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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 THE CONGO

IN THE CASE OF

THE PROSECUTOR v. MATHIEU NGUDJOLO CHUI

Public

Judgment pursuant to Article 74 of the Statute

Concurring Opinion of Judge Christine Van den Wyngaert

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda
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Jean-Pierre Kilenda Kakengi Basila
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Legal Representatives of Victims
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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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REGISTRY

Registrar
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Detention Section

Victims Participation and Reparations Section

Others

CONCURRING OPINION OF

JUDGE CHRISTINE VAN DEN WYNGAERT

This constitutes the Concurring Opinion of Judge Christine Van den Wyngaert to the Judgment pursuant to Article 74 of the Statute in the case of *The Prosecutor v. Mathieu Ngudjolo Chui.*

A. *Introduction*

1. I fully concur with the acquittal of Mathieu Ngudjolo. I write this opinion to express my views on the interpretation of Article 25(3)(a) of the Statute.

2. Although I agree with my colleagues that it was not necessary to rule on the law in relation to the mode of responsibility charged (i.e. "indirect co-perpetration" under Article 25(3)(a) of the Statute), I note that the Chamber explicitly asked the parties and participants at the beginning of the trial to express their views on the Pre-Trial Chamber's interpretation of Article 25(3)(a). As it was the first opportunity for a trial chamber to state its views on the novel notion of "indirect co-perpetration", I will offer my own views on the interpretation of Article 25(3)(a) in this opinion.

3. In their submissions, both defence teams asked the Chamber to reject the Pre-Trial Chamber's interpretation of Article 25(3)(a).[1] Though the prosecution adhered to the Pre-Trial Chamber's theory, it asked the Chamber to "revisit or closely examine" two elements of it.[2] The parties' final submissions confirm that they considered the proper

[1] Katanga Defence, *Prosecutor v. Katanga and Ngudjolo*, Corrigendum to Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, 30 October 2009, ICC-01/04-01/07-1578-Corr; Ngudjolo Defence, *Prosecutor v. Katanga and Ngudjolo*, Mémoire de la Défense de Mathieu Ngudjolo sur l'interprétation de l'article 25(3)(a) du Statut de Rome, 28 October 2009, ICC-01/04-01/07-1569.

[2] Prosecution, *Prosecutor v. Katanga and Ngudjolo*, Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541.

interpretation of Article 25(3)(a) an open question. The final submissions of the Defence for Mr. Katanga again challenged the validity of the Pre-Trial Chamber's theory and reiterated its arguments raised in October 2009.[3] Not only did the prosecution not object to the suggestion that the Chamber could adopt a different reading of Article 25(3)(a),[4] it itself advocated for a somewhat different interpretation.[5]

4. Since the first confirmation decision in the *Lubanga* case, pre-trial chambers have consistently interpreted Article 25(3)(a) of the Statute using tests derived from what has become known as the "*control of the crime theory*".[6] In the first trial, a Majority of judges endorsed this theory, while Judge Adrian Fulford distanced himself from it.[7]

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[3] Katanga Defence, *Prosecutor v. Katanga and Ngudjolo*, Public Redacted Version - Second Corrigendum to the Defence Closing Brief, 29 June 2012, ICC-01/04-01/07-3266-Conf, (ICC-01/04-01/07-3266-Corr2-Red), paras. 1111-16; Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, 21 May 2012, ICC-01/04-01/07-T-338-CONF-ENG, (ICC-01/04-01/07-T-338-Red-ENG WT), pp. 18 and 52 *et. seq*.

[4] Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, 23 May 2012, ICC-01/04-01/07-T-340-ENG CT.

[5] Prosecution, *Prosecutor v. Katanga and Ngudjolo*, Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541, para. 12.

[6] *See* Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008 ("*Katanga and Ngudjolo* Confirmation Decision"), para. 480 *et. seq.*; Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 326-41; Pre-Trial Chamber II, *Prosecutor v. Ruto et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras. 291-92; Pre-Trial Chamber II, *Prosecutor v. Muthaura et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 296; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, Corrigendum of the Decision on the Confirmation of Charges, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr, (ICC-02/05-03/09-121-Corr-Red), para. 126; Pre-Trial Chamber II, *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 348.

[7] *See* Trial Chamber I, *Prosecutor v. Lubanga*, Judgment pursuant to Article 74, 14 March 2012, ICC-01/04-01/06-2842 ("*Lubanga* Trial Judgment")

5. The control of the crime theory is primarily based on German legal doctrine and on the writings of Claus Roxin.[8] I agree with Judge Fulford that this direct import from the German legal system is problematic.[9] Considering its universalist mission, the Court should refrain from relying on particular national models, however sophisticated they may be.[10]

6. In this opinion, I also wish to distance myself from the theory, for reasons that, to a great extent, concur with the reasons given by Judge Fulford. First, I do not see this theory as being consistent with Article 22(2) of the Statute and the ordinary meaning of Article 25(3)(a). Second, I do not accept the premise on which the theory is based, i.e. the alleged hierarchy in the modes of liability listed in Article 25(3)(a)-(d). Third, the control theory's treatment of the common plan as an 'objective' as opposed to a 'subjective' element unduly focuses on the accused's link to the common plan as opposed to the crime. Fourth, I see no legal basis for the "essential contribution" requirement. I therefore reject the idea that it suffices for joint perpetration under Article 25(3)(a) that an accused only makes a contribution to a broadly defined common plan and not to the crime.

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[8] *See Katanga and Ngudjolo* Confirmation Decision, paras. 480-86. *See also* Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 348, n. 425.

[9] *See* Trial Chamber I, *Prosecutor v. Lubanga*, Judgment pursuant to Article 74, 14 March 2012, ICC-01/04-01/06-2842, para. 8, 10 (Separate Opinion of J. Fulford) ("Separate Opinion of Judge Fulford").

[10] *Cfr.* Article 21(1)(c) of the Statute (the Court is only allowed to apply "national laws of legal systems to the world" to the extent that "general principles of law" are derivable from them). *See infra*, para. 10.

7. In addition, I am also in disagreement with the Pre-Trial Chamber's interpretation of indirect perpetration [11] because the concept of "perpetration through an organisation" finds no support in the Statute. I also believe that the novel notion of "indirect co-perpetration",[12] as interpreted and developed by the Pre-Trial Chamber, goes beyond the terms of the Statute and is therefore incompatible with Article 22.

