Expert Paper
November 2013

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A review of the International Criminal Court's current jurisprudence and practice

Modes of Liability

Women's Initiatives for Gender Justice

The Women's Initiatives for Gender Justice is an international women's human rights organisation that advocates for gender justice through the International Criminal Court (ICC) and works with women most affected by the conflict situations under investigation by the ICC.

The Women's Initiatives for Gender Justice has country-based programmes with local and/or regional partners in Uganda, the Democratic Republic of the Congo, Sudan and Libya and a legal monitoring programme for all ICC Situation countries: Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya, Libya, the Côte d'Ivoire and Mali.

The Women's Initiatives for Gender Justice was the first NGO to file before the ICC and is the only international women's human rights organisation to have been recognised with amicus curiae status by the Court. To date, the organization has filed before the ICC on seven occasions, most recently on gender and reparations issues in *The Prosecutor v Thomas Lubanga Dyilo* case.

The Women's Initiatives for Gender Justice works with more than 6,000 grassroots partners and members across multiple armed conflicts and has offices in The Hague, Cairo, Kitgum and Kampala to support our country-based programmes.

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Introduction

The Rome Statute of the International Criminal Court (ICC) provides for jurisdiction over individuals for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[1] The various modes of individual criminal responsibility, understood as the grounds upon which a person can be held criminally liable for committing a crime within the jurisdiction of the ICC, are regulated primarily by Articles 25 and 28 of the Rome Statute. The Statute provides for two main categories of liability: individual criminal responsibility (Article 25), and the responsibility of commanders and other superiors (Article 28). This articulation of individual criminal responsibility within the Statute, also referred to as the 'mode of liability', lies at the core of a case, providing the legal theory connecting the alleged perpetrator to the crimes charged.

The Women's Initiatives for Gender Justice has been monitoring the ICC, including all the cases and situations before the Court, since 2004.[2] The ICC now has 20 cases before it relating to eight Situations. A total of 32 individuals have been charged by the Court. Since the Rome Statute entered into force in 2002, the ICC has issued 25 arrest warrants, including two warrants each for President Omar Al'Bashir and Bosco Ntaganda[3]; issued five summonses to appear for nine suspects[4]; taken seven suspects into custody[5]; held nine confirmation of charges hearings[6]; and issued

1 Article 5, Rome Statute. An amendment to the Rome Statute for the crime of aggression was adopted on 11 June 2010 at the 10-year Review Conference of the Rome Statute and the International Criminal Court. *RC/Res.6, Annex 1.* The Amendment addresses the definition, elements of the crime and conditions within which the ICC can exercise its jurisdiction for the crime of agression.

2 See Gender Report Cards on the International Criminal Court 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012, available at <http://www.iccwomen.org/publications/index.php>. See also Legal Eye on the ICC 2009, 2010, 2011, 2012 and 2013, available at <http://www.iccwomen.org/news/index.php>, ; see also <http://www.iccwomen.org/index.php>, see also twitter @4GenderJustice.

3 *Lubanga Arrest Warrant,* ICC-01/04-01/06-2; *Ngudjolo Arrest Warrant,* ICC-01/04-01/07-260; *Katanga Arrest Warrant,* ICC-01/04-01/07-1; *Mbarushimana Arrest Warrant,* ICC-01/04-01/10-2-tENG; *Mudacumura Arrest Warrant,* ICC-01/04-01/12-2; *Kony Arrest Warrant,* ICC-02/04-01/05-53; *Otti Arrest Warrant,* ICC-02/04-01/05-54; *Odhiambo Arrest Warrant,* ICC-02/04-01/05-56; *Ongwen Arrest Warrant,* ICC-02/04-01/05-57; *Lukwiya Arrest Warrant,* ICC-02/04-01/05-55; *Bemba Arrest Warrant,* ICC-01/05-01/08-15t-Eng; *Harun Arrest Warrant,* ICC-02/05-01/07-2; *Kushayb Arrest Warrant,* ICC-02/05-01/07-3-Corr; *Hussein Arrest Warrant,* ICC-02/05-01/12-2; *Barasa Arrest Warrant,* ICC-01/09-01/13-1-Red2; *Al-Senussi Arrest Warrant,* ICC-01/11-01/11-4; *Saif Gaddafi Arrest Warrant,* ICC-01/11-01/11-3; *Muammar Gaddafi Arrest Warrant,* ICC-01/11-01/11-2; *Laurent Gbagbo Arrest Warrant,* ICC-02/11-01/11-1; *Goudé Arrest Warrant,* ICC-02/11-02/11-1; *Simone Gbagbo Arrest Warrant,* ICC-02/11-01/12-1. Two arrest warrants were issued in the following cases: *Ntaganda Arrest Warrant 1,* ICC-01/04-02/06-2-Anx-tENG, *Ntaganda decision on Arrest Warrant 2,* ICC-01/04-02/06-36-Red; *Al'Bashir Arrest Warrant,* ICC-02/05-01/09-1; *Al'Bashir Arrest Warrant 2,* ICC-02/05-01/09-95.

4 *Summons to Appear for Bahr Idriss Abu Garda,* ICC-02/05-02/09-2, 7 May 2009; *Summons to Appear for Saleh Mohammed Jerbo Jamus,* ICC-02/05-03/09-2, *Summons to Appear for Abdallah Banda Abakaer Nourain,* ICC-02/05-03/09-3, 15 June 2010; *Decision on Summons to Appear for Ruto, Kosgey and Sang,* ICC-01/09-01/11-01; *Muthaura, Kenyatta & Ali Decision on Application for Summons to Appear,* ICC-01/09-02/11-01.

5 Thomas Lubanga Dyilo; Germain Katanga; Mathieu Ngudjolo Chui, released from custody on21 December 2012 after acquittal; Bosco Ntaganda; Callixte Mbarushimana, released from the Court's custody on 23 December 2011 after Pre-Trial Chamber I declined to confirm charges; Jean-Pierre Bemba Gombo; Laurent Gbagbo.

6 *The Prosecutor v. Thomas Lubanga Dyilo; The Prosecutor v. Germain Katanga and Mathieu*

eight confirmation of charges decisions.[7] The ICC has held or is currently presiding over seven trial proceedings,[8] and has issued two trial judgements to date, in *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Mathieu Ngudjolo Chui* cases, both arising from the Situation of the DRC.

Expert Paper

In this first Expert Paper, the Women's Initiatives for Gender Justice has selected a thematic focus on modes of liability. This paper provides an extensive review of the developments at the ICC to date in applying and interpreting the modes of liability included in the Rome Statute, drawing on existing jurisprudence as well as filings from parties and participants. The paper also highlights variations in approaches between and within Chambers, and in the emerging ICC case law in relation to criminal responsibilty, including interpretations applied to cases in which gender-based crimes have been charged. The period of review is from 1 January 2004 to 1 November 2013.

Divergent interpretations

Currently before the ICC, modes of liability are among the most debated aspects of the cases, both between and within the Trial and Pre-Trial Chambers, and also as the subject of multiple filings by the Prosecution, Defence and Legal Representatives of Victims. As the Statute provides only a general framework for determining individual criminal responsibility, the elements of each mode of liability have evolved through case law. The Pre-Trial and Trial Chambers have differed in their interpretations of diverse elements of the modes of liability, and these differences remain unresolved by the Appeals Chamber. As the Court's jurisprudence has grown, these divergent interpretations between Chambers, as well as between individual judges, on the modes of liability have become an increasing source of litigation.

Importantly, in both trial judgements issued to date, the elements of modes of liability as well as their underlying legal basis were called into question. Separate and concurring opinions were issued by Trial Chamber Judges Adrian Fulford and Christine

Ngudjolo Chui; The Prosecutor v. Callixte Mbarushimana; The Prosecutor v. Jean-Pierre Bemba Gombo; The Prosecutor v. Bahar Idriss Abu Garda; The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus; The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang; The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta; In the case of Laurent Gbagbo, a decision to adjourn the confirmation of charges hearing was issued on 3 June 2013, ICC-02/11-01/11-432.

7 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN; *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717; *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red; *Bemba Confirmation of Charges*, ICC-01/05-01/08-424; *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red; *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-Red; *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373.

8 Verdicts were rendered in the following two cases: *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Mathieu Ngudjolo Chui.* A verdict is expected in 2014 in: *The Prosecutor v. Germain Katanga; The Prosecutor v. Jean-Pierre Bemba Gombo.* Current proceedings: *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* Banda trial due to open on 5 May 2014; Proceedings against Jerbo terminated due to his death; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang;* Kenyatta trial is due to open on 12 November 2013.

Van den Wyngaert, to the Lubanga and Ngudjolo trial judgements, respectively. These concurrences, discussed in detail below, set forth differing legal interpretations of the modes of liability from that decided by the Majority, and initially by Pre-Trial Chamber I, in the Lubanga and Ngudjolo cases. These separate opinions at the judgement stage provide alternative interpretations to the existing case law governing specific aspects of the modes of liability at the ICC.

Significantly, the Appeals Chamber has yet to rule on any of the elements of modes of liability and their application in a particular case.[9] It is possible that the diverse interpretations given by Chambers to several of the elements of modes of liability may be attributed in part to the absence of any substantive decision to date by the Appeals Chamber, clarifying and potentially unifying interpretations regarding the elements of participation.

Standards of proof and evidence

The procedural framework at the ICC requires that cases, including both the charges and the mode of liability put forward by the Prosecution, be reviewed at multiple stages against increasing standards of proof. At the stage of issuing an arrest warrant or a summons to appear, the Pre-Trial Chamber decides, based on the evidence provided by the Prosecution, whether there are 'reasonable grounds to believe' that the charges and mode of liability were committed by the suspect.[10] In the confirmation of charges decision, handed down after the confirmation hearing, the Pre-Trial Chamber decides whether the evidence presented meets the higher standard of 'substantial grounds to believe.'[11] Finally, the Trial Chamber must determine, after considering all of the evidence presented at trial, whether the charges and mode of liability have been proven 'beyond reasonable doubt' for the purpose of conviction.[12]

Changes in Modes of Liability

The Pre-Trial Chambers have in a number of cases rejected the modes of liability asserted by the Prosecution, including those asserted in the alternative, at the arrest warrant/summons to appear stage.[13] The mode of liability as alleged by the Prosecutor has also been called into question by Pre-Trial Chambers in the confirmation of charges proceedings in *The Prosecutor v. Jean Pierre Bemba Gombo* and *The Prosecutor v. Laurent Gbagbo* cases, leading to adjournments in both confirmation hearings.[14]

In addition, as of June 2012, Pre-Trial Chambers have declined to confirm any charges against four suspects due to their determination that there was insufficient evidence supporting the criminal liability of the suspects as forwarded by the Prosecution. As a result, proceedings have been terminated in four cases: *The Prosecutor v. Callixte*

9 Although the Appeals Chamber has not ruled directly on the elements of modes of liability and their application, see *Appeals Chamber Judgement on Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-514, in which the Appeals Chamber declined to address the Prosecution's arguments on appeal concerning the requisite level of contribution under Article 25(3)(d).
10 Article 58(1)(a), Rome Statute.
11 Article 61(7), Rome Statute.
12 Article 66(3), Rome Statute.
13 See Mudacumura *Arrest Warrant Decision,* ICC-01/04-01/12-1-Red, para 62; *Muammar Gaddafi Arrest Warrant*, ICC-01/11-01/11-2, p 6.
14 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388; *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432.

Mbarushimana, The Prosecutor v. Bahar Idriss Abu Garda, The Prosecutor v. Henry Kiprono Kosgey, The Prosecutor v. Mohammed Hussein Ali. [15] Of these, only the Mbarushimana case included a dissenting opinion, written by Presiding Judge Sanji Mmasenono Monageng, who found that the test of 'substantial grounds to believe' had been satisfied regarding the criminal responsibility of the suspect as charged under Article 25(3)(d). The Majority decision was upheld on appeal.

At this time, four of the seven cases to reach the trial phase of proceedings are currently considering changes to the mode of liability confirmed at the Pre-Trial stage.[16] In *The Prosecutor v. Germain Katanga* and the Bemba cases, the mode of liability confirmed by the Pre-Trial Chamber was later called into question by the Trial Chambers, and have been made subject to 'legal recharacterisation' pursuant to Regulation 55 of the Regulations of the Court. These changes during the trial stage have led both Judges and the Defence to raise fair trial concerns, specifically with respect to the accused's right to be informed in detail of the nature, cause and content of the charges. In addition, judicial decisions changing the mode of liability during trial have also placed additional pressure on the Office of the Prosecutor to respond to new formulations of criminal responsibility. These developments, as well as the potential application of Regulation 55 to both cases in the Kenya Situation, are discussed in Part II of this paper.

Gender-based crimes

The Women's Initiatives' monitoring of the ICC incorporates a gender analysis of the Court's jurisprudence, as well as of its structural and institutional development. As of November 2013, gender-based crimes have been charged in six of eight Situations,

15 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 340, the majority of Pre-Trial Chamber I finding insufficient evidence to establish substantial grounds to confirm Mbarushimana's criminal responsibility under Article 25(3)(d), Presiding Judge Monageng dissenting; *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, paras 231, 233, finding insufficient evidence to establish substantial grounds to establish Abu Garda's individual criminal responsibility as either a co-perpetrator or an indirect co-perpetrator; *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, paras 293-297, finding insufficient evidence to establish substantial grounds to believe that Kosgey was criminally responsible as an indirect co-perpetrator 'or under any other alternative mode of liability' as applied to the crimes against humanity; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-Red, paras 425, 426, 430, finding insufficient evidence to establish the events as alleged by the Prosecution took place, and *a fortiori*, Ali's individual criminal responsibility.

16 See *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA; *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324; *Ruto & Sang Trial Chamber Order on Legal Characterisation*, ICC-01/09-01/11-907; *Kenyatta Prosecution's Submision on Indirect Co-perpetration*, ICC-01/09-02/11-444.

and 14 of 20 cases[17] with confirmation decisions rendered in four cases involving charges for these crimes.[18]

To date, there have been few decisions regarding modes of liability which explicitly address charges for sexual and gender-based crimes.

Within the four cases to have been dismissed at the confirmation stage, two of these, Mbarushimana and Ali, contained charges for gender-based crimes with the Mbarushimana case including the largest number and broadest range of sexual and gender-based crimes sought by the Office of the Prosecutor. The cases against Katanga, Bemba and Kenyatta remain with charges for crimes of sexual violence confirmed.

Cases at the trial stage inclusive of charges of gender-based crimes have also faced delays and legal uncertainty due to issues relating to modes of liability. With the Katanga and Bemba cases in the midst of Regulation 55 proceedings regarding the mode of liability, to date no case including charges of gender-based crimes has reached a trial judgement resulting in a conviction or an acquittal that includes adjudication of those charges.[19]

In the absence of such judgements, this paper reviews the few decisions and dissenting opinions in which modes of liability and gender-based crimes have been explicitly addressed.

Structure

This Expert Paper provides a detailed overview of how the Court has treated the various modes of liability outlined in the Statute, signalling those issues generating

17 Gender-based crimes have been charged in the situations in the Democratic Republic of Congo, the Central African Republic, Uganda, Sudan (Darfur), Kenya, and Côte d'Ivoire. Gender-based crimes have not been charged in the situations in Mali and Libya. Gender-based crimes have been charged in the following cases: *The Prosecutor v. Germain Katanga; The Prosecutor v. Mathieu Ngudjolo Chui; The Prosecutor v. Jean-Pierre Bemba Gombo; The Prosecutor v. Callixte Mbarushimana; The Prosecutor v. Bosco Ntaganda; The Prosecutor v. Sylvestre Mudacumura; The Prosecutor v. Abdel Raheem Muhammad Hussein; The Prosecutor v. Omar Hassan Ahmad Al'Bashir; The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman; The Prosecutor v. Joseph Kony et al; The Prosecutor v. Francis Kirimi Muthaura; Uhuru Muigai Kenyatta and Mohammed Hussein Ali; The Prosecutor v. Laurent Koudou Gbagbo; The Prosecutor v. Simone Gbagbo; and The Prosecutor v. Charles Blé Goudé.*

18 *Katanga & Ngudjolo Confirmation of Charges,* ICC-01/04-01/07-717; *Bemba Confirmation of Charges,* ICC-01/05-01/08-424; *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED.

19 While the Lubanga case did not include charges for gender-based crimes, the Ngudjolo case included charges of rape and sexual slavery. However, the Ngudjolo trial judgement principally contained the Chamber's factual conclusions related to the totality of the evidence concerning the organisation and structure of the Lendu combatants from Bedu-Ezekere within the relevant period, including Ngudjolo's role and function. While the Chamber affirmed that the events as alleged, including the crimes, had taken place,it concluded that, in the absence of sufficient evidence, the Trial Chamber aquitted Ngudjolo, as it could not find beyond a reasonable doubt that he was the lead commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack, as charged by the Office of the Prosecutor. In the final judgement, the Chamber made very limited findings concerning the sexual violence charges, but found that, as a factual matter, there was extensive evidence attesting to the commission of rape and sexual enslavement. See Women's Initiative for Gender Justice, ' DRC: Trial Chamber II acquits Ngudjolo in second trial judgement at the ICC', *Legal Eye on the ICC eLetter,* February 2013, available at http://www.iccwomen.org/news/docs/WI-LegalEye2-13-FULL/LegalEye2-13.html.

particular diversity in the interpretation of the relevant provisions and in their application in specific cases. Our review focuses on decisions that propose alternative interpretations of the elements, highlighting the elements which remain highly contested, and those around which a body of agreement is coalescing.

Part I provides a detailed review and analysis of the judicial interpretations to date of Articles 25 and 28, with specific reference to each mode of liability, their associated elements and the relevant cases and decisions. This includes an extensive review of the four modes of liability to have been recognised by the ICC under Article 25(3)(a), namely, co-perpetration, indirect perpetration, indirect co-perpetration and direct perpetration. We examine the decisions interpreting each element of these modes of liability.

Sub-sections integrated within Part I provide a summary of the decisions currently available in which modes of liability have been applied to gender-based crimes. These sub-sections address the common plan requirement as applied to gender-based crimes in the Katanga and Ngudjolo Confirmation of Charges Decision; individual criminal responsibility for gender-based crimes in the Lubanga Sentencing Decision; and indirect co-perpetration and gender-based crimes.

The paper also addresses Articles 25(3)(b), 25(3)(d), and 25(3)(f), and examines the cases and decisions relevant to each of these modes of liability.

The paper then reviews the interpretation of Article 28 by Chambers in relation to each element of this form of criminal responsibility in the Bemba case, the only case to date for which an intepretation of Article 28 has been applied.

Part II reviews changes to the modes of liability at different stages in the proceedings. This includes the changes to the modes of liability in ongoing proceedings, examining the changes sought in the pre-trial phase for arrest warrants and summonses to appear, as well as adjournments in confirmation proceedings pursuant to Article 61(7)(c). Finally, the paper provides an extensive review of the application of Regulation 55 to the mode of liability at the trial phase, along with the filings and decisions related to these proceedings.

Charts

The first overview Chart illustrates the mode of liability requested by the Prosecutor, and, if applicable, confirmed by the Pre-Trial Chamber and applied by the Trial Chamber, underscoring any changes that may have occurred during the proceedings, for all of the 32 individuals who have been indicted by the ICC as of I November 2013.

Throughout the paper, additional charts set out key holdings by Chambers with respect to individual elements of the modes of liability in the Statute, highlighting distinctions and variances in interpretation. The sub-section charts are not intended to summarise all of the decisions, but instead serve to highlight those decisions which represent alternative and diverse judicial opinions regarding the elements of each mode of liability.

