

MODES OF LIABILITY AND THE MENTAL ELEMENT ANALYZING THE EARLY JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
September 2010

ACKNOWLEDGMENTS

Susana SáCouto, War Crimes Research Office (WCRO) Director, and Katherine Cleary, WCRO Assistant Director, prepared this report, with the research assistance of Washington College of Law (WCL) alumnae Elizabeth Finne and WCL J.D. students Jennifer Goldsmith and Craig Mackey, as well as additional assistance from WCL J.D. students John Coleman and Whitney Evans, and WCRO Staff Assistant Brady Williamson. We are grateful for the generous support of the John D. and Catherine T. MacArthur Foundation, the Open Society Institute, the Oak Foundation and the WCL, without which this report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including Robert Goldman, former Inter-American Commission on Human Rights (IACHR) member and President (1999) and WCL Professor, and the members of the WCRO's ICC Advisory Committee: Mary McGowan Davis, former Acting New York State Supreme Court Judge and Member of the International Judicial Academy and of the American Association for the International Commission of Jurists (ICJ); Unity Dow, Commissioner of the ICJ, Member of the ICJ's Executive Committee and former Judge of the Botswana High Court; Siri Frigaard, Chief Public Prosecutor for the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes and former Deputy General Prosecutor for Serious Crimes in East Timor; Justice Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); and Chief Justice Phillip Rapoza of the Massachusetts Appeals Court and former Chief International Judge serving as Coordinator of the Special Panels for Serious Crimes in East Timor.

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The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer

The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer

A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

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EXECUTIVE SUMMARY

The Rome Statute of the International Criminal Court (ICC), unlike the statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), contains detailed provisions relating to the general part of criminal law, including articles distinguishing various modes of direct liability and superior responsibility, and specifying the mental element required for crimes within the jurisdiction of the Court. Importantly, these provisions represent an attempt by the drafters to create truly international principles of criminal law, meaning they are largely *sui generis* in nature, and have raised a number of issues regarding their appropriate interpretation. Two of the Court's Pre-Trial Chambers have attempted to answer some of these questions in the context of the first three confirmation decisions issued by the ICC.

The aim of this report is to examine the holdings in these first decisions regarding individual criminal responsibility and the mental element under the Rome Statute, not for purposes of analyzing the application of the law to the facts in any given case, but rather to look at some of the issues raised by the Chambers' initial interpretations of the Rome Statute's provisions on criminal law and offer recommendations regarding matters that are likely to arise again in the future. Our recommendations are briefly summarized below.

Article 25: Individual Criminal Responsibility

Article 25 of the Rome Statute is a detailed provision that seeks to lay out the various modes of both principal and accessory liability available under the Statute. For purposes of this report, the relevant portions of the provision read:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; [or]

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted...

“Indirect Co-Perpetration” under Article 25(3)(a) is a Legitimate Variant of Co-Perpetration under the Rome Statute, Regardless of Whether Any Domestic Jurisdiction has Applied the Theory

As explained in detail below, the early jurisprudence of the Court has established that Article 25(3)(a) of the Statute encompasses four types of criminal responsibility: direct perpetration (perpetration “as an individual”), co-perpetration (“jointly with another”), indirect perpetration (“perpetration through another person”), and “indirect co-perpetration.” The primary question that has arisen from this jurisprudence is whether the Court was correct in identifying the fourth form of liability, so-called “indirect co-perpetration,” which Pre-Trial Chamber I defined as a combination of perpetration “jointly with another” and perpetration “through another person.” The Defense for Germain Katanga has challenged this finding, stressing the fact that Article 25(3)(a) refers to acts perpetrated “jointly with another *or* through another person,” rather than “jointly with another *and* through another person.” The Katanga Defense further argues that the Court’s adoption of “indirect co-perpetration” is inappropriate in light of the fact that no other jurisdiction has ever applied the theory as applied by the Pre-Trial Chamber in the *Katanga & Ngudjolo* case.

With respect to the Katanga Defense’s textual argument, we believe that the Pre-Trial Chamber need not have defined “indirect co-perpetration” as a separate mode of liability under the Rome Statute, as the Chamber could have reached the same result by simply applying the elements of perpetration “jointly through another.” As defined by the Pre-Trial Chambers and accepted by the Katanga Defense team, the material elements of co-perpetration are: (i) a plurality of persons; (ii) a common plan involving the commission of a crime within the

Statute; and (iii) an essential contribution by each co-perpetrator to the execution of the common plan. Notably, there is no suggestion that the common plan must be predicated on each co-perpetrator directly carrying out his or her essential contribution. Thus, in a situation such as that alleged in the *Katanga & Ngudjolo* case, where the leaders of two rebel factions agree to “wipe out” a particular town, and each carries out his role in achieving that common plan, it is not relevant to the concept of co-perpetration *how* each co-perpetrator accomplishes his end of the plan. Of course, as a factual matter, the Court will need to establish that the acts or omissions that brought about the crimes are attributable to each co-perpetrator, but nothing prevents the Court from using the theory of perpetration “through another person” to analyze each co-perpetrator’s responsibility for his essential contribution.

Regarding the Katanga Defense team’s second argument, it is important to stress that, as mentioned above, the general principles of criminal law included in the Rome Statute were drafted as a blend of legal traditions, rather than an attempt to borrow wholesale from a particular jurisdiction. Indeed, given the types of crimes within the jurisdiction of the ICC – namely, genocide, crimes against humanity, and war crimes – and the fact that the Court will typically be prosecuting senior leaders and those most responsible for the crimes, it would actually be *inappropriate* to limit the Court to modes of liability recognized under national law. Hence, the Court should not be bound by any particular domestic jurisdiction’s interpretation of perpetration “through another person,” but rather should apply the underlying theory in a manner that is consistent with not only the language and history of the Rome Statute, but also its goal of prosecuting the most serious crimes known to mankind.

If “Ordering” is to be Viewed as Accessorial Liability under Article 25(3)(b), the Chambers Must Take a Flexible Approach to Indirect Perpetration under Article 25(3)(a)

Another question raised by the *Katanga & Ngudjolo* confirmation decision is whether “ordering” under Article 25(3)(b) is a form of accessory, as opposed to principal, liability. As explained below, the Prosecutor had initially alleged that Germain Katanga and Mathieu

Ngudjolo Chui were responsible for the relevant crimes as co-perpetrators under Article 25(3)(a), or, in the alternative, that they acted as accessories pursuant to Article 25(3)(b) by ordering their subordinates to commit the charged crimes. The Pre-Trial Chamber seemed to agree that “ordering” is a form of accessorial liability, holding that if it were to find sufficient evidence to establish substantial grounds to believe the two accused were responsible as co-perpetrators under Article 25(3)(a), such a finding would obviate the need to determine whether they bore liability as accessories under Article 25(3)(b). Yet, some commentators have questioned whether this is the best approach. Indeed, as demonstrated by cases prosecuted before the ICTR, there may be instances where a person in a position of authority or influence possesses the intent to commit serious violations of international law, but chooses to have others carry out his or her “dirty work” by ordering them to physically perpetrate the crimes. In such cases, it seems inapt to characterize the orderer as a mere “accessory” to the crimes of the physical perpetrators.

One commentator has sought to resolve this issue by stating that a person who orders the commission of a crime is not an accessory to the crime, but rather a principal who perpetrates the crime “though another person” under Article 25(3)(a). While this approach makes sense, its application may be problematic given the manner in which the *Katanga & Ngudjolo* Pre-Trial Chamber interpreted perpetration “through another person.” Specifically, relying on domestic interpretations of the mode of liability, Pre-Trial Chamber I held that indirect perpetration applies to just three types of cases: (i) those in which the physical perpetrator lacks the capacity for blameworthiness, *i.e.*, he or she acted under duress; (ii) those in which the indirect perpetrator misleads the physical perpetrator about the seriousness of the crime, the identity of the victim, or the qualifying circumstances of the crime; and (iii) those in which the indirect perpetrator commits the crime through another by means of “control over an organisation.” Importantly, this last scenario will only apply where the leader is able to secure “automatic compliance” with his orders, either due to his strict control over an organization sufficiently large to ensure that if one subordinate fails to carry out an order, he is easily replaced by a subordinate who will comply, or due to the leader’s control of the

apparatus through strict and violent training regimes. Clearly, this interpretation of indirect perpetration would exclude a finding of principal responsibility in cases such as those where an influential political figure who holds no position of authority over any regular organization is nevertheless able to use his sway over a community to convince others to commit crimes on his behalf. Again, assuming that this figure possessed the intent to commit the crime and was instrumental in bringing about its commission, but preferred to use his authority over others to accomplish the relevant physical acts, he cannot adequately be labeled a mere accessory.

Accurately characterizing an accused's role in the crime is particularly important in light of the fact that the ICC Rules of Procedure and Evidence mandate that a person's level of responsibility in a crime be taken into consideration for purposes of sentencing. Hence, in such cases, it would be appropriate for the Chambers of the ICC to consider expanding the interpretation given to indirect perpetration in the *Katanga & Ngudjolo* case. As discussed above, the Court is not bound to interpret the modes of liability described in Article 25(3)(a) in line with any given national jurisdiction, and in fact, it is our view that the judges of the ICC should mould their understandings of the relevant concepts to accurately reflect the unique nature of international crimes.

Article 28: Responsibility of Commanders and Other Superiors

Article 28 of the Rome Statute governs the responsibility of military commanders and civilian superiors for the crimes of their subordinates. To date, only one person, Jean-Pierre Bemba Gombo, has been sent to trial on charges confirmed under Article 28. Because the Pre-Trial Chamber determined that Mr. Bemba qualified as a military, as opposed to civilian, leader, the relevant portion of the article is subsection (a), which provides:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control

as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 28(a)(i)'s Use of the Words "Owing to the Circumstances at the Time" Brings the "Should Have Known" Standard Into Line with the "Had Reason to Know" Standard

In this report, we focus on Pre-Trial Chamber II's discussion of the mental element, namely, the requirement under subsection Article 28(a)(i) that the commander "knew or, owing to the circumstances at the time, should have known" about the relevant crimes. As described below, the Chamber determined in the *Bemba* case that the phrase "should have known" is a form of negligence and that it is different from the standard employed by the ICTY and ICTR, the statutes of which provide that a military commander may be held responsible where, *inter alia*, he or she "knew or *had reason to know*" about the relevant crimes. Importantly, the *ad hoc* tribunals have interpreted this language to mean that a superior will be criminally responsible only if information was available to him which would have put him on notice of offences committed by subordinates. By contrast, according to the *Bemba* Pre-Trial Chamber, the "should have known" language in Article 28(a)(i) requires that the superior take the necessary measures to secure knowledge of the conduct of his troops, regardless of the availability of information at the time of the commission of the crime.

Given the different language employed in the Rome Statute's provision on command responsibility ("should have known"), on the one hand, and the provisions found in the statutes of the ICTY and ICTR ("had reason to know"), on the other, it is arguable that the ICC is in fact governed by a different standard than that governing the *ad hoc* tribunals. Yet, a number of commentators have taken the opposite view, holding that there is not any meaningful difference between the "had reason to know" and the "should have known" standards. Unfortunately, the *travaux préparatoires* of the Rome Statute, reviewed below, do not readily indicate whether the drafters consciously intended to depart from the language used in the statutes of the ICTY and the ICTR. In terms of policy arguments, also explored below, it seems reasonable for the ICC to follow the approach taken by the *ad hoc* tribunals under the "had reason to know" standard. Importantly, as interpreted by the ICTY Appeals Chamber, the "had reason to know" standard does not require that the commander had information in his actual possession specifically alerting the commander to the relevant offense. Rather, all that is required is that the commander receive some form of information that would at least put him or her on notice of the need to investigate the conduct of the troops. Notably, this same approach could easily be interpreted as the approach warranted under Article 28(a) of the Rome Statute, given that the clause "owing to the circumstances at the time" appears immediately before the words "should have known."

Article 30: Mental Element

Article 30, governing the *mens rea* required for most crimes under the Rome Statute, provides as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

The Chambers Should Apply the Lower *Mens Rea* Standard Where Such a Standard is “Otherwise Provided” for by the Rome Statute or Elements of Crimes, Regardless of the Mode of Liability

One significant issue that arises under Article 30 relates to the approach of Pre-Trial Chamber I in the *Lubanga* case to the “[u]nless otherwise provided” language of subparagraph (1) in the context of co-perpetration. As explained below, Mr. Lubanga is charged with war crimes relating to the enlistment, conscription, and use of children under the age of fifteen in armed conflict. Notably, the Elements of Crimes make clear that, with regard to the perpetrator’s state of mind as to the age of the enlisted or conscripted children, it is only required that the perpetrator “knew or should have known that such person or persons were under the age of 15 years.” Noting this language, and the fact that Article 30 states “[u]nless otherwise provided,” a person must act with “intent and knowledge,” the *Lubanga* Pre-Trial Chamber initially held that the Prosecutor would satisfy his burden with respect to the mental element by establishing that Mr. Lubanga did not know the age of the children he enlisted, conscripted, or used in armed conflict and that he lacked such knowledge due to negligence. However, the Chamber went on to hold that, because in this case the suspect was charged as a co-perpetrator based on joint control over the crime, which requires that all the co-perpetrators be mutually aware of, and mutually accept, the likelihood that implementing the common

plan would result in the crime, the lower standard of “should have known” regarding the age of the children was not applicable.

The Chamber gave no support for this finding, and it is unclear why the Chamber did not merely require that each co-perpetrator either knew that the children were under fifteen or assumed the risk of that being the case. Notably, the drafting history of the Elements of Crimes demonstrates that there was a strong belief among the drafters that requiring actual knowledge regarding the age of child soldiers would place an undue burden on the prosecution, and that the lower standard was chosen for the purpose of ensuring protection of children. Nevertheless, the *Lubanga* Pre-Trial Chamber overrode the express language of the Elements of Crimes, without explanation. If this approach is followed in the future, it will effectively negate the “unless otherwise provided” language in Article 30 in all cases in which co-perpetration is charged as a mode of liability, having significant consequences not only for those charged in relation to the enlistment, conscription, and use of children in armed conflict, but also with regard to charges involving war crimes that need only be committed “wantonly” or “willfully.” Given the absence of support in the Rome Statute for such an approach, we recommend that the Court apply the lower standard of *mens rea* where called for by the Statute or Elements, regardless of the mode of liability with which a perpetrator is charged.