B. Observations on the interpretation of Article 25(3)(a) of the Statute

8. Like Judge Fulford, I endeavour to give a plain reading of the terms of the Statute. Before doing so, I will explain my general approach to the interpretation of Article 25(3)(a).

9. As a preliminary observation, I note that the sources of law on which the ICC can draw are significantly different from the law applied at the *ad hoc* tribunals, where, as acknowledged by the Pre-Trial Chamber,[13] customary international law plays a much more prominent role than at the ICC. [14] Whereas ICTY Chambers have drawn on customary international law in order to interpret modes of liability under their Statute,[15] it is highly doubtful that this can be done at the ICC.[16]

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[11] As the charges in the *Lubanga* case were based on joint perpetration only, no Trial Chamber has, as yet, interpreted indirect perpetration or "indirect co-perpetration".
[12] *See Katanga and Ngudjolo* Confirmation Decision, para. 480 *et. seq.*
[13] *Katanga and Ngudjolo* Confirmation Decision, para. 508.
[14] Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc., S/25704, 3 May 1993, para. 34 ("In the view of the Secretary-General, the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence ... to specific conventions does not arise.").
[15] ICTY, Appeals Chamber, *Prosecutor v. Mutiltinović et. al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras. 18-19. *See also* ICTY, Appeals Chamber, *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, 3 April 2007, para. 424. *See also infra note* 77.

10. Under Article 21(1)(a) of the Statute, the Court "shall apply [...] in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". There are, unfortunately, no "Elements of Criminal Responsibility" to guide the Court in its interpretation and application of Articles 25 and 28.[17] International law (Article 21(1)(b) of the Statute) and general principles derived from national law (Article 21(1)(c) of the Statute) are but subsidiary sources, which may only be relied upon when there is a lacuna in the Statute, Rules of Procedure and Evidence or Elements of Crimes. To determine whether such a lacuna exists, the Court must first apply the applicable rules of interpretation, as provided for by the Statute and the Vienna Convention on the Law of Treaties.

11. In interpreting the terms of the different forms of criminal responsibility contained in the Statute, the Court must strive to the maximum extent to give them their 'ordinary meaning' as required by Article 31(1) of the Vienna Convention on the Law of Treaties.[18]

12. I realise that the terms used by Article 25(3)(a) refer to open-textured concepts. Many legal systems use identical or comparable terms to

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[16] I am, in this respect, not convinced by those who argue that the "unless otherwise provided" clause in article 30(1) of the Statute would allow ICC Chambers to apply customary international law for the interpretation of the modes of liability. *See generally* Gerhard Werle and Florian Jessberger, *'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Elements of Crimes Under International Criminal Law*, 3 Journal of International Criminal Justice 35 (2005); Steffen Wirth, *Co-perpetration in the* Lubanga *Trial*, 10 Journal of International Criminal Justice 971 (2012) (arguing that Article 30(1) of the Statute's phrase "unless otherwise provided", allows for a wider use of customary international law in determining the *mens rea*).

[17] *See* Roger S. Clark, *Elements of Crimes in Early Decisions of Pre-Trial Chamber of the International Criminal Court*, 6 New Zealand Yearbook of International Law 209, 231 (2008); Maria Kelt and Herman von Hebel, General Principles of Criminal Law and the Elements of Crimes, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 21.

[18] UNTS, vol. 1155 (1969), p. 331.

describe a broad range of different forms of criminal responsibility. At the same time, in many domestic jurisdictions, terms such as 'committing', 'co-perpetration' and the like are legal terms of art which have a specific meaning that may vary from one system to another.[19] It is therefore exceedingly difficult to determine the 'ordinary meaning' of the terms used in Article 25(3)(a) by reference to national legal systems.

13. Unfortunately, the *travaux préparatoires* do not provide much clarification. In fact, the drafting history of Part III of the Statute reveals that it is based upon an eclectic combination of sources from several national legal traditions,[20] as well as some international instruments.[21] That Article 25 has such multi-faceted origins comes as no surprise, considering the States Parties' obvious wish to find a compromise between different legal traditions.

14. For better or for worse, with the possible exception of perpetration through another person, Article 25(3)(a) only contains basic and traditional forms of criminal responsibility. Any attempt to overextend the label of 'commission' to reach the 'intellectual authors' or 'masterminds' of international crimes is thus fraught with legal and conceptual difficulties.

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[19] *See generally* Max Planck Institute, *Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks – A Comparative Analysis* (Ulrich Sieber ed., forthcoming).

[20] *See, e.g.*, Comments of Ambassador Per Saland, Chairperson of the Working Group on General Principles of Criminal Law in Rome, *in* Roy S. Lee, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 199 (1999).

[21] For instance, Article 25(3)(d) was modelled on the 1997 International Convention for the Suppression of Terrorist Bombings, Resolution, adopted by the General Assembly on the report of the Sixth Committee (a/52/653) 52/164, 15 December 1997, art. 2(3). Similar language also appears in the Convention Relating to Extradition between the Member States of the European Union, OJ C 313 of 23 June 1996, art. 3(4).

15. It is notable, in this regard, that the drafters decided not to include certain forms of criminal responsibility originating from particular legal traditions, such as planning and conspiracy, which might have been particularly well-suited for the prosecution of 'intellectual authors' or 'masterminds' of atrocity crimes. This is particularly true in relation to planning, which is arguably the most suitable form of criminal responsibility to capture the conduct of so-called 'intellectual authors'. In this respect, it is significant that 'planning' is not contained in the Statute.[22] Equally crucial, I believe, is the fact that the decision was made during the Rome Conference not to include forms of responsibility that are based upon risk-awareness and/or acceptance, such as *dolus eventualis* or recklessness.[23]

16. I am firmly of the view that treaty interpretation cannot be used to fill perceived gaps in the available arsenal of forms of criminal responsibility. Even if the 'fight against impunity' is one of the over-arching *raisons d'être* of the Court[24] which may be relevant for the interpretation of certain procedural rules,[25] this cannot be the basis for

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[22] This form of criminal responsibility had already been accepted before other international tribunals and Article 2(3)(e) of the International Law Commission's 'Draft Code of Crimes against the Peace and Security of Mankind' (1996). *See* Charter of the Nuremberg International Military Tribunal, Article 6; ICTY Statute, Article 7(1); ICTR Statute, Article 6(1). "Planning" is also contained in several draft versions of this Court's Statute, where it appears alongside the language of what becomes Article 25(3)(a) of the Statute. *See, e.g.*, Working Group on General Principles 'Paper on criminal responsibility submitted by informal groups representing various legal systems', A/AC.249/1997/WG.2/DP.1; Report of the Inter-Sessional Meeting of the PrepCom (the so-called 'Zutphen Draft') (1997), A/AC.249/1998/L.13, p. 53; Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 (1998), article 23.