Overview of Mode of Liability Charged at Different Stages in Ongoing and Concluded cases

PTC = Pre-Trial Chamber
AW = Arrest Warrant
MOL = Mode of Liability

TC = Trial Chamber
CoC = Confirmation of Charges
StA = Summons to Appear

= Charged with Gender-Based Crimes

	Arrest Warrant / Summons		Confirmation of Charges		
Case	**MoL Requested by Prosecutor**	**Treatment by Pre-Trial Chamber**	**Prosecution Document Containing the Charges**	**Confirmation of Charges by Pre-Trial Chamber**	**Trial Chamber**
		Democratic Republic of Congo			
Thomas Lubanga	Art. 25(3)(a) Co-perpetrator[20]	Art. 25(3)(a) Co-perpetrator, and Indirect co-perpetrator[21] PTC I	Art. 25(3)(a) Co-perpetrator (Original by OTP) Indirect co-perpetrator (Per PTC I) Art. 25(3)(d) (Added by OTP) [22]	Art. 25(3)(a) Co-perpetrator[23] PTC I	Convicted as a Co-perpetrator pursuant to Art. 25(3)(a) TC I.[24] Judge Fulford issued a Separate and Concurring opinion discussing MOL[25]
Bosco Ntaganda	Art. 25(3)(a) Co-perpetrator[26]	Art. 25(3)(a) Indirect co-perpetrator[27] PTC II	In custody awaiting CoC hearing.		

20 *Lubanga Arrest Warrant Decision,* ICC-01/04-01/06-8-US-Corr, para 93.
21 *Lubanga Arrest Warrant Decision,* ICC-01/04-01/06-8-US-Corr, para 96.
22 *Lubanga Confirmation of Charges Decision,* ICC-01/04-01/06-803-tEN, p 109 FN 406. The Pre-Trial Chamber, citing the Document Containing the Charges (ICC-01/04-01/06-356-Conf-Anx1, p 27) also pointed out that the Prosecution stated it believed "common purpose" in terms of Article 25(3)(d) could properly be considered as an applicable mode of liability and requested the Pre-Trial Chamber make findings on the legal requirements of the three modes of liability. ICC-01/04-01/06-803-tEN, p 109, FN 406.
23 *Lubanga Confirmation of Charge Decision,* ICC-01/04-01/06-803-tEN, para 410.
24 *Lubanga Trial Judgement,* ICC-01/04-01/06-2842. In its document in support of the appeal of the Trial Judgement, the Defence challenged the Trial Chamber's legal and factual conclusions regarding the mode of liability. *Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du Jugement rendu en application de l'Article 74 du Statut rendu le 14 mars 2012,* ICC-01/04-01/06-2948-Red, 2 December 2012, paras 326-419.
25 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford,* ICC-01/04-01/06-2842.
26 Pre-Trial Chamber II, *Corrigendum of the Public Redacted Version of Prosecutor's Application under Article 58 filed on 14 May 2012,* ICC-01/04-611-Red-Corr, 14 May 2012, p 12-13.
27 *Ntaganda Arrest Warrant Decision,* ICC-01/04-02/06-36-Red, para 66.

Callixte Mbarushimana	Art. 25(3)(a) Co-perpetrator, or Art. 25(3)(d)[28]	Art. 25(3)(a) rejected[29] Art. 25(3)(d)[30] PTC I	Art. 25(3)(d)[31]	Charges not confirmed by PTC I.[32]	
Sylvestre Mudacumura	Art. 25(3)(a) Indirect perpetrator, Indirect co-perpetrator, or Art. 25(3)(b), or Art. 28(a)[33]	Art. 25(3)(a) rejected with explanation Art. 25(3)(b) Art. 28(a) rejected without explanation[34] PTC II	Suspect is currently at large.		
Germain Katanga	Art. 25(3)(b)[35]	Art. 25(3)(a) Unspecified, or Art. 25(3)(b)[36] PTC II	Art. 25(3)(a) Co-perpetrator, or Art. 25(3)(b)[37]	Art. 25(3)(a) *Co-perpetrator* (some charges) Indirect co-perpetrator (some charges) Art. 25(3)(b) not addressed [38] PTC I	TC II invoked Regulation 55 for a possible legal re-characterisation of the facts from Art. 25(3)(a) to Art. 25(3)(d).[39]

28 *Mbarushimana Arrest Warrant Decision,* ICC-01/04-01/10-1, paras 1, 28, citing *Prosecution's Application under Article 58,* ICC-01/04-573-US-Exp, 20 August 2010, paras 115, 129.
29 *Mbarushimana Arrest Warrant Decision,* ICC-01/04-01/10-1, paras 31-37.
30 *Mbarushimana Arrest Warrant,* ICC-01/04-01/10-2-tENG, paras 1, 10.
31 *Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-465-Red, FN 684, citing *Document Containing the Charges,* para 108.
32 *Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-465-Red, p 149. Judge Monageng issued a dissenting opinion, which is discussed in further detail below . The Appeals Chamber dismissed the Prosecution's appeal of Pre-Trial Chamber I's decision not to confirm the charges. Judge Fernández de Gurmendi issued a separate opinion thereto, also discussed in further detail below. *Appeals Chamber Judgement on Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-514.
33 Pre-Trial Chamber II, *Second Public Redacted version of Prosecution's Application under Article 58,* ICC-01/04-616-Red2, 4 July 2012, para 24.
34 *Mudacumura Arrest Warrant Decision,* ICC-01/04-01/12-1-Red, paras 59-69.
35 Pre-Trial Chamber I, *Prosecution's Submission of the Document Containing the Charges and List of Evidence,* ICC-01/04-01/07-422, 21 April 2008, para 1.
36 *Katanga Arrest Warrant,* ICC-01/04-01/07-1-US-tENG, p 6.
37 *Katanga & Ngudjolo Document Containing the Charges,* ICC-01/04-01/07-649-Anx1A, p 31-34.
38 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka,* ICC-01/04-01/07-717, paras 575-581. The charges confirmed under co-perpetration related to the war crime of using children under the age of fifteen years to participate actively in the hostilities. The charges confirmed under indirect co-perpetration related to the war crimes of directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities (Article 8(2)(b)(i)); willful killings (Article 8(2)(a)(i)); destruction of property (Article 8(2)(b)(xiii)); pillaging (Article 8(2)(b)(xvi)); sexual slavery and rape (Article 8(2)(b)(xxii)); and the crimes against humanity of murder (Article 7(1)(a)) and rape and sexual slavery (Article 7(l)(g)). Judge Ušacka issued a partly dissenting opinion concerning the majority's decision to confirm the rape and sexual slavery charges. ICC-01/04-01/07-717, p 214-226.
39 *Katanga Regulation 55 Implementation Decision,* ICC-01/04-01/07-3319-tENG/FRA. The Appeals Chamber, by majority, confirmed the Trial Chamber's decision. Judge Tarfusser issued a dissenting opinion, which is discussed in further detail below. *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser,* ICC-01/04-01/07-3363.

Mathieu Ngudjolo Chui	Information not available.	Art. 25(3)(a) Unspecified, or Art. 25(3)(b)[40] PTC I	Art. 25(3)(a) Co-perpetrator, or Art. 25(3)(b)[41]	Art. 25(3)(a) Co-perpetrator (some charges) Indirect co-perpetrator (some charges) Art. 25(3)(b) not addressed[42] PTC I	Acquitted by TC II.[43] Judge Van den Wyngaert issued a Separate and Concurring Opinion on Art. 25(3)(a).[44]
Uganda					
Joseph Kony	Art. 25(3)(b)[45]	Art. 25(3)(b)[46] PTC II	Suspect is currently at large.		
Vincent Otti	Art. 25(3)(b)[47]	Art. 25(3)(b)[48] PTC II	In September 2008, the Prosecutor confirmed the suspect's death and indicated it was preparing to terminate proceedings. The Court's public documents continue to treat him as a suspect-at-large.		
Okot Odhiambo	Art. 25(3)(b)[49]	Art. 25(3)(b)[50] PTC II	Suspect is currently at large.		
Dominic Ongwen	Art. 25(3)(b)[51]	Art. 25(3)(b)[52] PTC II	Suspect is currently at large.		
Raska Lukwiya	Art. 25(3)(b)[53]	Art. 25(3)(b)[54] PTC II	PTC II terminated proceedings against the suspect due to his death.[55]		

40 *Ngudjolo Arrest Warrant,* ICC-01/04-01/07-260-tENG, p 6.
41 *Katanga & Ngudjolo Document Containing the Charges,* ICC-01/04-01/07-649-Anx1A, p 31-34.
42 *Katanga &Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka,* ICC-01/04-01/07-717, paras 575-581. See Footnote 46 for additional details on charges.
43 *Ngudjolo Trial Judgement,* ICC-01/04-02/12-3-tENG. The acquittal was based on factual determinations and no detailed comments were made on the legal standards applicable to the modes of liability.
44 *Ngudjolo Trial Judgement Concurring Opinion of Judge Van den Wyngaert,* ICC-01/04-02/12-4.
45 *Kony Arrest Warrant,* ICC-02/04-01/05-53, para 42.
46 *Kony Arrest Warrant,* ICC-02/04-01/05-53, para 42.
47 *Otti Arrest Warrant,* ICC-02/04-01/05-54, para 42.
48 *Otti Arrest Warrant,* ICC-02/04-01/05-54, para 42.
49 *Odhiambo Arrest Warrant,* ICC-02/04-01/05-56, para 32.
50 *Odhiambo Arrest Warrant,* ICC-02/04-01/05-56, para 32.
51 *Ongwen Arrest Warrant,* ICC-02/04-01/05-57, para 30.
52 *Ongwen Arrest Warrant,* ICC-02/04-01/05-57, para 30.
53 *Lukwiya Arrest Warrant,* ICC-02/04-01/05-55, para 30.
54 *Lukwiya Arrest Warrant,* ICC-02/04-01/05-55, para 30.
55 *Decision to Terminate the Proceedings Against Raska Lukwiya,* ICC-02/04-01/05-248.
56 Pre-Trial Chamber III, *Prosecutor's Application for Warrant of Arrest under Article 58,* ICC-01/05-

Central African Republic					
Jean-Pierre Bemba Gombo	Art. 25(3)(a) Co-perpetration [56]	Art. 25(3)(a) Co-perpetration, or Indirect co-perpetration[57] PTC III	Art 25(3)(a) Co-perpetration, or Art. 28(a), or Art. 28(b)[58]	Art. 25(3)(a) rejected Art. 28(a) confirmed Art. 28(b) rejected.[59] PTC II	In December 2012, TC III invoked Regulation 55, giving notice of possible legal recharacterisation of the facts from a standard requiring 'knowing' crimes would be committed to 'should have known'.[60]

01/08-26-Red, 9 May 2008, para 63.

57 In the Arrest Warrant, the Pre-Trial Chamber found reasonable grounds to believe that Bemba was criminally responsible, jointly with another person *or through other persons,* under article 25(3)(a), apparently adding indirect co-perpetration to the charges. *Bemba Arrest Warrant 2,* ICC-01/05-01/08-15-tENG, para 24, emphasis added.

58 *Second Amended Bemba Document Containing the Charges,* ICC-01/05-01/08-395-Anx3, para 57. The Prosecutor submitted an initial and then an amended Document Containing the Charges to Pre-Trial Chamber III, asserting that Bemba was responsible as a co-perpetrator under Article 25(3)(a) of the Statute. *See Document Containing the Charges,* ICC-01/05-01/08-136-AnxA, 1 October 2008, para 56; *Amended Document Containing the Charges,* ICC-01/05-01/08-169-Anx3A, 17 October 2008, para 57. Subsequently, recalling statements made by the parties during oral argument and statements included in their written submissions, the Pre-Trial Chamber issued a decision, requesting the Prosecution to consider amending the charges to include Article 28. Pre-Trial Chamber III, *Decision Adjourning the Hearing pursuant to Article 61*(7)(c)(ii) *of the Rome Statute,* ICC-01/05-01/08-388, 3 March 2009, paras 40-49. The Prosecutor then submitted a second amended Document Containing the Charges to Pre-Trial Chamber II, detailing its charges against Bemba under Article 28(a) and (b). ICC-01/05-01/08-395-Anx3, paras 86-134.

59 *Bemba Confirmation of Charges,* ICC-01/05-01/08-424, paras 344, 444, p 184. The Chamber noted the Defence written submission complaining of 'imprecision and deficiency of the Amended DCC with respect to, *inter alia,* the suspect's form of participation - namely whether he is charged as a co-perpetrator, indirect perpetrator or indirect co-perpetrator'. In response, the Chamber stated that since the Prosecution put forth the precise elements of co-perpetation based on control over time, its examination would proceed based on that mode of participation. ICC-01/05-01/08-424, para 345.

60 Recalling Pre-Trial Chamber II's Decision on the Confirmation of Charges, the Trial Chamber notified the parties that, pursuant to Regulation 55, it may modify the legal characterisation of the facts in order to consider within the same mode of responsibility, the alternate form of knowledge in Article 18(a)(i), specifically that the accused 'should have known' of crimes being committed or about to be committed because: 'The Pre-Trial Chamber did not consider the "should have known" standard set out as an alternative in Article 28(a)(i) of the Statute.' *Bemba Notice of Regulation 55 Change,* ICC-01/05-01/08-2324, paras 1, 5. Subsequently, hearings were temporarily suspsended. *Bemba Proceedings Suspension Decision,* ICC-01/05-01/08-2480.

61 *Harun & Kushayb Application for Arrest Warrant,* ICC-02/05-56, paras 176-179, 181.

62 *Harun Arrest Warrant,* ICC-02/05-01/07-2, p 6-15.

Darfur, Sudan				
Ahmad Muhammad Harun	Art. 25(3)(d), and Art. 25(3)(b) (one count)[61]	Art. 25(3)(d), and Art. 25(3)(b) (one count)[62] PTC I	Suspect is currently at large.	
Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")	Art. 25(3)(d), and Art. 25(3)(a) Unspecified (some counts)[63]	Art. 25(3)(d) (some counts), and Art. 25(3)(a) (some counts)[64] PTC I	Suspect is currently at large.	
President Omar Hassan Ahmad Al'Bashir	Art. 25(3)(a)[65]	Art. 25(3)(a) Indirect perpetration, or Indirect co-perpetration[66] PTC I	Suspect is currently at large.	
Abdel Raheem Muhammad Hussein	Art. 25(3)(a) Co-perpetration, or Indirect co-perpetration[67]	Art. 25(3)(a) Indirect co-perpetration(Co-perpetration rejected)[68] PTC I	Suspect is currently at large.	

63 *Harun & Kushayb Application for Arrest Warrant,* ICC-02/05-56, paras 176-180.
64 *Kushayb Arrest Warrant,* ICC-02/05-01/07-3, p 6-16.
65 Rather than specifying co-perpetration, indirect perpetration or indirect co-perpetration, the Prosecution application stated: 'The Prosecution does not allege that AL BASHIR physically or directly carried out any of the crimes. He committed the crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with Art. 25 (3) (a) of the Statute.' Pre-Trial Chamber I, *Summary of Prosecutor's Application under Article 58,* ICC-02/05-152, 14 July 2008, paras 39, 62.
66 *Al'Bashir Arrest Warrant Decision,* ICC-02/05-01/09-3, para 223. Judge Ušacka issued a partly dissenting opinion, contained in the same document, which is discussed in further detail below. ICC-02/05-01/09-3. Following the Prosecutor's appeal and the Appeal Chamber's decision, on 12 July 2010, Pre-Trial Chamber I issued a second Arrest Warrant for Al'Bashir, in which the same mode of liability applied with respect to the charge for genocide as had been relied upon in the initial decision to issue an Arrest Warrant for war crimes and crimes against humanity. *Al'Bashir Arrest Warrant 2,* ICC-02/05-01/09-94, paras 41-43.
67 *Hussein Application for Arrest Warrant,* ICC-02/05-237-Red, para 34.
68 *Hussein Arrest Warrant Decision,* ICC-02/05-01/12-1-Red, para 39.
69 *Abu Garda, Banda & Jerbo Application for Arrest Warrant,* ICC-02/05-02/09-16-Anx1, para 140.
70 *Abu Garda Summons to Appear,* ICC-02/05-02/09-15-AnxA, para 28; The Prosecutor initially

Bahar Idriss Abu Garda	Art. 25(3)(a) Co-perpetration, or Indirect co-perpetration[69]	Art. 25(3)(a) Co-perpetration, or Indirect co-perpetration, and/or Art.25(3)(f) (Some counts)[70] PTC I	Art. 25(3)(a) Co-perpetration Indirect co-perpetration[71]	Charges not confirmed by PTC I.[72]	
Abdallah Banda Abakaer Nourain	Art. 25(3)(a Co- perpetration, or Indirect co-perpetration[73]	Art. 25(3)(a) Co-perpetration, or Indirect Co-perpetration[74] PTC I	Art. 25(3)(a) Co-perpetration, or Indirect Co-perpetration, and/or Art. 25(3)(f) (some counts)[75]	Art. 25(3)(a) Co-perpetration[76] PTC I	Trial scheduled for 5 May 2014. [77]
Saleh Mohammed Jerbo Jamus	Art. 25(3)(a) Co- perpetration, or Indirect co-perpetration[78]	Art. 25(3)(a) Co- perpetration, or Indirect co-perpetration[79] PTC I	Art. 25(3)(a) Co- perpetration, or Indirect co-perpetration, and/or Art. 25(3)(f) (some counts)[80]	Art. 25(3)(a) Co- perpetration [81] PTC I	TC IV terminated proceedings against the accused due to his death.[82]

applied for an arrest warrant but later submitted that a Summons to Appear (StA) would be sufficient to ensure the accused's appearance. ICC-02/05-02/09-15-AnxA, para 30.

71 *Abu Garda Confirmation of Charges,* ICC-02/05-02/09-243-Red, para 152, citing *Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute,* ICC-02/05-02/09-91-Red, 10 September 2009, para 117.

72 *Abu Garda Confirmation of Charges,* ICC-02/05-02/09-243-Red, paras 232-236.

73 *Abu Garda, Banda & Jerbo Application for Arrest Warrant,* ICC-02/05-02/09-16-Anx1, para 140.

74 *Decision on Banda & Jerbo Arrest Warrant Application,* ICC-02/05-03/09-1, para 31; The Prosecutor initially applied for an arrest warrant but later submitted that a StA would be sufficient to ensure the accused's appearance. ICC-02/05-03/09-1, para 33.

75 *Banda & Jerbo Confirmation of Charges,* ICC-02/05-03/09-121-Corr-Red, para 124.

76 *Banda & Jerbo Confirmation of Charges, I*CC-02/05-03/09-121-Corr-Red, paras 162-163, this finding makes it unnecessary for the Chamber to analyse whether Abdallah Banda and Saleh Jerbo can also be held responsible for having committed the crimes charged through their troops, that is as indirect co-perpetrators, as alternatively charged by the Prosecutor.

77 'Situation in Darfur, Sudan', available at http://www.icc-cpi.int/, last visited on 24 October, 2013.

78 *Abu Garda, Banda & Jerbo Application for Arrest Warrant,* ICC-02/05-02/09-16-Anx1, para 140.

79 Decision on Bando & Jerbo Arrest Warrant Application, ICC-02/05-03/09-1, para 31; The Prosecutor initially applied for an arrest warrant but later submitted that a StA would be sufficient to ensure the accused's appearance. ICC-02/05-03/09-1, para 33.

80 *Banda & Jerbo Confirmation of Charges,* ICC-02/05-03/09-121-Corr-Red, para 124.