Both the Plain Language and the Drafting History of Article 30 Suggest that *Dolus Eventualis* is Not Encompassed by the Rome Statute Except as Otherwise Provided

The final issue addressed in this report relates to a finding by the *Lubanga* Pre-Trial Chamber that Article 30 encompasses the concept of *dolus eventualis*, which the Chamber defines as involving those situations where a suspect is aware of the risk that his or her actions will bring about the objective elements of a crime, and accepts such an outcome by reconciling himself or herself with it or consenting to it. Briefly, the *Lubanga* Chamber reached its conclusion by finding that Article 30 requires the existence of a “volitional element” on the part of the suspect, and then defining that volitional element as

encompassing not only *dolus directus* in the first degree (or intent) and *dolus directus* in the second degree (knowledge that the circumstance will occur in the ordinary course of events), but also *dolus eventualis*.

Notably, the Chamber did not provide any support for its finding that Article 30 encompasses *dolus eventualis*, but rather merely observed that the concept has been used by the ICTY and the ICTR. However, the statutes of the ICTY and the ICTR are silent on the subject of *mens rea*, indicating that the judges of those tribunals were free to interpret the mental element required for the crimes within their jurisdiction according to their understanding of customary international law as it existed at the time the crimes were committed. The drafters of the Rome Statute, by contrast, expressly considered various approaches to defining the mental element for purposes of the ICC, including *dolus eventualis*, and ultimately defined “intent” as including those situations where a person “means” to cause a consequence or “is aware that it *will occur* in the ordinary course of events.” Similarly, the drafters defined “knowledge” as “awareness that a circumstance exists or a consequence *will occur* in the ordinary course of events.” Thus, as a number of commentators have observed, the plain language of the Rome Statute – specifically, the use of the words “will occur,” as opposed to “may occur” – appears to exclude the concept of *dolus eventualis*. Furthermore, even assuming some level of ambiguity in the plain language of the Statute that would allow for recourse to the drafting history, the relevant *travaux préparatoires*, discussed in detail below, strongly suggest a decision on the part of the drafters to exclude both the concept of recklessness and that of *dolus eventualis* from the Statute, except as otherwise provided. Lastly, even aside from the plain text and drafting history of Article 30, it is arguable that excluding *dolus eventualis* from the generally applicable standard of *mens rea* under the Rome Statute makes sense as a matter of policy, in light of the fact that the ICC is dedicated to prosecuting “the most serious crimes of concern to the international community as a whole,” the gravity of which presupposes intent and knowledge. While it has been argued that the Court should at least be able to prosecute *war crimes* committed with mere recklessness, the Rome Statute and Elements of Crimes in fact expressly lower the requisite mental element for a number of war crimes, meaning that such crimes will

often fall within the “unless otherwise provided” exception to Article 30’s default standard of intent and knowledge. Although it is true that certain war crimes are not so modified, the best result may in fact require that non-superior perpetrators who commit such war crimes without any volition towards the outcome of the crime be prosecuted at the national level, reserving the ICC’s resources for those who either acted with intent, or, in the case of superior responsibility, are held to a higher standard given their positions of authority.

I. INTRODUCTION

The Rome Statute of the International Criminal Court (ICC), unlike the statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), contains detailed provisions relating to the general part of criminal law, including articles distinguishing various modes of direct liability and superior responsibility, and specifying the mental element required for crimes within the jurisdiction of the Court.¹ Importantly, these provisions represent an attempt by the drafters to create truly international principles of criminal law, meaning that the provisions are “based on comparative criminal law and not on one legal tradition alone.”²

While the Rome Statute has been praised for its provisions setting forth the rules of general criminal law applicable to the crimes within the jurisdiction of the ICC,³ the unique nature of the provisions has

¹ See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *adopted on 17 July 1998, entered into force 1 July 2002*, Art. 25; *id.* Art. 28; *id.* Art. 30. While the statutes of the ICTY and ICTR contain provisions relating to modes of liability, the provisions “did not pay much attention to distinguishing different modes of participation... but rather applied a so-called unified perpetrator model.” Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT’L CRIM. JUST. 953, 955 (2007). Thus, for example, Article 7(1) of the ICTY Statute provides simply: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 7(1), *adopted on 25 May 1993*. The language of the ICTR Statute is virtually identical. See Statute of the International Tribunal for Rwanda, Art. 6(1), *adopted on 8 November 1994*. Neither the Statute of the ICTY nor that of the ICTR includes a general provision governing the requisite mental element for crimes.

² Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. of Int’l Crim. Just. 660, 662 (2006).

³ See, e.g., Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 European J. Int’l L. 144, 153 (1999) (“One of the merits

raised a number of questions regarding their appropriate interpretation. Two of the Court's Pre-Trial Chambers have attempted to answer some of these questions in the context of the confirmation decisions in the first three cases to go to trial before the ICC. This report examines the holdings in these first decisions regarding individual criminal responsibility and the mental element under the Rome Statute, not for purposes of analyzing the application of the law to the facts in any given case, but rather to look at some of the issues raised by the Chambers' initial interpretations of the Rome Statute's provisions on criminal law and offer recommendations regarding matters that are likely to arise again in the future.

of the Rome Statute is that it sets out in detail the most important principles of criminal law: the ban on analogy, the principle of *favor rei*, the *nullum crimen* and *nulla poena* principles, the principle of non-retroactivity of criminal law, the various forms of international criminal responsibility (for commission of crimes, aiding and abetting, etc.), the responsibility of military commanders and other superiors, the notion of *mens rea*, the grounds for excluding criminal responsibility, the rule of specialty, and so forth. Although most of these principles are familiar to national criminal lawyers, they had never until this time been specified in international treaties or at any rate been spelt out in detail. Hence, this section of the Rome Statute undoubtedly constitutes a major advance in international criminal law and, in addition, contributes to making this branch of law more congruent with the basic requirement of 'specificity.'"); Kevin Jon Heller, *The Rome Statute in Comparative Perspective*, Melbourne Law School Legal Studies Research Paper No. 370, at 21 (2008) (describing Article 25 of the Rome Statute, relating to modes of liability, as "a significant advance over previous international tribunals"); Albin Eser, *Individual Criminal Responsibility*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 767, 768 (Antonio Cassese, *et al.* eds., 2002) (noting the Rome Statute's improvement over earlier drafts of the treaty, which contained "less explicit rules of international criminal responsibility"); Gerhard Werle & Florian Jessberger, "*Unless Otherwise Provided*": *Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 J. Int'l Crim. Just. 35, 37 (2005) ("There can be no doubt that both codification and standardization of the mental element, if carried out in a proper and consistent manner, would add to the process of consolidation of international criminal law and push international criminal law closer to becoming a fully developed legal order. From that perspective, the efforts of the drafters of the ICC Statute deserve credit.").

II. DRAFTING HISTORY AND RELEVANT PROVISIONS

Unsurprisingly, given the largely *sui generis* nature of the general principles of criminal law in the Rome Statute, a number of contentious issues arose in the context of drafting the provisions on individual criminal responsibility and the mental element.⁴ However, given the focus of this report on the first three confirmation decisions issued by the ICC, the following section is primarily limited to exploring the drafting history relevant to issues that are implicated by those decisions.

A. Absence of General Principles of International Criminal Law from 1994 Draft Statute

The 1994 Draft Statute for an International Criminal Court prepared by the International Law Commission contained no section dedicated to general principles of international criminal law and was silent on the issues regarding modes of liability and the mental element of crimes within the jurisdiction of the proposed court.⁵ Accordingly, the *Ad Hoc* Committee on the Establishment of an International Criminal Court, set up by the United Nations (UN) General Assembly “to review the major substantive and administrative issues arising out of the [1994] draft statute,”⁶ charged a special Working Group with considering, *inter alia*, “the question of general rules of criminal law.”⁷ The

⁴ See, e.g., Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189-94, 198-200, 202-06 (Roy S. Lee ed., 1999).

⁵ See Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May-22 July 1994), U.N. Doc. A/49/10 (1994).

⁶ United Nations General Assembly Resolution 49/53, A/RES/49/53, ¶ 2 (9 December 1994).

⁷ *Ad Hoc* Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, delivered to the General Assembly, U.N. Doc. A/50/22, ¶ 9 (16 September 1995).

Working Group, in turn, prepared a broad set of items that “could be discussed” under the topic of general principles of criminal law, which it submitted to the full *Ad hoc* Committee.⁸ Among these items were “types of responsibility” and “*mens rea*,” including “[i]ntention (*culpa, dolus/intentionally, knowingly, recklessly/dolus eventualis, gross negligence*).”⁹ In response, the *Ad hoc* Committee attached the Working Group’s list of items to its final report, noting that there was support for the notion that the Statute should address “fundamental questions of general criminal law.”¹⁰ However, the Committee did not take any further action with regard to the list, other than to highlight that “the various questions identified by the Working Group deserved further examination.”¹¹

B. Negotiation of Provisions Governing Individual Criminal Responsibility and the Mental Element under the Rome Statute

Following the conclusion of the work of the *Ad hoc* Committee, the UN General Assembly established a Preparatory Committee on the Establishment of an International Criminal Court “to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and... to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.”¹² The Preparatory Committee met in six sessions between March 1996 and April 1998, during which time a number of proposals were contemplated relating to issues of participation in crimes and the level of *mens rea* to be

⁸ *Id.* Annex II.

⁹ *Id.*

¹⁰ *Id.* ¶ 87.

¹¹ *Id.* ¶ 89. *See also* Saland, *supra* n. 4, at 191 (noting that the special Working Group “identified a number of principles which the group thought ought to be included in the Rome Statute,” but that “[n]o texts were discussed at this stage”).

¹² United Nations General Assembly Resolution 50/46, A/RES/50/46, ¶ 2 (11 December 1995).

required under the Statute.¹³ The provisions were finalized at the Rome Conference, which took place from 15 June to 17 July 1998.

1. Direct Perpetration

On the issue of modes of responsibility for direct perpetrators, there was some debate early on as to whether the Statute should include “a provision laying down the basic elements” of responsibility or whether “such an explicit and elaborate provision was not needed, as it could lead to complex negotiations, a lengthy statute and a difficult task of defining such elements as participation, conspiracy and complicity.”¹⁴ While this debate was ongoing, in August 1996, an Informal Group on General Principles of Criminal Law submitted a compilation of various proposals relating to the individual criminal responsibility of principals and accomplices,¹⁵ all of which were far more detailed than

¹³ See Saland, *supra* n. 4, at 191-205; Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849-50 (Otto Triffterer ed., 2008).

¹⁴ Preparatory Committee on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996*, A/AC.249/1, ¶ 88 (7 May 1996).

¹⁵ Preparatory Committee on the Establishment of an International Criminal Court, *Informal Group on General Principles of Criminal Law: Proposed new Part (III bis) for the Statute of an International Criminal Court*, A/AC.249/CRP.13, at 4-8 (26 August 1996). Only one provision was set forth governing principals, which read as follows:

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

(a) Commits the conduct specified in the description (definition) of the crime;

(b) Causes the consequences, if any, specified in that description (definition); and

(c) Does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person

the corresponding provisions in the statutes of the ICTY and ICTR.¹⁶ Again, the view was expressed that a simpler provision on liability might be preferable, but “it was noted that specificity of the essential elements of the principle of criminal responsibility was important.”¹⁷ By February 1997, a “near-consensus as to the format and structure of the article was reached: *i.e.*, one single article to cover the responsibility of principals and all other modes of participation (except command responsibility), and to cover both complete crimes and attempted ones.”¹⁸ In line with this consensus, Canada, Germany, the Netherlands, and the United Kingdom, acting as an “informal group representing various legal systems,” submitted a working paper on individual responsibility that consolidated a number of the proposals contained in the August 1996 proposal.¹⁹ The consolidated proposal, which closely resembles the final provision adopted in the Rome

shall be criminally responsible and liable to be punished as a principal.

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

Id. at 4 (brackets in original). A variety of proposals relating to accomplice liability were included. *Id.* at 5-8.

¹⁶ As explained above, the statutes of the ICTY and ICTR define individual criminal responsibility for direct perpetrators simply by stating that a person “who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime... shall be individually responsible for the crime.” See *supra* n. 1.

¹⁷ Preparatory Committee on the Establishment of an International Criminal Court, *Informal Group on General Principles of Criminal Law: Proposed new Part (III bis) for the Statute of an International Criminal Court*, *supra* n. 15, at 4-8.

¹⁸ Saland, *supra* n. 4, at 198.

¹⁹ Preparatory Committee on the Establishment of an International Criminal Court, *Working Paper Submitted by Canada, Germany, Netherlands, and the United Kingdom: Paper on Criminal Responsibility submitted by Informal Group Representing Various Legal Systems*, A/AC.249/1997/WG.2/DP.1 (14 February 1997).

Statute under Article 25(3),²⁰ contained very few bracketed portions and only a single footnote, relating to conspiracy.²¹

At the Rome Conference, the debate over conspiracy was settled through an agreement to incorporate text from the then recently negotiated International Convention for the Suppression of Terrorist Bombings,²² and the final provision governing the individual responsibility of non-superiors was adopted as follows:

Article 25
Individual Criminal Responsibility

...

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

²⁰ See *infra* n. 23 and accompanying text.

²¹ Preparatory Committee on the Establishment of an International Criminal Court, *Working Paper Submitted by Canada, Germany, Netherlands, and the United Kingdom: Paper on Criminal Responsibility submitted by Informal Group Representing Various Legal Systems*, *supra* n. 19.

²² Saland, *supra* n. 4, at 199-200.

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

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

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose...²³

2. *Responsibility of Commanders and Other Superiors*

The primary debate surrounding the notion of superior responsibility centered around the question whether the principle of command

²³ Rome Statute, *supra* n. 1, Art. 25.

responsibility should be “restricted to military commanders or be extended to any superior regarding the actions of subordinates.”²⁴ Thus, for example, the August 1996 proposal put forth by the Informal Group on General Principles of Criminal Law provided:

[In addition to other forms of responsibility for crimes under the Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility] [A [commander] [superior] shall be regarded as the perpetrator] for crime under this Statute committed by [forces] [subordinate[s]] under his or her command [and effective control] as a result of the [commander’s] [superior’s] failure to exercise proper control where:

- (a) The [commander] [superior] either knew or [owing to the widespread commission of the offences should have known] [should have known] that the [forces] [subordinate[s]] were committing or intending to commit such crimes; and
- (b) The [commander] [superior] failed to take all necessary [and reasonable] measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].²⁵

Another issue related to the language in the above proposal that read: “knew or [owing to the widespread commission of the offences should have known] [should have known].” Specifically, the Informal Group on General Principles of Criminal Law noted in a footnote to the text that the language “‘had reason to know’ could be substituted for

²⁴ Preparatory Committee on the Establishment of an International Criminal Court, *Informal Group on General Principles of Criminal Law: Proposed new Part (III bis) for the Statute of an International Criminal Court*, *supra* n. 15, at 9.

²⁵ *Id.* at 9-10 (brackets in original).

