

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 15 June 2009

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
*IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO***

Public Document

**Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of
the Prosecutor Against Jean-Pierre Bemba Gombo**

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

The Office of the Prosecutor

Fatou Bensouda, Deputy Prosecutor
Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Karim A.A. Khan
Aimé Kilolo-Musamba
Pierre Legros

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson
Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae
Amnesty International

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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Chamber has established that the requisite *mens rea* has not been satisfied as elaborated below. It follows that the Chamber will focus only on the subjective elements.

351. As highlighted in the previous paragraph, in order to hold a person criminally responsible for crimes against humanity and war crimes, it is not sufficient that the objective elements are met. In this respect, the Statute does not permit attribution of criminal responsibility on the basis of strict liability. Rather, it requires also the existence of a certain state of guilty mind (*actus non facit reum nisi mens rea*) – commonly known as the *mens rea*. The latter is reflected in what may be defined as the subjective elements. In the present context, there are three cumulative subjective elements that must be satisfied alongside the objective elements in order to make a finding on the suspect's criminal responsibility as a co-perpetrator within the framework of the evidentiary standard required at the pre-trial stage as provided for in article 61(7) of the Statute. In particular, the suspect must (a) fulfil the subjective elements of the crimes charged, namely intent and knowledge as required under article 30 of the Statute; (b) be aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (c) be aware of the factual circumstances enabling him to control the crimes jointly with the other co-perpetrator.⁴⁴²

a) Notion of intent and knowledge of the perpetrator under article 30 of the Statute

352. The Chamber recalls article 30 of the Statute which stipulates:

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 [objective] 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;

⁴⁴² Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, pp. 118, 123-124; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, pp. 178, 180-181.

- (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.

353. The Chamber recalls that article 30 of the Statute codifies the general mental (subjective) element required for the crimes that fall within the jurisdiction of the Court. It defines the requisite state of mind for establishing the suspect's criminal responsibility for any of the crimes set out in articles 6 to 8 of the Statute. The express language of its first paragraph denotes that the provision is meant to function as a default rule for all crimes within the jurisdiction of the Court, "unless otherwise provided".⁴⁴³ Consequently, it must be established that the material elements⁴⁴⁴ of the respective crime were committed with "intent and knowledge", unless the Statute or the Elements of Crimes require a different standard of fault. This conclusion finds support in paragraph 2 of the General Introduction to the Elements of Crimes which reads: "[w]here 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 (...) intent, knowledge or both, set out in article 30, applies".

354. For instance, the application of the "should have known" standard pursuant to article 28(a) of the Statute justifies a deviation from the default rule as it requires a lower fault element than that required under article 30 of the Statute. Moreover, there are certain crimes that are committed with a specific purpose or intent, and thus, requiring that the suspect not only fulfil their subjective elements, but also an additional one – known as specific intent or *dolus specialis*.⁴⁴⁵

⁴⁴³ See paragraph 136 of the decision.

⁴⁴⁴ The general objective (material) elements of a crime are referred to in article 30(2) and (3) of the Statute as conduct, consequence and circumstance.

⁴⁴⁵ In this regard the Chamber recalls that the war crime of torture and pillaging call for a specific intent in addition to the intent and knowledge requirement of article 30 of the Statute, see paragraphs 294 and 320 of the decision.

355. In the opinion of the Chamber, article 30(2) and (3) of the Statute is constructed on the basis of an element analysis approach - as opposed to - a crime analysis approach, according to which different degrees of mental element are assigned to each of the material elements of the specific crime under consideration.⁴⁴⁶

356. The Chamber recalls that, according to article 30 of the Statute, the general mental element of a crime is fulfilled (a) where the suspect means to engage in the particular conduct with the will (intent) of causing the desired consequence, or is at least aware that a consequence (undesired) “will occur in the ordinary course of events” (article 30(2) of the Statute); and (b) where the suspect is aware “that a circumstance exists or a consequence will occur in the ordinary course of events” (article 30(3) of the Statute).