81 *Banda & Jerbo Confirmation of Charges,* ICC-02/05-03/09-121-Corr-Red, paras 162-163. Although Article 25(3)(f) is mentioned in the decision, it remains unclear whether the Pre-Trial Chamber confirmed or rejected this mode of liability.

82 *Decision terminating the proceedings against Jerbo,* ICC-02/05-03/09-512-Red.

83 *Decision on Gaddafi & Al-Senussi Arrest Warrant,* ICC-01/11-01/11-1, para 13.

84 *Muammar Gaddafi Arrest Warrant,* ICC-01/11-01/11-2, p 6.

85 Pre-Trial Chamber I, *Decision to Terminate the Case Against Muammar Mohammed Abu Minyar*

Libya					
Muammar Mohammed Abu Minyar Gaddafi	Art. 25(3)(a) Indirect perpetrator[83]	Art. 25(3)(a) Indirect co-perpetrator[84] PTC I	Case terminated due to suspect's death.[85]		
Saif Al-Islam Gaddafi	Art. 25(3)(a) Indirect co-perpetrator[86]	Art. 25(3)(a) Indirect co-perpetrator[87] PTC I	Suspect detained by Militia in Zintan area of Libya.		
Abdullah Al-Senussi	Art. 25(3)(a) Indirect co-perpetrator[88]	Art. 25(3)(a) Indirect co-perpetrator[89] PTC I	PTC I determined suspect's case was inadmissible under the principle of complementarity and could proceed in Libya, where he is currently in State custody.[90]		
Kenya					
Deputy President William Samoei Ruto	Art. 25(3)(a) Co-perp, or Indirect Co-perpetration, or Art. 25(3)(d)[91]	Art. 25(3)(a) Indirect Co-perpetration Art. 25(3)(d) rejected[92] PTC II	Art. 25(3)(a) Indirect Co-perpetration[93]	Art. 25(3)(a) Indirect Co-perpetration[94] PTC II	Trial ongoing before TC V.

Gaddafi, ICC-01/11-01/11-28, 22 November 2011.

86 *Decision on Gaddafi & Al-Senussi Arrest Warrant,* ICC-01/11-01/11-1, para 13.

87 Saif Gaddafi Arrest Warrant, ICC-01/11-14, p 6.

88 *Decision on Gaddafi & Al-Senussi Arrest Warrant,* ICC-01/11-01/11-1, para 13.

89 *Al-Senussi Arrest Warrant,* ICC-01/11-01/11-4, p 6.

90 Pre-Trial I, *Decision on the admissibility of the case against Abdullah Al-Senussi,* ICC-01/11-01/11-466-Red, 11 October 2013.

91 *Ruto, Kosgey & Sang Application for Summons to Appear,* ICC-01/09-01/11-26-Red2, para 27; *Decision on Summons to Appear for Ruto, Kosgey and Sang,* ICC-01/09-01/11-01, paras 35-36.

92 *Decision on Summons to Appear for Ruto, Kosgey and Sang,* ICC-01/09-01/11-01, paras 37-38; The Pre-Trial Chamber was satisfied that a Summons to Appear would be sufficient to ensure appearance of all suspects, Ruto, Kosgey and Sang, before the Court. ICC-01/09-01/11-01, para 56.

93 *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, paras 283-285, 290. The Pre-Trial Chamber found that the Prosecutor inconsistently labeled Ruto and Kosgey as "co-perpetrators", but "the Prosecutor's clarification that the two suspects are charged under article 25(3)(a) of the Statute by way of presenting the elements underlying indirect-co-perpetration cures the apparent inconsistency". ICC-01/09-01/11-373, para 285.

94 *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, para 299. As discussed in further detail below, on 3 July 2012, the Prosecution submitted its observations on the law of indirect co-perpetration under Article 25(3)(a) of the Statute, together with its application for notice to be given under Regulation 55(2) of the Regulations of the Court that the form of individual criminal responsibility of Ruto may be subject to legal recharacterization by the Trial Chamber. *Ruto Prosecution's Submission on Indirect Co-Perpetration,* ICC-01/09-01/11-433.

95 *Ruto, Kosgey & Sang Application for Summons to Appear,* ICC-01/09-01/11-26-Red2, para 27; Decision on Summons to Appear for Ruto, Kosgey and Sang, ICC-01/09-01/11-01, paras 35-36.

96 *Ruto, Kosgey & Sang Application for Summons to Appear,* ICC-01/09-01/11-1, paras 37-38.

Henry Kiprono Kosgey	Art. 25(3)(a) Co-perpetrator, or Indirect co-perpetrator, or Art. 25(3)(d)[95]	Art. 25(3)(a) Indirect co-perpetrator Art. 25(3)(d) rejected[96] PTC II	Art. 25(3)(a) Indirect co-perpetrator[97]	Charges not confirmed by PTC II.[98]	
Joshua Arap Sang	Art. 25(3)(a) Co-perpetrator, or Indirect co-perpetrator, or Art. 25(3)(d)[99]	Art. 25(3)(a) rejected Art. 25(3)(d)[100] PTC II	Art. 25(3)(d)[101]	Art. 25(3)(d)[102] PTC II	Trial ongoing before TC V.
Francis Kirimi Muthaura	Art. 25(3)(a) Indirect co-perpetrator Art. 25(3)(d)[103]	Art. 25(3)(a) Indirect co-perpetrator Art. 253(d) rejected[104] PTC II	Art. 25(3)(a) Indirect co-perpetrator[105]	Art. 25(3)(a) Indirect co-perpetrator[106] PTC II	TC V granted permission to the Prosecution to withdraw charges.[107]

97 *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, paras 283-285, 290.
98 *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, para 293.
99 *Ruto, Kosgey & Sang Application for Summons to Appear,* ICC-01/09-01/11-26-Red2, para 27; *Decision on Summons to Appear for Ruto, Kosgey and Sang,* ICC-01/09-01/11-01, paras 35-36.
100 *Decision on Summons to Appear for Ruto, Kosgey and Sang,* ICC-01/09-01/11-01, paras 37-38.
101 *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, para 285. The Pre-Trial Chamber stated, '[t]he same reasoning applies to the situation of Mr. Sang since the Prosecutor actually developed the legal elements of article 25(3)(d) of the Statute. It follows that the Chamber shall proceed with its examination on the basis of these particular modes of liability'. ICC-01/09-01/11-373, para 285.
102 *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, para 367.
103 *Muthaura, Kenyatta & Ali Decision on Application for Summons to Appear*, ICC-01/09-02/11-01, para 13, 34. In paragraph 13, the Prosecutor alleges in each count that the accused violated Article 25(3)(a) as co-perpetrators, however, in paragraph 34, the Prosecutor alleges clearly in reference to Article 25(3)(a) that 'Muthaura, Kenyatta and Ali are criminally responsible for the crimes against humanity alleged under the different counts presented to the Chamber [] as indirect co-perpetrators'.
104 *Muthaura, Kenyatta & Ali Decision on Application for Summons to Appear,* ICC-01/09-02/11-01, para 45. The Pre-Trial Chamber was satisfied that the Summons to Appear would be sufficient to ensure appearance of suspects Muthaura, Kenyatta and Ali before the Court. ICC-01/09-02/11-01, para 55.
105 *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-Red, para 287.
106 *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-Red, para 428.
107 Pre-Trial Chamber II, *Decision on the withdrawal of charges against Mr Muthaura,* ICC-01/09-02/11-696, 18 March 2013.
108 *Muthaura, Kenyatta & Ali Decision on Application for Summons to Appear,* ICC-01/09-02/11-01, paras 13, 34.
109 *Muthaura, Kenyatta & Ali Decision on Application for Summons to Appear,* ICC-01/09-02/11-01,

President Uhuru Muigai Kenyatta	Art. 25(3)(a) Indirect co-perpetrator, or Art. 25(3)(d)[108]	Art. 25(3)(a) Indirect co-perpetrator Art. 25(3)(d) rejected[109] PTC II	Art. 25(3)(a) Indirect co-perpetrator[110]	Art. 25(3)(a) Indirect co-perpetrator[111] PTC II	Trial scheduled to begin 12 November 2013[112]
Mohammed Hussein Ali	Art. 25(3)(a) Indirect co-perpetrator, or Art. 25(3)(d) [113]	Art. 25(3)(a) rejected Art. 25(3)(d)[114] PTC II	Art. 25(3)(d)[115]	Charges not confirmed by PTC II.[116]	
Walter Osapiri Barasa	Art. 25(3)(a) Direct perpetrator (2 out of 3 counts), or Art. 25(3)(f)[117]	Art. 25(3)(a) Direct perpetrator, and/or Art. 25(3)(f)[118] PTC II	Suspect is currently at large.		

para 45. The Pre-Trial Chamber was satisfied that the Summons to Appear would be sufficient to ensure appearance of the suspects Muthaura, Kenyatta and Ali before the Court. ICC-01/09-02/11-01, para 55.

110 *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-Red, para 287.

111 *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-Red, para 428.

112 'Situation in Kenya', available at http://www.icc-cpi.int/, last visited on 24 October 2013.

113 *Muthaura, Kenyatta & Ali Application Decision on Application for Summons to Appear,* ICC-01/09-02/11-01, paras 13, 34.

114 *Muthaura, Kenyatta & Ali Decision on Application for Summons to Appear,* ICC-01/09-02/11-01, para 51. The Pre-Trial Chamber was satisfied that the Summons to Appear would be sufficient to ensure appearance of the suspects Muthaura, Kenyatta and Ali before the Court. ICC-01/09-02/11-01, para 55.

115 *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-Red, paras 420, 422.

116 *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-Red, para 430.

117 *Barasa Arrest Warrant,* ICC-01/09-01/13-1-Red2, p 3-5.

118 *Barasa Arrest Warrant*, ICC-01/09-01/13-1-Red2, para 21.

119 *Laurent Gbagbo Arrest Warrant Decision,* ICC-02/11-01/11-9-Red , para 6.

120 *Laurent Gbagbo Arrest Warrant Decision,* ICC-02/11-01/11-9-Red, para 77, stating, as discussed in further detail below, that it was likely that the issue of the modes of liability would be revisited

Côte d'Ivoire				
Laurent Gbagbo	Art. 25(3)(a) Indirect co-perpetrator[119]	Art. 25(3)(a) Indirect co-perpetrator[120] PTC III	Art. 25(3)(a) Indirect co-perpetrator (4 counts), Art. 25(3)(d) (4 counts), Art. 25(3)(f) (2 counts, as alternative for 1 count of each of the above)[121]	Suspect is in custody. Confirmation of Charges hearing has been adjourned.[122]
Simone Gbagbo	Art. 25(3)(a) Indirect co-perpetrator[123]	Art. 25(3)(a) Indirect co-perpetrator[124] PTC III	Suspect is currently at large.	
Charles Blé Goudé	Art. 25(3)(a) Indirect co-perpetrator[125]	Art. 25(3)(a) Indirect co-perpetrator[126] PTC III	Suspect is in custody in Côte d'Ivoire.	

in 'due course'.

121 *Transcript of Confirmation of Charges Hearing,* ICC-02/11-01/11-T-14-ENG ET WT, 9 February 2013, p 3-4, citing *Document Containing the Charges,* ICC-02/11-01/11-357-Conf-Anx1, 17 January, 2013.

122 *Decision Adjourning Gbagbo Confirmation of Charges,* ICC-02/11-01/11-432.

123 Pre-Trial Chamber III, *Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo,* ICC-02/11-01/12-2-Red, 2 March 2012, para 24.

124 *Simone Gbagbo Arrest Warrant,* ICC-02/11-01/12-1, para 9.

125 *Goudé Arrest Warrant,* ICC-02/11-02/11-1, para 16, stating, as discussed in further detail below, that it was likely that the issue of the modes of liability would be revisited in 'due course'.

126 *Goudé Arrest Warrant,* ICC-02/11-02/11-1, para 9

Part I: Judicial interpretations of modes of liability in the Rome Statute

I. Relevant Rome Statute provisions and procedure

A. Article 25

Article 25: Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
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;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

B. Article 28

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

  (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.

C. Article 30

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.

II. Article 25

A. The Court's approach to Article 25(3)

The Prosecution has most frequently asserted one of the modes of liability set forth in Article 25(3), specifically Article 25(3)(a), in the charging documents. The Lubanga case was the first to have charges confirmed and go to trial based on co-perpetration under Article 25(3)(a). Since then, the Prosecution has alleged one of the forms of liability set forth in Article 25(3)(a) against 23 additional individuals.[127] The following sections detail several of the underlying principles upon which the Court's jurisprudence on Article 25(3) has developed. These principles have been called into question by several Judges at the Court in their concurring and dissenting opinions, also described below.

Principals versus accessories and a hierarchy of responsibilities

Pre-Trial Chambers in multiple cases have characterised the various modes of liability listed in Article 25 as pertaining to the liability of principals. In both its decisions issuing an Arrest Warrant and confirming the charges in Lubanga, the first case before the ICC, Pre-Trial Chamber I[128] distinguished between the modes of liability as a principal under Article 25(3)(a) and 'any other forms of accessory, as opposed to principal, liability provided for in article 25(3)(b) to (d) of the Statute'.[129] Summarising the prior

127 Thomas Lubanga Dyilo; Bosco Ntaganda; Callixte Mbarushimana; Sylvestre Mudacumura; Mathieu Ngudjolo Chui; Ali Kushayb; Omar Hassan Ahmad Al' Bashir; Bahar Idriss Abu Garda; Abdallah Banda Abakaer Nourain; Saleh Mohammed Jerbo Jamus; Abdel Raheem Muhammad Hussein; William Samoei Ruto; Henry Kiprono Kosgey; Joshua Arap Sang; Uhuru Muigai Kenyatta; Francis Muthaura; Walter Osapiri Barasa; Jean-Pierre Bemba Gombo; Saif Al-Islam Gaddafi; Abdullah Al-Senussi; Muammar Gaddafi; Laurent Gbagbo; Simone Gbagbo; Charles Blé Goudé.

128 At the time of the decision, Pre-Trial Chamber I was composed of Judge Claude Jorda (Presiding Judge), Judge Akua Kuenyehia and Judge Sylvia Steiner.

129 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 320, citing *Lubanga Arrest Warrant Decision*, ICC-01/04-01/06-8-US-Corr, para 78.

jurisprudence of the Court in its decision issuing Mbarushimana's Arrest Warrant, Pre-Trial Chamber I[130] found that "commission", within the meaning of article 25(3)(a), gives rise to principal liability whereas the modes of participation punishable under article 25(3)(b) to (d) give rise to accessory liability'.[131]

Pre-Trial Chambers have also found that Article 25(3) entailed a hierarchy of responsibility, whereby the seriousness of the perpetrator's contribution decreased with each additional form of contribution. For example, in its decision confirming the charges against Mbarushimana, Pre-Trial Chamber I[132] described the modes of liability listed in Article 25(3) as being arranged in accordance with 'a value oriented hierarchy of participation in a crime under international law', where the 'control over the crime decreases' as one moves down the sub-paragraphs.[133]

While most Chambers have accepted this approach and have continued to characterise the various modes of liability listed in Article 25 as reflecting a hierarchy of responsibility, this approach was challenged by Judges Fulford and Van den Wyngaert in their concurring opinions to the Lubanga and Ngudjolo Trial Judgements, respectively.[134] Judge Fulford disputed the necessity to establish 'a clear dividing line' between the various forms of liability under Article 25(3)(a) to (d) of the Statute, in particular the need to distinguish between the liability of 'accessories' under Article 25(3)(b) and that of 'principals' under Article 25(3)(a) of the Statute.[135] He stated, 'in my judgement the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a)-(d) of the Statute were not intended to be mutually exclusive'.[136]

Similarly, Judge Van den Wyngaert stated: 'Like Judge Fulford, I see no proper basis for concluding that acting under Article 25(3)(b) of the Statute is less serious than acting under Article 25(3)(a).'[137] Rather, she found that 'the reality is that the different sub-paragraphs of Article 25(3) overlap to a substantial degree and that there is no compelling reason to believe that they are arranged in a hierarchy of seriousness'.[138] While 'mindful of the fact that it is the aspiration of the Court to concentrate on the "masterminds" or the "intellectual authors" of international crimes as somehow most blameworthy for large-scale criminality', she found that 'very often the acts and conduct of political and military leaders will simply not fit the mould of principal liability'.[139]

130 At the time of the decision, Pre-Trial Chamber I was composed of Judge Cuno Tarfusser (Presiding Judge), Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng.
131 *Mbarushimana Arrest Warrant Decision,* ICC-01/04-01/10-1, para 30.
132 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sanji Mmasenono Monageng (Presiding Judge), Judge Sylvia Steiner and Judge Cuno Tarfusser.
133 *Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-465-Red, para 279.
134 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford,* ICC-01/04-01/06-2842, para 6. For a detailed description of Judge Fulford's separate concurring opinion, see *Gender Report Card 2012*, p 155-156; *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert,* ICC-01/04-02/12-4, para 27.
135 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 6.
136 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 7.
137 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 23- 24. Rather, Judge Van den Wyngaert found that 'the blameworthiness of the accused is dependent on the factual circumstances of the case rather than on abstract legal categories'.
138 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 28.
139 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 29.

The concurring opinions of Judges Fulford and Van den Wyngaert are described in greater detail in the sections on co-perpetration and indirect co-perpetration, below.