‘should have known.’”²⁶ The Informal Group’s proposal on command/superior responsibility was largely maintained in the final draft discussed at the Rome Conference, although the footnote relating to the alternative “had reason to know” language was dropped from the proposal in the Preparatory Committee’s final report.²⁷

At Rome, the drafters agreed that the provision on superior responsibility would extend to civilian leaders, but that a different mental requirement would apply to civilians as compared to military commanders.²⁸ The final language reads:

Article 28

Responsibility of Commanders and Other Superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

²⁶ *Id.* at 9.

²⁷ Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add.1, at 61 (14 April 1998).

²⁸ See Saland, *supra* n. 4, at 202-04.

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.²⁹

²⁹ Rome Statute, *supra* n. 1, Art. 28.

3. *Mental Element*

Finally, on the subject of the mental element, there was general agreement on the need to “set[] out all the elements involved,”³⁰ but difficulty regarding which concepts to include and how to define those concepts. For instance, following the first meeting of the Preparatory Committee, which took place in March and April 1996, it was noted that, “[r]egarding recklessness and gross negligence, there were differing views as to whether these elements should be included.”³¹ A few months later, the Informal Group on General Principles of Criminal Law proposed the following definition of the mental element:

1. Unless otherwise provided, a person is only criminally responsible and liable for punishments for a crime under this Statute if the physical elements are carried out with intent [or] [and] knowledge [, whether general or specific or as the substantive crime in question may specify].

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) In relation to conduct, that person means to engage in the act or omission;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, “know,” “knowingly” or “knowledge” means:

³⁰ Preparatory Committee on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996*, *supra* n. 14, ¶ 96.

³¹ *Id.* ¶ 97.

(a) To be aware that a circumstance exists or a consequence will occur; or

(b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur.]

[4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) The person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) The person is aware that the risk is highly unreasonable to take; [and]

[(c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]³²

Additionally, in a footnote to the bracketed language of subparagraph 4, the authors of the proposal stated that the “concepts of recklessness and *dolus eventualis* should be further considered in view of the seriousness of the crimes considered.”³³ As one participant in the

³² Preparatory Committee on the Establishment of an International Criminal Court, *Informal Group on General Principles of Criminal Law: Proposed new Part (III bis) for the Statute of an International Criminal Court*, *supra* n. 15, at 16 (brackets in original).

³³ *Id.* at 17.

drafting of the general part of the Rome Statute later explained, “most of the players” involved in drafting the mental element “were generally uncomfortable with liability based on recklessness or its civil law (near) counterpart *dolus eventualis*.”³⁴ While, as seen below, the term “recklessness” continued to be debated through the final Rome Conference,³⁵ *dolus eventualis* “fell out of the written discourse” before the final negotiations in Rome.³⁶

Prior to the Rome Conference, the Preparatory Committee revised the proposal slightly, dropping the proposed language in subparagraph 3(b) above.³⁷ Thus, under the revised provision, a person would only have “knowledge” of a circumstance where he or she was “aware that a circumstance exists or a consequence will occur.”³⁸ The bracketed provision defining recklessness, and the note that the concept required further deliberations, were maintained going into the Rome Conference.³⁹ Ultimately, however, the drafters agreed that the provision on *mens rea* did not need to include a definition of “recklessness” because the term did not appear anywhere in the Statute.⁴⁰ The final wording, as adopted at the Rome Conference, is as follows:

³⁴ Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings*, 19 *Crim. L. Forum* 519, 525 (2008).

³⁵ See *infra* n. 39 *et seq.* and accompanying text.

³⁶ Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 *Crim. L. Forum* 291, 301 (2000).

³⁷ Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *supra* n. 27, at 65-66.

³⁸ *Id.* at 66.

³⁹ *Id.*

⁴⁰ Saland, *supra* n. 4, at 205.

Article 30
Mental Element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.⁴¹

⁴¹ Rome Statute, *supra* n. 1, Art. 30.

III. RELEVANT JURISPRUDENCE

A. *The Prosecutor v. Thomas Lubanga Dyilo*

The first accused to be arrested by the ICC was Thomas Lubanga Dyilo, a national of the Democratic Republic of Congo (DRC) who is alleged to be both President of the *Union des Patriotes Congolais* (UPC) and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC). Prior to the confirmation hearing in the *Lubanga* case, the Prosecution filed its Document Containing the Charges in which it alleged that Mr. Lubanga is responsible as a co-perpetrator under Article 25(3)(a) for war crimes relating to enlisting, recruiting, and using children under the age of fifteen in armed conflict.⁴² Pre-Trial Chamber I held a confirmation hearing from 9 to 28 November 2006, and delivered its decision on 29 January 2007.⁴³

As the first Chamber to issue a confirmation decision, Pre-Trial Chamber I devoted a substantial portion of its decision to the issues of modes of liability and *mens rea*. Regarding modes of liability, the Chamber began its discussion by noting the distinction among principal liability under Article 25(3)(a) of the Rome Statute, accessory liability under Articles 25(3)(b)-(d), and superior responsibility under Article 28.⁴⁴ It stressed that, if it were to find sufficient evidence to establish substantial grounds to believe that Mr. Lubanga was criminally responsible as a co-perpetrator under Article 25(3)(a), the issue of whether it could consider other forms of liability (namely, accessory liability or superior responsibility), would become moot.⁴⁵

⁴² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, ¶ 319 (Pre-Trial Chamber I, 29 January 2007).

⁴³ *Id.* ¶ 30.

⁴⁴ *Id.* ¶ 320.

⁴⁵ *Id.* ¶ 321.

Next, the Chamber turned to an analysis of co-perpetration under the Rome Statute. In the Chamber's view, "the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the object elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all others and, as a result, can be considered as a principal to the whole."⁴⁶ Therefore, "the definitional criterion of the concept of co-perpetration is linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons."⁴⁷ The Chamber then identified three different approaches to distinguishing between principals and accessories in the case of a crime committed by a plurality of persons. First, there is the objective approach, pursuant to which "only those who physically carry out one or more of the objective elements of the offence can be considered principals to the crime."⁴⁸ Second is the subjective approach, which "moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made."⁴⁹ Under this approach, which is the approach adopted by the ICTY in its interpretation of joint criminal enterprise,⁵⁰ "only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its

⁴⁶ *Id.* ¶ 326.

⁴⁷ *Id.* ¶ 327.

⁴⁸ *Id.* ¶ 328.

⁴⁹ *Id.* ¶ 329.

⁵⁰ *Id.* Joint criminal enterprise is a mode of liability, used extensively by the *ad hoc* tribunals, that involves the "commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons." *The Prosecutor v. Duško Tadić*, Judgement, IT-94-1, ¶ 190 (Appeals Chamber, 15 July 1999). Pursuant to the theory of liability, "[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions." *Id.*

commission.”⁵¹ Finally, there is the “control over the crime” approach, which holds that “principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those 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.”⁵² Under this last approach, the following perpetrators would be found to have control over the crime, and thus be classified as principals to the crime: (i) those who physically carry out the offense (direct perpetration); (ii) those who control the will of those who carry out the offense (indirect perpetration, or perpetration through another person); and (iii) those who have an essential role in carrying out a crime jointly with others (co-perpetration).⁵³

The Chamber determined that Article 25(3) does not follow the objective approach, because “the notion of committing an offence through another person” under Article 25(3)(a) “cannot be reconciled with the idea of limiting the class of principals to those who physically carry out one or more of the objective elements of the offence.”⁵⁴ The Chamber also rejected the subjective approach, noting that Article 25(3)(d) “would have been the basis of the concept of co-perpetration within the meaning of [A]rticle 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories,”⁵⁵ but that, because Article 25(3)(d) begins with the words “[i]n any other way contributes to the commission or attempted commission” of a crime,⁵⁶ it “provides for a form of *accessory liability* which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding,

⁵¹ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 42, ¶ 329.

⁵² *Id.* ¶ 330.

⁵³ *Id.* ¶ 332.

⁵⁴ *Id.* ¶ 333.

⁵⁵ *Id.* ¶ 335.

⁵⁶ *Id.* ¶ 336.

abetting or assisting” within the meaning of Articles 25(3)(b) or (c).⁵⁷ By default, therefore, the Chamber concluded that the Rome Statute adheres to the concept of control over the crime.⁵⁸

The Chamber then set forth the elements of co-perpetration based on joint control of the crime. As a general matter, the Chamber noted that the concept is “rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner.”⁵⁹ Thus, “although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.”⁶⁰ More specifically, the Chamber explained, co-perpetration under Article 25(3)(a) requires the following objective elements:

(i) The existence, whether explicit or implicit, of an agreement or common plan between two or more persons, which includes an “element of criminality,”⁶¹ and

(ii) The coordinated essential contribution by each co-perpetrator resulting in the realization of the crime, such that any one co-perpetrator could frustrate the commission of the crime by not performing his or her tasks.⁶²

Turning to the subjective elements of co-perpetration, the Chamber held that:

⁵⁷ *Id.* ¶ 337 (emphasis added).

⁵⁸ *Id.* ¶ 338.

⁵⁹ *Id.* ¶ 342.

⁶⁰ *Id.* ¶ 342.

⁶¹ *Id.* ¶¶ 343-45

⁶² *Id.* ¶¶ 346-47.

(i) the suspect must “fulfil the subjective elements of the crime with which he or she is charged, including any requisite *dolus specialis* or ulterior intent for the type of crime involved,”⁶³

(ii) all co-perpetrators must be “mutually aware” and “mutually accept” that “implementing their common plan may result in the realisation of the objective elements of the crime;”⁶⁴ and

(iii) the suspect must be aware of the “factual circumstances enabling him or her to jointly control the crime.”⁶⁵

Looking to the first subjective requirement, the Chamber cited Article 30 of the Rome Statute for the proposition that “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”⁶⁶ The Chamber then went on to evaluate this requirement, stating:

The cumulative reference to “intent” and “knowledge” [in Article 30] requires the existence of a volitional element on the part of the suspect. This volitional element encompasses, first and foremost, those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the

⁶³ *Id.* ¶ 349.

⁶⁴ *Id.* ¶ 361.

⁶⁵ *Id.* ¶ 366.

⁶⁶ *Id.* ¶ 350 (quoting Article 30(1) of the Rome Statute).

objective elements of the crime (also known as *dolus directus* of the first degree).

The above-mentioned volitional element also encompasses other forms of the concept of *dolus* which have already been resorted to by the jurisprudence of the *ad hoc* tribunals, that is:

(i) situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions (also known as *dolus directus* of the second degree); and

(ii) situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).⁶⁷

With regard to *dolus eventualis*, the Chamber distinguished between two scenarios.⁶⁸ First, where the risk of bringing about the objective elements of the crime is substantial, “the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from: (i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and (ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness.”⁶⁹ Second, “if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or

⁶⁷ *Id.* ¶¶ 351-52.

⁶⁸ *Id.* ¶ 353.

⁶⁹ *Id.*

expressly accepted the idea that such objective elements may result from his or her actions or omissions.”⁷⁰

The Chamber took a similar approach to the second subjective element of co-perpetratorship. Specifically, the Chamber held that this second element requires that the 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.”⁷¹ Again, the Chamber distinguished two scenarios. First, if there is a substantial risk that the crime will be carried out, “the mutual acceptance by the suspect and the other co-perpetrators of the idea of bringing about the objective elements of the crime can be inferred from: (i) the awareness by the suspect and the other co-perpetrators of the substantial likelihood that implementing the common plan would result in the realisation of the objective elements of the crime; and (ii) the decision by the suspect and the other co-perpetrators to implement the common plan despite such awareness.”⁷² Second, “if the risk of bringing about the objective elements of the crime is low, the suspect and the other co-perpetrators must have clearly or expressly accepted the idea that implementing the common plan would result in the realisation of the objective elements of the crime.”⁷³

The third subjective element of co-perpetratorship, according to the Chamber, requires that the suspect “be aware (i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime, and (ii) that he or she can – by reason of the essential nature of his or her task – frustrate the implementation of the

⁷⁰ *Id.* ¶ 354.

⁷¹ *Id.* ¶ 361 (emphasis added).

⁷² *Id.* ¶ 363.

⁷³ *Id.* ¶ 364.

common plan, and hence the commission of the crime, by refusing to perform the task assigned to him or her.”⁷⁴

Finally, noting that Article 30 only provides the default *mens rea* standard, as indicated by the phrase “[u]nless otherwise provided” in Article 30(1), the Chamber explained that the crimes with which Mr. Lubanga was charged – namely: enlisting, conscripting, and using children under the age of fifteen in armed conflict – require only that the perpetrator “knew or should have known that such person or persons were under the age of 15 years.”⁷⁵ The Chamber thus determined, as an initial matter, that for purposes of determining whether Mr. Lubanga fulfilled the subjective elements of the crime, the Prosecutor need only establish that, where the suspect did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities, he “lacked such knowledge because he or she did not act with due diligence in the relevant circumstances...”⁷⁶ However, the Chamber went on to hold that, because in this case the suspect was charged as a co-perpetrator based on joint control over the crime, which “requires that all the co-perpetrators, including the suspect, be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realisation of the objective elements of the crime,” the lower standard of “should have known” regarding the age of the children was “not applicable.”⁷⁷

Applying the standards identified above to the case against Mr. Lubanga, the Chamber found “sufficient evidence to establish substantial grounds to believe that, in the main, but not on a permanent basis,” the accused had control over FPLC policies⁷⁸ and that “there

⁷⁴ *Id.* ¶ 367.

⁷⁵ *Id.* ¶ 357 (quoting the Elements of Crimes for Articles 8(2)(b)(xxvi) and 8(2)(e)(vii)).

⁷⁶ *Id.* ¶ 358.

⁷⁷ *Id.* ¶ 365.

⁷⁸ *Id.* ¶ 376.

was an agreement or common plan” among Mr. Lubanga and various UPC and FPLC commanders “to further the... war effort by (i) recruiting, voluntarily or forcibly, young people into the FPLC; (ii) subjecting them to military training[;] and (iii) using them to participate actively in military operations and as bodyguards.”⁷⁹

Although the “common plan did not specifically target children under the age of fifteen,” in the “normal course of events,” a plan to target young recruits “entail[s] the objective risk that it would involve children under the age of fifteen years...”⁸⁰ Hence, the Chamber determined that there was sufficient evidence to establish substantial grounds to believe that from early September 2002 to the end of 2003, the FPLC admitted, forcibly recruited, encouraged the joining of, and trained for the purpose of participating actively in military operations, people under the age of fifteen.⁸¹ The Chamber also found that Mr. Lubanga “played a key overall co-ordinating role in the implementation of the common plan” and “personally performed other tasks in the implementation of the common plan.”⁸² As to the subjective elements, the Chamber found “sufficient evidence to establish substantial grounds to believe that” during the relevant time frame, Mr. Lubanga “was, at the very least, aware that, in the ordinary course of events, the implementation of the common plan would involve” illegal acts or results, namely the voluntary and forcible recruitment of children under the age of fifteen to actively participate in military operations and as bodyguards, and he “accepted such a result by reconciling himself with it or by condoning it.”⁸³ The Chamber made a similar finding with regard to Mr. Lubanga’s co-perpetrators.⁸⁴ Finally, the Chamber determined that Mr. Lubanga was aware of “his co-ordinating role in the implementation of the common

⁷⁹ *Id.* ¶ 377.