357. The Chamber stresses that the terms “intent” and “knowledge” as referred to in article 30(2) and (3) of the Statute reflect the concept of *dolus*, which requires the existence of a volitional as well as a cognitive element. Generally, *dolus* can take one of three forms depending on the strength of the volitional element *vis-à-vis* the cognitive element – namely, (1) *dolus directus in the first degree* or direct intent, (2)

⁴⁴⁶ The Chamber’s conclusion also finds support in literature, see for example, M. Kelt/H. von Hebel, “General Principles of Criminal Law and the Elements of Crimes” in: R. S. Lee et al. (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, 2001), p. 28; M. E. Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Law Perspective’, 19 *Criminal Law Forum* p. 473, at pp. 475-476 (2008); R. 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 *Criminal Law Forum* p. 519, at p. 530 (2008).

dolus directus in the second degree – also known as oblique intention,⁴⁴⁷ and (3) *dolus eventualis* – commonly referred to as subjective or advertent recklessness.⁴⁴⁸

358. In the view of the Chamber, article 30(2) and (3) of the Statute embraces two degrees of *dolus*. *Dolus directus in the first degree* (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime.⁴⁴⁹ According to the *dolus directus in the first degree*, the volitional element is prevalent as the suspect purposefully wills or desires to attain the prohibited result.

359. *Dolus directus in the second degree* does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, *i.e.*, the suspect “is aware that [...] [the consequence] will occur in the ordinary course of events” (article 30(2)(b) of the Statute).⁴⁵⁰ In this context, the volitional element decreases substantially and is overridden by the cognitive element, *i.e.* the awareness that his or her acts or omissions “will” cause the *undesired* proscribed consequence.

⁴⁴⁷ English law adopts the concept of oblique intention that is equivalent to the notion of *dolus directus in the second degree* in continental law systems. See for example, D. Ormerod/A. Hooper, *Blackstone's Criminal Practice*, (OUP, 2009), p. 19; I. Kugler, 'The Definition of Oblique Intention', 68 *The Journal of Criminal Law* p. 79(2004); G. Williams, 'Oblique Intention', 46 *Cambridge Law Journal* p. 417, at p. 422 (1987).

⁴⁴⁸ The concept of subjective or advertent recklessness known in common law systems is generally treated as equivalent to the notion of *dolus eventualis* in the continental law systems. See for example, ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 587; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, “Judgment”, 22 March 2006, para. 101; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, “Judgment”, 1 September 2004, para. 265 n. 702; ICTY, *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, “Judgment on Motions for Acquittal Pursuant to Rule 98Bis”, 5 April 2004, para. 50; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, “Judgment”, 15 July 1999, para. 220.

⁴⁴⁹ Pre-Trial Chamber I, *Lubanga* decision, para. 351; Pre-Trial Chamber I, *Katanga* decision, para. 529.

⁴⁵⁰ Pre-Trial Chamber I, *Lubanga* decisión, ICC-01/04-01/06-803-tEN, para. 351; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 530.

360. With respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute. This conclusion is supported by the express language of the phrase “will occur in the ordinary course of events”, which does not accommodate a lower standard than the one required by *dolus directus in the second degree* (oblique intention). The Chamber bases this finding on the following considerations.

361. The Statute, being a multilateral treaty, is governed by the principles of treaty interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”).⁴⁵¹

362. Thus, the Chamber considers that, by way of a literal (textual) interpretation, the words “[a consequence] will occur” serve as an expression for an event that is “inevitably” expected.⁴⁵² Nonetheless, the words “will occur”, read together with the phrase “in the ordinary course of events”, clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as “virtual certainty” or “practical certainty”, namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.⁴⁵³

⁴⁵¹ UNTS, vol. 1155, p. 331; this approach has been confirmed by the Appeals Chamber, “Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 33.

⁴⁵² C. Soanes/A. Stevenson (eds.), *Concise Oxford English Dictionary*, (OUP, 11th ed., 2004), pp. 1650-1651; *Shorter Oxford English Dictionary On Historical Principles*, vol. 2, (OUP, 5th ed.), p. 3641.