B. Article 25(3)(a): Liability as a principal

1. 'Control over the crime' approach

As noted above, the ICC's first case was against Thomas Lubanga Dyilo, the President of the *Union des Patriotes Congolais* and Commander-in-Chief of the *Forces Patriotiques pour la Libération du Congo*, for the war crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities, in the context of a non-international armed conflict in the Ituri region, Eastern DRC.[140] Pre-Trial Chamber I confirmed the charges against Lubanga based on Article 25(3)(a). In the Confirmation of Charges Decision, the Chamber outlined three possible approaches to distinguishing between principals and accessories when a crime was committed by a number of individuals: the objective approach, the subjective approach and the 'control over the crime' approach[141]. It found the 'control over the crime' approach to be the most consistent with Article 25(3)(a) as it synthesised the objective and subjective components of individual criminal liability.[142] It further found the 'control over the crime' approach to be widely recognised in legal doctrine as it ensured that principal perpetrators, in addition to those who physically carried out the crime, included individuals who, 'in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed'.[143]

Pre-Trial Chamber I interpreted the language within the text of Article 25(3)(a), 'regardless of whether that other person is criminally responsible', as militating 'in favour of the conclusion that this provision extends to the commission of a crime not only through an innocent agent (that is, through another person who is not criminally responsible), but also through another person who is fully criminally responsible'.[144] It concluded that Article 25(3)(a) cohered with the concept of 'control over the crime' to distinguish between principles and accessories.[145] In the Confirmation of Charges Decision in the Katanga & Ngudjolo case, Pre-Trial Chamber I[146] reiterated this link, stating: 'the criminal responsibility of a person--whether as an individual, jointly with another or through another person--must be determined under the control over the

140 For more about the Lubanga case, see *Gender Report Card 2011,* p 203-225.
141 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, paras 327-332.
142 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, paras 328-330, further finding that the provisions of Article 25(3) obviated the objective and subjective approaches, which had both been rejected by modern legal doctrine to distinguish between principles and accessories to a crime. See also *Katanga & Ngudjolo Confirmation of Charges,* ICC-01/04-01/07-717, paras 481-484.
143 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 330. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 485; *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 152; *Mbarushimana Arrest Warrant Decision*, ICC-01/04-01/10-1, para 30; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 296; *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 126.
144 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 339.
145 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 340.
146 At the time of the decision, Pre-Trial Chamber I was composed of Judge Akua Kuenyehia (Presiding Judge), Judge Anita Ušacka and Judge Sylvia Steiner.

crime approach to distinguishing between principles and accessories'.[147] The 'control over the crime' theory, as espoused by Pre-Trial Chamber I in the Lubanga and Katanga & Ngudjolo Confirmation of Charges Decisions, has since provided the basis for the other Pre-Trial Chambers' decisions relating to liability as a principal under Article 25(3)(a).[148]

However, the continued application of the 'control over the crime' approach by other Pre-Trial Chambers in their interpretation of Article 25(3)(a) as a means for distinguishing between principals and accessories was challenged by Judges Fulford and Van den Wyngaert in their concurring opinions to the Lubanga and Ngudjolo Trial Judgements, respectively. In his separate, concurring opinion to the Lubanga Trial Judgement, Judge Fulford contested the need to rely on the 'control over the crime' approach, deriving from the German domestic legal system where sentencing depended upon the mode of liability, which was not the case within the Court's statutory framework.[149] According to Judge Fulford, a 'plain reading' of Article 25(3)(a) established the criminal liability of co-perpetrators who contributed to the commission of the crime notwithstanding their absence from the scene, thus rendering it unnecessary to invoke the 'control of the crime' theory in order to secure this result.[150]

Like Judge Fulford's concurring opinion to the Trial Judgement in the Lubanga case, Judge Van den Wyngaert distanced herself from the 'control over the crime' theory, in her concurring opinion to the Ngudjolo Trial Judgement.[151] She found it 'problematic' to directly import national legal principles into the ICC statutory framework.[152] She stated: 'Considering its universalist mission, the Court should refrain from relying on particular national models, however sophisticated they may be'.[153] She further underscored the importance of strictly construing the definition of crimes as required by Article 22(2),[154] which she argued extended to forms of criminal responsibility as well.[155] Judge Van den Wyngaert found that the methods of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, particularly the teleological method, 'may be entirely adequate for interpreting other parts of the Statute', but

147 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 486.
148 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 348.
149 Specifically, Judge Fulford noted that pursuant to Rule 145(1)(c), the degree of participation was only one of a number of relevant factors for sentencing. *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, paras 9-11.
150 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 12. For a more detailed discussion of Judge Fulford's dissenting opinion see *Gender Report Card 2012*, p 155-156.
151 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4. Although the charges against Ngudjolo were confirmed under both a co-perpetrator and an indirect co-perpetrator, both of which require the same objective elements.
152 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 5.
153 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 5.
154 Article 22(2) provides: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'.
155 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 17.

for the interpretation of individual criminal responsibility, 'the principles of strict construction and *in dubio pro reo*[156] are paramount'.[157]

2. The four modes of liability under Article 25(3)(a)

Article 25(3)(a) explicitly provides that an individual can incur liability for the commission of a crime in three ways: (i) individually;[158] (ii) jointly with another; or (iii) through another person. This reading was confirmed by Pre-Trial I's interpretation of co-perpetration under Article 25(3)(a) in the Lubanga Confirmation of Charges Decision.[159] In line with the Statute, in the January 2007 Confirmation Decision in that case, Pre-Trial Chamber I held that Article 25(3)(a) established criminal liability as a principal for those having both control over the crime and the awareness of such, if:

i. they physically carried out all elements of the offence (individual commission of the crime, or direct perpetration); or,

ii. they controlled the wills of those who carried out the objective elements of the offence (commission of the crime through another person, or indirect perpetration); or,

iii. they had, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration).[160]

Subsequently, on 30 September 2008, in the Katanga & Ngudjolo Confirmation of Charges Decision, Pre-Trial Chamber I interpreted Article 25(3)(a) as including a fourth modality: indirect co-perpetration, according to which one co-perpetrator could be held criminally liable for the crimes committed by the subordinates of his co-perpetrator through 'mutual attribution'.[161] In that decision, described in more detail in the section on indirect co-perpetration, below, Pre-Trial Chamber I combined 'co-perpetration' and 'indirect perpetration', to create 'indirect co-perpetration', thus reading a fourth mode of liability into Article 25(3)(a) of the Statute.[162]

Since then, several Pre-Trial Chambers have consistently held that Article 25(3)(a) included four modes of liability derived from the notion of control of the crime: direct perpetration, perpetration through another person or indirect perpetration, co-

156 Meaning, 'when in doubt for the accused'.
157 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 18.
158 The first mode of liability mentioned in Article 25(3)(a), individual perpetration, has not yet been addressed in any of the cases before the Court.
159 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 318.
160 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 332. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 488.
161 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 519.
162 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 490-491. As Pre-Trial Chamber I found that indirect co-perpetration encompassed the elements of co-perpetration, its discussion of these elements is included in the section on co-perpetration as well as the section on indirect co-perpetration, below.

perpetration based on joint control and indirect co-perpetration.[163] However, the Pre-Trial Chambers' adoption of the view that Article 25(3)(a) contained four modes of liability was explicitly challenged by Judge Van den Wyngaert in her concurring opinion to Ngudjolo Trial Judgement, as discussed in further detail in the sections on co-perpetration and indirect co-perpetration, below.[164]

To date, 75% of the individuals indicted by the ICC have been charged and/or confirmed pursuant to one of the modes of liability set forth in Article 25(3)(a). Consequently, most of the litigation on the mode of liability has involved one or more of the elements required by this provision. As many of the elements required for establishing each of these four modes of liability overlap, conflicting interpretations regarding one or more of the elements are detailed in the following subsections.

C. Co-perpetration

Of the 24 individuals indicted by the ICC under Article 25(3)(a), 12 were originally charged by the Office of the Prosecutor as co-perpetrators.[165]

As interpreted by Pre-Trial Chamber I[166] in the Lubanga case, the concept of co-perpetration derived from:

> the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.[167]

The Pre-Trial Chamber further indicated that co-perpetration was characterised by its distinction 'between principals and accessories to a crime' when the crime

163 *Al'Bashir First Arrest Warrant Decision; Partly Dissenting Opinion of Judge Anita Ušacka,* ICC-02/05-01/09-3, para 210. See also *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 154; *Decision on Gaddafi & Al-Senussi Arrest Warrant,* 01/11-01/11-1, para 68; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-Red; *Laurent Gbagbo Arrest Warrant Decision*, ICC-02/11-01/11-9-Red, para 77; *Simone Gbagbo Arrest Warrant Decision,* ICC 02/11-01/12-2-Red, para 9; *Goudé Arrest Warrant*, ICC-02/11-02/11-1, para 9.

164 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4. Although Trial Chamber II based the acquittal on its factual findings concerning Ngudjolo's role and functions within the Lendu militia from Bedu-Ezekere and declined to enter into any legal analysis of Ngudjolo's criminal responsibility, Judge Van den Wyngaert issued a concurring opinion, addressing the Pre-Trial Chamber I's interpretation of Article 25(3)(a) in the confirmation of charges decision against Ngudjolo based on indirect co-perpetration.

165 Thomas Lubanga Dyilo; Bosco Ntaganda; Callixte Mbarushimana; Jean-Pierre Bemba Gombo; Sylvestre Mudacumura; Abdel Raheem Muhammad Hussein; Abdallah Banda Abakaer Nourain; Saleh Mohammed Jerbo Jamus; Bahar Idriss Abu Garda; William Samoei Ruto; Henry Kiprono Kosgey; Joshua Arap Sang.

166 At the time of the decision, Pre-Trial Chamber I was composed of Judge Claude Jorda (Presiding Judge), Judge Akua Kuenyehia and Judge Sylvia Steiner.

167 *Lubanga Confirmation of Charges*, ICC-01/-04-01/06-803-tENG, para 326.

was 'committed by a plurality of persons'.[168] As noted above, Pre-Trial Chamber I underscored that the notion underpinning its approach was that:

> principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[169]

It explained that the 'control over the crime' approach involved 'an objective element, consisting of the appropriate factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances'.[170] It adopted a five-part test for co-perpetrator liability, which it found was grounded in the division of essential tasks for the purpose of committing a crime. It stated, 'although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task'.[171]

The test consisted of five elements, two of which were objective:

(i) the 'existence of an agreement or common plan between two or more persons';[172] and

(ii) a 'co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime';.[173]

The other three elements of the test for co-perpetration were subjective:

(iii) the subjective elements of the crime in question'[174] pursuant to Article 30;[175]

(iv) the 'suspect and the other co-perpetrators: (a) must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it';[176] and

168 *Lubanga Confirmation of Charges*, ICC-01/-04-01/06-803-tENG, para 327. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 484, 486; *Gaddafi & Al-Senussi Arrest Warrant*, ICC-01/011-12, para 68. Subsequently, in the Lubanga Trial Judgement, Trial Chamber I affirmed that the offence must be the result of the 'combined and coordinated contributions of those involved', as the concept of co-perpetration entailed that none of the participants individually exercised control over the crime as a whole, but that the control over the crime fell into the hands of a collective as such. *Lubanga Trial Judgement,* ICC-01/04-01/06-2842, para 994.
169 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 330.
170 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 331.
171 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 342.
172 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 343.
173 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 346.
174 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 349.
175 Article 30 requires that the crime be committed with both intent and knowledge.
176 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 361.

(v) the 'suspect must be aware of the factual circumstances enabling him or her to jointly control the crime'.[177]

This five-part test has since governed the Court's interpretation of co-perpetration in numerous cases. Most notably, it formed the basis of Lubanga's conviction by Trial Chamber I, in which Judge Fulford issued a separate, concurring opinion, offering a distinct interpretation of Article 25(3)(a).[178] Charges were also confirmed in the Katanga & Ngudjolo[179] case and in *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*[180] based on co-perpetration. In addition, co-perpetration was analysed, but not confirmed, in the Abu Garda Confirmation of Charges Decision, and the Mbarushimana and Hussein Arrest Warrant Decisions. In these decisions, the Chambers have elaborated further on the five elements, each of which is described in more detail, below.

1. The common plan

In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I identified the 'existence of an agreement or common plan between two or more persons' as the first objective element of co-perpetration.[181] It found that it was sufficient:

(i) that the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or

(ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such outcome.[182]

Although the common plan was held to constitute an objective element, in line with the Pre-Trial Chamber's definition, in the Lubanga Trial Judgement, the Majority of Trial Chamber I[183] was guided by the manner in which the 'plan is mirrored in the mental element' in order to establish the existence of a common plan.[184] Reading Article 30 into the common plan requirement, the Majority found that 'the mental requirement that the common plan included the commission of a crime will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result'.[185] Concerning the 'objective part of this requirement', the

177 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 366. See also *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, paras 128, 150; *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 351, listing only the subjective elements.
178 For a description of the application of Article 25(3)(a) in the Lubanga Trial Judgement, see *Gender Report Card 2012*, p 153-158.
179 Katanga was originally charged under Article 25(3)(b) of the Rome Statute. In the Decision on the Confirmation of Charges, Pre-Trial Chamber I confirmed the charges against Katanga & Ngudjolo as co-perpetrators for the crime of enlisting and conscripting children under the age 15 and their active use in hostilities. For all other crimes, charges were confirmed as indirect co-perpetrators.
180 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, paras 126-162.
181 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 343.
182 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 344.
183 As referred to in the Trial Judgement paras 985-987.
184 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 985.
185 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 986.

Majority found that it was met if the implementation of the common plan embodied 'a sufficient risk that, in the ordinary course of events' a crime would be committed.[186]

Pre-Trial Chamber I further held that the agreement 'need not be explicit', and that 'its existence can be inferred from the subsequent concerted action of the co-perpetrators'.[187] In the Confirmation of Charges Decision in the Abu Garda case, Pre-Trial Chamber I[188] attempted to infer the existence of an agreement from the evidence related to a coordinated essential contribution, the second objective element of the five-part test.[189] According to the Chamber, in this case the Prosecution evidence was 'so scant and unreliable' that the Chamber was unable to do so.[190]

In the Lubanga Confirmation of Charges Decision, the Pre-Trial Chamber further held that the common plan 'must include an element of criminality, although it does not need to be specifically directed at the commission of a crime'.[191] In the Lubanga Trial Judgement, the Majority of Trial Chamber I[192] further discussed the required level of criminality in the common plan. In line with Pre-Trial Chamber I's interpretation in the Lubanga Confirmation of Charges Decision, the Majority of the Trial Chamber held that committing the crime in question did not need to be the 'overarching goal' of the co-perpetrators, nor did the plan need to be 'intrinsically criminal'.[193] Rather, the Trial Chamber held that at a minimum, the common plan must include a 'critical element of criminality', whereby its implementation 'embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed'.[194]

Although the language in the Statute requires that the common plan be 'between two or more persons', in the decision to issue an Arrest Warrant for Mbarushimana, Pre-Trial Chamber I[195] required that the common plan be made with the 'low rank executors or physical perpetrators of the alleged crimes' for the purpose of co-perpetration.[196] The Chamber decided to examine the accused's criminal responsibility under indirect co-perpetration as the alleged common plan was not made with 'any of the low rank

186 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 987.
187 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 345. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 523; *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 988, finding further that 'although direct evidence of the plan is likely to assist in demonstrating its existence, this is not a legal requirement. The agreement can be inferred from circumstantial evidence'.
188 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sylvia Steiner (Presiding Judge), Judge Sanji Mmasenono Monageng and Cuno Tarfusser.
189 *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 180. Here, Pre-Trial Chamber I assessed his individual criminal responsibility under both co-perpetration and indirect co-perpetration. ICC-02/05-02/09-243-Red, para 157.
190 *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 231.
191 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 344. See also *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 129. In the Katanga & Ngudjolo Confirmation Charges, Pre-Trial Chamber I found that the 'common plan must include the commission of a crime'. *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 523.
192 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 985.
193 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, paras 984-985.
194 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 984. Trial Chamber I's reference to risk is addressed in greater detail in the section on the knowledge and intent requirement, below.
195 At the time of the decision, Pre-Trial Chamber I was composed of Judge Cuno Tarfusser (Presiding Judge), Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng.
196 *Mbarushimana Arrest Warrant*, ICC-01/04-01/10-1, para 31. The decision was issued on 28 September 2010.

executors or physical perpetrators of the alleged crimes'.[197] Similarly, in the decision issuing the Arrest Warrant for Hussein, Pre-Trial Chamber I[198] required that members of the group acting with the common plan 'personally executed portions of the alleged crimes' in order to find liability as a direct co-perpetrator.[199]

2. Questioning the need for the 'common plan' requirement

In his separate, concurring opinion to the Lubanga Trial Judgement, Judge Fulford called into question the 'common plan' requirement. He contended that co-perpetration could be demonstrated by showing 'coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, expressed or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime'.[200]

Similarly, in her concurring opinion to the Ngudjolo Trial Judgement, Judge Van den Wyngaert also contested the common plan requirement.[201] She noted that the term 'common plan' appeared nowhere in the Statute, nor in the *travaux préparatoires*.[202] She found the common plan requirement to be overly rigid as an objective element as it did not cover instances where two or more people 'spontaneously commit a crime together on an ad hoc basis'.[203] Judge Van den Wyngaert explained that as an objective element, the common plan turned the focus 'away from how the conduct of the accused [was] related to the commission of a crime to what role he/she played in the execution of the common plan'.[204] She explained: 'By focusing on the realisation of a common plan, the mens rea and actus reus requirements are now linked to the common plan instead of to the conduct of the actual physical perpetrators of the crime'.[205]

Judge Van den Wyngaert further found this problematic as Article 30 'links the mental element for responsibility to the bringing about of the material elements of

197 *Mbarushimana Arrest Warrant*, ICC-01/04-01/10-1, para 31.
198 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sanji Mmasenono Monageng (Presiding Judge), Judge Sylvia Steiner and Judge Cuno Tarfusser.
199 *Hussein Arrest Warrant Decision*, ICC-02/05-01/12-1-Red, para 39. The decision was issued on 1 March 2012. Pre-Trial Chamber I concluded that there were reasonable grounds to believe that Hussein was criminally responsible as an indirect co-perpetrator.
200 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 16. For a more detailed description of Judge Fulford's concurrence ,see *Gender Report Card 2012*, p 155-156.
201 Judge Van den Wyngaert's separate, concurring opinion concerned the charges against Ngudjolo, which were based on indirect co-perpetration, rather than co-perpetration, as described in greater detail, below. However, in light of the common elements as applied to both modes of liability, her concurrence is discussed briefly here.
202 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 31, noting that mention was made of a 'collective criminal purpose' in Article 25(3)(d). As noted in the section on indirect co-perpetration, below, common purpose has been equated to the 'common plan' in the Court's jurisprudence.
203 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 33.
204 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 34, emphasis in original.
205 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 34.

the crime'.[206] She reasoned: 'To the extent that the common plan is to commit a crime, no problem arises in this regard. However, if the mental element is linked to a contribution towards a broadly defined common plan, as the control theory does, then the connection to the crime might be almost entirely lost'.[207]

a. Common plan requirement as applied to gender-based crimes

The Katanga and Ngudjolo Confirmation of Charges decision is one of the few confirmation decisions to date to have dealt directly with the application of modes of liability in relation to charges of sexual violence. This was the first case to reach the confirmation stage inclusive of charges for crimes of sexual violence. The arrest warrants for Germain Katanga and Mathieu Ngudjolo Chui were both issued by Pre-Trial Chamber I under Article 25(3)(a), or in the alternative, Article 25(3)(b), and contained charges for war crimes and crimes against humanity, including sexual slavery. Charges of rape were later added by the Prosecution, as well as charges for outrages upon personal dignity, although as discussed below, only the charges of rape and sexual slavery were confirmed by the Majority. Katanga and Ngudjolo were the alleged commanders of the *Force de Résistance Patriotique en Ituri* and *Front de Nationalistes et Intégrationnistes*, respectively, armed groups in the Ituri region of Eastern DRC, accused of attacking the village of Bogoro on 24 February 2003.[208]

In the Katanga & Ngudjolo Confirmation of Charges Decision, the Pre-Trial Chamber unanimously agreed that there was sufficient evidence to establish substantial grounds to believe that Katanga and Ngudjolo jointly committed the war crime of using children under the age of 15 to participate actively in hostilities.[209] The Chamber further unanimously agreed that there were substantial grounds to believe that Katanga and Ngudjolo committed jointly through other persons, with intent to commit the crimes, the war crimes of directing an attack against a civilian population or against individual civilians, wilful killings, and destruction of property.[210]

The Chamber also unanimously agreed that Katanga and Ngudjolo jointly committed through other persons, with the knowledge that the following crimes would occur in the ordinary course of events, the war crime of pillaging.[211] The Chamber stated:

> Although the evidence tendered by the Prosecution is not sufficient to establish substantial grounds to believe that the agreement or common plan specifically instructed the soldiers to pillage the village of Bogoro, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, in

206 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 35.
207 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 35. Judge Van den Wyngaert noted in this regard that 'Pre-Trial Chamber I in the Lubanga case explicitly accepted *dolus eventualis*, and this interpretation allowed for a finding that the common plan need not be criminal and only requires awareness and acceptance of a risk that a crime will occur.'
208 For more about the Katanga and Ngudjolo cases, read *Gender Report Card 2011*, p 225-234.
209 *Katanga & Ngudjolo Confirmation Decision*, ICC-01/04-01/07-717, para. 574. For the charge of using children under the age of 15 to participate actively in the hostilities, the accused were charged with co-perpetration. ICC-01/04-01/07-717, para 535.
210 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 575.
211 *Katanga & Ngudjolo Confirmation of Charges,* ICC-01/04-01/07-717, para 575.