⁸⁰ *Id.*

⁸¹ *Id.* ¶ 379.

⁸² *Id.* ¶ 383.

⁸³ *Id.* ¶ 404.

⁸⁴ *Id.* ¶ 408.

plan and of his ability to frustrate the implementation of the plan by refusing to play this co-ordinating role.”⁸⁵

B. *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

The next case before the ICC to proceed to the confirmation of charges stage was the joint case against Germain Katanga, the alleged commander of the *Force de résistance patriotique en Ituri* (FRPI), and Mathieu Ngudjolo Chui, alleged former leader of the *Front des nationalistes et intégrationnistes* (FNI). The confirmation hearing against the accused, who are charged with a number of crimes committed in the village of Bogoro in the DRC on or around 24 February 2003, was held from 27 June to 18 July 2008, and a decision on the charges was handed down on 30 September.⁸⁶ Again, the decision was issued by Pre-Trial Chamber I, but two of the three judges on that Chamber had been replaced since the issuance of the *Lubanga* confirmation decision.

In the Document Containing the Charges against Messrs. Katanga and Ngudjolo, the Prosecution alleged that the two were responsible for the relevant crimes as co-perpetrators under Article 25(3)(a) or, in the alternative, that they “acted as accessories by *ordering* their subordinates to attack the civilian population of Bogoro,” pursuant to Article 25(3)(b).⁸⁷ However, as in the *Lubanga* decision, the Pre-Trial Chamber began its discussion of modes of liability by stating that, if the Chamber were to find sufficient evidence to establish substantial grounds to believe the two accused were responsible as co-perpetrators, such a finding would “render[] moot further questions of accessorial liability.”⁸⁸

⁸⁵ *Id.* ¶ 409.

⁸⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07 (Pre-Trial Chamber I, 30 September 2008).

⁸⁷ *Id.* ¶ 470 (emphasis added).

⁸⁸ *Id.* ¶ 471.

Next, the Chamber turned to an issue raised by the Defense for Germain Katanga relating to the *Lubanga* Pre-Trial Chamber's interpretation of Article 25(3) of the Rome Statute. Specifically, the Katanga Defense team had argued that the *Lubanga* Chamber, in its definition of co-perpetration, seemed to merge two theories of liability: co-perpetration and indirect perpetration.⁸⁹ According to the Defense, while Article 25(3)(a) "has incorporated both the notion of co-perpetration (jointly with another) and indirect perpetration (through another person, regardless of whether that other person is criminally responsible), it has clearly not incorporated the notion of indirect co-perpetration," as the provision refers to acts perpetrated "jointly with another *or* through another person," rather than "jointly with another *and* through another person."⁹⁰ The *Katanga & Ngudjolo* Chamber dismissed this argument by reasoning that the term "or," as used in Article 25(3)(a), may be interpreted either as a "weak or inclusive disjunction" (in the sense of "either one or the other, and possibly both"), or as a "strong or exclusive disjunction" (meaning "either one or the other but not both"), and that there is nothing in the Statute preventing the Chamber from adopting the former interpretation over the latter.⁹¹ Thus, the Chamber determined that "through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which

⁸⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, ICC-01/04-01/07-698, ¶ 24 (Defense, 28 July 2008).

⁹⁰ *Id.* (emphasis in original).

⁹¹ *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 86, ¶ 491. The Pre-Trial Chamber supports this point by noting that the Rome Statute "contain[s] several examples of the weak or 'inclusive' use of the disjunction 'or.'" *Id.* n. 652. For example, "the objective elements of crimes against humanity consisting [of] 'widespread' or 'systematic' attack, meaning that the attack can be widespread, or systematic, or both; the war crime of torture consisting in infliction of 'severe physical or mental pain or suffering', in which, as a logical conclusion, the victim can be inflicted with severe physical or mental pain or suffering, or both." *Id.*

allows the Court to assess the blameworthiness of ‘senior leaders’ adequately.”⁹²

Having upheld “indirect co-perpetration” as a mode of liability under the Rome Statute, the Chamber went on to define its elements. It began with the objective requirements for commission of a crime “through another person,” or indirect perpetration, which, the Chamber explained, includes cases in which “the perpetrator behind the perpetrator commits the crime through another by means of ‘control over an organisation’ (*Organisationsherrschaft*).”⁹³ According to the Chamber, this concept requires the following:

(i) the suspect must have control over the organization;⁹⁴

(ii) the organization controlled by the suspect must “be based on hierarchical relations between superiors and subordinates,” and must “be composed of sufficient subordinates to guarantee that superiors’ orders will be carried out, if not by one subordinate, then by another”⁹⁵; and

(iii) the “particular characteristics of the organised and hierarchical apparatus” must “enable the leader to actually secure the commission of crimes,” such that “the leader’s control over the apparatus allows him to utilise his subordinates as ‘a mere gear in a giant machine’ in order to produce the criminal result ‘automatically.’”⁹⁶

⁹² *Id.* ¶ 492.

⁹³ *Id.* ¶ 498.

⁹⁴ *Id.* ¶¶ 500-10.

⁹⁵ *Id.* ¶ 512.

⁹⁶ *Id.* ¶ 515. The Chamber explained that this attribute of automatic compliance with orders may be demonstrated either by a large number of fungible subordinates within the organization, so that a failure by one subordinate to comply with the leader’s

The Chamber then added the objective elements of co-perpetration, namely: (i) the existence of an agreement of common plan between two or more persons, and (ii) a coordinated essential contribution by each co-perpetrator resulting in the realisation of the crime.⁹⁷ In the context of indirect co-perpetration, the Chamber explained, a co-perpetrator's "essential contribution" may "consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes."⁹⁸

The Chamber then turned to the subjective elements of indirect co-perpetration. First, as in the case of co-perpetration, the Chamber held that the suspects must "carry out the subjective elements of the crimes with which they are charged..."⁹⁹ Notably, however, the Chamber only referred to two situations as being encompassed under Article 30: that where the suspect knows that his or her conduct will bring about the objective elements of the crime and engages in the conduct with the "express intent" to commit the crime (*dolus directus* in the first degree), and that where the suspect lacks the intent to bring about the objective elements of the crime, but is nonetheless aware that the crime will occur in the ordinary course of events (*dolus directus* in the second degree).¹⁰⁰ The Chamber did not address whether Article 30 encompasses *dolus eventualis*, as the *Lubanga* Chamber concluded, because in the case against Messrs. Katanga and Ngudjolo, the Chamber did not find it necessary to rely on that concept in relation to the crimes charged.¹⁰¹

orders may be compensated by the substitution of another subordinate, or by evidence that the leader maintains his control through "intensive, strict, and violent training regimens." *Id.* ¶¶ 516-17.

⁹⁷ *Id.* ¶¶ 522-26.

⁹⁸ *Id.* ¶ 525.

⁹⁹ *Id.* ¶ 527.

¹⁰⁰ *Id.* ¶ 530.

¹⁰¹ *Id.* ¶ 533.

In addition to possessing the subjective elements of the crimes charged, indirect co-perpetration requires, according to the Chamber, that the suspects must: be mutually aware that implementing their common plan will result in the realisation of the objective elements of the crime; undertake such activities with the specific intent to bring about the objective elements of the crime, or be aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events; and be aware of the factual circumstances enabling them to exercise control over the crime through another person.¹⁰² Finally, the suspects must be aware of the “factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person.”¹⁰³

Applying the concept of indirect co-perpetration to the facts of the *Katanga & Ngudjolo* case, the Chamber found, first, that there was sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 through late 2004, Germain Katanga had control over the FRPI,¹⁰⁴ and that Mathieu Ngudjolo Chui had control over the FNI from early 2003 through October 2006.¹⁰⁵ Next, it established that the FRPI and FNI were hierarchically organized groups,¹⁰⁶ each providing its leaders with an extensive supply of interchangeable soldiers, “ensur[ing] that the orders given by the highest commanders, if not complied with by one soldier, w[ould] be complied with by another one.”¹⁰⁷ In addition, the Chamber pointed out that the soldiers of both organizations were young, subjected to a “brutal military training regime,” and had allegiance to the leaders of their ethnic groups, and thus were likely to comply with the orders of

¹⁰² *Id.* ¶¶ 533-34.

¹⁰³ *Id.* ¶ 538.

¹⁰⁴ *Id.* ¶ 540.

¹⁰⁵ *Id.* ¶ 541.

¹⁰⁶ *Id.* ¶¶ 543-44.

¹⁰⁷ *Id.* ¶ 546.

these leaders “almost automatically.”¹⁰⁸ The Chamber also found “substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to ‘wipe out’ Bogoro”¹⁰⁹ “by directing the attack against the civilian population, killing and murdering the predominately Hema population and destroying their properties.”¹¹⁰ The implementation of this common plan, “in the ordinary course of events, ... would inevitably result in the pillaging of the Bogoro village... and in the rape or sexual enslavement of civilian women there.”¹¹¹ Additionally, for the attack on Bogoro village, Messrs. Katanga and Ngudjolo “agreed upon the use of children under the age of fifteen years to actively participate,” including those children acting as their own bodyguards.¹¹² Next, the Chamber found that both Messrs. Katanga and Ngudjolo “played an overall coordinating role in the implementation of the common plan” and “personally performed other tasks in the implementation of the common plan.”¹¹³ Importantly, the Chamber stressed that “FRPI soldiers would obey only orders issued by FRPI commanders and that, similarly, FNI soldiers would obey only orders issued by FNI commanders,” as the groups were organized along ethnic lines.¹¹⁴ Thus, the cooperation of Messrs. Katanga and Ngudjolo, as the “highest commanders of the Ngiti and Lendu combatants,” was necessary for the implementation of the common plan.¹¹⁵ Finally, the Chamber was satisfied that the suspects were aware of the factual circumstances enabling them to exercise joint control over the crimes or joint control over the crimes through their respective organizations,¹¹⁶ and that they were mutually aware and mutually

¹⁰⁸ *Id.* ¶ 547.

¹⁰⁹ *Id.* ¶ 548.

¹¹⁰ *Id.* ¶ 549.

¹¹¹ *Id.* ¶¶ 550-51.

¹¹² *Id.* ¶ 553.

¹¹³ *Id.* ¶ 555.

¹¹⁴ *Id.* ¶ 560.

¹¹⁵ *Id.*

¹¹⁶ *Id.* ¶¶ 562-63.

accepted that the implementation of their common plan would result in the realization of the crimes.¹¹⁷

C. *The Prosecutor v. Jean-Pierre Bemba Gombo*

The third confirmation hearing held at the ICC involved the charges against Jean-Pierre Bemba Gombo, alleged President and Commander-in-Chief of the *Mouvement de libération du Congo* (MLC). The hearing on the charges against Mr. Bemba, who is a national of the DRC, but charged with crimes allegedly committed in the Central African Republic, was held before Pre-Trial Chamber II¹¹⁸ from 12 to 15 January 2009 and the Chamber issued its decision on 15 June 2009.¹¹⁹

Prior to the confirmation hearing, the Prosecution had charged that Mr. Bemba was responsible for the alleged crimes as a co-perpetrator under Article 25(3)(a).¹²⁰ However, approximately two months after the close of the confirmation hearing, the Pre-Trial Chamber issued a decision adjourning the confirmation process and requesting that the Prosecution consider amending the mode of responsibility to include allegations that the accused is responsible for the alleged crimes under a theory of superior responsibility.¹²¹ In line with the Chamber's

¹¹⁷ *Id.* ¶¶ 564-72.

¹¹⁸ The pre-trial proceedings in the *Bemba* case were initially before Pre-Trial Chamber III, but on 19 March 2009, the Presidency of the ICC decided to merge Pre-Trial Chamber III with Pre-Trial Chamber II and to assign the situation in the Central African Republic, including the *Bemba* case, to the latter. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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, ¶ 16 (Pre-Trial Chamber II, 15 June 2009).

¹¹⁹ See generally *Id.*

¹²⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version, Amended Document Containing the Charges, ICC-01/05-01/08-169-Anx3A, ¶ 57 (Office of the Prosecutor, 17 October 2008), annexed to Prosecution's Submission of Amended Document Containing the Charges and Amended List of Evidence, ICC-01/05-01/08-169 (Office of the Prosecutor, 17 October 2008).

¹²¹ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the

request, the Prosecution filed an Amended Document Containing the Charges on 30 March 2009, including allegations involving Mr. Bemba's liability as a superior pursuant to Article 28 of the Rome Statute as an alternative to his individual responsibility pursuant to Article 25 of the Rome Statute.¹²²

Examining Mr. Bemba's alleged liability under Article 25(3)(a) first, the Chamber began by agreeing with Pre-Trial Chamber I that "a determination on the criminal responsibility of a person within the meaning of [A]rticle 25(3)(a) of the Statute concerning co-perpetrators or indirect perpetrators should be examined in light of the concept of 'control over the crime.'"¹²³ It also agreed with the earlier decisions as to the objective elements of co-perpetration under the Rome Statute, confirming that: "(i) the suspect must be part of a common plan or an agreement with one or more persons; and (ii) the suspect and the other co-perpetrator must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime."¹²⁴ However, turning to the subjective elements of co-perpetration, the Chamber parted from the holding in *Lubanga* that Article 30 encompasses the concept of *dolus eventualis*.¹²⁵ While the Chamber agreed that, as a general matter, *dolus* can take one of three forms (*dolus directus* in the first degree, *dolus directus* in the second degree, and *dolus eventualis*), it held that Article 30 of the Rome Statute embraces only the first two degrees of *dolus*.¹²⁶ The Chamber supported its holding by citing, first, to the plain language of the provision, which defines intent as either a desire to bring about the

Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 118, ¶ 15.

¹²² See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, ICC-01/05-01/08-395 (Office of the Prosecutor, 30 March 2009).

¹²³ *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, *supra* n. 118, ¶ 348.

¹²⁴ *Id.* ¶ 350.

¹²⁵ *Id.* ¶¶ 352-69.

