis a particular situation, and by creating a clear degree of crossover between the various modes of liability, Article 25(3) covers all eventualities. Put otherwise, in my judgment the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a) – (d) of the Statute were not intended to be mutually exclusive.[13]

8. Some have suggested that Article 25(3) establishes a hierarchy of seriousness as regards the various forms of participation in a crime, with Article 25(3)(a) constituting the gravest example and Article 25(3)(d) the least serious.[14] I am unable to adopt this approach. In my judgment, there is no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it "through another person" (Article 25(3)(a)), and these two concepts self-evidently overlap. Similarly, I am unable to accept that the

[13] By way of comparison, it is of note that the *ad hoc* Tribunals have held that the various modes of liability available under their statutes are not mutually exclusive. *See, e.g.*, ICTR, *The Prosecutor v. Nahimana et al.*, *Case No. ICTR-99-52-A*, Appeals Chamber, Judgment, 28 November 2007, para. 483 ("the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive"); ICTR, *The Prosecutor v. Ndindabahizi*, *Case No. ICTR-01-71-A*, Appeals Chamber, Judgment, 16 January 2007, paras 122-123 (conviction for committing, instigating and aiding and abetting the same crime); ICTY, *The Prosecutor v. Đordević*, *Case No. IT-05-87-1-T*, Trial Chamber, Judgment, 23 February 2011, paras 2193-94 (conviction for participation in a joint criminal enterprise and for aiding and abetting).

[14] *See, e.g.*, Gerhard Werle, "Individual criminal responsibility in Article 25 ICC Statute", 5 J. Int'l Crim. Justice 953, 957 (2007) ("Article 25(3)(a)-(d) establishes a value oriented hierarchy of participation in a crime under international law").

criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history's most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a common goal.

9. I am also unpersuaded that it will assist the work of the Court to establish a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability within Article 25(3) of the Statute. Whilst it might have been of assistance to "rank" the various modes of liability if, for instance, sentencing was strictly determined by the specific provision on which an individual's conviction is based, considerations of this kind do not apply at the ICC. Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence, which govern the sentences that are to be imposed, provide that an individual's sentence is to be decided on the basis of "all the relevant factors", "including the gravity of the crime and the individual circumstances of the convicted person". Although the "degree of participation" is one of the factors listed in Rule 145(1)(c) of the Rules, these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors.

10. The control of the crime theory has its origins in the post-war German legal system, where particular domestic considerations – which do not exist at the ICC – have made it appropriate to apply this principle. In adopting this theory, the Pre-Trial Chamber focussed substantially on a

minority view from the *ad hoc* tribunals,[15] in that it cited the judgment of the ICTY Trial Chamber in the *Stakić* case when it held that the accused was responsible as a co-perpetrator[16] (the conviction on this basis was set aside on appeal)[17] and Judge Schomburg's separate opinion in the ICTR Appeals Chamber's judgment in the *Gacumbitsi* case.[18] In these two instances, the judges relied heavily on the scholarship of the German academic Claus Roxin as the primary authority for the control theory of co-perpetration,[19] and in the result, this approach was imported directly from the German legal system.[20] While Article 21(1)(c) of the Statute permits the Court to draw upon "general principles of law" derived from national legal systems, in my view before taking this step, a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at

[15] ICC-01/04-01/06-803-tEN, footnotes 418, 422 – 26, 432, 434, 436 and 442.
[16] ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003 ("*Stakić*").
[17] ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 62 and the Disposition at page 141.
[18] ICTR, *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment: separate opinion of Judge Schomburg, 7 July 2006 ("*Gacumbitsi* Schomburg Opinion").
[19] *Stakić*, para. 440 (citing Roxin, C, Täterschaft und Tatherrschaft (Perpetration and control over the act), 6th Edition (1994); *Gacumbitsi* Schomburg Opinion, para. 17 (citing Roxin, C, Täterschaft und Tatherrschaft (Perpetration and control over the act), 7th Edition (2000).
[20] I note in passing that although Professor Roxin's scholarship appears to form the basis for the control of the crime theory, the test adopted by the Pre-Trial Chamber differs in material respects from the theory as described by Professor Roxin. For example, Professor Roxin acknowledges that in practice, it is impossible to determine, after the crime has been committed, whether an accused's contribution was "essential" in the sense that its absence would have thwarted the commission of the crime. *See* Roxin, Claus, 'Täterschaft und Tatherrschaft (Perpetration and control over the act)', 6th Edition, Berlin, New York, 1994, page 283 (but see also page 280, where he confirms that each co-perpetrator must be able to obstruct or ensure the commission of the crime). Under Professor Roxin's approach, co-perpetrator liability would attach if the accused had "functional control" and the accused's contribution was of "substantial importance" ("*wesentlicher Bedeutung*") to the commission of the crime. *Ibid*., pages 280 and 284. Professor Roxin argues that the term "substantial importance" in itself has no tangible content, but affords the judge the discretion to determine, on the facts of the case, whether the accused's contribution was such that it created a "functional dependency" between the perpetrators. *Ibid.*, page 284. In contrast, the Pre-Trial Chamber held that co-perpetrator liability should attach only if the accused's contribution was "essential" in the sense that the crime would have been frustrated absent the accused's contribution. *See* ICC-01/04-01/06-803-tEN, para. 347. Similarly, the *dolus eventualis* standard adopted by the Pre-Trial Chamber differs from the mental element proposed by Professor Roxin. Compare *ibid.*, paras 352-54 with Roxin, page 285.