> the ordinary course of events, the implementation of the common plan would inevitably result in the pillaging of the Bogoro village.[212]

The Chamber also unanimously agreed that Katanga and Ngudjolo jointly committed through other persons, with intent to commit the crimes, the crime against humanity of murder[213] and unanimously declined to confirm that Katanga and Ngudjolo committed the war crimes of inhuman treatment and outrages upon personal dignity.[214] The Majority of the Chamber, Judge Ušacka dissenting, further declined to confirm the crime against humanity of other inhumane acts.[215]

Pre-Trial Chamber I also found, unanimously, that the Prosecution evidence was insufficient 'to establish substantial grounds to believe that the agreement or common plan[216] specifically instructed the soldiers to rape or sexually enslave the civilian women there'.[217]

However, not finding express intent, the Majority of Pre-Trial Chamber I found, with Judge Ušacka dissenting, that there was 'sufficient evidence to establish substantial grounds to believe that, in the ordinary course of events, the implementation of the common plan would inevitably result in the rape or sexual enslavement of civilian women' in Bogoro.[218]

In deciding to confirm the charges of rape and sexual slavery, the Majority reasoned that their conclusion was substantiated by the fact that:

i. rape and sexual slavery against of women and girls constituted a common practice in the region of Ituri throughout the protracted armed conflict;

ii. such common practice was widely acknowledged amongst the soldiers and the commanders;

iii. in previous and subsequent attacks against the civilian population, the militias led and used by the suspects to perpetrate attacks repeatedly committed rape and sexual slavery against women and girls living in Ituri;

iv. the soldiers and child soldiers were trained (and grew up) in camps in which women and girls were constantly raped and kept in conditions to ease sexual slavery;

v. Germain Katanga, Mathieu Ngudjolo Chui and their commanders visited the camps under their control, frequently received reports of the activities of the camps by the camps commanders under their command, and were in permanent contact with the combatants during the attacks, including the attack on Bogoro;

212 *Katanga & Ngudjolo Confirmation of Charges,* ICC-01/04-01/07-717, para 550.
213 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 579.
214 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 577.
215 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 581.
216 Notably, the common plan as defined in that case was to secure control over, and 'wipe out,' the village of Bogoro. *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 387, 548.
217 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 551.
218 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 551.

vi. the fate reserved to captured women and girls was widely known amongst combatants; and

vii. the suspects and the combatants were aware, for example, which camps and which commanders more frequently engaged in this practice.[219]

As noted above, the Pre-Trial Chamber unanimously found that the charges for the war crime of pillaging could be confirmed as it found there were substantial grounds to believe that Katanga and Ngudjolo were aware that, in the ordinary course of events, the implementation of the common plan would inevitably result in this crime occurring as part of the attack on Bogoro.

Judge Ušacka joined with the Majority in their assessment of liability for the accused in relation to the crime of pillaging. She agreed that the first objective element establishing co-perpetration for pillaging– namely, the existence of a common plan – was satisfied according to *dolus directus* in the second degree. In her dissenting opinion, however, Judge Ušacka examined whether charges for rape and sexual slavery could be confirmed against the suspects pursuant to *dolus directus* in either the first or second degree.[220] Although she agreed with the Majority of Pre-Trial Chamber I that the objective elements of the crimes of rape and sexual slavery as war crimes and crimes against humanity had been established, Judge Ušacka found there was insufficient evidence that the suspects 'intended for rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events'.[221]

In her dissenting opinion, Judge Ušacka stated that she was not 'thoroughly satisfied' that there were substantial grounds to believe that 'the suspects intended for rape and sexual slavery to be included in the common plan to attack Bogoro village'.[222] She listed the type of evidence that she found necessary to establish the suspects' culpability in respect of these crimes:

> For example, the Prosecution did not present evidence that either Germain Katanga or Mathieu Ngudjolo Chui directly ordered, suggested or induced members of the FNI/FRPI to commit rape or sexual slavery. Neither did the Prosecution present evidence that the suspects expressly agreed that rape and sexual slavery would be committed during the attack on Bogoro village, or even that in the aftermath of the Bogoro attack, the suspects were present when the crimes of rape and/or sexual slavery were committed.[223]

Judge Ušacka stated that, while she did not agree that the charges of rape and sexual slavery could be confirmed on the basis of the evidence presented, instead of confirming the charges 'a better course of action would have been for the Chamber to adjourn the hearing on these charges pursuant to Article 61(7)(c) of the Statute and

219 *Katanga & Ngudjolo Confirmation Decision*, ICC-01/04-01/07-717, para 568.
220 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, para 12.
221 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, paras 12, 14.
222 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, para 28.
223 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, para 19.

request the Prosecutor to provide further evidence which links the suspects' to these crimes.[224]

Other Chambers have held different views on the specificity required within the common plan. In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I held that the common plan 'must include an element of criminality, although it does not need to be specifically directed at the commission of a crime'.[225] The Chamber referred to the language of Article 30 which states that a person can be held criminally liable for a crime 'only if the material elements are committed with intent and knowledge.'[226] The Lubanga Pre-Trial Chamber stated that, in Article 30, 'the cumulative reference to "intent" and "knowledge" requires the existence of a volitional element on the part of the suspect.'[227] This element encompasses *dolus directus* of the first degree but also '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'.[228]

Pre-Trial Chamber I in Lubanga held that it was sufficient that

> (i) that the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or
>
> (ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such outcome.[229]

This reading was subsequently affirmed by Trial Chamber I in the Lubanga Trial Judgement, in which the Majority held that committing the crime in question did not need to be the 'overarching goal' of the co-perpetrators, nor did the plan need to be 'intrinsically criminal'.[230] Rather, the Trial Chamber held that at a minimum, the common plan must include a 'critical element of criminality', whereby its implementation 'embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed'.[231]

The Prosecution had also sought to have charges confirmed against Katanga and Ngudjolo for outrages upon personal dignity as a war crime, alleging that one woman, threatened with death, had been 'stripped and forced to parade half naked' in front of combatants.[232] However, the Chamber found that the Prosecution had 'brought no

224 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, para 29.
225 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 344. See also *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 129. In the Katanga & Ngudjolo Confirmation Charges, Pre-Trial Chamber I found that the 'common plan must include the commission of a crime'. *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 523.
226 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 351 citing Article 30(1) of the Rome Statute.
227 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 351.
228 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 352.
229 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 344.
230 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 985.
231 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 984. Trial Chamber I's reference to risk is addressed in greater detail in the section on the knowledge and intent requirement, below.
232 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 366.

evidence that the commission of such crimes was intended by [Katanga and Ngudjolo] as part of the common plan to "wipe out" Bogoro village,[233] nor did the Prosecution bring 'sufficient evidence to establish substantial grounds to believe that, as a result or part of the implementation of the common plan, these facts would occur in the ordinary course of events.'[234]

Instead, the Chamber found that the crime of outrages, as well as charges of inhuman treatment[235], 'appear to be crimes intended and committed incidentally by the soldiers, during and in the aftermath of the attack on Bogoro village, without a link to the suspects' mental element.'[236] The Pre-Trial Chamber therefore declined to confirm either of these charges against Katanga and Ngudjolo.

233 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 570.
234 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 571.
235 The charges for the war crime of of inhuman treatment were in relation to combatants detaining civilians,'menacing them with weapons, and imprisoning them in a room filled with corpses of men, women, and children' during and in the aftermath of the attack on Bogoro village. *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 355.
236 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 571.

Co-perpetration: First objective requirement: common plan. Highlights of distinctions and variances between cases where common plan was discussed

<table>
<tr><th>Lubanga Confirmation of Charges Decision
(PTC I)</th><th>Lubanga Trial Judgement Majority (TC I)</th><th>Katanga & Ngudjolo Confirmation of Charges Decision (PTC I) [237]</th><th>Mburushimana Arrest Warrant Decision
(PTC I)</th><th>Hussein Arrest Warrant Decision
(PTC I)</th><th>Lubanga Trial Judgement,
Judge Fulford Concurring Opinion</th><th>Ngudjolo Trial Judgement, Judge Van den Wyngaert Concurring Opinion</th></tr>
<tr><td colspan="5">Common Requirement
'The existence of an agreement or a common plan between two or more persons'</td><td colspan="2">Common Plan Requirement Questioned</td></tr>
<tr><td>(para 343)</td><td>(para 981)</td><td>(para 522)</td><td>(para 31)</td><td></td><td></td><td></td></tr>
<tr><td colspan="5">Element of Criminality</td><td></td><td></td></tr>
<tr><td>Must include an element of criminality, although it need not be specifically directed at the commission of a crime. It suffices that the co-perpetrators:
1) have agreed (i) to start the implementation of the common plan to achieve a non-criminal goal and, (ii) to only commit the crime if certain conditions are met
2) (i) are aware of the risk that implementing the common plan will result in the commission of the crime, and (ii) accept such an outcome
(para 344)</td><td>Committing the crime in question need not be the overarching goal, nor need the plan be intrinsically criminal. However,the common plan must include a critical element of criminality, (its implementation embodies a sufficient risk that, if events follow the ordinary course, a crime will becommitted)
(para 984)</td><td colspan="3">These decisions did not go into a substantive discussion about the level of criminality.</td><td>Co-perpetration can be demonstrated by showing coordination between those who commit the offense
(para 15)</td><td>The common plan requirement is overly rigid as it does not cover instances where two or more people spontaneously commit a crime together
(para 33)</td></tr>
<tr><td colspan="5">Additional Requirements</td><td></td><td></td></tr>
<tr><td colspan="3">The agreement need not be explicit and its existence can be inferred from the subsequent concerted actions of the co-perpetrators
(para 345) (para 988) (para 523)</td><td colspan="2">The common plan must be made with the direct/physical perpetrators</td><td></td><td></td></tr>
<tr><td colspan="3"></td><td>Common plan must be made with the direct perpetrators for the purpose of co-perpetration
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(para 39)</td><td></td><td></td></tr>
<tr><td>No reference to the mental element</td><td>Reference to the manner that the plan is mirrored in the mental element (para 985)
The co-perpetrators 1) knew that in the ordinary course of events, implementing the plan would lead to that result and, 2) were aware of the risk that the consequence, prospectively, would occur (para 986)</td><td>No reference to the mental element</td><td>No reference to the mental element</td><td>No reference to the mental element</td><td></td><td></td></tr>
</table>

237 The dissenting opinion of Judge Ušacka on the common plan requirement is highlighted in the chart below on the intent and knowledge requirement

3. The 'essential contribution' requirement

In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I held that the second objective requirement of co-perpetration was 'the coordinated essential contribution made by each co-perpetrator'.[238] It reasoned that 'only those to whom essential tasks have been assigned -- and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks -- can be said to have joint control over the crime'.[239] It declined, however, to link the essential task to the physical perpetration of the crime at the stage of its execution, finding that the Statute indicated no such restriction.[240]

In the Lubanga Trial Judgement, the Majority of Trial Chamber I underscored that the contribution of the co-perpetrator must be 'essential'.[241] This threshold, the Majority held, was satisfied where the co-perpetrator performed 'an essential role in accordance with the common plan'.[242] As reaffirmed by Pre-Trial Chamber I[243] in the Banda & Jerbo Confirmation of Charges Decision: 'A person has been assigned an essential task if he or she has the power to frustrate the commission of the crime, in the way it was committed, by not performing his or her tasks'.[244]

4. Questioning the 'essential contribution' requirement

In his concurrence to the Lubanga Trial Judgement, Judge Fulford found that the Statute required only an 'operative link between the individual's contribution and the commission of the crime', not that the accused's involvement was essential.[245] According to Judge Fulford's plain text reading, Article 25(3) did not require 'proof that the crime would *not* have been committed absent the accused's involvement (*viz.* that his role was essential). Rather, the prosecution must simply demonstrate that the individual contributed to the crime by committing it with another or others'.[246]

In her concurrence to the Ngudjolo Trial Judgement, Judge Van den Wyngaert expressed her agreement with Judge Fulford that there was no statutory support for the essential contribution requirement.[247] Judge Van den Wyngaert found that it

238 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 346. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 524.
239 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 347. See also *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 136; *Mbarushimana Arrest Warrant*, ICC-01/04-01/10-1, para 35, finding that as Mbarushimana's contribution was not essential, he could not be held liable as a co-perpetrator; the Chamber proceeded to analyse his liability under Article 25(3)(d), as described in greater detail, below.
240 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 348. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 526.
241 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, paras 996, 999.
242 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1000.
243 At the time of the decision, Pre-Trial Chamber I was composed of Judge Cuno Tarfusser (Presiding Judge), Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng.
244 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 136. The decision was issued on 7 March 2011.
245 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 15. See also, *Ruto Prosecution's Submission on Indirect Co-perpetration,* ICC-01/09-01/11-433, para 12, suggesting the requirement of a 'substantial contribution'.
246 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 15, emphasis in original.
247 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 41.

compelled 'Chambers to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution'.[248] However, while Judge Fulford suggested that the required level of contribution be a 'causal link between the individual's contribution and the crime', Judge Van den Wyngaert found causality to be too 'elastic'.[249] Rather, she suggested that for co-perpetration, there must be 'a direct contribution to the realisation of the material elements of the crime' to be determined in the specific circumstances of each case.[250]

248 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 42.

249 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 43. Judge Fulford specifically suggested that the required contribution could be 'direct or indirect, provided either way there is a causal link between the individual's contribution and the crime'. *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 16.

250 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 44, 46, 47, emphasis in original.

Co-perpetration: Second objective requirement: essential contribution. Highlights of distinctions and variances between cases where essential contribution was discussed

<table>
<tr><th>Lubanga Confirmation of Charges Decision
(PTC I)</th><th>Lubanga Trial Judgement Majority
(TC I)</th><th>Katanga & Ngudjolo Confirmation of Charges Decision
(PTC I)</th><th>Banda and Jerbo Confirmation of Charges Decision
(PTC I)</th><th>Lubanga Trial Judgement, Fulford Concurring Opinion</th><th>Ngudjolo Trial Judgement Van den Wyngaert, Concurring Opinion</th></tr>
<tr><th colspan="4">Essential Contribution of the Accused</th><th colspan="2">Accused's Contribution Does not Need to Be Essential</th></tr>
<tr><td>Only those to whom essential tasks have been assigned and who have the power to frustrate the commission of the crime by not performing their tasks
(para 347)</td><td>Emphasis on essential contribution: an essential role in accordance with the common plan
(para 1000)</td><td>Only those to whom essential tasks have been assigned and who have the power to frustrate the commission of the crime by not performing their tasks
(para 525)</td><td>A person has been assigned an essential task if he or she has the power to frustrate the commission of the crime, in the way it was committed, by not performing his or her tasks
(para 136)</td><td rowspan="2">The Statute does not require that the accused's involvement be essential
(para 15)
The only requirement is a causal link between the individual's contribution and the crime
(para 15)</td><td rowspan="2">No statutory support for the essential contribution requirement
(para 41)
There must be a direct contribution to the realisation of the material elements of the crime, as opposed to a casual link
(paras 44, 46, 47)</td></tr>
<tr><td>No link required between the essential task and physical perpetration (para 348)</td><td></td><td>No link required between the essential task and physical perpetration
(para 526)</td><td></td></tr>
</table>

5. The knowledge and intent requirement

In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I indicated that the first subjective element for establishing co-perpetration was the knowledge and intent requirement that applied to all crimes under the jurisdiction of the Court, unless otherwise specified, as set out in Article 30 of the Statute. In the Lubanga Trial Judgement, Trial Chamber I characterised Article 30 as requiring three factors:

> First, pursuant to Article 30(2)(a), a person has intent if he or she 'means to engage in the conduct'. Second, under Article 30(2)(b) and in relation to a consequence, it is necessary that the individual 'means to cause that consequence or is aware that it will occur in the ordinary course of events'. Third, by Article 30(3), "knowledge" 'means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.[251]

In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I found that the cumulative intent and knowledge requirement foresaw the suspect's volition, namely, (i) knowing that his 'actions or omissions will bring about the objective elements of the crime', and (ii) undertaking 'such actions or omissions with the concrete intent to bring about the objective elements of the crime'.[252] The Pre-Trial Chamber noted that these volitional elements within Article 30 were 'also known as dolus directus of the first degree' and that the provision encompassed 'other forms of the concept of dolus', which it noted had been used by the ad hoc tribunals. It found that these included:

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).[253]

Further interpretation of the intent requirement was made set out by Judge Ušacka in her dissenting opinion to the Katanga & Ngudjolo Confirmation of Charges Decision. She explained that 'if intent is established pursuant to article 30(2)(b) of the Statute, the requirement of knowledge within the meaning of article 30(3) will also be satisfied'.[254] In addition, in her dissent Judge Ušacka also set forth the following example to distinguish between *dolus directus* in the first and second degrees:

> dolus directus in the first degree can be established, for example, when the perpetrator says, "I intend to kill"; dolus directus in the second degree can be established, for example, when the perpetrator aims a gun at another person at

251 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1007. See also *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 153.
252 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, paras 351, 352, emphasis added.
253 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 352.
254 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, para 7.