¹²⁶ *Id.* ¶¶ 357-59.

material elements of a crime or a knowledge that one's acts or omissions "will" cause the crime to occur "in the ordinary course of events."¹²⁷ The latter concept, according to the Chamber, "indicate[s] that the required standard of occurrence is close to certainty,"¹²⁸ which is a "standard undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis* – namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility."¹²⁹ Had the Rome Statute's drafters intended to include *dolus eventualis*, the Chamber reasoned, "they could have used the words 'may occur' or 'might occur in the ordinary course of events' to convey mere eventuality or possibility, rather than near inevitability or virtual certainty."¹³⁰ Second, the Chamber looked to the *travaux préparatoires* of the Rome Statute and concluded that "the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations,"¹³¹ and that the common law counterpart of *dolus eventualis*, advertent recklessness, was deleted at the Rome Conference.¹³² This deletion, according to the Chamber, "makes it even more obvious that both concepts [*dolus eventualis* and advertent recklessness] were not meant to be captured" by Article 30.¹³³ Hence, the Chamber concluded that a suspect cannot "be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtual certain consequence of the implementation of the common plan."¹³⁴

¹²⁷ *Id.* ¶¶ 358-62.

¹²⁸ *Id.* ¶ 362.

¹²⁹ *Id.* ¶ 363.

¹³⁰ *Id.* ¶ 363.

¹³¹ *Id.* ¶ 366.

¹³² *Id.*

¹³³ *Id.* ¶ 367.

¹³⁴ *Id.* ¶ 369.

Applying its understanding of the subjective requirement of co-perpetration to the case before it, the Chamber determined that Mr. Bemba lacked the requisite intent to commit the charged crimes under Article 25(3)(a).¹³⁵ Accordingly, it next considered whether there was sufficient evidence to establish substantial grounds to believe Mr. Bemba was responsible for the crimes under Article 28 of the Statute. First, the Chamber determined that Mr. Bemba was either a military or military-like commander, meaning that his alleged responsibility would be analyzed under Article 28(a), as opposed to Article 28(b).¹³⁶ Next, the Chamber laid out the elements for proving command responsibility, providing that:

(a) The suspect must be either a military commander or a person effectively acting as such;

(b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute;

(c) The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;

(d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in articles 6 to 8 of the Statute; and

(e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to

¹³⁵ *Id.* ¶¶ 372-401.

¹³⁶ *Id.* ¶ 406.

submit the matter to the competent authorities for investigation and prosecution.¹³⁷

As discussed by the Chamber, “the term ‘military commander’ refers to a category of persons who are formally or legally appointed to carry out a military commanding function (*i.e.*, *de jure* commanders),”¹³⁸ whereas the term “person effectively acting as a military commander” covers “a distinct as well as a broader category of commanders,”¹³⁹ namely, those “who are not elected by law to carry out a military commander’s role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command.”¹⁴⁰ As to the “effective command and control, or effective authority and control over the forces,” the Chamber determined that “‘effective control’ is mainly perceived as ‘the material ability [or power] to prevent and punish’ the commission of offences,”¹⁴¹ whereas “the term ‘effective authority’ may refer to the modality, manner or nature, according to which, a military or military-like commander exercise ‘control’ over his forces or subordinates.”¹⁴² Looking to the causality requirement – *i.e.*, the requirement that the “crimes committed by the suspect’s forces

¹³⁷ *Id.* ¶ 407.

¹³⁸ *Id.* ¶ 408.

¹³⁹ *Id.* ¶ 409.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ¶ 415.

¹⁴² *Id.* ¶ 413. The Chamber cited the jurisprudence of the ICTY for the proposition that “*indicia* for the existence of effective control are ‘more a matter of evidence than of substantive law,’ depending on the circumstances of each case.” *Id.* ¶ 416. Yet, there are several factors that could indicate effective control: “(i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (*i.e.*, ensure that they would be executed; (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.” *Id.* ¶ 417.

resulted from [the superior's] failure to exercise control properly over them" – the Chamber clarified that "the element of causality only relates to the commander's duty to prevent the commission of future crimes," and not to the duties to repress crimes or submit crimes to the competent authorities.¹⁴³ The Chamber also made clear that, in terms of establishing causality, "it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible..."¹⁴⁴

Turning to the requirement that "the suspect either knew or, owing to the circumstances at the time, should have known" about the relevant crimes, the Chamber first reiterated that "the Rome Statute does not endorse the concept of strict liability," meaning that "attribution of criminal responsibility for any of the crimes that fall within the jurisdiction of the Court depends on the existence of the relevant state of mind or degree of fault."¹⁴⁵ For purposes of responsibility under Article 28(a), this means that the suspect either had actual knowledge that his forces were "about to engage or were engaging or had engaged" in conduct constituting crimes under the Statute, or that the superior was "negligent in failing to acquire" such knowledge.¹⁴⁶ In analyzing the "should have known" standard, the Chamber recognized that the command responsibility provisions in the statutes of the ICTY and ICTR require that the commander "knew or had reason to know," as opposed to "knew or should have known," and concluded that that the language under Article 28(a) of the Rome Statute sets a different standard than that applied by the *ad hoc* tribunals.¹⁴⁷ Specifically, the Chamber found that the "should have known" standard "requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to

¹⁴³ *Id.* ¶ 424.

¹⁴⁴ *Id.* ¶ 425.

¹⁴⁵ *Id.* ¶ 427.

¹⁴⁶ *Id.* ¶¶ 428-32.

¹⁴⁷ *Id.* ¶ 434.

inquire, regardless of the availability of information at the time on the commission of the crime.”¹⁴⁸

Finally, the Chamber held Article 28(a) requires that the suspect “failed at least to fulfil one of the three duties...: the duty to prevent crimes, the duty to repress crimes or the duty to submit the matter to the competent authorities for investigation and prosecution.”¹⁴⁹

According to the Chamber, a superior can only take measures within his material possibility, “depend[ing] on the superior’s degree of effective control over his forces at the time his duty arises.”¹⁵⁰ Thus, “what constitutes a reasonable and necessary measure will be assessed on the basis of the commander’s *de jure* power as well as his *de facto* ability to take such measures.”¹⁵¹

Looking to the facts of the *Bemba* case, the Chamber found, first, “sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba, at all times relevant to the charges, effectively acted as a military commander and had effective authority and control over the MLC troops” who committed the relevant crimes.¹⁵² Next, the Chamber determined that Mr. Bemba “had the power to issue or give orders,”¹⁵³ as well as “the power to prevent and to repress the commission of crimes.”¹⁵⁴ It also found that Mr. Bemba “actually knew about the occurrence of the crimes committed during the five-month period of intervention” by his troops into the Central African Republic.¹⁵⁵ Lastly, the Chamber concluded that the suspect “failed to take all necessary and reasonable measures within his power to prevent

¹⁴⁸ *Id.* ¶ 433.

¹⁴⁹ *Id.* ¶ 435.

¹⁵⁰ *Id.* ¶ 443.

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 446.

¹⁵³ *Id.* ¶ 458.

¹⁵⁴ *Id.* ¶ 461.

¹⁵⁵ *Id.* ¶ 489.

or repress the commission by the MLC troops” of the crimes charged.¹⁵⁶

¹⁵⁶ *Id.* ¶ 490.

IV. ANALYSIS & RECOMMENDATIONS

As noted above, the following analysis is intended not to examine the application of the Chambers' understanding of the law to the facts in any of the cases discussed above, but rather to look at some of the issues raised by the Chambers' initial interpretations of Article 25, 28, and 30 and offer recommendations regarding matters that are likely to arise again in the future.

A. Article 25: Individual Criminal Responsibility

1. Indirect Co-Perpetration

The first question raised by the Court's early jurisprudence interpreting Article 25(3) is whether the *Katanga & Ngudjolo* Pre-Trial Chamber was correct in holding that the provision encompasses not only co-perpetration and indirect perpetration, but also "indirect co-perpetration." Indeed, this remains a live question in the *Katanga & Ngudjolo* case at the time of this writing, as the Defense for Germain Katanga has argued before the Trial Chamber currently presiding over the case that the Pre-Trial Chamber erred by adopting indirect co-perpetration as a new, "highly prejudicial and controversial" mode of liability.¹⁵⁷

As explained above, Pre-Trial Chamber I justified its finding that the Rome Statute embraces the concept of "indirect co-perpetration" by interpreting the term "or," as used in Article 25(3)(a), as a "weak or inclusive disjunction," as opposed to a "strong or exclusive disjunction."¹⁵⁸ While agreeing with the result reached by the Chamber, we believe it was not necessary to create a new, distinct

¹⁵⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, ICC-01/04-01/07-1578, ¶ 24 (Defense, 30 October 2009).

¹⁵⁸ See *supra* n. 91 *et seq.* and accompanying text.

mode of liability under the Rome Statute. Rather, the Chamber could have reached the same result by simply applying the elements of perpetration “jointly with another,” which is expressly encompassed by the Statute.¹⁵⁹ As defined by the Pre-Trial Chamber and accepted by the Katanga Defense team,¹⁶⁰ the material elements of co-perpetration are: (i) a plurality of persons; (ii) a common plan involving the commission of a crime within the Statute; and (iii) an essential contribution by each co-perpetrator to the execution of the common plan.¹⁶¹ Notably, there is no suggestion that the common plan must be predicated on each co-perpetrator directly carrying out his or her essential contribution. To illustrate, imagine a scenario where A and B both intend to commit a murder, and they agree to a plan whereby A will secure the gun and B will pull the trigger. Assuming A went out and purchased a gun and delivered the gun to B, and B proceeded to pull the trigger and kill the victim, there would be no question that the two could be convicted as co-perpetrators of the crime. Would that conclusion change if A had paid C to buy the gun and deliver the gun to B? Should A escape liability in such a scenario? There was still a plurality of persons, a common plan, and an essential contribution by both A and B, as well as the requisite intent on the part of each actor. Similarly, where the leaders of two rebel factions agree to “wipe out” a particular town, and each carries out his role in achieving that common plan, it is not relevant to the concept of co-perpetration *how* each co-perpetrator accomplishes his end of the plan. Of course, as a factual matter, the Court will need to establish that the

¹⁵⁹ Rome Statute, *supra* n. 1, Art. 25(3)(a).

¹⁶⁰ See *Katanga & Ngudjolo*, Defence for Germain Katanga’s Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, *supra* n. 157, ¶ 28 (“[German Professor Gerhard] Werle has defined the *actus reus* and *mens rea* of co-perpetration as follows: The *actus reus* of co-perpetration requires ‘(i) a plurality of persons; (ii) a common plan involving the commission of a crime under international law; (iii) an essential contribution to the execution of the common plan.’ The *mens rea* of co-perpetration requires that ‘every co-perpetrator has to act with the requisite mental element himself.’ *The Defence sees no reason to dispute this definition of co-perpetration, which corresponds with the definition adopted by the Pre-Trial Chamber, as set out above.*”) (emphasis added).

¹⁶¹ See *supra* n. 59 *et seq.* and accompanying text.

acts or omissions that brought about the crimes are attributable to each co-perpetrator, but nothing prevents the Court from using the theory of indirect perpetration to analyze each co-perpetrator's responsibility for his essential contribution.¹⁶²

It is worth noting that the Katanga Defense team seems to rest much of its argument against the notion of "indirect co-perpetration" on the fact that "the Defence has not come across a single legal tradition where criminal liability exists on the basis of indirect co-perpetration."¹⁶³ The same may be said of applying co-perpetration to a scenario where one or more of the co-perpetrators carry out their essential contribution through an organization that the co-perpetrator(s) control. Yet, as noted at the beginning of this report, the general part of the Rome Statute, including the provisions on modes of liability, was drafted as a blend of legal traditions, rather than an attempt to borrow wholesale from a particular jurisdiction.¹⁶⁴ Indeed, given the types of crimes within the jurisdiction of the ICC and the perpetrators likely to be prosecuted by the Court,¹⁶⁵ it would be actually be *inappropriate* to limit the Court to modes of liability recognized under national law. As Hector Olásolo explains:

¹⁶² This view is in line with the position taken by the Prosecution in a brief submitted to the Trial Chamber in the *Katanga & Ngudjolo* case. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), ICC-01/04-01/07-1541, ¶ 20 (Office of the Prosecutor, 19 October 2009) ("Joint commission through another person is not a distinct mode of liability. Rather it is a form of co-perpetration, wherein the members of the Common Plan use other persons or an organised structure of power as a tool or instrument to carry out the objective elements of the crime(s).").

¹⁶³ *Katanga & Ngudjolo*, Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, *supra* n. 157, ¶ 26.

¹⁶⁴ See *supra* n. 2 and accompanying text.

¹⁶⁵ The ICC Office of the Prosecutor has committed to a strategy of pursuing "those who bear the greatest responsibility for the most serious crimes." International Criminal Court, Office of the Prosecutor, *Prosecutorial Strategy 2009 – 2012*, ¶¶ 18-20 (February 2010).

Senior political and military leaders are usually geographically remote from the scene of the crime when the crimes take place and have no contact whatsoever with the low level members of their organisations who physically carry out the crimes ('the physical perpetrators'). As a result, the gravity of their actions or omissions *is not well reflected by the traditional modes of liability in national criminal law* because they never amount to an objective element of a crime... Indeed, despite the fact that senior political and military leaders are usually the individuals who plan and set into motion campaigns of large scale and systematic commission of international crimes (or at least have the power to prevent or stop them), *the application of the traditional modes of liability in national criminal law leads to the conclusion that they are mere participants in the crimes committed by others (accessories to the crimes), as opposed to perpetrators of the crimes (principals to the crimes)*. This does not reflect the central role that they usually play in the commission of international crimes, and often results in a punishment, which is inappropriately low considering the wrongdoing of their actions and omissions.¹⁶⁶

Hence, the Court should not be bound by any particular domestic jurisdiction's interpretation of perpetration "through another person," but rather should apply the underlying theory in a manner that is consistent not only with the language and history of the Rome Statute,

¹⁶⁶ Hector Olásolo, *THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES* 3 (2009) (emphasis added). See also Kai Ambos, *Article 25: Individual Criminal Responsibility*, in *Commentary on the Rome Statute of the International Criminal Court* 743, 746 (Otto Triffterer ed., 2008) ("[C]riminal attribution in international criminal law has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person's individual act is punished, international criminal law creates liability for acts committed in a collective context and systematic manner; consequently the individual's own contribution to the harmful result is not always readily apparent.").

but also with its goal of prosecuting the most serious crimes known to mankind.¹⁶⁷

2. *Distinguishing between Principals and Accessories: Ordering*

Another question raised by the *Katanga & Ngudjolo* confirmation decision is whether “ordering” under Article 25(3)(b) is a form of accessory, as opposed to principal, liability. As explained above, the Prosecutor had initially alleged that the Germain Katanga and Mathieu Ngudjolo Chui were responsible for the relevant crimes as co-perpetrators under Article 25(3)(a), or, in the alternative, that they “acted as accessories by ordering their subordinates to attack the civilian population of Bogoro.”¹⁶⁸ The Pre-Trial Chamber seemed to agree that “ordering” is a form of accessorial liability, holding that if it were to find sufficient evidence to establish substantial grounds to believe the two accused were responsible as co-perpetrators under Article 25(3)(a), such a finding would “render[] moot” the question whether they bore liability as accessories.¹⁶⁹ Yet, some commentators have questioned whether this is the best view.¹⁷⁰

¹⁶⁷ This approach has been generally been advocated by Rod Rastan, who has observed the following with respect to the Court’s approach to Article 25: “To remain adaptable to the different types of organized criminality that will be litigated in the ICC, the formal requirements of control of the crime theory as originally conceived may need to be applied in ways that will enable it to evolve in one of two ways: (i) the concept of the organizational apparatus through which control is exercised may need to be conceived in more flexible terms than those for which the theory was initially developed, or (ii) the parameters of Article 25(3)(a) may need to be broadened so as to capture other forms of principal liability not expressly regulated therein.” Rod Rastan, *Review of ICC Jurisprudence 2008*, 7 Nw. U. J. Int’l Hum. Rts. 261, 10 (Summer 2009).