⁴⁵³ See in the same vein, England and Wales Court of Appeal, (Children), Re [2000] EWCA Civ 254 (22 September 2000); House of Lords, R v. Woolin (H.L.(E.)) [1998] 3 W.L.R., pp. 392 G-H, 393 A; Nedrick [1986] 1 W.L.R., p. 1028; Federal Supreme Court of Justice (Bundesgerichtshof), BGHSt Bd. 21, S. 283 (Vol. 21, p. 283). The Chamber’s finding is also supported in legal doctrine, see D. Ormerod, *Smith and Hogan Criminal Law*, (OUP, 12th ed.), pp. 97 – 107; I. Kugler, ‘The Definition of Oblique Intention’, 68 *The Journal of Criminal Law* p. 79 (2004); G. Williams, ‘Oblique Intention’, 46 *Cambridge Law Journal* p. 417, at p. 422 (1987); Cf. A. Esser, ‘Mental Element – Mistake of Fact and Mistake of Law’, in A. Cassese/P. Gatea/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (OUP, 2002), pp. 914-915; J. D. Van der Vyver, ‘The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law’ 12 *University of Miami International & Comparative Law Review* p. 57, at p. 63 (2004).

363. This standard is 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.⁴⁵⁴ Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words “may occur” or “might occur in the ordinary course of events”⁴⁵⁵ to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.

364. The Chamber’s interpretation is also confirmed by way of review of the *travaux préparatoires* of the Statute. The Chamber notes that according to article 32 of the VCLT “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31[...].” Thus, in order to confirm its finding reached on the basis of a textual interpretation of article 30(2) (b) of the Statute, the Chamber will look to the *travaux préparatoires*.⁴⁵⁶

⁴⁵⁴ See ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, “Judgment”, 15 July 1999, para. 220 (“In order for responsibility for the deaths to be imputable to the others [...]. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were *most likely* to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required” (emphasis added)); ICTY, *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, “Decision on form of further Amended Indictment and Prosecution Application to Amend”, 26 June 2001, para. 29 (“‘most likely’ means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to possibility”); ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, “Judgment”, 31 July 2003, para. 587 (“The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he “reconciles himself” or ‘makes peace’ with the likelihood of death. Thus, if the killing is committed with ‘manifest indifference of the value of human life’, even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*”; ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-T, “Decision on Motions for Acquittal Pursuant to Rule 98Bis of the Rules of Procedure and Evidence”, 27 September 2004, para. 37 (adopting the same standard established in the cases *Tadić* and *Stakić*).

⁴⁵⁵ See also O. Triffterer, “The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility”, in: K. Koufa (ed.), *The New International Criminal Law*, (Sakkoulas, 2003), p. 706.

⁴⁵⁶ See also ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports (2004), paras 94-95; ICJ, *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 17 December 2002, ICJ Reports (2002), paras 53-58; ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment of 3 February 1994, ICJ Reports

365. The Chamber examined carefully the *travaux préparatoires* and found that the first reference to the different degrees of culpability including *dolus eventualis* and recklessness appeared in an annex appended to the report of the 1995 *Ad hoc* Committee as concepts subject to considerations in future sessions.⁴⁵⁷ These concepts appeared once more in a compilation of proposals prepared by the Preparatory Committee in 1996.⁴⁵⁸ Article H, which covered the issue of *mens rea* stated:

[...] 2. For the purposes of this Statute and unless otherwise provided, a person has intent where: [...] (b) in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. [...]

[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: [...]

[Note. The concepts of recklessness and *dolus eventualis* should be further considered in view of the seriousness of the crimes considered. Therefore, paragraph 4 would provide a definition of “recklessness”, to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly. It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex [...]).⁴⁵⁹

366. The Chamber observed that although the drafters explicitly stated that the concepts of “recklessness and *dolus eventualis* should be further considered”, the reference to *dolus eventualis* disappeared altogether from subsequent draft proposals and there is no record that such concept was meant to be included in article 30 of the Statute. This observation suggests that the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations. As to advertent recklessness, which

(1994), para. 55; ECtHR, *Feldbrugge v The Netherlands (Merits)*, App. No. 8562/79, Judgment of 29 May 1996, (joint dissenting opinion of Judges Ryssdal, Robert, Lagergren, Matscher, Evans, Bernhardt and Gersing), paras 19-22.