> a close enough range that if he pulls the trigger death will certainly occur, and the perpetrator subsequently pulls the trigger. For dolus directus in the second degree, although the perpetrator has not expressed his intent to kill, this intent is inferred from his or her knowledge or awareness that once he or she pulls the trigger, death of the person will occur "in the ordinary course of events".[255]

a. *Dolus eventualis*

Regarding the third form of *dolus*, that is *dolus eventualis,* in the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I considered that it entailed two distinguishable scenarios based on the level of risk. In the first scenario, 'if the risk of bringing about the objective elements of the crime is substantial, (that is, there is a likelihood that it "will occur in the ordinary course of events")', the suspect's acceptance of the 'idea of bringing about the objective elements of the crime' could 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.[256]

In the second scenario, 'if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions'.[257] It summarised the subjective requirement under a *dolus eventualis* interpretation of Article 30:

> Where the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements, and hence would not meet the "intent and knowledge" requirement embodied in article 30 of the Statute.[258]

b. Questioning the inclusion of *dolus eventualis*

In the Katanga & Ngudjolo Confirmation of Charges Decision, Pre-Trial Chamber I also found that the volitional element required by Article 30 encompassed *dolus directus* in the first and second degree; it made no finding, however, with respect to *dolus eventualis*.[259] In contrast, in the confirmation of charges decisions by Pre-Trial Chamber II in Bemba, Muthaura, Kenyatta & Ali and *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Article 30 did not encompass

255 *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, ICC-01/04-01/07-717, para 9, footnote 4 and citing the explanation set forth in, Werle, G., *Principles of International Criminal Law,* Cambridge, Cambridge University Press, 2005, p. 104, 'in the perpetrator's perception at the time of the act, carrying out the conduct would cause the consequence, unless extraordinary circumstances intervened'.
256 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 353.
257 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 354.
258 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 355.
259 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 529-531. While the majority of the Pre-Trial Chamber endorsed the inclusion of *dolus eventualis,* Judge Ušacka disagreed. See *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka,* ICC-01/04-01/07-717, FN 10.

dolus eventualis.[260] Both Pre-Trial Chamber I and Trial Chamber I subsequently reiterated this holding in the Banda & Jerbo Confirmation of Charges Decision and the Lubanga Trial Judgement, respectively.[261]

In the Bemba Confirmation of Charges decision, Pre-Trial Chamber II[262] held that Article 30 embraced only 'two degrees of dolus', namely *dolus directus* in the first and second degrees.[263] It found that the third form, *dolus eventualis*, which included recklessness and other lower forms of culpability, was not encompassed by Article 30.[264] Furthermore, Pre-Trial Chamber II interpreted the first subjective element as requiring virtual certainty, rather than a mere possibility. Engaging in an extensive analysis of Article 30, including the *travaux préparatoires*, the Pre-Trial Chamber read the language 'will occur' with 'in the ordinary course of events' to 'clearly indicate that the required standard of occurrence is close to certainty'.[265] It thus found 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.[266]

Thus, Pre-Trial Chamber II concluded in the Bemba case that 'the most that can be inferred is that Mr Jean-Pierre Bemba may have foreseen the risk of occurrence of such crimes as a mere possibility and accepted it for the sake of achieving his ultimate goal–that is, to help Mr Patassé to retain power', which it held did 'not meet the required standard for article 30'.[267]

Similarly, in the Lubanga Trial Judgement, Trial Chamber I found that the language of Article 30(2)(b) excluded the concept of *dolus eventualis*.[268] It reasoned that 'awareness that a consequence will occur in the ordinary course of events', meant that the co-perpetrators must anticipate, based on their knowledge of how events ordinarily unfolded, that the consequence would occur in the future.[269] However, in contrast to Pre-Trial Chamber II, which required virtual certainty, Trial Chamber I found that this prognosis involved the concepts of 'possibility' and 'probability', which were

260 *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 411.
261 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 156; *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1011.
262 At the time of the decision, Pre-Trial Chamber I was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser .
263 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 358. See also *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 411.
264 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 360.
265 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 362.
266 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 369, emphasis added.
267 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 400. Although Pre-Trial III had issued the Arrest Warrant for Bemba on the basis of his responsibility either as a co-perpetrator or as an indirect perpetrator, Pre-Trial Chamber II declined to confirm the charges based on Article 25(3)(a), finding that Bemba lacked the appropriate *mens rea*. Specifically, it did not find reasonable grounds to conclude that Bemba committed the crimes 'with the knowledge that they would occur in the ordinary course of events.' ICC-01/05-01/08-424, para 344. As described in greater detail in the section on Article 28, below, Pre-Trial II confirmed the charges against Bemba on the basis of command responsibility under Article 28(a).
268 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1011, indicating that it agreed with Pre-Trial Chamber II on this issue, and citing *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, paras 364-369.
269 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1012.

inherent to the notions of 'risk' and 'danger'.[270] It defined risk as 'danger, (exposure to) the possibility of loss, injury or other adverse circumstance'.[271] It clarified that because the co-perpetrators only 'know' the consequences of their conduct once they have occurred, the Article required that at the time the co-perpetrators had agreed on a common plan and throughout its implementation, they must have known the existence of a risk that the consequence would occur.[272] As to the degree of risk, the Trial Chamber held that it must be no less than the awareness on the part of the co-perpetrator that the consequence 'will occur in the ordinary course of events', which meant that a low risk would not be sufficient.[273]

270 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1012. In her concurrence to the Ngudjolo Trial Judgement, Judge Van den Wyngaert characterised Trial Chamber I's 'reliance on "risk" as an element under Article 30' was 'tantamount to accepting *dolus eventualis* dressed up as *dolus directus* second degree'. She found that 'the Statute does not contain a form of criminal responsibility that is based on the mere acceptance of a risk that a crime might occur as the consequence of personal or collective conduct'. *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 38, 39.
271 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1012.
272 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1012.
273 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 1012.

Co-perpetration: First subjective requirement: intent and knowledge. Highlights of distinctions and variances between cases where Article 30 was discussed

<table>
<tr><th>Lubanga Confirmation of Charges Decision
(PTC I)</th><th>Lubanga Trial Judgement Majority
(TC I)</th><th>Bemba Confirmation of Charges Decision
(PTC II)</th><th>Banda & Jerbo Confirmation of Charges Decision
(PTC I)</th><th>Katanga & Ngudjolo Confirmation of Charges Decision
(PTC I)</th><th>Katanga & Ngudjolo Confirmation of Charges Decision, Partly Dissenting Opinion of Judge Anita Ušacka</th></tr>
<tr><td colspan="6">Dolus directus of the 1st degree</td></tr>
<tr><td colspan="6">1) Knowing that actions or omissions will bring about the objective elements of the crime
2) Undertaking such actions or omissions with the concrete intent to bring about the objective elements of the crime</td></tr>
<tr><td>(paras 351- 352)</td><td>(para 1013)</td><td>(paras 358- 359)</td><td>(para 153)</td><td>(paras 529- 530)</td><td>(para 8)</td></tr>
<tr><td colspan="6">Dolus directus of the 2nd degree</td></tr>
<tr><td colspan="6">1) No concrete intent to bring about the objective elements of the crime
2) Aware that such elements will be the necessary outcome of actions or omissions</td></tr>
<tr><td>(paras 351- 352)</td><td>(para 1013)</td><td>(paras 358- 359)</td><td>(para 153)</td><td>(paras 529- 530)</td><td>(para 8)</td></tr>
<tr><td colspan="6">Some Chambers required an element of certainty</td></tr>
<tr><td>No requirement of certainty</td><td>Knowledge involves the concepts of 'possibility' and 'probability' which are inherent to the notion of risk and danger. The degree of risk must be no less than awareness that the consequence 'will occur in the ordinary course of event'
(para 1012)</td><td>Requires virtual certainty that the crimes would occur in the ordinary course of events, rather than a mere possibility
(para 369)</td><td>Requires virtual certainty that the crimes would occur in the ordinary course of events
(para 156)</td><td>No requirement of certainty</td><td>Requires awareness that the crimes would occur in the ordinary course of events
(para 22)</td></tr>
<tr><td colspan="6">Dolus eventualis</td></tr>
<tr><td>Article 30 encompasses dolus eventualis
1) Aware of the risk that the objective elements of the crime may result
2) Accepts such outcome
(para 352)</td><td colspan="3">Article 30 does not encompass dolus eventualis
(para 1011) (Para 358) (para 156)</td><td>Article 30 does not encompass dolus eventualis (footnote 329).
Made no findings on dolus eventualis (paras 529-531)
(footnote 10 in Judge Ušacka's dissent noting that the majority of the Chamber endorsed dolus eventualis)</td><td>Article 30 does not encompass dolus eventualis
(footnote 10)</td></tr>
</table>

6. Second and third subjective requirements

Pre-Trial Chamber I determined in the Lubanga Confirmation of Charges Decision that the second subjective element required '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.[274] It established different tests based on whether there was a 'substantial risk' or a low risk of bringing about the objective elements of the crime.[275] For the former, the Chamber held that in the event of:

> a substantial risk of bringing about the objective elements of the crime (that is, if it is likely that "it will occur in the ordinary course of events"), the mutual acceptance by the suspect and the other co-perpetrators of the idea of bringing about the objective elements of the crime can be inferred from:
>
> i. the awareness by the suspect and the other co-perpetrators of the substantial likelihood that implementing the common plan would result in the realisation of the objective elements of the crime; and
>
> ii. the decision by the suspect and the other co-perpetrators to implement the common plan despite such awareness.[276]

In the event of a low risk of bringing about the objective elements of the crime, the Chamber determined the test to be that 'the suspect and the other co-perpetrators must have clearly or expressly accepted the idea that implementing the common plan would result in the realisation of the objective elements of the crime'.[277]

In the Confirmation of Charges Decision in the Katanga & Ngudjolo case, Pre-Trial Chamber I slightly altered the formulation, finding that co-perpetration required that both suspects: (i) were mutually aware that implementing the common plan would result in the realisation of the objective elements of the crime; and (ii) undertook such activities with the specific intent to bring about the objective elements of the crime, or were aware that the realisation of the objective elements would be a consequence of their acts in the ordinary course of events.[278]

In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I considered that the third subjective element for co-perpetration was 'the awareness by the suspect of the factual circumstances enabling him or her to jointly control the crime'.[279] It interpreted this element to require: (i) the awareness that his role was essential to the implementation of the common plan, and hence in the commission of the crime; and (ii) an awareness of being able to 'frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to perform the task assigned'.[280]

274 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 365.
275 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, paras 363, 364.
276 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 363.
277 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 364.
278 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 533.
279 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 366. See also *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 534.
280 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 367.

Co-perpetration: Highlights of distinctions and variances between cases where the second and third subjective elements were discussed

Lubanga Confirmation of Charges Decision (PTC I)	Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)	Bemba Confirmation of Charges Decision (PTC II)
Second Subjective Element		
All the co-prepetrators, including the suspect, must 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 (para 365) The Court established two different tests. 1) When there is a substantial risk of bringing about the objective elements of the crime, the mutual acceptance can be inferred from: i) the awareness by the suspect and the other co-perpetrators of the substantial likelihood that implementing the common plan would result in the realisation of the objective elements of the crime; and ii) the decision by the suspect and the other co-perpetrators to implement the common plan despite such awareness (para 363) 2) When there is a low risk of bringing about the objective elements of the crime, 'the suspect and the other co-perpetrators must have clearly or expressly accepted the idea that implementing the common plan would result in the realisation of the objective elements of the crime' (para 364)	Perpetrators are: mutually aware that implementing the common plan would result in the realisation of the objective elements of the crime; and undertook activities with the specific intent to bring about the objective elements of the crime, or were aware that the realisation of the objective elements would be a consequence of their acts in the ordinary course of events (para 533)	Perpetrators carried 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 (para 370)
Third Subjective Element		
The suspect must be aware of the factual circumstances enabling him or her to jointly control the crime This requires that each suspect was aware 1) of his essential role in the implementation of the common plan; 2) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan		
(paras 366-367)	(paras 538-539)	(para 371)

7. The separate and concurring opinions to *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Mathieu Ngudjolo Chui* Trial Judgements

a. Judge Fulford's separate, concurring opinion to *The Prosecutor v. Thomas Lubanga Dyilo* Trial Judgement

As noted above, two Judges, Judge Fulford and Judge Van den Wyngaert, diverged significantly in their interpretations of Article 25(3)(a) in concurrences to the ICC's two trial judgements issued to date. In agreement on several issues, these separate, concurring opinions represent a clear break in the consensus as to the principles upon which the Court's case law on the modes of liability has evolved. These alternative interpretations have further led Judges and parties to characterise the Court's jurisprudence on Article 25(3) as unsettled.[281]

As described above, in his concurrence to the Lubanga Trial Judgement, Judge Fulford argued for a plain reading of Article 25(3)(a), which defeated any need to 'establish a clear dividing line between the various forms of liability under Article 25(3)(a)-(d)'.[282] He called into question the application of the 'control over the crime' theory as a means to distinguish between principals and accessories, and for ensuring the liability of principals despite their absence from the scene of the crime. He argued that his plain text reading secured this result without relying on the 'control over the crime' theory. He also found the Majority's reference to 'possibility', 'probability', 'risk' and 'danger' to be 'potentially confusing'.[283]

Concerning the two objective requirements to co-perpetration as established by the Pre-Trial Chamber and applied by a Majority of the Trial Chamber in the Lubanga Trial Judgement, Judge Fulford contended that rather than requiring the establishment of a 'common plan', co-perpetration could be demonstrated by showing 'coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime'.[284]

Judge Fulford further found that the 'plain text of Article 25(3) does not require proof that the crime would not have been committed absent the accused's involvement (*viz.* that his role was essential)'.[285] In contrast, he found that the Statute required only

281 See *Appeals Katanga Decision on Regulation 55, Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 15, noting that 'both the legal doctrine and, more significantly the relevant case law of the Court show that its interpretation is far from being uncontentious or settled'. See also *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 20, underscoring that the application of Article 25(3) at the Court was 'not settled'.

282 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, paras 6, 7. See also *Appeals Katanga Decision on Regulation 55, Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 15.

283 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 15.

284 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 16. For a more detailed description of Judge Fulford's concurrence, see *Gender Report Card 2012*, p 155-156.

285 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 15, emphasis in original.

an 'operative link between the individual's contribution and the commission of the crime'.[286] He explained:

> It seems to me to be important to stress that an *ex post facto* assessment as to whether an individual made an essential contribution to war crimes, crimes against humanity or genocide will often be unrealistic and artificial. These crimes frequently involve a large number of perpetrators, including those who have controlling roles. It will largely be a matter of guesswork as to the real consequence for the particular crime if the accused is (hypothetically) removed from the equation, and most particularly it will not be easy to determine whether the offence would have been committed in any event.[287]

Judge Fulford found that the test as applied by the Majority posed 'an unnecessary and unfair burden' on the Prosecution.[288] Rather, he would establish the following elements for co-perpetration:

(i) the involvement of at least two individuals;

(ii) coordination between those who committed the offence, which could take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, would lead to the commission of the crime;

(iii) a contribution to the crime, which could be direct or indirect, provided there was a causal link between the individual's contribution and the crime; and

(iv) intent and knowledge, as defined in Article 30 of the Statute, or as otherwise provided elsewhere in the Court's legal framework.[289]

Notwithstanding Judge Fulford's disagreement with the Majority on these issues, he found that it would be unfair, at the trial judgement stage of the proceedings, to utilise alternative (and lower) criteria concerning the mode of liability of co-perpetration without providing prior notice to the Defence. He explained that the test applied by the Majority of the Trial Chamber 'with minor modifications to ensure compliance with the Statute' mirrored the Pre-Trial Chamber's approach in its Decision Confirming the Charges,

> which established (certainly in this context) the principles of law on which the trial has been prosecuted and defended. No substantive warning has been given to the parties that the Chamber may apply a different test, and as a matter of fairness it would be wrong at this late stage to modify the legal framework of the case. In short, it would be unjust to the present accused to apply a different, and arguably lesser, test.[290]

286 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 15.
287 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 17.
288 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 3.
289 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 16. Judge Fulford's concurring opinion is discussed in greater detail in the *Gender Report Card 2012*, p 155-156.
290 *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 2.

b. Judge Van den Wyngaert's separate, concurring opinion to *The Prosecutor v. Mathieu Ngudjolo Chui* Trial Judgement

In her concurrence to the Ngudjolo Trial Judgement, Judge Van den Wyngaert echoed Judge Fulford's concurrence, taking issue with the requirements of the existence of a common plan and the accused's essential contribution to it.[291] Like Judge Fulford, Judge Van den Wyngaert took issue with these two objective elements of both co-perpetration and indirect co-perpetration. Observing that a common plan constituted a 'crucial' objective element in the Pre-Trial Chamber's interpretation of 'joint perpetration', Judge Van den Wyngaert noted that the term 'common plan' appeared nowhere in the Statute, nor in the *travaux préparatoires*.[292] She found the common plan requirement to be overly rigid as an objective element as it did not cover instances in which two or more people 'spontaneously commit a crime together on an ad hoc basis'.[293] She explained that as an objective element, the common plan turned the focus 'away from how the conduct of the accused [was] related to the commission of a *crime* to what role he/she played in the execution of the common *plan*'.[294]

Judge Van den Wyngaert concurred with Judge Fulford that the 'essential contribution' requirement found no support in the Statute and compelled the Chambers to engage in speculative exercises as to whether a crime would have been committed without the accused's specific contribution.[295] However, she disagreed with Fulford's suggestion that the test should be a causal link between the contribution and the crime. Noting that other modes of liability under Article 25(3) required a 'substantial' and a 'significant' contribution, she proposed that a 'direct contribution to the realisation of the material elements of the crime' be required.[296] She explained that as the 'essence of committing a crime is bringing about its material elements', '[o]nly those individuals whose acts made a direct contribution to bringing about the material elements can thus be said to have jointly perpetrated the crime'.[297] She defined a 'direct contribution' as one that had 'an immediate impact on the way in which the material elements of the crime are realised', to be determined on a case-by-case basis.[298]

291 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4. Ngudjolo was charged as an indirect perpetrator and co-perpetrator; the common plan and essential contribution are objective requirements for both modes of criminal responsibility.
292 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 31.
293 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 33.
294 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 34, emphasis in original.
295 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 42.
296 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 44.
297 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 44.
298 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 46, 47, noting that a 'direct contribution' did not necessarily require the physical presence of the joint perpetrator at the scene of the crime, and could include certain forms of planning and coordination.

8. Individual criminal responsibility for gender-based crimes in the Lubanga Sentencing Decision

The single sentencing decision delivered to date, in the Lubanga case, emphasised the importance of evidence supporting the criminal responsibility of the accused, even within the relatively greater latitude that the Chamber has at this stage of the proceedings. In the Lubanga Trial Judgement, the Chamber declined to substantively discuss the evidence of sexual violence that had been raised during the course of the trial, but did not foreclose the possibility of addressing sexual violence at sentencing, stating that 'In due course, the Chamber will consider whether these matters ought to be taken into account for the purposes of sentencing and reparations.'[299]

Article 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence set out considerations for the Court in the determination of the sentence. Rule 145 (1) (a) and (b) state respectively that the totality of any sentence must reflect the culpability of the convicted person; and that the Court is to balance all relevant factors, including any mitigating and aggravating factors and consider the circumstances of both the convicted person and the crime. Rule 145(1)(c) further states that the Court is to give consideration to the gravity of the crime and the individual circumstances of the convicted person (as stated in Article 78(1)), as well as:

> the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; *the degree of participation of the convicted person; the degree of intent;* the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.[300]

The Rules therefore envisage that the mode of liability will be a consideration in determining the sentence. In the Lubanga Sentencing Decision, the Majority cites the reasoning of the Trial Chamber in the Judgement as an 'important foundation' for the sentence, further noting the Chamber's determination that Lubanga 'agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri.'[301] The Sentencing Decision goes on to note that the Judgement did not conclude that Lubanga meant to conscript and enlist child soldiers and use them to participate actively in hostilities, but that instead Lubanga 'was aware that, in the ordinary course of events, this would occur' leading the Trial Chamber to find him guilty as 'a co-perpetrator who made an essential contribution to the common plan.'[302]

299 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para. 630-631.
300 Rule 145(1)(c), emphasis added.
301 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 52.
302 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 52.

A list of possible mitigating and aggravating circumstances are set out in Rule 145(2).[303] However, in the Lubanga Sentencing Decision, the Chamber declined to find any aggravating circumstances.[304] In addition, while noting that Article 145(1)(c) states that the Chamber shall consider 'the harm caused to victims and their families', the Majority declined to enter into any substantive consideration of the extent of the damage and harm caused to victims, in the context of the Sentencing Decision.[305]

In considering both the punishment of children and sexual violence, put forward by the Prosecution as possible aggravating factors[306], the Majority again examined Lubanga's degree of participation and intent. The Majority made the following determination regarding punishment:

> Although the Chamber found that a number of recruits were subjected to a range of punishments during training with the UPC/FPLC, the Majority has concluded that the evidence does not support a conclusion beyond reasonable doubt that the punishment of children below 15 years of age occurred in the ordinary course of the crimes for which Mr Lubanga has been convicted. Furthermore, nothing suggests that Mr Lubanga ordered or encouraged these punishments, that he was aware of them or that they can otherwise be attributed to him in a way that reflects his culpability. Therefore, the Majority of the Chamber has decided that it has not been demonstrated that the individual punishments referred to by the Chamber were the responsibility of Mr Lubanga, and in any event the Chamber has not taken this into account as an aggravating factor in the determination of his sentence. [307]

In its consideration of sexual violence as a possible aggravating factor, the Chamber went further to comment on the Prosecution's failure to produce sufficient evidence concerning Lubanga's culpability for gender-based crimes in the context of the Lubanga trial.[308] At the outset of its discussion on sexual violence as a possible

303 Rule 145(2) provides that the Court shall take into account, as appropriate: (a) Mitigating circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; and (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court; and b) aggravating circumstances such as: (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) Abuse of power or official capacity; (iii) Commission of the crime where the victim is particularly defenceless; (iv) Commission of the crime with particular cruelty or where there were multiple victims; (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3; and (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

304 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 97.