¹⁶⁸ See *supra* n. 87 and accompanying text (emphasis added).

¹⁶⁹ See *supra* n. 88 and accompanying text.

¹⁷⁰ See, e.g., Ambos, *Article 25: Individual Criminal Responsibility*, *supra* n. 166, at 753 (arguing that ordering is principal, as opposed to accessorial, liability); Rastan, *supra* n. 167, at 11 (“Why should a superior who orders the commission of a crime by his subordinates not be held to be liable as a principal of the crime?”); Heller, *supra* n. 3, at 24 (“Categorizing ordering as a form of accessory liability... fails to

Commenting on this issue, Kai Ambos has argued that “[a] person who orders a crime is not a mere accomplice but rather a perpetrator by means, using a subordinate to commit the crime.”¹⁷¹ Thus, according to Ambos, ordering “actually belongs to the forms of perpetration provided for in subparagraph (a), being a form of commission ‘through another person’.”¹⁷² However, according to the Pre-Trial Chamber in *Katanga & Ngudjolo*, indirect perpetration is a rather narrow concept that applies to just three types of cases: (i) those in which the physical perpetrator lacks the capacity for blameworthiness, *i.e.*, he or she acted under duress;¹⁷³ (ii) those in which the perpetrator behind the perpetrator “commits a crime through the direct perpetrator by misleading the latter about the seriousness of the crime[,] the qualifying circumstances of the crime[,] and/or the identity of the victim;”¹⁷⁴ and (iii) those in which “the perpetrator behind the perpetrator commits the crime through another by means of ‘control over an organisation’ (*Organisationsherrschaft*).”¹⁷⁵ Importantly, this last scenario will only apply where the leader is able to secure “automatic compliance” with his orders, either due to his strict control over an organization sufficiently large to ensure that if one subordinate fails to carry out an order, he is easily replaced by a subordinate who will comply, or due to the leader’s control of the apparatus through “intensive, strict, and violent training regimes.”¹⁷⁶ Clearly, this interpretation of indirect perpetration would exclude a finding of

reflect the fact that the superior’s culpability for the crime is *greater* than the subordinate’s, because the superior not only violates his duty to control his subordinates, but also misuses his power in order to ensure that the crime is committed.”) (emphasis added).

¹⁷¹ Ambos, *Article 25: Individual Criminal Responsibility*, *supra* n. 166, at 753.

¹⁷² *Id.*

¹⁷³ *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 86, ¶ 495.

¹⁷⁴ *Id.* n. 658.

¹⁷⁵ *Id.* ¶ 498.

¹⁷⁶ *Id.* ¶¶ 517-18.

principal responsibility in cases such as the *Semanza* case tried before the ICTR.¹⁷⁷ In that case, Laurent Semanza, a Rwandan politician who was influential in his community, but held no formal position of authority at the time of the genocide, was convicted of ordering genocide and the crime against humanity of extermination in relation to events that took place at a church in April 1994.¹⁷⁸ The relevant facts were as follows:

[T]he Accused... went to Musha church on 8 or 9 April 1994 in order to assess the situation shortly after [Tutsi] refugees began arriving there. At that time, the Accused expressed an intention to kill the refugees. The Accused... then returned to the church with *Interahamwe*, soldiers, and gendarmes on 13 April 1994 around midmorning. These assailants proceeded to attack the refugees in the church with gunfire and grenades. After gaining access to the church, the attackers ordered the refugees to leave the church, and many complied. At some point after these refugees left the church, the Accused ordered the Hutu refugees to separate from the Tutsi refugees. The Tutsis were then executed on directions from the Accused... While the Tutsi refugees outside the church were being separated and executed, the assailants continued to attack those remaining in the church.¹⁷⁹

Importantly, the Appeals Chamber determined that the physical perpetrators “regarded [Semanza] as speaking with authority,”¹⁸⁰ and that he was therefore guilty on the basis of ordering, even though there was no evidence that Semanza misled the attackers or that the

¹⁷⁷ See *The Prosecutor v. Laurent Semanza*, Trial Judgment, ICTR-97-20 (Trial Chamber, 15 May 2003); *The Prosecutor v. Laurent Semanza*, Appeals Judgment, ICTR-97-20 (Appeals Chamber, 20 May 2005)..

¹⁷⁸ *Semanza*, Trial Judgement, *supra* n. 177, ¶ 15.

¹⁷⁹ *Id.* ¶ 196.

¹⁸⁰ *Semanza*, Appeals Judgement, *supra* n. 177, ¶ 363.

attackers formed part of a hierarchical organization strictly controlled by Semanza.

In light of the *Katanga & Ngudjolo* Pre-Trial Chamber's interpretation of indirect perpetration under the Rome Statute, Hector Olásolo argues that, except where superiors can be "considered principals to the crime pursuant to the notion of [*Organisationsherrschaft*]," orderers should in fact be viewed as accessories.¹⁸¹ He supports this view by noting that the ICTY "has not required that those senior political and military leaders who issue the orders must themselves fulfil the subjective elements of the crimes in question, including any requisite ulterior intent."¹⁸² Yet, what if the orderer *does* fulfill the subjective elements of the crimes, and just prefers to have his "dirty work" carried out by someone else? For instance, in the *Semanza* case discussed directly above, the ICTR expressly found "clear and unequivocal evidence of the Accused's genocidal intent at the time of the massacres at [the] church."¹⁸³ This intent, coupled with Semanza's role in gathering the physical perpetrators at the church and ordering them to engage in the killings, suggests it would be inapt to consider Semanza's responsibility as merely "derivative of"¹⁸⁴ the responsibility of the physical perpetrators.

Labeling an actor as an "accessory" or a "principal" to a crime under the Rome Statute is critical for two reasons. First, it is important for purposes of accurately representing that actor's responsibility in the historical record. William Schabas has made a similar point with respect to convictions under the theories of joint criminal enterprise and superior responsibility at the ICTY, saying that while "these two techniques facilitate the conviction of individual villains who have apparently participated in serious violations of human rights," they result in "discounted convictions that inevitably diminish the didactic

¹⁸¹ Olásolo, *supra* n. 166, at 140-41.

¹⁸² *Id.* at 139-40.

¹⁸³ *Semanza*, Trial Judgment, *supra* n. 177, ¶ 429.

¹⁸⁴ Olásolo defines accessories as "those others whose liability derives from the principal liability of the perpetrators." Olásolo, *supra* n. 166, at 14.

significance of the Tribunal's judgements and that compromise its historical legacy."¹⁸⁵ To illustrate, Schabas referred to the then-ongoing trial of Slobodan Milosevic, explaining:

At present, a conviction that relies upon either superior responsibility or joint criminal enterprise appears to be a likely result of the trial of Slobodan Milosevic...

However, if it cannot be established that the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit, we may well ask whether the Tribunal will have fulfilled its historic mission. It is just a bit like the famous prosecution of gangster Al Capone, who was sent to Alcatraz for tax evasion, with a wink and a nod, because federal prosecutors couldn't make proof of murder.¹⁸⁶

Second, the accurate characterization of one's level of responsibility is relevant to punishment, as the ICC Rules of Procedure and Evidence mandate that the "the degree of participation of the convicted person" be considered for purposes of sentencing.¹⁸⁷ Thus, in cases such as those represented by the *Semanza* example above, it would be appropriate for the Chambers of the ICC to consider expanding the interpretation given to indirect perpetration in the *Katanga & Ngudjolo* case. As discussed above,¹⁸⁸ the Court is not bound to interpret the modes of liability described in Article 25(3)(a) in line with any given national jurisdiction, and in fact, should mould its understanding of the

¹⁸⁵ William Schabas, *Mens rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 *New Eng. L. Rev.* 1015, 1034 (2002-03).

¹⁸⁶ *Id.*

¹⁸⁷ International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 145(1)(c) (2000).

¹⁸⁸ *See supra* n. 166 *et seq.* and accompanying text.

relevant concepts to adequately reflect the unique nature of international crimes.

B. Article 28: Responsibility of Commanders and Other Superiors

As previously discussed, Pre-Trial Chamber II confirmed the charges against Jean-Pierre Bemba Gombo pursuant to Article 28(a) of the Rome Statute,¹⁸⁹ which provides that a military commander is responsible for crimes committed by forces under the commander's effective command and control where: (i) the commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁹⁰ Notably, although the Chamber found that Mr. Bemba had *actual knowledge* that the forces under his control were committing or were about to commit crimes falling within the jurisdiction of the Court,¹⁹¹ it engaged in a brief discussion regarding the language under Article 28(a) requiring that the commander "either knew or, owing to the circumstances at the time, should have known" about the crimes.¹⁹² Specifically, the Chamber noted that while the term "knew" requires "the existence of actual knowledge," the term "should have known" is "in fact a form of negligence."¹⁹³ The Chamber also stated that the standard used in Article 28(a) is different than the standards employed by the ICTY and ICTR, the statutes of which provide that a military commander may be held responsible where, *inter alia*, he or she "knew or *had reason to know*" about the

¹⁸⁹ See *supra* n. 136 *et seq.* and accompanying text.

¹⁹⁰ Rome Statute, *supra* n. 1, Art. 28(a).

¹⁹¹ See *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, *supra* n. 118, ¶ 489.

¹⁹² *Id.* ¶ 428 (citing Article 28 of the Rome Statute).

¹⁹³ *Id.* ¶ 429.

relevant crimes.¹⁹⁴ Importantly, the ICTY and ICTR have interpreted this language to mean that “a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him which would have put him on notice of offences committed by subordinates.*”¹⁹⁵ By contrast, according to the *Bemba* Pre-Trial Chamber, the “should have known” language in Article 28(a) “requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime.”¹⁹⁶ Similarly, Pre-Trial Chamber I, in the context of the *Lubanga* confirmation of charges hearing, opined in a footnote that “the expression ‘had reason to know’ is a stricter requirement than the ‘should have known’ requirement because it does not criminalise the military superiors’ lack of due diligence to comply with their duty to be informed of their subordinates’ activities.”¹⁹⁷

Given the different language employed in the Rome Statute’s provision on command responsibility (“should have known”), on the

¹⁹⁴ *Id.* ¶ 434 (emphasis added).

¹⁹⁵ *The Prosecutor v. Zejnil Delalić, et al.*, Judgement, IT-96-21-A, ¶ 241 (Appeals Chamber, 20 February 2001) (emphasis added). *See also The Prosecutor v. André Ntagerura, et al.*, Judgement and Sentence, ICTR-99-46-T, ¶ 629 (Trial Chamber, 25 February 2004) (“A superior will be found to have possessed or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility provided that: (i) the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the statute; or (ii) the superior possessed information providing notice of the risk of such offences by indicating the need for additional investigations in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates.”); *The Prosecutor v. Miroslav Kvočka, et al.*, Judgement, IT-98-30/1-T, ¶ 317 (Trial Chamber, 2 November 2001) (“The Appeals Chamber in the *Čelebići* case found that Article 7(3) does not impose a duty upon a superior to go out of his way to obtain information about crimes committed by subordinates, unless he is in some way put on notice that criminal activity is afoot.”).

¹⁹⁶ *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, *supra* n. 118, ¶ 433.

¹⁹⁷ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 42, n. 439.

one hand, and the provisions found in the statutes of the ICTY and ICTR (“had reason to know”), on the other, it is arguable that the ICC is governed by a different standard than that governing the *ad hoc* tribunals. Indeed, this appears to have been the view of the ICTY Trial Chamber presiding over the *Čelebići* case, which was the first Chamber to consider the potential differences between the ICTY’s standard and that found in the Rome Statute.¹⁹⁸ Specifically, the *Čelebići* Chamber drew a distinction between “should have known” and “had reason to know” by finding that the former represents a mere negligence standard as applied in certain post-World War II cases,¹⁹⁹ whereas the latter derives from the language in Additional Protocol I to the Geneva Conventions, which provides that superiors may be responsible for the crimes of their subordinates “if they knew, or had information which should have enabled them to conclude in the circumstances at the time” that the crimes were about to be or had been committed.²⁰⁰ Yet, a number of commentators have taken the opposite view, holding that there is not any meaningful difference between the “had reason to know” and the “should have known”

¹⁹⁸ *The Prosecutor v. Zejnil Delalić, et al.*, Judgment, IT-96-21-T, ¶¶ 387-93 (Trial Chamber, 16 November 1998).

¹⁹⁹ *Id.* ¶¶ 338-39 (citing the judgment of the International Military Tribunal for the Far East, the *Hostages* case, the *Pohl* case, the *Roechling* case, and the case against Admiral Toyoda).