[23] *See* Pre-Trial Chamber II, *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras. 360-69. *See also infra* paras. 36-37 for further discussion on *dolus eventualis*.

[24] *See* Preamble of the Statute, pt. 5.

[25] *See, e.g.*, Appeals Chamber, *Prosecutor v. Lubanga*, Judgment 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 characterisation of the

a teleological interpretation[26] of the articles dealing with criminal responsibility.

17. Likewise, I believe that it is not appropriate to draw upon subsidiary sources of law, as defined in Articles 21(1)(b) and (c) of the Statute, to justify incorporating forms of criminal responsibility that go beyond the text of the Statute. Reliance on the control over the crime theory, whatever its merits are in Germany and other legal systems that have followed the German model, would only be possible to the extent that it qualifies as a general principle of criminal law in the sense of Article 21(1)(c). However, in view of the radical fragmentation of national legal systems when it comes to defining modes of liability, it is almost impossible to identify general principles in this regard. It is therefore very unlikely that the control theory could aspire to such a status. Moreover, even if general principles could be identified, reliance on such principles, even under the guise of treaty interpretation, in order to broaden the scope of certain forms of criminal responsibility would amount to an inappropriate expansion of the Court's jurisdiction.

18. Last but not least, I attach the greatest importance to Article 22(2) of the Statute,[27] which obliges the Court to interpret the definition of crimes strictly and prohibits any extension by analogy. There can be little doubt that this fundamental principle applies with equal force in relation to the definition of criminal responsibility.[28] Indeed, I believe

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facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, para. 77.

[26] *See Katanga and Ngudjolo* Confirmation Decision, para. 492.

[27] Article 22(2) of the Statute provides that "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".

[28] *See* William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 410.

that this article overrides the conventional methods of treaty interpretation, as defined in the Vienna Convention on the Law of Treaties, particularly the teleological method. Whereas these methods of interpretation may be entirely adequate for interpreting other parts of the Statute, I consider that for interpreting articles dealing with the criminal responsibility of individuals, the principles of strict construction and *in dubio pro reo* are paramount.

19. As far as the latter is concerned, I believe that the express inclusion of the *in dubio pro reo* standard in Article 22(2) of the Statute is a highly significant characteristic of the Statute. By including this principle in Part III of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of 'judicial creativity' of which other jurisdictions may at times have been suspected. Moreover, this principle is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law.

20. Individuals must have been in a position to know at the time of engaging in certain conduct that the law criminalised it.[29] The Grand Chamber of the European Court of Human Rights has given considerable weight to the elements of "accessibility" and "foreseeability" in its assessment of the legality principle.[30] I doubt

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[29] Article 22 of the Statute. *See also* International Covenant on Civil and Political Rights, 1976, 999 UNTS 171, art. 15; European Convention on Human Rights, 1955, 213 UNTS 221, ETS 5, art. 7; American Convention on Human Rights, 1979, 1144 UNTS 123, OASTS 36, art. 9.

[30] ECtHR, Grand Chamber, *Achour v. France*, Application N° 67335/01, Judgment (Merits), 29 March 2006, para. 41 ("[i]t follows [from Article 7 of the European Convention on Human Rights] that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable"); ECtHR, Grand Chamber, *Kononov v. Latvia*, Application N° 36376/04, Judgment (Merits and Just Satisfaction), 17 May 2010, para. 185;

whether anyone (inside or outside the DRC) could have known, prior to the Pre-Trial Chamber's first interpretations of Article 25(3)(a), that this article contained such an elaborate and peculiar form of criminal responsibility as the theory of "indirect co-perpetration", much less that it rests upon the "control over the crime" doctrine.

21. These considerations lead me to the conclusion that a number of aspects of the interpretation of Article 25(3)(a) by the Pre-Trial Chamber and by the Majority of Trial Chamber I must be revisited as they are problematic from a legal point of view. Moreover, as I will explain, there is no need for adopting this complex interpretation.

C. Article 25(3) as a hierarchy of blameworthiness

22. The control of the crime theory has been introduced ostensibly to provide a criterion to make a normative distinction between principals under Article 25(3)(a) and accessories under Articles 25(3)(b)-(d) of the Statute. The perceived need for making such a distinction is premised on the assumption that there exists a hierarchy in Article 25(3) according to which principals are considered to be more blameworthy than accessories.[31] Although I can see that there is a conceptual difference between principal and accessorial criminal responsibility (one is direct and the other derivative), I do not believe that this necessarily translates to a different legal treatment of those who are found guilty under one or the other form. Indeed, the fact that principals are connected more directly to the bringing about of the

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ECtHR, Grand Chamber, *Korbely v. Hungary*, Application N° 9174/02, Judgment (Merits and Satisfaction) 19 September 2008, para. 71.

[31] *Lubanga* Trial Judgment, para. 999; Kai Ambos, *The First Judgment of the ICC (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal issues*, 12 International Criminal law Review, 115, 140-141 (2012), Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 Journal International Criminal Justice 953, 957 (2007).

material elements of the crime than accessories does not imply that the role of the former should be regarded as *inherently* more blameworthy.[32]

23. I see nothing in the Statute or the *travaux préparatoires* for concluding that Article 25(3)(a) would be distinct from the other sub-paragraphs because it entails a higher level of blameworthiness. Like Judge Fulford, I see no proper basis for concluding that acting under Article 25(3)(b) of the Statute is less serious than acting under Article 25(3)(a).[33] In fact, I believe that ordering and inducing others to commit crimes is often at least as morally reprehensible as committing the act oneself. It matters little, in this regard, whether one views ordering as a form of indirect perpetration under Article 25(3)(a) or whether one sees it as a derivative form of criminal responsibility under Article 25(3)(b).