this Court, and it should investigate the doctrine's compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.

11. This case demonstrates why a detailed assessment of this kind is necessary. Under the German legal system, the sentencing range is determined by the mode of liability under which an individual is convicted,[21] and it is therefore necessary to draw clear distinctions between principals on the one hand and accessories on the other. As set out above, these considerations do not apply at the ICC, where sentencing is not restricted in this way, and this example of the differences that exist is of significance in this context.

12. The second justification advanced by the Pre-Trial Chamber for adopting the control of the offence theory was to establish "principal" liability for individuals who, "in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed".[22] However, as developed below, in my judgment a plain reading of Article 25(3)(a) establishes the criminal liability of co-perpetrators who contribute to the commission of the crime notwithstanding their absence from the scene, and it is unnecessary to

[21] *See* German Criminal Code (13 November 1998, as amended 2 October 2009), §§ 27(2) and 49(1). English translation available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P27.
[22] ICC-01/04-01/06-803-tEN, para. 330.

invoke the control of the crime theory in order to secure this result.[23] Therefore, individuals who are involved indirectly can be prosecuted as co-perpetrators without relying on this principle.

Joint-perpetration under a plain text reading of Article 25(3)(a) of the Statute

13. As it seems to me, the Court's approach to this issue should be rooted in the plain text of the Statute. The Appeals Chamber has held that the Statute is to be applied in conformity with Article 31(1) of the Vienna Convention on the Law of Treaties,[24] which requires that the Statute's provisions are to be interpreted "in good faith in accordance with the[ir] ordinary meaning [. . .] in their context and in light of [the Statute's] object and purpose".[25] In line with these principles, I have sought to give the relevant terms their plain meaning, and it has been unnecessary to read in additional terms in order to give effect to the express words of the Statute.

14. In relevant part, Article 25(3) of the Statute provides:

[23] *See infra*, para. 16.
[24] *See, e.g.*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 33; Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, paras 38 and 39; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 40; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019, para. 49.
[25] Article 31(1), Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.

> 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;

15. When establishing joint perpetrator liability, the prosecution must prove that an individual committed the crime jointly with another. The latter words ("jointly with another") clearly indicate the involvement of at least two people, whilst the expression "commits […] jointly" denotes coordination between the individuals involved. This self-evidently necessitates a sufficient meeting of minds, by way of an agreement, common plan or joint understanding. In practice, this will not always be explicit or the result of long-term planning, and the existence of the joint venture may need to be inferred from the conduct of the co-perpetrators. Although the text of the Statute does not provide that the agreement, common plan or joint understanding must have an overarching criminal goal, the mental element of Article 30 of the Statute must be satisfied, and unless the Court's legal framework has "otherwise provided",[26] the joint perpetrators must, at a minimum, be aware that executing the agreement or plan will lead to the commission of a crime within the jurisdiction of the Court "in the ordinary course of events".[27] I consider it is unhelpful to investigate whether the requirement of awareness (on the part of the accused) that a crime will be committed "in the ordinary course of events" is to be equated with a "possibility", a "probability", a "risk" or a "danger" (see paragraph 1012 of the Judgment). Put otherwise, the

[26] Article 30(1) of the Statute.
[27] Article 30(2)(b) and 30(3) of the Statute.

Chamber's decision as to whether the accused was aware that something will happen in the ordinary course of events is not assisted by asking the question as to whether he was aware of the possibility, the probability, the risk or the danger that it would occur. The words are plain and readily understandable, and it is potentially confusing to reformulate or to interpret this test using other words. Finally, the verb "commits" requires a contribution to the commission of the crime. Nothing in the Statute requires that the contribution must involve direct, physical participation at the execution stage of the crime, and, instead, an absent perpetrator may be involved. Either way, the use of the word "commits" simply requires an operative link between the individual's contribution and the commission of the crime. Additionally as regards causation, the plain text of Article 25(3) does not require proof that the crime would *not* have been committed absent the accused's involvement (*viz.* that his role was essential).[28] Rather, the prosecution must simply demonstrate that the individual contributed to the crime by committing it with another or others.

