

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-01/06**

Date: **14 March 2012**

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO***

**Public**

**Judgment pursuant to Article 74 of the Statute**

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**Other**

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evidence related to the alleged crime.

### **b) The Mental Element**

1007. Article 30 defines the requirement of “intent” by reference to three particular factors: conduct, consequence and circumstance. First, pursuant to Article 30(2)(a), a person has intent if he or she “means to engage in the conduct”. Second, under Article 30(2)(b) and in relation to a consequence, it is necessary that the individual “means to cause that consequence or is aware that it will occur in the ordinary course of events”. Third, by Article 30(3) “knowledge” “means awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.

1008. As noted earlier, the Pre-Trial Chamber decided that the subjective elements that the suspect must fulfil<sup>2712</sup> are the following: (i) “[t]he suspect and the other co-perpetrators [...] 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 [...] must all mutually accept such a result by reconciling themselves with it or consenting to it”;<sup>2713</sup> and (ii) “the awareness by the suspect of the factual circumstances enabling him or her to jointly control the crime”.<sup>2714</sup>

1009. The Pre-Trial Chamber decided that the “cumulative” reference to “intent” and “knowledge” in Article 30 means there must be a “volitional element” on the part of the accused. This encompasses not only situations in which the suspect:

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<sup>2712</sup> ICC-01/04-01/06-803-tEN, para. 349.

<sup>2713</sup> ICC-01/04-01/06-803-tEN, para. 361.

<sup>2714</sup> ICC-01/04-01/06-803-tEN, para. 366.

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 objective elements of the crime (also known as *dolus directus* of the first degree)<sup>2715</sup>

but also the “other forms of the concept of *dolus*”.<sup>2716</sup> The Pre-Trial Chamber was of the view that these include:

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);<sup>2717</sup> 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*).<sup>2718</sup>

1010. The Pre-Trial Chamber considered that within *dolus eventualis* “two kinds of scenarios are distinguishable”. First, if the co-perpetrator was aware of a *substantial* risk that his conduct will bring about “the objective elements of the crime”, his intent can be inferred from the fact that he acted in the manner agreed in spite of this level of awareness.<sup>2719</sup> Second, if there was a low risk of bringing about “the objective elements of the crime”, “the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions”.<sup>2720</sup>

1011. The conscription or enlistment of children under the age of 15 or using them to participate actively in hostilities is said by the prosecution to have been the *result* of the implementation of a common

<sup>2715</sup> ICC-01/04-01/06-803-tEN, para. 351.

<sup>2716</sup> ICC-01/04-01/06-803-tEN, para. 352.

<sup>2717</sup> ICC-01/04-01/06-803-tEN, para. 352.

<sup>2718</sup> ICC-01/04-01/06-803-tEN, para. 352.

<sup>2719</sup> ICC-01/04-01/06-803-tEN, para. 353.

<sup>2720</sup> ICC-01/04-01/06-803-tEN, paras 354 and 364.



plan.<sup>2721</sup> The drafting history of the Statute suggests that the notion of *dolus eventualis*, along with the concept of recklessness, was deliberately excluded from the framework of the Statute (e.g. see the use of the words “unless otherwise provided” in the first sentence of Article 30).<sup>2722</sup> The plain language of the Statute, and most particularly the use of the words “will occur” in Article 30(2)(b) as opposed to “may occur”, excludes the concept of *dolus eventualis*.<sup>2723</sup> The Chamber accepts the approach of Pre-Trial Chamber II on this issue.<sup>2724</sup>

1012. In the view of the Majority of the Chamber, the “awareness that a consequence will occur in the ordinary course of events” means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of “possibility” and “probability”, which are inherent to the notions of “risk” and “danger”. Risk is defined as “danger, (exposure to) the possibility of loss, injury or other adverse circumstance”.<sup>2725</sup> The co-perpetrators only “know” the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the

<sup>2721</sup> ICC-01/04-01/06-2748-Red, paras 74 and 75.

<sup>2722</sup> Roger S. Clark, “The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the elements of offences”, *Criminal Law Forum* (2001), page 301; 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”, *Criminal Law Forum* (2008), page 529; War Crimes Research Office, *Modes of Liability and the Mental Element: Analyzing the early jurisprudence of the International Criminal Court*, Washington College of Law, American University (September 2010), page 69 *et seq.*

<sup>2723</sup> War Crimes Research Office, *Modes of Liability and the Mental Element: Analyzing the early jurisprudence of the International Criminal Court*, Washington College of Law, American University (September 2010), page 69 *et seq.*

<sup>2724</sup> ICC-01/05-01/08-424, paras 364-369.

<sup>2725</sup> See *Oxford Dictionary* (2002, 5<sup>th</sup> ed).

part of the co-perpetrator that the consequence “will occur in the ordinary course of events”. A low risk will not be sufficient.

1013. The Chamber is of the view that the prosecution must establish, as regards the mental element, that:

(i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence “will occur in the ordinary course of events”; and

(ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.

1014. As already highlighted, the general mental element contained in Article 30(1) (“intent” and “knowledge”) applies to all crimes under the jurisdiction of the Court “[u]nless otherwise provided”. Article 8(2)(e)(vii), which gives the Court jurisdiction over the war crime of “conscripting and enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” does not derogate from this principle. However, under Article 8(2)(e)(vii) of the Elements of Crimes the following requirement is set out:

3. The perpetrator knew or should have known that such a person or persons were under the age of 15 years.

1015. This lesser mental element raises a number of issues, including:

(i) whether it is possible, under the framework of the Rome Statute, for the Elements of Crimes to alter any of the material elements of the crimes established in the Statute; and (ii) the scope and interpretation

of this “should have known” requirement. However, as set out above, the prosecution does not invite a conviction of the accused on the basis “he should have known” that the individuals who were conscripted or enlisted, or who were used, were under the age of 15 years. It submits the Chamber should convict the accused only if it finds he knew there were children under 15 years.<sup>2726</sup> The Majority of the Chamber considers it is unnecessary to approach the case on any other basis, and it would be inappropriate to rule on these substantive issues in the abstract.

1016. Addressing the contextual elements, and in accordance with Element 5 of Article 8(2)(e)(vii) and the introduction to Article 8 of the Elements of Crimes, the accused must be “aware of [the] factual circumstances that established the existence of an armed conflict.” It is not necessary for the prosecution to prove he knew that there was an armed conflict.<sup>2727</sup> The accused must also be aware of the link between these factual circumstances and his conduct.

1017. Judge Fulford has written a concurring opinion which is attached to this Judgment.

## **6. Conclusions of the Chamber**

1018. For the reasons set out above, the prosecution must prove in relation to each charge that:

- (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once

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<sup>2726</sup> ICC-01/04-01/06-2748-Red, para. 72, footnote 123; ICC-01/04-01/06-2778-Red, para. 39 *et seq.*

<sup>2727</sup> ICC-01/04-01/06-803-tEN, para. 360.