

**Cour
Pénale
Internationale**



**International
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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo Chui***

Public Redacted Version

Decision on the confirmation of charges

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517. The main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders. Thus, “[s]uch Organisation develops namely a life that is independent of the changing composition of its members. It functions, without depending on the individual identity of the executant, as if it were automatic.”⁶⁸⁴ An authority who issues an order within such an organisation therefore assumes a different kind of responsibility than in ordinary cases of criminal ordering. In the latter cases, article 25(3)(b) of the Statute provides that a leader or commander who orders the commission of a crime may be regarded as an accessory.

518. Attributes of the organisation — other than the replaceability of subordinates — may also enable automatic compliance with the senior authority’s orders. An alternative means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict, and violent training regimens. For example, abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape, and kill, may be an effective means for ensuring automatic compliance with leaders’ orders to commit such acts. The leader’s ability to secure this automatic compliance with his orders is the basis for his principal — rather than accessorial — liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed.

II. Objective elements of joint commission of a crime

519. The Chamber has established the elements that allow for the criminal actions of subordinates to be attributed to their leaders — in this case, FRPI and FNI

Kommentar zum Strafgesetzbuch, 11th ed., Berlin, De Gruyter, 1993, § 25 n. 122, 127; MAURACH, R., GÖSSEL, K.H. & ZIPF, H., *Strafrecht, Allgemeiner Teil 2*, Heidelberg, Müller, 2008, § 48 n. 88, SCHÖNKE, A. & SCHRÖDER, H., *Kommentar zum Strafgesetzbuch*, 26th ed., München, Beck, 2001, § 25 n. 25.

⁶⁸⁴ ROXIN, C., *Tatertschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, p. 245.

combatants to Germain Katanga and Mathieu Ngudjolo Chui respectively. It is now necessary to explain how those crimes may be jointly attributed to both of them. With regard to the crime of using soldiers under the age of fifteen, the Chamber will analyse whether that Germain Katanga and Mathieu Ngudjolo Chui “used” those minors, themselves rather than through another person. The Chamber will subsequently address the basis for mutual attribution of liability in such use of children of different ethnicities. As previously mentioned, the leaders’ horizontal sharing of responsibility is critical because the distinction between the Ngitis and the Lendus made it unlikely for combatants to comply with the orders of a leader who was not of the same ethnicity. In particular, the Defence for Germain Katanga submitted that it was improper to hold a co-perpetrator criminally liable for the crimes committed by the fully responsible subordinates of his co-perpetrator.⁶⁸⁵

520. However, in the view of the Chamber, these crimes may be ascribed to each of them on the basis of mutual attribution, if the additional objective elements for the mode of liability known as joint commission of the crime are satisfied. The *Lubanga* Decision, which referred to joint commission as “co-perpetration”, defined and explained this mode of liability under article 25(3)(a), as follows:

[t]he 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 objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.⁶⁸⁶

521. Co-perpetration based on joint control over the crime involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime. As explained, the fulfilment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person.

⁶⁸⁵ ICC-01/04-01/07-698, para. 27.

⁶⁸⁶ ICC-01/04-01/06-803-tEN, para. 325; AMBOS, K., “Article 25: Individual Criminal Responsibility”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, p. 479, margin No. 8.

a. Existence of an agreement or common plan between two or more persons

522. In the view of the Chamber, the first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between the persons who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual. Participation in the crimes committed by the latter without coordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute.

523. As explained in the *Lubanga* Decision, the common plan must include the commission of a crime.⁶⁸⁷ Furthermore, the Chamber considered that the agreement need *not be explicit*, and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.⁶⁸⁸

b. Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

524. The Chamber considers that the second objective requirement of co-perpetration based on joint control over the crime is the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.

525. When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime. Where such persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.

⁶⁸⁷ ICC-01/04-01/06-803-tEN, para. 344.

⁶⁸⁸ ICC-01/04-01/06-803-tEN, para. 345.

526. Although some authors have linked the essential character of a task – and hence, the ability to exercise joint control over the crime – to its performance at the execution stage,⁶⁸⁹ the Statute does not encompass any such restriction. Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime).