305 The Majority states: 'Against this general background the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, inter alia, to the extent of the damage caused, and in particular "the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person."' *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 44. However, Judge Odio Benito states that the Majority 'fundamentally disregards this fundamental factor.' *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 5.

306 *Prosecution's submissions on Sentencing*, ICC-01/04-01/06-2881, paras 18-22; 30-36; *Transcript from Prosecution's statement at the Sentencing Hearing*, ICC-01/04-01/06-T-360-Red2-ENG, p. 34, lines 4-20.

307 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 59.

308 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, paras 74-75.

aggravating factor, the Chamber stated that it 'strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence.'[309] The Chamber noted that, while advancing extensive submissions on sexual violence in the opening and closing statements and arguing that it should be considered as an aggravating factor, 'the former Prosecutor' had failed 'to apply to include charges of sexual violence or sexual slavery at any stage during these proceedings, including in the original charges',[310] and had actively opposed adding such charges during the trial, when they were the approved by the Majority as a result of Regulation 55 proceedings.[311] Nonetheless, the Chamber noted that the former Prosecutor's decision to not charge crimes of sexual violence is 'not determinative of the question of whether that activity is a relevant factor in the determination of the sentence.'[312] The Chamber found that it was still entitled to consider sexual violence under Rule 145.

As a threshold matter, in the Lubanga Sentencing Decision, Trial Chamber I held that it could consider facts and circumstances outside of the Confirmation of Charges Decision. It stated, 'the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the Defence has had a reasonable opportunity to address them'.[313] More specifically, the Chamber held that it could consider sexual violence with regard to sentencing with 'no consequential unfairness' to the Defence, despite 'the prosecution's failure to charge' Lubanga for rape and sexual violence, and despite the fact that this evidence was not considered for the purpose of conviction.[314] In their written and oral submissions on sentencing, the Prosecution stated that sexual violence should be considered as an aggravating factor.[315] In the Sentencing Decision, however, the Majority of the Trial Chamber found that the Prosecution had failed to provide sufficient evidence, stating:

> Although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial. As a result, in the view of the Majority, the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond a reasonable doubt. Therefore,

309 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 60.
310 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 60.
311 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 60.
312 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 60.
313 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, paras, 20, 29-31. The Chamber noted the measures it had undertaken to ensure fairness to the Defence in sentencing, namely that: it had ordered a separate sentencing hearing in the event of a conviction, following a Defence request (ICC-01/04-01/06-1140, para 32); it had held that evidence relating to sentencing could be admitted during the trial, for efficiency and judicial economy (ICC-01/04-01/06-2360, para 38); and, the Defence had had adequate notice on matters to be considered by the Chamber in sentencing, as well as adequate time and facilities to prepare.
314 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, paras 61, 67, 68. In her dissent, Judge Odio Benito reiterated that the consideration of cruel treatment and sexual violence, although not included in the facts and circumstances of the confirmation of charges decision, caused no unfairness to the Defence 'given the procedural safeguards implemented by the Chamber'. ICC-01/04-01/06-2901, *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, para 8.
315 Prosecution's submissions on Sentencing, ICC-01/04-01/06-2881, paras 30 – 36; Transcript from Prosecution's statement at the Sentencing Hearing, ICC-01/04-01/06-T-360-Red2-ENG, p. 34, lines 4-20.

> this factor cannot properly form part of the assessment of his culpability for the purposes of sentence.[316]

Trial Chamber I thus declined to consider the sexual violence perpetrated against child soldiers for the purpose of sentencing as it could not be accorded with the findings in the judgement on Lubanga's individual criminal responsibility. The Chamber concluded:

> On the basis of the totality of the evidence introduced during trial on this issue, the Majority is unable to conclude that the sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible. Moreover, nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability.[317]

Notably, the Chamber framed its findings in terms of the common plan and the knowledge and intent requirement. In the Trial Judgement, the Majority of Trial Chamber I held that 'the mental requirement that the common plan included the commission of a crime will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result'.[318] Concerning the 'objective part of this requirement', the Majority in the Judgement found that it was met if the implementation of the common plan embodied 'a sufficient risk that, in the ordinary course of events' a crime would be committed.[319] In its analysis of the evidence of sexual violence as a possible aggravating factor, the Chamber largely applied the same test and used the same language as with its analysis of punishment as an aggravating factor, with the exception of the criterion of the sexual violence being 'sufficiently widespread' to be characterised as occurring in the ordinary course of events.

Judge Elizabeth Odio Benito wrote a dissenting opinion disagreeing with the Majority on both the absence of any consideration of the harm suffered as a result of severe punishment and sexual violence committed against the recruits; and on the imposition of a differentiated sentence for each of the three crimes. At the outset of her dissent, Judge Odio Benito stated that she agreed with the Majority that 'no aggravating circumstances are to be considered'.[320] However, Judge Odio Benito 'strongly disagreed' with the Majority's decision to disregard 'the damage caused to victims and their families', pursuant to Rule 145(1)(c).[321] She found that 'the Chamber received ample evidence during the trial related to the conditions in which boys and girls were recruited and the harms they suffered as a result of their involvement with the UPC', including severe punishments and sexual violence.[322] She cited evidence given by both expert and fact-based witnesses describing punishment and sexual violence and the harm caused by these practices. According to one witness cited by

316 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 75.
317 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, para 74.
318 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 986.
319 *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 987.
320 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 1.
321 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 2.
322 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 6.

Judge Odio Benito, who 'extensively interviewed children recruited by the UPC,'[323] children in this militia group provided 'a clear account of systemic sexual violence in the camps'.[324]

Significantly, Judge Odio Benito criticised the Majority of Trial Chamber I for considering only: 'a) the large-scale and widespread nature of the crimes committed; b) the degree of participation and intent of the convicted person; and c) the individual circumstances of the convicted person' for the purpose of sentencing, without considering the harm resulting from the crimes, a mandatory factor related to the gravity of the offence under Rule 145(1)(c). Referring to the expert testimony presented at trial, she articulated the existence of 'clear differential gender effects and damages' caused by sexual violence.[325] Judge Odio-Benito further stated:

> Although, as noted by the Majority of the Chamber, Mr Lubanga may not have "deliberately discriminated against women in committing these offences", the crimes for which he was convicted resulted in the discrimination of women, particularly girls under the age of 15 who were subject to sexual violence (and consequently to unwanted pregnancies, abortions, HIV and other sexually transmitted diseases) as a result of their recruitment within the UPC. Although this may not have been the deliberate intention of the convicted person, the sexual violence suffered by children under the age of 15 as a result of the crimes for which he was found to be a co-perpetrator, impaired and most likely nullified, perhaps for the rest of their lives, the enjoyment of other human rights and fundamental freedoms of its victims (including *inter alia*, their right to education, their right to health, including sexual and reproductive health, and their right to a family life).[326]

Without considering any aggravating circumstances, and taking into account Lubanga's cooperation with the Court as a mitigating circumstance, the Majority sentenced Lubanga to concurrent sentences of 13 years of imprisonment for the crime of conscripting children under the age of 15 into the UPC; 12 years for the crime of enlisting children under the age of 15 into the UPC; and 14 years for using children under the age of 15 to participate actively in hostilities. [327] Judge Odio Benito dissented on the differentiated sentences imposed, stating that as all are the result of the same plan which resulted in damage to the victims and their families, all three crimes for which Lubanga was convicted should carry a sentence of 15 years.[328]

D. Indirect perpetration

Liability for indirect perpetration pursuant to Article 25(3)(a) has been charged in a limited number of cases, and no charges have yet been confirmed on this basis. Pre-

323 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 16.
324 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 17.
325 *Lubanga Trial Judgement, Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2842, para 13.
326 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, para 21, internal citations omitted.
327 *Lubanga Sentencing Decision*, ICC-01/04-01/06-2901, paras 98-99.
328 *Lubanga Sentencing Decision*, *Dissenting opinion of Judge Odio Benito*, ICC-01/04-01/06-2901, paras 24-27.

Trial Chamber III[329] issued an Arrest Warrant for Bemba under indirect perpetration in the alternative.[330] A Majority of Pre-Trial Chamber I[331] issued an Arrest Warrant for President Al'Bashir as an indirect perpetrator or an indirect co-perpetrator in the alternative.[332] Pre-Trial Chamber I issued an Arrest Warrant for Abdullah Al-Senussi as an indirect perpetrator.[333] The Prosecutor sought an Arrest Warrant against Muammar Mohammed Abu Minyar Gaddafi as an indirect perpetrator.[334] The Pre-Trial Chambers did not elaborate on the concept, nor the elements, of indirect perpetration in the above-listed Arrest Warrant decisions. However, in the decision issuing an Arrest Warrant for Gaddafi & Al-Senussi, Pre-Trial Chamber I[335] set out the common elements between indirect perpetration and indirect co-perpetration:

i. the suspect must have control over the organisation;

ii. the organisation must consist of an organised and hierarchical apparatus of power;

iii. the execution of the crimes must be secured by almost automatic compliance with the suspect's orders;

iv. the suspect must fulfil the subjective elements of the crimes;

v. the suspect must be aware of the factual circumstances enabling him or her to exercise control over the crime through another person.[336]

329 At the time of the decision, Pre-Trial Chamber I was composed of Judge Fatoumata Diarra (Presiding Judge), Judge Hans-Peter Kaul and Judge Ekaterina Trendafilova.

330 *Bemba Arrest Warrant*, ICC-01/05-01/08-1-tENG, para 21. Although Pre-Trial Chamber III issued the Arrest Warrant for Bemba on the basis of his responsibility either as a co-perpetrator or as an indirect perpetrator, Pre-Trial II confirmed the charges on the basis of command responsibility under Article 28(a).

331 At the time of the decision, Pre-Trial Chamber I was composed of Judge Akua Kuenyehia (Presiding Judge), Judge Anita Ušacka, and Judge Sylia Steiner

332 *Al'Bashir Arrest Warrant 1*, ICC-02/05-01/09-1. Judge Ušacka issued a Separate and Partly Dissenting Opinion. *Al'Bashir First Arrest Warrant Decision, Partly Dissenting Opinion of Judge Anita Ušacka,* ICC-02/05-01/09-3.

333 *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, para 71. On 11 October 2013, Pre-Trial Chamber I determined the case against Al-Senussi to be inadmissible. *Al-Senussi Admissibility Decision,* ICC-01/11-01/11-466-Red. The decision had no effect on the case against Gaddafi. See also 'ICC Pre-Trial Chamber I decides that the Al-Senussi case is to proceed in Libya and is inadmissible before the ICC', 10 November 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx, last visited on 28 October 2013.

334 *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, paras 13, 66, citing Pre-Trial Chamber I, *Decision Regarding the "Report of the Registry regarding the execution of the requests for arrest and surrender"*, ICC-01/11-4-Conf-Exp, 18 November 2011, para 137. However, Pre-Trial Chamber I issued the Arrest Warrant based on co-perpetration. ICC-01/11-01/11-1, para 71. The case against Muammar Gaddafi was terminated following his death. See 'Situation in Libya', http://www.icc-cpi.int/en_menus/icc/ situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx, last visited on 28 October 2013.

335 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sanji Mmasenono Monageng (Presiding Judge), Judge Sylvia Steiner and Judge Cuno Tarfusser.

336 *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, para 69, citing *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 500-537; *Lubanga Confirmation of Charges,* ICC-01/04-01/06-803-tEN, paras 349-365.

As these elements are common to both modes of liability, indirect perpetration and indirect co-perpetration, they are described in the section on indirect co-perpetration, below.

E. Indirect co-perpetration

As described above, Pre-Trial Chamber I[337] in the Katanga & Ngudjolo Confirmation of Charges Decision was the first Chamber to read a fourth mode of liability into Article 25(3)(a), by combining indirect perpetration with co-perpetration to create indirect co-perpetration.[338] Specifically, it held that one co-perpetrator could be held criminally liable for the crimes committed by the subordinates of his co-perpetrator through 'mutual attribution'.[339] Finding 'no legal grounds for limiting the joint commission of the crimes solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it,' Pre-Trial Chamber I reasoned 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 allows the Court to assess the blameworthiness of "senior leaders" adequately'.[340]

In the Ruto, Kosgey & Sang Confirmation of Charges Decision, Pre-Trial Chamber II[341] concurred with Pre-Trial Chamber I's approach, as it had 'merely provided a dynamic or effective interpretation of the provision by way of merging the two modes of participation, which is, in the opinion of this Chamber, consistent with the rules of treaty interpretation envisaged by article 31 of the Vienna Convention on the Law of Treaties'.[342]

The objective requirements for indirect co-perpetration as determined by the Pre-Trial Chamber in the Katanga & Ngudjolo Confirmation of Charges Decision included:

i. the existence of an agreement or common plan between two or more persons;[343]

ii. coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime;[344]

iii. control over the organisation;[345]

iv. organised and hierarchical apparatus of power;[346]

337 At the time of the decision, Pre-Trial Chamber I was composed of Judge Akua Kuenyehia (Presiding Judge), Judge Anita Ušacka and Judge Sylvia Steiner.
338 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717. This decision was issued on 30 September 2008. Pre-Trial Chamber I had confirmed the charges against Ngudjolo based on indirect co-perpetration for all crimes except those related to using child soldiers, for which he was charged as a direct co-perpetrator. ICC-01/04-01/07-717,para 489; Trial Chamber II, *Judgement pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, para 107.
339 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 519.
340 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 492.
341 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.
342 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 289.
343 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 522.
344 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 524-526.
345 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 500.
346 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 511-512.

v. execution of the crimes secured by almost automatic compliance by the subordinates with the orders given by the leader.[347]

The subjective elements required to prove indirect co-perpetration included:

i. The suspects must carry out the subjective elements of the crimes, in accordance with Article 30 of the Statute.[348]

ii. Both suspects must be mutually aware that implementing their common plan would result in the realisation of the objective elements of the crime, and 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 would be a consequence of their acts in the ordinary course of events.[349]

iii. The suspects must be 'aware of the factual circumstances enabling them to exercise control over the crime through another person', including awareness of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near automatic compliance with their orders.[350]

iv. 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', which required that each suspect was aware: '(i) of his essential role in the implementation of the common plan; (ii) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.'[351]

347 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 515. See also *Mbarushimana Arrest Warrant Decision*, ICC-01/04-01/10-1, para 31, summarising the holding in the *Katanga & Ngudjolo Confirmation of Charges Decision*; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 297; *Ntaganda Arrest Warrant Decision*, ICC-01/04-02/06-36-Red, para 67, Al-Senussi Arrest Warrant, *Gaddafi & Al-Senussi Arrest Warrant Decision,* ICC-01/11-01/11-1, para 69; *Simone Gbagbo Arrest Warrant Decision,* ICC 02/11-01/12-2-Red, para 28.

348 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 527-532. Pre-Trial Chamber II in the Bemba, Ruto, Kosgey & Sang and Muthaura & Kenyatta Confirmation of Charges decisions held that Article 30 did not contemplate *dolus eventualis*. *Ruto, Kosgey & Sang Confirmation of Charges,* ICC-01/09-01/11-373, para 333. *Bemba Confirmation of Charges,* ICC-01/05-01/08-424, para 360. *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-RED, para 411.

349 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 533. As described by Pre-Trial Chamber III in the Ruto, Kosgey & Sang Confirmation of Charges Decision, the second subjective requirement involved 'specific intent, where certain crimes require that the suspect fulfils the subjective elements together with an additional one known as ulterior intent or *dolus specialis*'. *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 333.

350 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 534.

351 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 538-539. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 333; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 297; *Ntaganda Arrest Warrant Decision*, ICC-01/04-02/06-36-Red, para 67; *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, para 69; *Simone Gbagbo Arrest Warrant Decision*, ICC 02/11-01/12-2-Red, para 28.

These requirements were reiterated and retained by Pre-Trial Chamber I in the Abu Garda Confirmation of Charges Decision and by Pre-Trial Chamber II in the Ruto, Kosgey & Sang Confirmation of Charges Decision and the Muthaura, Kenyatta and Ali Confirmation of Charges Decision.[352] Indirect co-perpetration has also been the basis for the issuance of numerous arrest warrants.[353] As detailed below, while Pre-Trial Chambers have retained this fourth mode of liability,[354] it was challenged by Judge Van den Wyngaert in her concurrence to the Ngudjolo Trial Judgement.

1. The common plan and essential contribution requirements

In the Katanga & Ngudjolo Confirmation of Charges Decision, Pre-Trial Chamber I held that the crimes committed through their subordinates by indirect perpetration could be mutually ascribed to each of the co-perpetrators 'on the basis of mutual attribution' if the additional objective and subjective elements for co-perpetration were met.[355] It thus applied the objective elements of co-perpetration, namely the common plan and essential contribution requirements. With respect to the former, it found that the common plan could exist between those 'who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual'.[356] It held that 'the common plan must include the commission of a crime', but need not be explicit.[357] Pre-Trial Chamber II applied this standard in both the Ruto, Kosgey & Sang and the Muthaura, Kenyatta & Ali Confirmation of Charges Decisions.[358] In light of the non-explicit nature of the common plan, in the

352 *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 153. In the Abu Garda Confirmation of Charges Decision, Pre-Trial Chamber I assessed his individual criminal responsibility as both a co-perpetrator and an indirect co-perpetrator, underscoring the elements in common between the two modes of liability. ICC-02/05-02/09-243-Red, paras 159-160. *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 292, as applied to Ruto and Kosgey. Pre-Trial Chamber II did not confirm the charges against Kosgey under any mode of liability. It did confirm the charges against Ruto based on indirect co-perpetration. ICC-01/09-01/11-373, paras 293, 349.

353 *Al'Bashir Second Arrest Warrant Decision*, ICC-02/05-01/09-94, 12 July 2010, paras 41-43, discussing only the objective elements. Pre-Trial Chamber I issued an Arrest Warrant for Hussein based on indirect co-perpetration on 1 May 2012. *Hussein Arrest Warrant Decision*, ICC-02/05-01/12-1-Red, paras 20-39. On 27 June 2011, Pre-Trial Chamber I issued Arrest Warrants for Muammar and Saif Al-Islam Gaddafi and Abdullah Al-Senussi based on indirect co-perpetration. *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, paras 83, 90.

354 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 287; *Al-Bashir First Arrest Warrant Decision*, ICC-02/05-01/09-3, para 210. See also *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red; *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, para 68; *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 348; *Mbarushimana Arrest Warrant Decision*, ICC-01/04-01/10-1, para 31.

355 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 520.

356 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 522.

357 *Katanga & Ngudjolo Confirmation of Charges,* ICC-01/04-01/07-717, para 523. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 301; *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-RED, para 399; *Ntaganda Arrest Warrant Decision*, ICC-01/04-02/06-36-Red, para 69; *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12, paras 60, 62, noting that the common plan and the common policy for the purposes of crimes against humanity 'may overlap', but 'are not actually one and the same'.

358 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 301; *Muthaura, Kenyatta & Ali Confirmation of Charges,* ICC-01/09-02/11-382-RED, para 297.