²⁰⁰ *Id.* ¶¶ 390-92 (citing Article 86 of Additional Protocol I). *See also* Victor Hansen, *Lessons from Abu Ghraib*, 42 *Go. L. Rev.* 335, 385-86 (2006-07) (“The *mens rea* adopted by the ICC for military commanders is a ‘know or should have known’ standard. The specific rejection of the language used in Article 86 of Protocol I, as well as the language used in the ICTY and ICTR statutes, was undoubtedly intentional. Arguably the term ‘should have known’ is more akin to a negligence standard similar to the standard used in the Hostage case and the Tokyo trials.”); E. van Sliedregt, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* 186 (2003) (arguing that the “should have known” and “had reason to know” standards “do differ slightly”); Guénaél Mettraux, *THE LAW OF COMMAND RESPONSIBILITY* 210 (2009) (“While the ‘had reason to know’ standard requires proof that the accused possessed some information that should have allowed him to draw certain conclusions as regards the commission of a crime or the risk thereof, the ICC standard goes one step below that standard and attributes knowledge based on a set of circumstances which, it is assumed, should have put the accused on notice of the commission of a crime or the risk thereof.”).

standards.²⁰¹ Indeed, the *Čelebići* Appeals Chamber, while endorsing the Trial Chamber's interpretation of "had reason to know," suggested that "had reason to know" and "should have known" could be reconciled, observing: "If 'had reason to know' is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of 'should have known' as upheld by certain cases decided after the Second World War."²⁰²

Unfortunately, the *travaux préparatoires* of the Rome Statute do not readily indicate whether the drafters consciously intended to depart from the language used in the statutes of the ICTY and the ICTR. Although the Informal Group on General Principles of Criminal Law noted in its proposal that the language "had reason to know" could be used instead of "should have known," suggesting a substantive difference between the two,²⁰³ there is no indication how either phrase was understood by the drafters. As Jenny Martinez has observed, since World War II, various courts and tribunals have convicted superiors for the crimes of their subordinates under a variety of standards, and these decisions have subsequently been afforded various

²⁰¹ See Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 *Leiden J. of Int'l L.* 715, 722 (2009) (arguing that both "should have known" and "had reason to know" "essentially constitute negligence standards"); Roberta Arnold & Otto Triffterer, *Article 28: Responsibility of Commanders and Other Superiors*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 795, 830 (Otto Triffterer ed., 2008) ("[E]ven though it will be the ICC's task to define the details of the *mens rea* requirements under its Statute, it may be concluded that, notwithstanding a slightly different working, the applicable test is still whether someone, on the basis of the available information, *had reason to know* in the sense of [Additional Protocol I.]" (emphasis in original); Col. C.H.B. Garraway, *Command Responsibility: Victor's Justice or Just Desserts?*, in *INTERNATIONAL CONFLICT AND SECURITY LAW* 68, 79-80 (R. Burchill and N.D. White, eds. 2005) ("[Article 28] differs from the wording used in the Statutes of the ICTY and ICTR but that does not necessarily mean that there is a risk that jurisprudence of the Tribunals and the ICC will develop in different directions.").

²⁰² *Delalić, et al.*, Appeals Judgment, *supra* n. 195, ¶ 235.

²⁰³ See *supra* n. 25 *et seq.* and accompanying text.

interpretations,²⁰⁴ making it difficult to ascribe a consensus understanding to the words “should have known” and “had reason to know.” Furthermore, the *ad hoc* tribunals had not defined the contours of their own provisions governing command responsibility at the time that the Rome Statute was adopted, meaning there could not have been a conscious intent on the part of the Rome Statute’s drafters to depart from the jurisprudence of the ICTY and ICTR regarding the *mens rea* standard to be applied in cases involving the alleged responsibility of commanders.

As a policy matter, Martinez makes a strong argument in favor of reading the Rome Statute’s language as imposing a duty of knowledge on military commanders, as opposed to reading “should have known” along the same lines as “had reason to know.” Stressing the nature of the harm inflicted in cases of command responsibility for international crimes, she explains:

Warfare entails an inevitably high risk that the lawfully sanctioned violence will spill over into unlawful violence, and any attempt to maintain the boundary between lawful and unlawful violence *must entail constant monitoring of what soldiers are doing*. A commander’s dereliction of duty must be quite severe, indeed, when men over whom he has “effective control” engage in genocide or crimes against humanity and he does not even notice. In such a situation, the harms flowing from his breach of duty are extreme, and predictably so. Criminal punishment of commanders is hardly unjust in a retributive sense when it is commensurate with the degree of harm their breach of duty has caused, and to the responsibility for the conduct and choices of others they chose to undertake at the moment they accepted military command.²⁰⁵

²⁰⁴ See generally Jenny S. Martinez, *Understanding Mens rea in Command Responsibility*, 5 J. Int’l Crim. Just. 638 (July 2007).

²⁰⁵ *Id.* at 663 (emphasis added).

Martinez further supports her position from a “prevention perspective,” noting that “it makes sense to require a commander to take the steps a reasonably prudent individual in the circumstances would take to acquire knowledge of subordinates’ behaviour.”²⁰⁶ On the other hand, the approach taken by the ICTY and ICTR is understandable on the grounds that “it would [be] unrealistic of international humanitarian law to require that commanders undertake the role of investigators when they are not in possession of any troublesome information.”²⁰⁷ It is likely for this reason that the *ad hoc* tribunals have required that the superior have received *some* minimal information that would at least put the superior *on notice* of the need to investigate whether his or her subordinates are about to or have engaged in a crime. Importantly, as applied by the *ad hoc* tribunals, the “had reason to know” standard *does not* require that a superior had “information on subordinate offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility.”²⁰⁸ Rather, as the ICTY Appeals Chamber explained in the *Čelebići* case:

A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he ‘had reason to know’ ... As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent

²⁰⁶ *Id.* at 664.

²⁰⁷ Ilias Bantekas, *Review Essay*, 7 J. Int’l Crim. Just. 1197, at 1206 (November 2009).

²⁰⁸ *Delalić, et al.*, Appeals Judgment, *supra* n. 195, ¶ 238.

or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.²⁰⁹

Notably, this same approach – *i.e.*, one that requires that the superior be put on notice, in some form, of the need to investigate the behavior of his or her subordinates – could easily be interpreted as the approach warranted under Article 28, given that the clause “owing to the circumstances at the time” appears immediately before the words “should have known.”²¹⁰

C. Article 30: Mental Element

1. “Unless Otherwise Provided” in the Context of Co-Perpetration

One of two significant issues raised by the *Lubanga* Pre-Trial Chamber’s findings under Article 30 relates to its approach to the “[u]nless otherwise provided” language in that provision in the context of co-perpetration. As explained above, Mr. Lubanga is charged with war crimes relating to the enlistment, conscription, and use of children under the age of fifteen in armed conflict.²¹¹ Notably, the Elements of Crimes make clear that, with regard to the perpetrator’s state of mind

²⁰⁹ *Id.*

²¹⁰ See Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 Yale J. Int’l L. 89, 122 (Winter 2000) (arguing that the clause “owing to the circumstances at the time” “probably makes the ICC standard closer to the ICTY standard than to the mythical ‘should have known’ standard.”). See also Ambos, *Critical Issues in Bemba*, *supra* n. 201, at 722 (“If one really wants to read a difference in these two standards considering that the ‘should have known’ standard ‘goes one step below’ the ‘had reason to know’ standard, it would be the ICC’s task to employ a restrictive interpretation which brings the former in line with the latter.”); Mettraux, *supra* n. 200, at 212 (arguing that the ICC should interpret the “should have known” standard “restrictively so as to mean that a military commander ‘should have known’ of crimes where information available to him at the time allowed for an inference that he should reasonably have drawn – namely, that crimes were being or were about to be committed by his men”).

²¹¹ See *supra* n. 42 and accompanying text.

as to the age of the enlisted or conscripted children, it is only required that the perpetrator “knew or should have known that such person or persons were under the age of 15 years.”²¹² Noting this language, and the fact that Article 30 states “[u]nless otherwise provided,” a person must act with “intent and knowledge,” the *Lubanga* Pre-Trial Chamber initially held that the Prosecutor could satisfy his burden with respect to the mental element by establishing that, if Mr. Lubanga did not know the age of the children he enlisted, conscripted, or used in armed conflict, he “lacked such knowledge because he or she did not act with due diligence in the relevant circumstances.”²¹³ However, the Chamber went on to hold that, because in this case the suspect was charged as a co-perpetrator based on joint control over the crime, which “requires that all the co-perpetrators, including the suspect, be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realisation of the objective elements of the crime,” the lower standard of “should have known” regarding the age of the children was “not applicable.”²¹⁴

The Chamber gave no support for this finding, and it is unclear why the Chamber did not merely require that each co-perpetrator either knew that the children were under fifteen or assumed the risk of that being the case. In the words of Thomas Weigend:

The Chamber correctly states that each co-perpetrator must have an indispensable role in the common plan, and that they must all be mutually aware of their roles. But when the law requires only negligence with respect to an accompanying circumstance, *e.g.* the age of the victims, not more than negligence in that respect can be demanded of co-perpetrators. The common control of their actions remains unaffected by the fact that one or all of them were unaware of the age of the boys they

²¹² International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Art. 8(2)(b)(xxvi); *id.* Art. 8(2)(e)(vii).

²¹³ *See supra* n. 76 and accompanying text.

²¹⁴ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 42, ¶ 365.

conscripted or enlisted: they recruited, in intentional co-operation, the boys they had before them, and the law says that it is immaterial whether they knew their true age or not. Their offence in fact remains an intentional one even when negligence is sufficient as to an accompanying circumstance.²¹⁵

Notably, during the drafting of the Elements of Crimes relating to war crimes involving child soldiers, “there was a considerable body of opinion” that held that requiring actual knowledge of the children’s ages “would impose too high a burden on the prosecution.”²¹⁶ Indeed, even though there was some debate as to whether the Elements of Crimes could legislate a mental requirement different than that described in the Statute,²¹⁷ “*all delegations considered that it was*

²¹⁵ Thomas Weigend, *Intent, Mistake Of Law, and Co-Perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. Int’l Crim. Just. 471, 485 (July 2008).

²¹⁶ Charles Garraway, *Article 8(2)(b)(vxxi)—Using, Conscripting or Enlisting Children*, in THE INTERNATIONAL CRIMINAL COURT ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 205, 207 (Roy S. Lee ed., 2001).

²¹⁷ This is an issue of ongoing debate. *See, e.g.*, Weigend, *supra* n. 215, at 472-74. On the one hand, Article 21 of the Rome Statute, entitled “Applicable Law,” provides that “The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence,” suggesting the Elements of Crimes are “law.” Rome Statute, *supra* n. 1, Art. 21(1). On the other hand, Article 9 states that the “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8” and that “Elements of Crimes and amendments thereto shall be consistent with this Statute,” *id.* Art. 9(1), (3), which may suggest that the Elements “could not provide for ‘downward’ departures from the offence requirements listed in the Statute.” Weigend, *supra* n. 215, at 473. For its part, the Elements of Crimes states the following: “As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, *i.e.*, intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.” Elements of Crimes, *supra* n. 212, General Introduction, ¶ 2. The *Lubanga* Pre-Trial Chamber simply states, without engaging in any analysis, that “the ‘should have known’ requirement as provided for in the Elements of Crimes in relation to

important to signify to the judges what the international community considered that the appropriate test was in these particular circumstances, in order to ensure the protection of children.”²¹⁸ Nevertheless, the *Lubanga* Pre-Trial Chamber overrode the express language of the Elements of Crimes, without explanation. If this approach is followed in the future, it will effectively negate the “unless otherwise provided” language in Article 30 in all cases in which co-perpetration is charged as a mode of liability, having significant consequences not only for those charged in relation to the enlistment, conscription, and use of children in armed conflict, but also with regard to charges involving war crimes that need only be committed “wantonly” or “willfully.”²¹⁹ Given the absence of support in the Rome Statute for such an approach, we recommend that the Court apply the lower standard of *mens rea* where called for by the Statute or Elements, regardless of the mode of liability with which a perpetrator is charged.

2. Dolus Eventualis

As demonstrated by the split in positions taken by Pre-Trial Chamber I in the *Lubanga* confirmation decision and Pre-Trial Chamber II in the *Bemba* confirmation decision, one of the biggest questions to arise from the early jurisprudence of the Court on general issues of criminal law is whether the *Lubanga* Pre-Trial Chamber was correct in holding that *dolus eventualis* is encompassed by Article 30 of the Rome Statute.²²⁰

[A]rticles 8(2)(b)(xxvi) and 8(2)(e)(vii) is an exception to the ‘intent and knowledge’ requirement embodied in [A]rticle 30 of the Statute.” *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 42, ¶ 359. According to Weigend, the *Lubanga* Chamber erred in failing to accompany this conclusion with “at least a modicum of explanation.” Weigend, *supra* n. 215, at 474.

²¹⁸ Garraway, *Article 8(2)(b)(vixi)—Using, Conscripting or Enlisting Children*, *supra* n. 216, at 207 (emphasis added).

²¹⁹ See *infra* n. 239 *et seq.* and accompanying text.

²²⁰ Although the term *dolus eventualis* has “at different times and in different legal systems, acquired different connotations,” see Weigend, *supra* n. 215, at 482, we use the term here as it was used by the *Lubanga* Pre-Trial Chamber, namely, to describe

As explained above, the *Lubanga* Pre-Trial Chamber began its discussion of Article 30 by noting that the “cumulative reference [in Article 30(1)] to ‘intent’ and ‘knowledge’ requires the existence of a volitional element on the part of the suspect.”²²¹ Yet, rather than turning to the definitions of “intent” and “knowledge” under subparagraphs (2) and (3) of Article 30, the Chamber went on to discuss *its own understanding* of Article 30’s “volitional element,” determining that it encompasses not only *dolus directus* in the first degree (or intent) and *dolus directus* in the second degree (knowledge that the circumstance will occur in the ordinary course of events), but also *dolus eventualis*.²²² Notably, the Chamber did not provide any support for its finding that Article 30 encompasses *dolus eventualis*, but rather merely observed that the concept has been “resorted to by the jurisprudence of the *ad hoc* tribunals.”²²³ However, the statutes of the ICTY and the ICTR are silent on the subject of *mens rea*, indicating that the judges of those tribunals were free to interpret the mental element required for the crimes within their jurisdiction according to their understanding of customary international law as it existed at the time the crimes were committed.²²⁴ The drafters of the Rome Statute, by contrast, expressly considered various approaches to defining the mental element for purposes of the ICC, including *dolus eventualis*, and ultimately defined “intent” as including those situations where a person “means” to cause a consequence or “is aware that it *will occur* in the ordinary course of events.”²²⁵ Similarly, the drafters defined “knowledge” as “awareness that a circumstance exists

the situation in which “the suspect is (a) aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.” *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 42, ¶ 352.

²²¹ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 42, ¶ 351.

²²² *Id.* ¶¶ 351-52.

²²³ *Id.* ¶ 352.

²²⁴ *See supra* n. 1.

²²⁵ Rome Statute, *supra* n. 1, Art. 30(2) (emphasis added).

or a consequence *will occur* in the ordinary course of events.”²²⁶ Thus, as a number of commentators have observed, the plain language of the Rome Statute – specifically, the use of the words “will occur,” as opposed to “may occur” – appears to exclude the concept of *dolus eventualis*.²²⁷

²²⁶ *Id.* Art. 30(3) (emphasis added).