III. Subjective elements

a. The suspects must carry out the subjective elements of the crimes

527. The Chamber finds that the commission of the crimes requires that the suspects carry out the subjective elements of the crimes with which they are charged, including any required *dolus specialis* or ulterior intent for the type of crime involved.⁶⁹⁰

528. Article 30 of the Statute sets out the general subjective element for all crimes within the jurisdiction of the Court, specifying 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.” The general mental element of the crime is satisfied:

⁶⁸⁹ ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 292 *et seq.* According to ROXIN, those who contribute only to the commission of a crime at the preparatory stage cannot be described as co-perpetrators even if they carry out tasks with a view to implementing the common plan. This point of view is shared by MIR PUIG, S., *Derecho Penal, Parte General*, Editorial Reppertor, 6th ed., Barcelona, Editorial Reppertor, 2000, p. 385; HERZEBERG, R.D., *Täterschaft und Teilnahme*, München, Beck, 1977, pp. 65 *et seq.*; KÖHLER, M., *Strafrecht Allgemeiner Teil*, Berlin, Springer, 1997, p. 518. However, many other authors do not share this point of view. See inter alia: MUÑOZ CONDE, F., “Dominio de la voluntad en virtud de aparatos organizados en organizaciones no desvinculadas del Derecho”, 6 *Revista Penal* (2000), p. 113; PÉREZ CEPEDA, A., “Criminalidad en la empresa: problemas de autoría y participación”, 9 *Revista Penal* (2002), p. 106 *et seq.*; JESCHECK, H. & WEIGEND, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed., Berlin, Duncker und Humblot, 1996, p. 680; KÜHL K., *Strafrecht Allgemeiner Teil*, 2nd ed., München, Vahlen, 1997, p. 111; KINDHÄUSER, U., *Strafgesetzbuch, Lehr- und Praxiskommentar*, Baden-Baden, Nomos, 2002, para. 25, No. 38.

⁶⁹⁰ *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 495.

- i. if the person means to engage in the relevant conduct with the intent to cause the relevant consequence, and/or is aware that it will occur in the ordinary course of events; and
- ii. if the person is “[aware] that a circumstance exists or a consequence will occur in the ordinary course of events”.

529. The cumulative reference to “intent” and “knowledge” 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 express intent to bring about the objective elements of the crime (also known as *dolus directus* of the first degree).⁶⁹¹

530. The above-mentioned volitional element also encompasses another form of the concept of *dolus* which has been explained by the jurisprudence of this Chamber, relied on by the jurisprudence of the *ad hoc* tribunals and commonly accepted in the legal literature.⁶⁹² This form of *dolus* concerns those situations in which although the suspect does not have the intent to bring about the objective elements of the crime, he is nonetheless “aware that it (the consequence) will occur in the ordinary course of events” (also known as *dolus directus* of the second degree), as expressed in article 30(2)(b), second part, of the Statute.

531. As previously mentioned, there is no need for the present Decision to discuss whether the concept of *dolus eventualis* has a place within the framework of article 30

⁶⁹¹ ICC-01/04-01/06-803-tEng, paras 315, 352. The mentioned decision included in the footnote 430 the following references: ESER, A., “Mental Elements–Mistakes of Fact and Law”, in CASSESSE, A., GAETA, P. & JONES, J. (Ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford, Oxford University Press, 2002, pp. 899-900.

⁶⁹² ICC-01/04-01/06-315; ICC-01/04-01/06-352. The mentioned decision included the following references in footnotes 431-433: ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeals Judgement, 15 July 1999, paras 219-220; ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 587; PIRAGOFF, D.K., “Article 30: Mental Element”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, Nomos, 1999, p. 534; RODRIGUEZ-VILLASANTE & PIETRO J.L., “Los Principios Generales del Derecho Penal en el Estatuto de Roma”, 75 *Revista Española de Derecho Militar* (2000), p. 417; ESER, A., “Mental Elements–Mistakes of Fact and Law”, in CASSESSE, A., GAETA, P. & JONES, J. (Ed.), *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I, Oxford, Oxford University Press, 2002, pp. 905 *et seq.*; STRATENWERTH, G. & KUHLEN, L., *Strafrecht, Allgemeiner Teil I*, § 8/107.