24. The same applies to aiding and abetting under Article 25(3)(c) of the Statute. Although in some legal systems, aiding and abetting may be treated as less serious than committing, I see no legal basis for this in the Statute. In fact, I fail to see an inherent difference in blameworthiness between aiding and abetting and committing a crime. I do not believe that the foot soldier who participated in a mass killing (Article 25(3)(a)) is necessarily more blameworthy than the army general who aided and abetted the same killing (Article 25(3)(c)).[34] I am

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[32] The drafters of the Rome Statute may well have wished to move away from a "pure unitarian concept" of perpetration in favour of a "more differentiated system". Kai Ambos, *The First Judgment of the ICC (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, 12 International Criminal law Review, 115, 144 (2012)). However, this does not necessarily mean that they intended to introduce a hierarchy between the various paragraphs of article 25(3).

[33] Separate Opinion of Judge Fulford, para. 8.

[34] There are examples in the post WWII jurisprudence of accessories receiving the maximum sentence. For instance, in the *Zyklon B Case*, two German suppliers of the gas used to kill Nazi victims in concentration camps were convicted as accessories to these killings, sentenced to

of the view that the blameworthiness of an accused is dependent on the factual circumstances of the case rather than on abstract legal categories.

25. I am aware, in this regard, of the practice of the *ad hoc* tribunals, who appear to sentence aiders and abettors more leniently.[35] However, it is far from certain whether this Court will follow the same approach. The drafters of the Rome Statute deliberately decided to provide a stricter mental element for aiding and abetting under Article 25(3)(c) than for the corresponding notion under Article 7(1) of the ICTY Statute: Article 25(3)(c) requires *purpose*, as opposed to aiding and abetting under the ICTY jurisprudence, which only requires *knowledge*.[36] Moreover, even if the Court were to follow the *ad hoc* tribunals with regard to aiding and abetting, nothing permits a conclusion that a similar reduction in sentencing would always be appropriate under Article 25(3)(b) or Article 25(3)(d) of the Statute.

26. I also note, in this regard, the 50-year prison sentence against Mr. Charles Taylor imposed on the basis of aiding and abetting by the

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death and executed. *In re Tesch*, Brit. Mil. Ct. Hamburg 1946, *in* UNITED NATIONS WAR CRIMES COMMISSION, 1 LAW REPORTS OF TRIALS OF WAR CRIMINAL 93, 97. In this case, the prosecution's claim was that "knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of *those who actually carried it out.*" *Id.* at p. 94 (emphasis added).

[35] *See* ICTY, Appeals Chamber, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, 25 February 2004, para. 182; ICTR, Trial Chamber, *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgment and Sentence, 28 April 2005, para. 593.

[36] The Appeals Chamber of the ICTY has held that the mental element for aiding and abetting is "*knowledge* that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal". ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, paras. 45-46; ICTY, Appeals Chamber, *Prosecutor v. Vasiljevic*, Judgement, 25 February 2004, IT-98-32-A, para. 142; ICTY, Trial Chamber, *Prosecutor v. Furundzija*, Judgement, 10 December 1998, IT-95-17/1, para. 249. Article 25(3)(c), on the other hand, requires that the *actus reus* of aiding and abetting be committed "[f]or the *purpose* of facilitating the commission of [...] a crime" (emphasis added).

Special Court for Sierra Leone, which took into consideration, *inter alia,* the accused's position of leadership.[37] This shows that the leadership element must not necessarily find expression in a particular form of participation but can equally be reflected in sentencing.

27. Like Judge Fulford, I am not persuaded by the argument that the perceived hierarchy in Article 25(3) is supported by Article 78 of the Statute and Rule 145(1)(c) of the Rules, which provide that, in determining the sentence, the Court shall, among many other factors, take into account the "degree of participation of the convicted person".[38] In the absence of clear provisions indicating a differentiation in penalties for each of the paragraphs of Article 25(3), it is impossible to conclude that there exists a mandatory reduction of the sentence depending on the form of criminal responsibility. I note, in this regard, that mandatory sentence reductions for aiding and abetting and other forms of accessorial responsibility is not something that is familiar to a majority of legal systems and is indeed unknown in great parts of the world irrespective of which legal tradition they belong to.[39] It can therefore not be considered as a general principle of law in the sense of Article 21(1)(c).

28. This is not to say that I do not accept the principle of "fair labelling", which requires that the role played by the accused in bringing about the material elements of a crime must be adequately reflected in the

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[37] Special Court for Sierra Leone, *Prosecutor v. Taylor,* SCSL-03-01-T. Sentencing Judgment, 30 May 2012, para. 29.

[38] *See* Separate Opinion of Judge Fulford, para. 9.

[39] For example, in France the *Nouveau Code Pénal,* which entered into force on 1 March 1994, abolished the distinction. *See Nouveau Code Pénal,* art. 121-6 to 121-7. The Code of Laws of the United States of America also expressly rejects such a distinction. *See also* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

form of criminal responsibility that is applied.[40] However, the reality is that the different sub-paragraphs of Article 25(3) overlap to a substantial degree and that there is no compelling reason to believe that they are arranged in a hierarchy of seriousness.

29. As regards fair labelling, I am mindful of the fact that it is the aspiration of the Court to concentrate on the 'masterminds'[41] or the 'intellectual authors' [42] of international crimes. There is an understandable intuitive tendency to consider such persons as somehow most blameworthy for large-scale criminality. However, as explained above,[43] the drafters of the Statute have not elaborated (and have even deliberately disregarded) forms of criminal responsibility specifically aimed at this category of offenders. Nevertheless, even assuming that there is a gap in this respect, it is highly questionable in view of the text of the Statute and the applicable interpretation rules of the Statute,[44] whether judges can fill it by reading a "hierarchy of criminal responsibility" into Article 25(3) and then try to reflect the blameworthiness of 'masterminds' and 'intellectual authors' by characterising them as principals.[45] Very often the acts and conduct of political and military leaders will simply not fit the mould of principal

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[40] *See* Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 Chicago Journal of International Law 693, 751-52 (2011), *quoting* Frédéric Mégret, Prospects for Constitutional Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part (paper presented in 2010 at International Legal Scholars Workshop at Washington University School of Law).

[41] Pre-Trial Chamber II, *Prosecutor v. Muthaura et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 409; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, Corrigendum of the Decision on the Confirmation of Charges, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr, (ICC-02/05-03/09-121-Corr-Red), para.134(a).

[42] *See Katanga and Ngudjolo* Confirmation Decision, para. 515.

[43] *See supra* para. 15.

[44] Article 22 of the Statute.