16. To summarise, a plain text reading of Article 25(3)(a) establishes the following elements for co-perpetration:
    a. The involvement of at least two individuals.
    b. Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to

[28] *C.f.* ICC-01/04-01/06-803-tEN, paras 346-47.

undertake action that, in the ordinary course of events,[29] will lead to the commission of the crime.

c. A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual's contribution and the crime.

d. Intent and knowledge, as defined in Article 30 of the Statute, or as "otherwise provided" elsewhere in the Court's legal framework. I consider it would be unfair, at this stage of the proceedings, to approach the issue of the accused's knowledge on a lesser basis than "he knew" there were children under the age of 15 who were conscripted, enlisted or used (see paragraph 1015 of the Judgment).

17. Not only is the above approach supported by the plain text of the Statute, it also provides a realistic basis for the Court to conduct its work. It avoids a hypothetical investigation as to how events might have unfolded without the accused's involvement (which is necessary under the "essential contribution" formulation) and it places appropriate emphasis on the accused's state of mind, once it is established that he or she contributed to the offence. It seems to me to be important to stress that an *ex post facto* assessment as to whether an individual made an essential contribution to war crimes, crimes against humanity or genocide will often be unrealistic and artificial. These crimes frequently involve a large number of perpetrators, including those who have controlling roles. It will largely be a matter of guesswork as to the real consequence for the particular crime if the accused is (hypothetically) removed from the

[29] Article 30(2)(a) and 30(3) of the Statute. If the mental element for the crime charged is provided elsewhere than Article 30 of the Statute, the "ordinary course of events" standard is to be substituted with the crime's specific mental element.

equation, and most particularly it will not be easy to determine whether the offence would have been committed in any event.

18. For all of these reasons, I respectfully disagree with the approach to co-perpetrator liability on the part of the Pre-Trial Chamber and my judicial colleagues in Trial Chamber I.

Applying the approach of the Pre-Trial Chamber

19. Notwithstanding the conclusions set out above, at this stage in the present case I am of the view that the Chamber ought to apply the tests in paragraphs 1013 and 1018 of the Judgment, which largely mirror the approach of the Pre-Trial Chamber, in the present context. The case has been conducted on the basis of the legal framework established by the Pre-Trial Chamber, which should not be significantly altered if that step would cause material prejudice.

20. One of the Trial Chamber's principal duties under the Statute is to ensure that the "trial is fair" and "is conducted with full respect for the rights of the accused".[30] Of particular relevance is the accused's right, under Article 67(1)(a) of the Statute, to be informed "in detail of the nature, cause and content of the charge[s]" against him. In my view, this requirement for notice means that the accused should not only be informed of the factual allegations against him, but he needs to be aware of the basic outline of the legal framework against which those facts will be

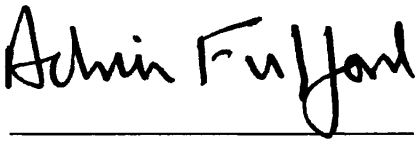
[30] Article 64(2) of the Statute.

determined. This ensures that the accused knows, at all stages of the proceedings, what he is expected to meet. This is an essential prerequisite for a fair trial.[31]

21. Abandoning the control of the crime theory for the purposes of the Article 74 Decision would significantly modify the law governing the charges, at a stage when the evidence is closed and the parties have made their submissions. The alternative approach which I have described above arguably involves applying a "lesser" test. If at this stage in the proceedings (and without prior notice) the Chamber ruled that the prosecution only has to establish a contribution – as opposed to an "essential" contribution – the trial would be rendered unfair, in violation of Article 64(2) of the Statute. The accused is likely to have made a number of tactical decisions that, at least in part, have been informed by the legal requirements for a conviction. I am therefore in agreement with my colleagues that the tests described in paragraphs 1013 and 1018 of the Judgment are to be applied, notwithstanding my overall reservations as to the "control of the crime" theory.

[31] *See, e.g.*, ICTY, *The Prosecutor v Kupreskic et al.*, Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 725 (holding that the right to be informed "of the nature and cause of the charge[s]" requires that accused be "put in a position to know the legal ingredients of the offence charged"); *ibid.*, paras 720-48; European Court of Human Rights, *Case of Pelissier and Sassi v. France*, Application No. 25444/94, Judgment, 25 March 1999, para. 52 (holding that "in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair").

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford

Dated this 14 March 2012

At The Hague, The Netherlands