Modes of Liability and the Mental Element
Analyzing the Early Jurisprudence of the I

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ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or "hybrid" war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

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

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

WAR CRIMES RESEARCH OFFICE
International Criminal Court
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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:

> (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

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 shou] is is

Ngudjolo Chui were responsible for the relevant crimes as co-

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

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.

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 ICCf

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> (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

encompassing not only *dolus directus*

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.

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

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[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

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.

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*

required under the Statute.[13]

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 lega

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 Establiatora-2(ll)See infra

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

„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*

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

> (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

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.

RELEVANT JURISPRUDENCE

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

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.”

commission."[51] Finally, there is the "control over the crime" approach,

(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

> 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.*

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

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

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

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]

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, i(he Ch)3(he Ch) Tm3f1

these leaders “almost automatically.”

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

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 II[118] 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

> 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

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[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, repla(d s)8(ue)4(or 21T1in.48 Tf1 0 0n0044B00480055004800440056>35n46)3(m)6(m)6(ar

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.

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.

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] fn/F0 0 142.4 Tm[(Asexplasi)-4nre

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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 achievinmies

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 princ

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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

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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

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[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

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

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[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.

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 comma

relevant crimes.[194]

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

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 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

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 ot

> 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]

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

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

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[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] Cha

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

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

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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).

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 t

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*

> 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,

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[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.

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-

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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 BrĎanin*, 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

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.

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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)DC BT1 0 0 1 211.16TTJETBT/F1 (e.14 caussupra

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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.

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