[45] *See also supra* Part B.

liability. To try to characterise them as principals at any cost will thus often be problematic from a legal and conceptual point of view. However, once the rigid division between Articles 25(3)(a) and 25(3)(b)-(d) is abandoned, there is no reason to qualify them as principals in order to attribute the level of blame which they deserve.

30. In sum, I am not convinced that the "control of the crime theory" should guide the ICC's interpretation of Article 25(3)(a). I share Judge Fulford's view that, in interpreting Article 25(3)(a) of the Statute, the Court should engage in a plain text reading of the article. I will further explore what this interpretation could consist of below.

D. Joint perpetration and the "common plan"

31. The crucial element in the Pre-Trial Chamber's interpretation of "joint perpetration" in Article 25(3)(a) is the notion of a "common plan", which is considered as an objective element of joint perpetration.[46] However, the term "common plan" nowhere appears in either the text of the Statute or the *travaux préparatoires* of Article 25(3)(a). The only place where mention is made of a collective criminal purpose existing independently of the individual will of an accused person is in Article 25(3)(d).

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[46] *Katanga and Ngudjolo* Confirmation Decision, paras. 522-23; Pre-Trial Chamber II, *Prosecutor v. Ruto et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras. 292; Pre-Trial Chamber II, *Prosecutor v. Muthaura et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 297; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, Corrigendum of the Decision on the Confirmation of Charges, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr, (ICC-02/05-03/09-121-Corr-Red), para. 129; Pre-Trial Chamber II, *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 350.

32. In my view, the common plan pertains to the subjective rather than to the objective element of joint perpetration. I see no reason for treating a common plan in the context of Article 25(3)(a) as anything other than a particular form in which *a shared intent* may manifest itself. In fact, a combined reading of Articles 25(3)(a) and 30 clearly suggests that the mental element of joint perpetration is the existence among the joint perpetrators of a shared intent - in whatever form - to commit a crime. In my view, the test should be whether there is a voluntary coordination of action by each of the co-perpetrators as a consequence of a shared intent to carry out a particular action or to produce a certain outcome together. There is thus a requirement of voluntarily coordinated action, which is necessary to distinguish joint perpetration from random coincidental actions of persons acting individually. All joint perpetrators must, moreover, be at least mutually aware that the consequences of their joint actions will, in the ordinary course of events, be the realisation of the material elements of the crime. This position is along the same lines as Judge Fulford's interpretation.[47]

33. To be sure, a common plan can be evidence of such shared intent. In fact, if there is proof of a common plan to commit a crime, this will *ipso facto* be evidence of the shared intent of the joint perpetrators. However, it is not an independent objective element as such. Indeed, the requirement of a common plan as an objective element risks being overly rigid, because there might not always be evidence of a pre-existing objective common plan in cases where two or more persons spontaneously commit a crime together on an *ad hoc* basis.

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[47] Separate Opinion of Judge Fulford, paras. 15, 16(b).

34. What troubles me in the Pre-Trial Chamber's interpretation is that by turning the 'common plan' into an objective element, the focus of attention has shifted away from how the conduct of the accused is related to the commission of a *crime* to what role he/she played in the execution of the common *plan*. Indeed, under the Pre-Trial Chamber's interpretation, it suffices for an accused to make a contribution to the realisation of the common *plan*, even if this contribution has no direct impact on the coming into being of the material elements of a *crime*. By focusing on the realisation of a common plan, the *mens rea* and *actus reus* requirements are now linked to the common plan instead of to the conduct of the actual physical perpetrators of the crime.

35. I find this to be problematic under Article 30(1) of the Statute, which links the mental element for responsibility to the bringing about of the material elements of a *crime*. This follows directly from the text of Article 30(1) of the Statute. To the extent that the common plan is to commit a crime, no problem arises in this regard. However, if the mental element is linked to a contribution towards a broadly defined common plan, as the control theory does, then the connection to the crime might be almost entirely lost. When this happens, we come dangerously close to treating the mode of criminal responsibility as a crime in itself, instead of as a legal instrument to connect the actions and omissions of an accused to the acts of one or more physical perpetrators.

36. The notion of an objective common plan is therefore especially problematic in combination with an expansive reading of the words "in the ordinary course of events" in Article 30(2)(b) and (3) of the Statute. Indeed, everything turns on the degree to which the commission of a crime must have been the quasi-automatic (the so-

called "*dolus directus* second degree") or rather merely foreseeable (*dolus eventualis*) outcome of the execution of the plan. Although Pre-Trial Chamber II has consistently held that *dolus eventualis* is not part of the Statute and that knowledge that a consequence will occur in the ordinary course of events requires *virtual certainty*,[48] other Chambers have ruled differently. Pre-Trial Chamber I in the *Lubanga* case explicitly accepted *dolus eventualis*,[49] and this interpretation allowed for a finding that the common plan need not be criminal and only requires awareness and acceptance of a risk that a crime will occur.[50] A Majority of the Pre-Trial Chamber in this case also endorsed this interpretation,[51] although it is to be noted that *dolus eventualis* was formally not relied upon.[52]

37. In a similar vein, the Majority in the *Lubanga* Trial Chamber, despite stating agreement with Pre-Trial Chamber II's rejection of *dolus eventualis*,[53] held that deciding what occurs "in the ordinary course of events" involves "consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'".[54]

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[48] Pre-Trial Chamber II, *Prosecutor v. Ruto et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras. 335-36; Pre-Trial Chamber II, *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, paras. 360-69.

[49] Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 351-52.

[50] Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 344 ("element of criminality").

[51] *Katanga and Ngudjolo* Confirmation Decision, para. 251 n. 329.

[52] *Katanga and Ngudjolo* Confirmation Decision, para. 531.

[53] *Lubanga* Trial Judgment, para. 1011.

[54] *Lubanga* Trial Judgment, para. 1012.

38. Judge Fulford, in his separate opinion to the *Lubanga* judgment, considers this to be "unhelpful" and "potentially confusing".[55] I would go even further and say that reliance on 'risk' as an element under Article 30 of the Statute is tantamount to accepting *dolus eventualis*[56] dressed up as *dolus directus* second degree. Besides direct intent, Article 30 of the Statute only allows for criminal responsibility when the perpetrator fully expects that the material elements of a crime "*will* occur in the ordinary course of events."[57] Accordingly, any reference to risk-taking by the accused is out of place in this context.