⁴⁵⁷ Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), Annex II, pp. 58-59.

⁴⁵⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51st Sess., Vol. 2, Supp. No. 22, UN Doc. A/51/22 (1996), Article H, Proposal 1, p. 92.

⁴⁵⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51st Sess., Vol. 2, Supp. No. 22, UN Doc. A/51/22 (1996), Article H, Proposal 1, pp. 92-93.

is viewed as the common law counterpart of *dolus eventualis*, there was a paragraph on this concept that remained throughout the negotiations,⁴⁶⁰ until it was finally deleted by the Working Group on General Principles of Criminal Law in Rome.⁴⁶¹

367. Thus, even assuming that the drafters made no further reference to *dolus eventualis* as it had been part of the discussion on recklessness, the fact that the draft provision was deleted in Rome makes it even more obvious that both concepts were not meant to be captured by article 30 of the Statute.

368. The Chamber's conclusion finds further support in the draft proposal of article H quoted above. It is apparent that paragraph 2(b) of the said proposal, which states that a person has intent in relation to consequence where "that person means to cause that consequence or is aware that it will occur in the ordinary course of events", is identical to the current wording of article 30(2)(b) of the Statute. This suggests that the language of article H(2), (b) with its high required standard was not controversial from the beginning of the negotiations until it found its way in the final text of article 30(2)(b). This conclusion is further supported by the fact that the proposed text of article H(2), (b) initially appeared and remained throughout the drafting process without square brackets. Moreover, the fact that paragraph 4 on recklessness and its accompanying footnote, which stated that "recklessness and *dolus eventualis* should be further considered", came right after paragraph 2(b) in the same proposal, indicates that recklessness and *dolus eventualis* on the one hand, and the phrase "will occur in the ordinary course of events" on the other, were not meant to be the same notion or to set the same standard of culpability.

⁴⁶⁰ *Decisions Taken By the Preparatory Committee At Its Session Held in New York 11 to 21 February 1997*, UN Doc. A/AC.249/1997/L.5(1997), Annex II, *Report of the Working Group on General Principles of Criminal Law and Penalties*, Article H, para. 4, pp. 27-28; *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998), Article 23[H], para. 4, p. 60; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, UN Doc. A/CONF.183/2/Add.1 (1998), Article 29, para. 4, p. 66; *Summary Records of the Meetings of the Committee of the Whole, 1st meeting*, UN Doc. A/CONF.183/C.1/SR.1, para. 24.

⁴⁶¹ *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGCP/L.4, p. 255.

369. Consequently, the Chamber considers that the suspect could not 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 virtually certain consequence of the implementation of the common plan. The Chamber's finding that the text of article 30 of the Statute does not encompass *dolus eventualis*, recklessness or any lower form of culpability aims to ensure that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in article 22(2) of the Statute. It also ensures that the Chamber is not substituting the concept of *de lege lata* with the concept of *de lege ferenda* only for the sake of widening the scope of article 30 of the Statute and capturing a broader range of perpetrators.

b) The co-perpetrator's awareness and acceptance that implementing the common plan will result in the fulfillment of the material elements of the crimes

370. The second subjective element that needs to be satisfied under the theory of co-perpetration is the (1) co-perpetrators' mutual awareness that implementing the common plan will result in the fulfillment of the material elements of the crimes; and yet (2) they carry out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or are aware that in the ordinary course of events, the fulfillment of the material elements will be a virtually certain consequence of their actions.

c) The suspect's awareness of the factual circumstances enabling him or her to control the crime with the other co-perpetrator

371. The final subjective element that must be met under the theory of co-perpetration based on control over the crime is the suspect's awareness of the factual