²²⁷ See, e.g., Werle & Jessberger, *supra* n. 3, at 41 (“Under [Article 30], the minimum requirement for criminal liability is awareness of the probable occurrence of the consequence. That means that in the perpetrator’s perception at the time of the act, carrying out the conduct would cause the consequence, unless extraordinary circumstances intervened. Thus, it is not enough for the perpetrator to merely anticipate the possibility that his or her conduct would cause the consequence. This follows from the words ‘will occur’; after all, it does not say ‘may occur’.”); Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 *Crim. L. Forum* 1, 21-22 (1999) (“[T]he wording of article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of ‘indirect intent.’”); Eser, *supra* n. 3, at 915 (“Whereas the civil law tradition would still treat it as intention if the perpetrator, aware of the risk that his conduct may cause the prohibited result, is prepared to accept the result should the prohibited result in fact occur, this seems not to be the position of the Rome Statute when requiring that in the perception of the perpetrator the consequences ‘will’ rather than merely ‘may’ occur.”); Johan Van der Vyver, *International Decisions: Prosecutor v. Jean-Pierre Bemba Gombo*, 104 *Am. J. of Int’l L.* 241, 243 (“The phrase designating the mental element that must exist in relation to the consequences of the act – that the accused ‘means to cause the consequence or is aware that it will occur in the ordinary course of events’ – covers *dolus directus* and *dolus indirectus* only.”). It should be noted that two scholars have stated that the concept of *dolus eventualis* is included within the ambit of Article 30. See Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 *J. Int’l Crim. Just.* 26, 32 (April 2003) (finding that Article 30 “does include intent and recklessness (*dolus eventualis*), though... it implicitly excludes liability in cases of mere negligence (*culpa*)” (emphasis in original)); Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, As Mirrored in the ICC Statute*, 2 *J. Int’l Crim. Just.* 38, 45 (March 2004) (“Knowledge is here taken to mean ‘awareness, that ... a consequence will occur in the ordinary course of events’ (Article 30(3) of the ICC Statute), including the concept of *dolus eventualis* used in continental European legal theory.”). However, neither of these authors provide any support for their assertions, either in terms of analyzing the language of the provision or the drafting history; each merely asserts that Article 30 encompasses *dolus eventualis* within a broader, general discussion of the general part of the Rome Statute.

Furthermore, even assuming some level of ambiguity in the plain language of the Statute that would allow for recourse to the drafting history, the relevant *travaux préparatoires* strongly suggest a decision on the part of the drafters to exclude both the concept of recklessness and that of *dolus eventualis* from the Statute,²²⁸ except as otherwise provided. First, although the Working Group established by the 1995 *Ad hoc* Committee on the Establishment of an International Criminal Court expressly highlighted *dolus eventualis* as a concept that “could be discussed,”²²⁹ the term was never incorporated into the various draft proposals defining the mental element. Furthermore, when the Informal Group on General Principles of Criminal Law put forward its proposed language governing *mens rea*, the article was divided into two parts: one un-bracketed portion, which contained language virtually identical to the language that appears in the final Article 30,²³⁰ and a separate, bracketed portion, defining the concept of recklessness, which included a footnote stating that “the concepts of recklessness and *dolus eventualis* should be further considered.”²³¹ This proposal is instructive for two reasons. First, the fact that the proposal included separate language relating to recklessness and *dolus eventualis*, in addition to the language that was ultimately adopted in Article 30, suggests that the concepts of recklessness and *dolus eventualis* were not considered by the drafters to be inherently included in the Article 30 language. Second, the bracketed portion was ultimately dropped, indicating that the drafters chose to exclude

²²⁸ Note that there is some ambiguity as to whether these concepts were considered equivalent by the drafters. According to Roger Clark, who participated in the drafting of the Rome Statute’s general principles, including the mental element, the two concepts were “apparently viewed... as substantially the same concept” in the draft proposal put forth by the Informal Group on General Principles of Criminal Law, while on other occasions, Clark believed some drafters “regarded *dolus eventualis* as closer to knowledge.” Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, *supra* n. 36, at 301.

²²⁹ *See supra* n. 8 and accompanying text.

²³⁰ *See supra* n. 32 and accompanying text.

²³¹ *See supra* n. 33 and accompanying text.

recklessness and *dolus eventualis* from the scope of the article.²³² Finally, individuals involved in the drafting of the Rome Statute have themselves suggested that Article 30 encompasses only *dolus directus* in the first degree (or intent) and *dolus directus* in the second degree (knowledge that the circumstance will occur in the ordinary course of events). For instance, Roger Clark, referring to the *Lubanga* Chamber's holding that Article 30 encompasses both *dolus directus* in the second degree and *dolus eventualis*, has observed:

These categories are hardly what emerges from the literal language of the Statute, nor, if my analysis of the history is correct, from the *travaux préparatoires*. The first of these (*dolus directus* of the second degree) comes close to knowledge as defined in Article 30 and may thus pass muster. But *dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus. *If it is to be read into the Statute, it is in the teeth of the language and history.*²³³

Similarly, Donald Piragoff and Darryl Robinson have written:

Article 30 only refers specifically to 'intent' and 'knowledge.' With respect to *other mental elements*, such as certain forms of 'recklessness' and '*dolus eventualis*', concern was expressed by some delegations that various forms of negligence or objective states of mental culpability should not be contained as a general rule in article 30. Their inclusion in article 30 might send the wrong signal that these forms of culpability were sufficient for criminal liability as a general rule. As no consensus could be achieved in defining these

²³² See *supra* n. 40 *et seq.* and accompanying text.

²³³ Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings*, *supra* n. 34, 529 (emphasis added).

mental elements for the purposes of the general application of the Statute, it was decided to leave the incorporation of such mental states of culpability in individual articles that defined specific crimes or modes of responsibility, if and where their incorporation was required by the negotiations.²³⁴

Lastly, even aside from the plain text and drafting history of Article 30, it is arguable that excluding *dolus eventualis* from the generally applicable standard of *mens rea* under the Rome Statute makes sense as a matter of policy, in light of the fact that the ICC is dedicated to prosecuting “the most serious crimes of concern to the international community as a whole.”²³⁵ Indeed, as Antonio Cassese has observed,

²³⁴ Piragoff & Robinson, *supra* n. 13, at 850 (emphasis added). Piragoff and Robinson later state: “Traditionally, in most legal systems, ‘intent’ does not only include the situation where there is direct desire and knowledge that the consequence will occur or be caused, but also situations where there is knowledge or foresight of such a substantial probability, amounting to virtual certainty, that the consequence will occur. This is likely the meaning to be attributed to the phrase ‘will occur in the ordinary course of events.’” *Id.* at 860. Oddly, Piragoff and Robinson then go to say: “In civilian legal systems, [the phrase “will occur in the ordinary course of events”] is a notion captured by the concept of *dolus eventualis*.” *Id.* However, this is not a common interpretation of the concept, which is typically defined along the lines of the *Lubanga* Pre-Trial Chamber’s understanding, or as a notion equivalent to recklessness. See, e.g., Ambos, *General Principles of Criminal Law in the Rome Statute*, *supra* n. 227, at 21-22 (“[*Dolus eventualis*] is a kind of “conditional intent” by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness. The perpetrator may be indifferent to the result or be “reconciled” with the harm as a possible cost of attaining his or her goal... However, the perpetrator is not, as required by article 30(2)(b), aware that a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible.”); John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. Miami Int’l & Comp. L. Rev. 57, 63-64 (2004) (“In Anglo/American legal systems, *dolus eventualis* is usually defined as a manifestation of fault in cases where the perpetrator acted ‘recklessly’ in regard to the (undesired) consequences of the act.”); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. Int’l Crim. Just. 109, 111 (March 2007) (defining *dolus eventualis* as “recklessness or advertent recklessness”).

²³⁵ Rome Statute, *supra* n. 1, Pmb1.

“in the case of genocide, crimes against humanity and aggression, the extreme gravity of the offence presupposes that it may only be perpetrated when intent and knowledge are present.”²³⁶ While Cassese laments the Court’s inability to prosecute *war crimes* committed with mere “recklessness,”²³⁷ the Rome Statute and Elements of Crimes in fact expressly lower the requisite mental element for a number of war crimes, meaning that such crimes will often fall within the “unless otherwise provided” exception to Article 30’s default standard of intent and knowledge. For instance, as seen in the *Lubanga* confirmation decision, a person may be held responsible for the crimes of enlisting, conscripting, and using children in armed conflict if he or she “knew or should have known” that the children were under the age of fifteen.²³⁸ Other provisions under Article 8 of the Rome Statute specify that the perpetrator must have acted “wilfully,”²³⁹ which has consistently been interpreted by the ICTY to incorporate “wrongful intent, or recklessness,”²⁴⁰ or “wantonly,”²⁴¹ which has similarly been

²³⁶ Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, *supra* n. 3, at 154. See also Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, *supra* n. 234, 64-65 (arguing that, in light of the Court’s dedication to ending impunity for the most serious crimes of international concern, “it is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC”).

²³⁷ Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, *supra* n. 3, at 154.

²³⁸ See *supra* n. 75 and accompanying text. As addressed above, the *Lubanga* Pre-Trial Chamber held that this lower standard could not be applied in cases of co-perpetration, but provided no compelling support for its position, and we see no reason why this approach should be followed in the future. See *supra* n. 213 *et seq.* and accompanying text.

²³⁹ See Rome Statute, *supra* n. 1, Art. 8(2)(a)(i) (“Wilful killing”); *id.* Art. 8(2)(a)(iii) (“Wilfully causing great suffering, or serious injury to body or health.”); *id.* Art. 8(2)(a)(vi) (“Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial.”).

²⁴⁰ See *The Prosecutor v. Stanislav Galić*, Judgement and Opinion, IT-98-29-T, ¶ 54 (Trial Chamber, 5 December 2003) (noting that the International Committee for the Red Cross, in its Commentary to Article 85 of Additional Protocol I, defines “wilfully” as “encompass[ing] the concepts of ‘wrongful intent’ or ‘recklessness,’” and “accept[ing] this explanation”); *aff’d The Prosecutor v. Stanislav Galić*,

interpreted as recklessness.²⁴² Although it is true that certain war crimes are not so modified, the best result may in fact require that non-

Judgement, IT-98-29-A, ¶ 140 (Trial Chamber, 30 November 2006) (holding that the Trial Chamber's reasoning in relation to the definition of "willfulness" as encompassing recklessness is "correct"); *The Prosecutor v. Pavle Strugar*, Judgement, IT-01-42-A, ¶ 270 (Appeals Chamber, 17 July 2008) (holding that "wilfully" incorporates "wrongful intent, or recklessness, [but] not 'mere negligence'").

²⁴¹ See Rome Statute, *supra* n. 1, Art. 8(2)(a)(iv) ("Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.").

²⁴² See, e.g., *The Prosecutor v. Radoslav Brđanin*, Judgement, IT-99-36-T, ¶ 593 (Trial Chamber, 1 September 2004) ("With respect to the *mens rea* requisite of [wanton] destruction or devastation of property under Article 3 (b), the jurisprudence of this Tribunal is consistent. The destruction or devastation must have been either perpetrated intentionally, with the knowledge and will of the proscribed result, or in reckless disregard of the likelihood of the destruction or devastation."). Note that other provisions of the Rome Statute specify that acts must be committed "intentionally," such as the crime against humanity of torture, which requires, *inter alia*, "the intentional infliction of severe pain or suffering." Rome Statute, *supra* n. 1, Art. 7(2)(e). Addressing this issue, the *Bemba* Pre-Trial Chamber determined that the use of "intentional" in Article 7(2)(e) of the Rome Statute, coupled with the "[u]nless otherwise provided" language of Article 30, means that the "separate requirement of knowledge as set out in [A]rticle 30(3) of the Statute" is excluded from the crime against humanity of torture. *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, *supra* n. 118, ¶ 194. Another view, expressed by Piragoff and Robinson, is that the use of "intentional" or "intentionally" in certain provisions of Articles 7 and 8 "is likely superfluous." Piragoff & Robinson, *supra* n. 13, at 855. See also Van der Vyver, *International Decisions*, *supra* n. 227, at 246 ("The definitions of crimes that involve 'intentionally directing attacks' or 'intentionally' using starvation of civilians as a method of warfare... add nothing to the general requirement of fault. The tautological choice of words is here entirely attributable to definitions being taken from existing treaties in force and the drafters' resolve to retain that language as far as possible."). Yet, given that the use of "intentional" and "intentionally" only appears with regard to *consequence* elements (*i.e.*, "intentional infliction of pain and suffering" or "intentional infliction of conditions of life... calculated to bring about the destruction of part of a population"), as opposed to *circumstance* elements (*i.e.*, "with knowledge of the attack" or "in the knowledge that such attack will cause incidental loss of life or injury to civilians"), the approach taken by the *Bemba* Pre-Trial Chamber makes little practical difference, as "intent" under Article 30(2)(b) encompasses those situations in which, "[i]n relation to a consequence, [the suspect]

superior perpetrators who commit such war crimes without any volition towards the outcome of the crime be prosecuted at the national level, reserving the ICC's resources for those who either acted with intent, or, in the case of superior responsibility, are held to a higher standard given their positions of authority.

means to cause that consequence *or is aware that it will occur in the ordinary course of events.*" Rome Statute, *supra* n. 1, Art. 30(2)(b) (emphasis added). *See also* Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, 19 *Crim. L. Forum* 473, 495 (2008) ("Under the ICC Statute, the distinction between acting 'intentionally' and 'knowingly' is very narrow. Knowledge that a consequence 'will occur in the ordinary course of events' is a common element in both conceptions.").

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MODES OF LIABILITY AND THE MENTAL ELEMENT: ANALYZING THE EARLY JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court (ICC), unlike the statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, contains detailed provisions relating to the general part of criminal law, including articles distinguishing various modes of direct liability and superior responsibility, and specifying the mental element required for crimes within the jurisdiction of the Court. Importantly, these provisions represent an attempt by the drafters to create truly international principles of criminal law, and thus none is drawn directly from any single domestic legal tradition.

While the Rome Statute has been praised for its provisions setting forth the rules of general criminal law applicable to the crimes within the jurisdiction of the ICC, the unique nature of the provisions has raised a number of questions regarding their appropriate interpretation. Two of the Court's Pre-Trial Chambers have attempted to answer some of these questions in the context of the confirmation decisions in the first three cases to go to trial before the ICC. This report examines the holdings in these first decisions regarding individual criminal responsibility and the mental element under the Rome Statute, not for purposes of analyzing the application of the law to the facts in any given case, but rather to look at some of the issues raised by the Chambers' initial interpretations of the Rome Statute's provisions on criminal law and offer recommendations regarding matters that are likely to arise again in the future.



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