39. In short, by shifting the focus from the *crime* to the common *plan*, the notion of "joint perpetration" in Article 25(3)(a) has been interpreted in a manner that goes well beyond a strict interpretation of the terms of the Statute. In short, my reading of the Statute leads me to the conclusion (a) that there is no requirement for an 'objective' common plan (although this may be an element of proof of shared criminal intent) and (b) that the Statute does not contain a form of criminal responsibility that is based on the mere acceptance of a risk that a crime might occur as the consequence of personal or collective conduct. Like Judge Fulford, I propose a plain interpretation that is closer to the wording of Article 25(3)(a).

E. Joint perpetration and the "essential contribution"

40. The Pre-Trial Chamber requires that the suspect and the other co-perpetrators must carry out coordinated *essential* contributions

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[55] *See* Separate Opinion of Judge Fulford, para. 15.

[56] *See* Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 Chicago Journal of International Law 693, 724 (2011) (the concept of "substantial risk" accords with *dolus eventualis*).

[57] Article 30(2)(b) and (3) of the Statute (emphasis added).

resulting in the realisation of the objective elements of the crime.[58] It is required that the accused's contribution was a *conditio sine qua non* to the commission of the crime and that he/she had the ability to frustrate its commission.[59]

41. The "essential contribution" requirement flows from the control of the crime theory and is premised on the idea that the co-perpetrator should control the commission of the crime. Take away his/her contribution and the crime would not have been committed. For the reasons explained above, I distance myself from this theory as the basis for interpreting Article 25(3)(a).[60] I therefore do not see the need for requiring an "essential" contribution.

42. I also agree with Judge Fulford's criticism that the "essential contribution" requirement finds no support in the Statute and that it compels Chambers to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution.[61]

43. What then should be the required level of contribution? For Judge Fulford, the test should be the causal link between the individual's contribution and the crime.[62] I am, however, reluctant to accept that it is sufficient for there to be simply a causal link between an individual's

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[58] *Katanga and Ngudjolo* Confirmation Decision, para. 524; Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 346; Pre-Trial Chamber II, *Prosecutor v. Ruto et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 305; Pre-Trial Chamber II, *Prosecutor v. Muthaura et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 297.

[59] *Katanga and Ngudjolo* Confirmation Decision, para. 525.

[60] *See supra*, Part B and C.

[61] Separate Opinion of Judge Fulford, para. 17.

[62] Separate Opinion of Judge Fulford, para. 16(c).

contribution and a crime. Causality is an elastic notion, the outer contours of which are notoriously difficult to define. Depending on which conception of causality one adopts, it is possible to characterise contributions that are very far removed from the actual crime as causal.

44. Instead, the contribution requirement for joint perpetration under Article 25(3)(a) should be interpreted in light of its wording and context, i.e. by comparing it to the *actus reus* of the other forms of criminal responsibility listed in Article 25(3). I note, in this regard, that paragraphs (c) and (d) of Article 25(3) have been said to require a substantial and a significant contribution respectively.[63] While such quantitative criteria may be appropriate for these forms of criminal responsibility, I propose to rely upon a qualitative criterion for contributions required under Article 25(3)(a). In particular, for joint perpetration, there must, in my view, be a *direct* contribution to the realisation of the material elements of the crime. This follows from the very concept of joint perpetration. Under Article 25(3)(a), only persons who have committed a crime together can be held responsible. The essence of committing a crime is bringing about its material elements. Only those individuals whose acts made a direct contribution to bringing about the material elements can thus be said to have jointly perpetrated the crime.

45. For example, the acquisition of a weapon by a murderer acting individually is not part of the crime of killing. Only the actual shooting of the victim with the weapon is the killing. This is because the

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[63] *See* Pre-Trial Chamber I, *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Conf, (ICC-01/04-01/10-465-Red), 16 December 2011, paras. 279, 283-84. *See also Lubanga* Trial Judgment, para. 997 (in context of a paragraph discussing Article 25(3)(c)).

material elements of that crime do not include obtaining the means for its commission, regardless of whether acquiring the means of commission of the killing could be classified as an "essential contribution". There is no reason why this reasoning should change according to whether persons act individually or jointly. When persons act jointly, the material elements of the crime remain exactly the same, they just bring them about together. For this reason, only those persons who are directly involved in the realisation of the material elements of a crime can be said to have jointly perpetrated it.

46. What is required by a "direct" contribution is an immediate impact on the way in which the material elements of the crimes are realised. Whether a contribution qualifies as direct or indirect is not something that can be defined in the abstract. It is something the Court must appreciate in the specific circumstances of each case.

47. It may be pointed out, however, that the requirement of a "direct contribution" does not necessarily require the physical presence of the joint perpetrator on the scene of the crime and may, depending on the circumstances of the case and the nature of the crime charged, include certain forms of planning and coordination. Indeed, some crimes cannot reasonably be committed without planning and coordination (e.g. displacing a civilian population in violation of Article 8(2)(e)(viii) of the Statute). Moreover, sometimes the means used to commit the material elements of a crime inherently require planning and coordination (e.g. an air raid by a bomber squadron). In all those cases the distinctive feature of what constitutes a direct contribution is that it is an intrinsic part of the actual execution of the crime.

48. I conclude that a plain reading of Article 25(3)(a) does not require an essential contribution to the crime charged and that there is a more natural reading of the article which gives independent content to each of the sub-provisions of Article 25(3). This approach leads to the conclusion that, for the purposes of joint perpetration under Article 25(3)(a), the contribution must be *direct*.

F. Commission through another person and the notion of "Organisationsherrschaft"

49. Unlike in the *Lubanga* case, where the charges were limited to joint perpetration, the charges in this case were also based on the last limb of Article 25(3)(a), namely "commission [...] through another person, regardless of whether that other person is criminally responsible". This is the first case in which a pre-trial chamber was called upon to interpret this notion.

50. In line with its general approach based on the control of the crime theory developed in the *Lubanga* confirmation decision in 2007,[64] the same Pre-Trial Chamber sitting in this case in 2008 also grounded its interpretation of "commission through another person" largely on German legal thinking and the writings of Claus Roxin.[65] Roxin was credited with the notion of *Organisationsherrschaft*,[66] which the Pre-Trial Chamber referenced as applying in cases in which the "perpetrator behind the perpetrator commits the crime through another by means of

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[64] Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 338-40.

[65] *See Katanga and Ngudjolo* Confirmation Decision, paras. 496-98, n. 659.

[66] For a critical comment on this concept, *see* Thomas Weigend, *Perpetration Through an Organization: The Unexpected Career of a German Legal Concept*, 9 Journal of International Criminal Justice 91 (2011).

'control over an organisation'".[67] The Pre-Trial Chamber held that "for the purposes of this Decision, the control over the crime approach is predicated on a notion of a principal's control over the organisation",[68] thus linking Article 25(3)(a) to the notion of *Organisationsherrschaft*.[69]

51. Since its introduction, other pre-trial chambers have followed this interpretation. As the requirements have crystallised in more recent confirmation decisions, the elements in the "indirect co-perpetration" test relevant to *Organisationsherrschaft* are that: "the suspect must have control over the organisation", "the organisation must consist of an organised and hierarchical apparatus of power" and "the execution of crimes must be secured by an almost automatic compliance with the orders issued by the suspect".[70]

52. Regardless of *Organisationsherrschaft*'s historic origin and intrinsic merits, I believe that elevating the concept of 'control over an organisation' to a constitutive element of criminal responsibility under Article 25(3)(a) is misguided. Article 25(3)(a) only speaks of commission "through another *person*". It is hard to see how this could be read to mean that this form of criminal responsibility also attaches when an accused commits crimes through an *organisation*. Article 31(4) of the Vienna Convention on the Law of Treaties provides that "a special meaning shall be given to a term if it is established that the parties so intended". In this instance, there is no indication that the

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[67] *Katanga and Ngudjolo* Confirmation Decision, paras. 496-97.
[68] *Katanga and Ngudjolo* Confirmation Decision, para. 500.
[69] *Katanga and Ngudjolo* Confirmation Decision, para. 499.
[70] Pre-Trial Chamber II, *Prosecutor v. Ruto et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 292; Pre-Trial Chamber II, *Prosecutor v. Muthaura et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a)(b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 297.

States Parties meant the word 'person' to mean 'organisation'. In my view, this interpretation therefore violates the prohibition against the principle of strict construction contained in Article 22(2) of the Statute.

53. I am mindful of the fact that organisations are made up of persons. However, there is a fundamental difference between the interaction among individuals, even within the context of an organisation, and the exercise of authority over an abstract entity such as an 'organisation'. Moreover, by dehumanising the relationship between the indirect perpetrator and the physical perpetrator, the control over an organisation concept dilutes the level of personal influence that the indirect perpetrator must exercise over the person through whom he or she commits a crime.

54. I do not consider it to be a precondition that indirect and physical perpetrators know each other personally. What matters is the level of control or influence of the indirect perpetrator over the physical perpetrator. The words "perpetration through another person" require a high level of personal involvement on the part of the indirect perpetrator in subjugating the will of the physical perpetrator. It is this subjugation, the domination of the individual will of the physical perpetrator, which is the real *actus reus* under this limb of Article 25(3)(a).

55. While I do not accept *Organisationsherrshaft* as a constituent element of commission through another person under Article 25(3)(a), I do not necessarily exclude that the type of control over an organisation that is envisaged by the Pre-Trial Chamber could be an important evidentiary factor to demonstrate that an accused did in fact dominate the will of certain individuals who were part of this organisation. However, in

such cases, the level of discipline within an organisation and the accused's role in maintaining it are elements of proof and not legal criteria.

56. Evidence related to organisational control may also be relevant in the context of "ordering" (Article 25(3)(b)). Needless to say, the authority required for ordering liability will also often be exercised within the structure of an organisation. What distinguishes commission through another person from ordering, however, is that the former requires a much higher level of actual control and influence over the acts and conduct of the physical perpetrator. Indeed, Pre-Trial Chamber II has articulated the elements of ordering without mentioning any requirement that there be "automatic compliance" with the orders given.[71]

57. In sum, I believe that the notion of *Organisationsherrshaft* cannot be used to interpret the words "commission through another person" in Article 25(3)(a). These words should be given their ordinary meaning, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties.

G. "Indirect co-perpetration"

58. In the Confirmation Decision, Pre-Trial Chamber I introduced a concept that was not contained in Article 25(3)(a) by combining joint perpetration and perpetration through another person into what it called "indirect co-perpetration". It held that there are no legal grounds

[71] *See* Pre-Trial Chamber II, *Prosecutor v. Mudacumura*, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12-1- Conf-Exp, (ICC-01/04-01/12-1-Red), para. 63.

preventing the combination of both forms of responsibility.[72] As described by the Pre-Trial Chamber:

> An 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 used as an instrument — these crimes can be attributed to him on the basis of mutual attribution.[73]

59. As a result, the Pre-Trial Chamber recognized a fourth alternative ("indirect co-perpetration"), in addition to the three alternatives provided for in Article 25(3)(a) (perpetration, joint perpetration and perpetration through another person). In doing so, the Pre-Trial Chamber developed a new axis for the attribution of criminal responsibility: in addition to the horizontal axis (joint perpetration) and the vertical axis (perpetration through another person), a new diagonal axis ("indirect co-perpetration") was created.[74]

60. This combined reading is purportedly based on a "texualist interpretation" of Article 25(3)(a) by which the word "or" is understood as an "inclusive disjunction".[75] The reasoning behind this interpretation is, with the greatest respect, unconvincing.[76]

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[72] *Katanga and Ngudjolo* Confirmation Decision, para. 492.
[73] *Katanga and Ngudjolo* Confirmation Decision, para. 493.
[74] *Katanga and Ngudjolo* Confirmation Decision, para. 493.
[75] *Katanga and Ngudjolo* Confirmation Decision, para. 491.
[76] The Pre-Trial Chamber attributes two meanings to the word "or": one known as "inclusive" and the other as "exclusive". It then goes on by interpreting the word "or" in Article 25(3)(a) as to mean "either one or the other, or possibly both", which is a so-called "inclusive disjunction", as opposed to the "exclusive disjunction" which means "either one or the other but not both". I find this reading misguided. "Inclusive disjunction" may be a concept known in formal logic, but is totally foreign to ordinary language. The ordinary meaning of Article 25(3)(a) in natural language is clearly that the three forms of criminal responsibility that are listed are distinct and separate alternatives. If someone says "I will be successful, whether as a doctor, a lawyer, or a business executive", the natural reading of this sentence is that one will try to become successful in one of these professions, rather than trying to be successful at all three. Article 25(3)(a) is structured no differently. The reference by the Pre-Trial Chamber

61. This combined reading leads to a radical expansion of Article 25(3)(a) of the Statute, and indeed is a totally new mode of liability.[77] Under the Pre-Trial Chamber's interpretation, it becomes possible to hold the accused responsible for the conduct of the physical perpetrator of a crime, even though he/she neither exercised any direct influence or authority over this person, nor shared any intent with him or her.

62. I accept that different forms of criminal responsibility under the Statute may be combined, as long as all the elements of each form are proven. Accordingly, when A and B commit a crime through C by jointly subjugating the latter's will, I would have no problem in holding A and B jointly responsible for C's behaviour (Article 25(3)(a) second plus third alternative). In the same way, I accept that other forms of attribution under Article 25(3) can be combined. For example, it is possible to envisage that, in certain circumstances, two or more persons jointly order or induce another to commit a crime under the Statute (Article 25(3)(a) plus (b)). It would indeed seem overly restrictive to limit ordering and inducing to cases where there is only one person giving orders or inducing.

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to the concept of inclusive disjunctions from formal logic is thus misleading and confusing. The Vienna Convention of the Law of Treaties requires that terms be interpreted in accordance with their "ordinary meaning", rather than through the prism of formal logic. I also do not find the examples of the Pre-Trial Chamber in footnote 652 of the Confirmation Decision convincing. In relation to article 7, the phrase "widespread or systematic" refers to a minimum threshold, of which only one element must be satisfied. Thus, the "widespread or systematic attack" element is realized once there has been *either* a widespread *or* systematic attack; the fact that there is both a widespread *and* systematic attack does not change the disjunction's purpose. The example from the Elements of Crimes pertaining to torture, (Article 8(2)(a)(ii)) also fails to persuade for the same reasons.

[77] I am conscious of the fact that the ICTY adopted a form of criminal responsibility under the heading of the third variant of Joint Criminal Enterprise that is functionally similar to indirect co-perpetration ICTY, Appeals Chamber,, *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, 3 April 2007, para. 424. However, this form of criminal responsibility is clearly based on customary international law and not on the Statute, and can therefore not be used by this Court.

63. However, the Pre-Trial Chamber's interpretation in the Confirmation Decision goes well beyond a common-sense combination of forms of criminal responsibility. It creates the possibility of confirming charges on an "indirect co-perpetration" theory without being able to confirm on either a joint perpetration theory or an indirect perpetration theory. [78] One needs to look no further than the (now largely discredited) facts confirmed by the Pre-Trial Chamber in the current case for an example of how this could be so.[79]

64. For these reasons, I believe that the concept of "indirect co-perpetration", as interpreted by Pre-Trial Chamber I, has no place under the Statute as it is currently worded. The concept is based on an expansive interpretation of Article 25(3)(a) of the Statute which is inconsistent with Article 22(2) of the Statute.

H. Conclusion

65. In sum, I have strong reservations towards Pre-Trial Chamber I's interpretation of Article 25(3)(a) in this case.

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[78] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012), pp. 168-69.

[79] Hector Olásolo analysed the facts confirmed in this case and commented on the Pre-Trial Chamber's approach as follows:

> The success of the attack [confirmed by the Pre-Trial Chamber at Bogoro] was, therefore, dependent on the joint and coordinated action between Germain Katanga and Mathieu Ngudjolo Chui because their respective subordinates would not execute orders given by the other [...] Under these circumstances the notion of [organised structure of power ("OSP")] could hardly be applied because it was not possible to identify which specific armed group the direct perpetrators belonged. Furthermore, the notion of co-perpetration based on joint control of the crime could not be applied because neither member of the common plan had directly committed the crimes that took place during the attack on Bogoro [...] *As a result, ICC Pre-Trial Chamber I applied the notion of indirect perpetration based on OSP and joint control.*

Hector Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing, 2010), pp. 319-20 (emphasis added).

66. I do not agree with the premise that those whose conduct falls under Article 25(3)(a) are necessarily more blameworthy than those whose conduct falls under Article 25(3)(b)-(d). A person's responsibility may well be covered by multiple provisions of Article 25(3).

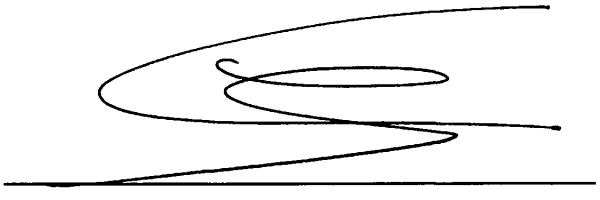
67. Like Judge Fulford, I disagree that Article 25(3) of the Statute adopts the control over the crime doctrine. In particular, I do not accept: (i) that a contribution to a non-criminal plan with a *risk* of criminality can be the basis for conviction, (ii) that an essential contribution to the common plan is required under Article 25(3)(a), (iii) that perpetration through another person can be equated to control over an organisation and (iv) that the notion of "indirect co-perpetration" has any legal basis in the Statute.

68. The main reason for departing from the Pre-Trial Chamber's interpretation of Article 25(3)(a) is my concern that it is incompatible with the principles of strict interpretation and *in dubio pro reo*. Courts of criminal justice cannot claim to protect an accused's fundamental rights to a fair trial while making expansive interpretations of articles that define modes of liability.

69. It is important to stress that a return to the ordinary meaning of Article 25(3)(a) is without prejudice to the applicability of other forms of criminal responsibility. In other words, a finding that certain conduct does not fall under Article 25(3)(a) does not mean that this conduct is not criminal (or is less criminal) under another sub-paragraph of Article 25 or indeed Article 28 of the Statute. I therefore do not consider my interpretation of Article 25(3)(a) to create any 'impunity gap' in the Statute.

70. The interpretation of Article 25(3) thus needs to move away from preserving a misguided assumption that accessories are inherently less blameworthy than principals and that the blameworthiness of political and military leaders can therefore only be fully captured by treating them as principals. The reality is that the Statute does not contain a mode of criminal responsibility that is tailored towards 'masterminds' and 'intellectual authors'. This was a choice made by the States Parties, just like it was their decision not to include *dolus eventualis* in the Statute. Perhaps one day the Statute may be amended in this regard. However, until that day, I believe that the judges of this Court are bound by the plain wording of the Statute, strictly interpreted in light of Article 22(2). It is therefore our responsibility to apply the language in the Statute in as natural a manner as is possible.

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



Judge Christine Van den Wyngaert

Dated 18 December 2012

At The Hague, The Netherlands