Abu Garda Confirmation of Charges Decision, Pre-Trial Chamber I[359] subsequently assessed whether it could be inferred from the existence of the alleged essential contribution.[360]

Indirect Co-perpetration: First objective requirement: common plan. Highlights of distinctions and variances between cases where common plan was discussed

Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)	Abu Garda Confirmation of Charges Decision (PTC I)	Muthaura, Kenyatta & Ali Confirmation of Charges Decision (PTC II)	Ruto, Kosgey & Sang Confirmation of Charges Decision (PTC II)	Ntaganda Arrest Warrant Decision (PTC I)
Common plan can exist between those who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual (para 522)	Existence of an agreement or common plan between two or more persons (para 160)	The suspect must be part of a common plan or an agreement with one or more persons (para 297)	Existence of a common plan among those who fulfill the elements of the crime through another person (para 301)	The suspect must be part of a common plan or an agreement with one or more persons (para 67)
Non-explicit nature of the common plan				
The common plan must include the commission of a crime but need not be explicit (para 523)	Assessed whether common plan could be inferred from the existence of the alleged essential contribution (para 231)	The common plan must include the commission of a crime but need not be explicit (para 399)	The agreement does not necessarily need to be explicit. Its existence can be inferred (para 301)	Common plan does not need to be directed at the commission of the crime but must contain an element of criminality (para 69)

359 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sylvia Steiner (Presiding Judge), Judge Sanji Mmasenono Monageng and Cuno Tarfusser.

360 *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 231; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 399.

With respect to the essential contribution requirement, Pre-Trial Chamber I found that where 'persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes'.[361] As noted by Pre-Trial Chamber III in the Ruto, Kosgey & Sang and Muthaura, Kenyatta & Ali Confirmation of Charges Decisions, 'the Statute does not require that the essential character of a task be linked to its performance at the execution stage'.[362]

Indirect Co-perpetration: Second objective requirement: essential contribution. Highlights of distinctions and variances between cases where essential contribution was discussed

Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)	Ruto, Kosgey & Sang Confirmation of Charges Decision (PTC II)	Muthaura, Kenyatta & Ali Confirmation of Charges Decision (PTC II)	Ntaganda Arrest Warrant Decision (PTC I)
Where persons commit crimes through others, their essential contribution may consist of activating the mechanisms which lead to automatic compliance with their orders and, thus, the commission of the crimes			
(para 525)	(para 306)	(para 402)	(para 71)
The Statute does not require that the essential character of a task be linked to its performance at the execution stage		The suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime	
(para 526)	(para 306)	(para 296)	(para 67)

361 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 525. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 306; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 402; *Ntaganda Arrest Warrant Decision*, ICC-01/04-02/06-36-Red, para 71. In its submissions pursuant to Regulation 55 on the mode of liability in the Ruto case, the Prosecution called into question the 'essential contribution' requirement, arguing rather that it should be 'substantial'. *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 12. The Prosecution's submission is detailed in the section below on Regulation 55.

362 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 306; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 296.

2. Control over the organisation

At the outset of its discussion of this new mode of individual criminal liability, indirect co-perpetration, in the Katanga & Ngudjolo Confirmation of Charges Decision, Pre-Trial Chamber I read the concept of 'control over the organisation' into the concept of 'control over the crime' and thus into Article 25(3)(a) of the Statute. It explained:

> A concept has developed in legal doctrine that acknowledges the possibility that a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible. The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator'.[363]

It found that 'the cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of "control over an organisation" (Organisationsherrschaft)'.[364] It thus held that: 'For the purposes of this Decision, the control over the crime approach is predicated on a notion of a principal's "control over the organisation"'.[365] Pre-Trial Chamber I decided to base its decision on 'control over the organisation' for 'numerous reasons', namely: '(i) it has been incorporated into the framework of the Statute;[366] (ii) it has been increasingly used in national jurisdictions; and (iii) it has been addressed in the jurisprudence of the international tribunals'.[367] It further noted that this approach had been 'endorsed' by Pre-Trial Chamber III in its decision issuing the Arrest Warrant for Bemba.[368] This approach was subsequently adopted by Pre-Trial Chamber II in the Ruto, Kosgey & Sang and the Muthaura, Kenyatta & Ali Confirmation of Charges Decisions.[369]

363 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 496-497.
364 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 498.
365 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 500.
366 The Chamber found that 'by specifically regulating the commission of a crime through another responsible person, the Statute targets the category of cases which involves a perpetrator's control over the organisation'. *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 501. This view was challenged by Judge Van den Wyngaert in her concurrence to the Ngudjolo Trial Judgement, as described below.
367 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 500, 503, 506, citing Jerusalem District Court, *The Attorney General v. Eichmann,* Case No. 40/61, Judgement, 36 I.L.R. 5-14, 18-276, 12 December 1961, para 197 and, ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Judgement, para 62.
368 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 509, citing Pre-Trial Chamber III, *Decision on the Prosecutor's Application for a Warrant of Arrest against Jean–Pierre Bemba Gombo*, ICC-01/05-01/08-14-tENG, 10 June 2008, para 78.
369 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, paras 291-292; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, paras 296-297.

Indirect Co-perpetration: Third objective requirement: control over the organisation. Highlights of distinctions and variances between cases where control over the organisation was discussed

Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)	Bemba Warrant of Arrest Decision (PTC III)	Muthaura, Kenyatta & Ali Confirmation of Charges Decision (PTC II)	Ruto, Kosgey & Sang Confirmation of Charges Decision (PTC II)	Ngudjolo Trial Judgement, Judge Van den Wyngaert Concurring Opinion
The perpetrator commits the crime through another by means of control over an organisation (para 498) Read the concept of control over the organisation into 'control over the crime': a person who acts through another may be individually criminally responsible, regardless of whether the executor is also responsible. The perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator (paras 496-497)	This decision endorsed the approach of control over an organisation (para 78)	The suspect must have control over the organisation (para 297)	The suspect must have control over the organisation (para 292)	Article 25(3)(a) speaks only of commission through another person: 1) Substituting 'organisation' for 'person' violates strict construction (para 52) 2) Dehumanising the relationship between the indirect perpetrator and the physical perpetrator, the control over an organisation concept dilutes the level of personal influence that the indirect perpetrator must exercise over the person through whom he or she commits a crime (para 53) Overall, the creation of a fourth mode of liability is unconvincing because the level of influence of the indirect perpetrator over the physical perpetrator is at issue (paras 54, 60, 61)

3. Hierarchical apparatus of power & automatic compliance by subordinates

In the Katanga & Ngudjolo Confirmation of Charges Decision, Pre-Trial Chamber I set forth the key criteria for determining the organisation: a hierarchical organisation and the automatic compliance by replaceable subordinates. First, it found that the organisation 'must be based on hierarchical relations between superiors and subordinates' and 'be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another'.[370] As '[t]he leader must use his control over the apparatus to execute the crimes', the Chamber further characterised 'control over the organisation' by the ability of the highest authorities to secure automatic compliance with their orders.[371] It stated: 'In essence, the leader's control over the apparatus allows him to utilise his subordinates as "a mere gear in a giant machine" in order to produce the criminal result "automatically".[372] It explained that such 'mechanisation' ensured that the execution of the plan would not be 'compromised by any particular subordinate's failure to comply with an order'.[373] It stated: 'Any one subordinate who does not comply may simply be replaced by another who will; the actual executor of the order is merely a fungible individual. As such, the organisation also must be large enough to provide a sufficient supply of subordinates'.[374] These requirements were subsequently endorsed and applied collectively, given their inter-related nature, by Pre-Trial Chamber II in the Ruto, Kosgey & Sang and the Muthaura, Kenyatta & Ali Confirmation of Charges Decisions.[375]

Noting that it was such 'automatic compliance' with the leader's orders that rendered him or her a principal to the crime, the Pre-Trial Chamber found that it might be secured 'through intensive, strict, and violent training regimes', including 'abducting minors and subjecting them to punishing training regimes in which they are taught to shoot, pillage, rape, and kill'.[376]

As described in greater detail, below, in her concurrence to the Ngudjolo Trial Judgement, Judge Van den Wyngaert contested the application of the concept of 'control over the organisation'.[377]

370 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 512.
371 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, paras 514, 517. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, paras 313-314. In its submissions pursuant to Regulation 55 on the mode of liability in the Ruto case, the Prosecution suggested that in addition to compliance with orders, the requirement might also be met through the power of veto within the organisation, or the capacity to hire, train, impose discipline or provide resources to subordinates. *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 15. The Prosecution's submission is detailed in the section below on Regulation 55.
372 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 515.
373 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 516.
374 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 516.
375 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, paras 292, 313; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 407.
376 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 518.
377 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 52-54.

Indirect Co-perpetration: Fourth objective requirement: hierarchical apparatus of power and automatic compliance. Highlights of distinctions and variances between cases where hierarchical apparatus of power and automatic compliance was discussed

Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)	Ruto, Kosgey & Sang Confirmation of Charges Decision (PTC II)	Muthaura, Kenyatta & Ali Confirmation of Charges Decision (PTC II)	Ruto Prosecution's submission on Indirect Co-perpetration
Hierarchical organisation: Organisation based on hierarchical relations between superiors and subordinates (para 512)	Organisation consists of an organized and hierarchical apparatus of power (para 314)	Organisation consists of an organized and hierarchical apparatus of power (para 297)	Organisation consists of an organized and hierarchical apparatus of power (para 15)
Automatic compliance by replaceable subordinates: there are sufficient subordinates that the orders will be carried out, if not by one subordinate, then by another (para 512) Automatic compliance means the execution of the plan will not be compromised by any particular subordinate's failure to comply (para 516)	The accused's orders to commit the crimes are secured by almost automatic compliance (para 314)	The accused's orders to commit the crimes are secured by almost automatic compliance (para 297)	Automatic compliance of the subordinates with orders. This requirement is also met when accused possesses a power of veto within the organization, or has the capacity to hire, train, impose discipline and provide resources to the subordinates (para 15)

4. Subjective elements

While in the Katanga & Ngudjolo Confirmation decision Pre-Trial Chamber I applied the first subjective elements of co-perpetration in line with the Confirmation of Charges Decision in the Lubanga case, it added additional factors to the second requirement when co-perpetration was committed through another person, namely that 'the suspects must be aware of the character of their organisations, their authority within the organisation and the factual circumstances enabling near-automatic compliance with their orders'.[378] Similarly, to the third subjective element, 'the suspects' awareness of the factual circumstances enabling them to exercise joint control over the crime', it added an additional component, namely 'joint control over the commission of the crime through another person'.[379]

Concerning the application of Article 30, in the Katanga & Ngudjolo and the Muthaura, Kenyatta & Ali Confirmation of Charges Decisions, Pre-Trial Chambers I and II applied *dolus directus* in the first and second degrees, with no mention of *dolus eventualis*.[380] Following Pre-Trial Chamber III in the Bemba case, in the Ruto, Kosgey & Sang Confirmation of Charges Decision, Pre-Trial Chamber II explicitly held that Article 30 did not encompass *dolus eventualis*.[381] Furthermore, in the Muthaura, Kenyatta & Ali Confirmation of Charges Decision, Pre-Trial Chamber II confirmed *dolus directus* in the second degree that the suspects knew that the commission of the crime 'was a virtually certain consequence of the implementation of the common plan'.[382]

378 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 534.
379 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 538.
380 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 531; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 410.
381 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, paras 333, 335, 336.
382 *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 415.

Indirect Co-perpetration: Subjective elements required to prove indirect co-perpetration

Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)	Muthaura, Kenyatta & Ali Confirmation of Charges Decision (PTC II)	Ruto, Kosgey & Sang Confirmation of Charges Decision (PTC II)
First Subjective Element		
Dolus directus of 1st and 2nd degrees (para 531)	*Dolus directus* of the 1st degree and *Dolus directus* of the 2nd degree with virtual certainty (paras 411, 415)	Intent and knowledge as defined in article 30 of the Statute. It does not encompass *Dolus Eventualis* (paras 333, 336)
Second Subjective Element		
All the co-perpetrators, including the suspect, must 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, and undertake such activities with the specific intent to bring about the objective elements of the crime (para 533)	The suspects must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes (para 410)	The suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes (para 292)
Additional Element		
The suspect must be aware of the character of their organisations, their authority within the organisation and the factual circumstances enabling near automatic compliance with their orders (para 534)	No additional element	No additional element
Third Subjective Element		
The suspect's awareness of the factual circumstances enabling them to exercise joint control over the commission of the crime through another person(s) (para 534)	The suspects must be aware of the factual circumstances enabling them to exercise joint control over the commission of the crime through another person(s). (para 410)	The suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s). (para 292)
Additional Element		
The suspect must be aware of the character of their organisations, their authority within the organisation and the factual circumstances enabling near automatic compliance with their orders (para 534)	No additional element	No additional element

5. Judge Van den Wyngaert's separate, concurring opinion to *The Prosecutor v. Mathieu Ngudjolo Chui* Trial Judgement

Although Trial Chamber II declined to enter into any legal analysis of Ngudjolo's criminal responsibility in the Trial Judgement, as it acquitted him of all charges based on its factual findings,[383] Judge Van den Wyngaert issued a concurring opinion, addressing Pre-Trial Chamber I's interpretation of Article 25(3)(a) in its decision confirming the charges against Ngudjolo based on indirect co-perpetration.[384]

As noted above, Judge Van den Wyngaert distanced herself from the 'control over the crime' and thus the 'control over the organisation' theories. Finding that Article 25(3)(a) spoke only of commission 'through another person', Judge Van den Wyngaert contended that 'elevating the concept of "control over an organisation" to a constitutive element of criminal responsibility under Article 25(3)(a) [was] misguided'.[385] First, she found that substituting 'organisation' for 'person' violated strict construction.[386] Second, she found that 'by dehumanising the relationship between the indirect perpetrator and the physical perpetrator, the control over an organisation concept dilute[d] the level of personal influence that the indirect perpetrator must exercise over the person through whom he or she commits a crime'.[387] For Judge Van den Wyngaert, the level of influence of the former over the latter should involve 'subjugation, the domination of the individual will of the physical perpetrator'.[388]

Judge Van den Wyngaert found that the creation of a fourth mode of liability was 'unconvincing' as it led to 'a radical expansion of Article 25(3)' and 'a totally new mode of liability'.[389] According to Judge Van den Wyngaert, 'the level of control or

383 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4. In its final judgement, Trial Chamber II based the acquittal of Ngudjolo on its factual findings concerning his role and functions within the Lendu militia from Bedu-Ezekere. It stated, 'an examination of the evidence does not permit retaining, nor even envisaging, the form of indirect perpetration adopted by the Pre-Trial Chamber, whatever its interpretation of Article 25(3)(a) of the Statute'. *Ngudjolo Trial Judgement*, ICC-01/04-02/12-3-tENG, para 110.

384 *Ngudjolo Trial Judgement*, ICC-01/04-02/12-3-tENG, para 107. Pre-Trial Chamber I had confirmed the charges against Ngudjolo based on indirect co-perpetration for all crimes except those related to using child soldiers, for which he was charged as a direct co-perpetrator. ICC-01/04-02/12-3-tENG, para 107; *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 489.

385 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 52, emphasis in original.

386 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 52. She further underscored the importance of strictly construing the definition of crimes as required by Article 22(2), which she argued extended to forms of criminal responsibility as well. Article 22(2) provides: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' She stated, 'treaty interpretation cannot be used to fill perceived gaps in the available arsenal of forms of criminal responsibility'. *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 16-17.

387 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 53.

388 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 54.

389 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, paras 60-61.

influence of the indirect perpetrator over the physical perpetrator' was at issue.[390] In this regard, she described this mode of liability as the creation of a 'new diagonal axis', with 'joint perpetration' constituting a horizontal axis and 'perpetration through another' constituting a vertical axis.[391] She thus found that according to Pre-Trial Chamber I's interpretation, it was possible to confirm charges based on this newly created mode of liability, 'indirect co-perpetration', without being able to confirm either joint perpetration, or indirect perpetration, both of which were explicitly included in the Statute. She stated: 'One needs to look no further than the (now largely discredited) facts confirmed by the Pre-Trial Chamber I in the current case for an example of how this could be so.'[392]

6. Indirect co-perpetration and gender-based crimes

As noted above, in the Muthaura, Kenyatta & Ali Confirmation of Charges Decision, Pre-Trial Chamber II based its decision on a reading of Article 30 that encompassed *dolus directus* of the first and second degree. Specifically, it found substantial grounds to believe that Muthaura and Kenyatta 'intended both to engage in the conduct and to cause the consequences (dolus directus in the first degree)' for the 'killings, displacement and severe physical and mental injuries'.[393] In contrast, in the one paragraph in the Decision in which rape was addressed, for this crime, the Chamber found that the suspects 'knew that rape was a virtually certain consequence of the implementation of the common plan'. It thus found substantial grounds to believe that the suspects:

> possessed the requisite intent for rape, i.e. they intended to engage in the conduct and were aware that the consequence would occur in the ordinary course of events, as the almost inevitable outcome of their conduct, within the meaning of article 30(2)(b) of the Statute (dolus directus in the second degree).[394]

390 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 54.
391 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 59.
392 *Ngudjolo Trial Judgement*, *Concurring Opinion of Judge Van den Wyngaert*, ICC-01/04-02/12-4, para 63.
393 *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 414.
394 *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 415.

Article 25(3)(a) Summary of distinctions between co-perpetration, indirect perpetration and indirect co-perpetration

	Co-perpetration	Indirect Perpetration	Indirect Co-perpetration
Objective Elements			
Common Plan	X		X
Essential Contribution	X		X
Control over an Organisation		X	X
Organised and Hierarchical Apparatus of Power		X	X
Execution of the Crimes Secured by Almost Automatic Compliance by the Subordinates		X	X
Subjective Elements			
Knowledge and Intent	X	X	X
(Mutual) Awareness and Acceptance of the Likelihood that Implementing the Common Plan would Result in the Realisation of the Objective Elements of The Crime	X	X	X
Awareness of the Factual Circumstances Enabling to (Jointly) Control the Crime	X	X	X

F. Article 25(3)(b): Liability for ordering, soliciting or inducing the commission of a crime

Although Pre-Trial Chamber II[395] issued Arrest Warrants in the Situation in Uganda for all five suspects on the basis of ordering or inducing under Article 25(3)(b),[396] until its decision on 13 July 2012 to issue a Warrant of Arrest for Sylvestre Mudacumura, no ICC Chamber had elaborated on the interpretation of the standards for liability under this provision. Similarly, in its decision to issue an Arrest Warrant for Ahmad Harun in the Darfur Situation, Pre-Trial Chamber I[397] found reasonable grounds to believe that Harun was criminally responsible under Articles 25(3)(b) and 25(3)(d) of the Statute for the commission of various crimes against humanity and war crimes,[398] without elaborating on the standards for liability under Article 23(3)(b).

Mudacumura, who remains at large, is the alleged Supreme Commander of the *Forces Démocratiques pour la Libération du Rwanda* (FLDR), an alleged member of the FDLR Steering Committee, and President of the High Command, making him the highest ranking military officer in the FDLR. He is charged with committing war crimes and crimes against humanity, including rape, torture, mutilation, and outrages upon personal dignity, in North and South Kivu, Eastern DRC in 2009-2010.[399] In its decision to issue a Warrant of Arrest for Mudacumura,[400] Pre-Trial Chamber II[401] observed that the Prosecutor had presented three alternative modes of liability for Mudacumura's individual criminal responsibility, namely: (i) indirect co-perpetration pursuant to Article 25(3)(a) of the Statute, (ii) ordering pursuant to Article 25(3)(b) of the Statute; and (iii) command responsibility pursuant to Article 28(a) of the Statute.[402] Finding no reasonable grounds to believe that Mudacumura was criminally responsible as an indirect co-perpetrator within the meaning of Article 25(3)(a)

395 At the time of the decision, Pre-Trial Chamber II was composed of Judge Tuiloma Neroni Slade (Presiding Judge), Judge Mauro Politi and Judge Fatoumata Dembele Diarra.

396 Pre-Trial Chamber II issued an Arrest Warrant for Kony, Otti, Odhiambo, Ongwen and Lukwiya pursuant to Article 25(3)(b) of the Statute without discussing the applicable standards for liability under the provision. See *Kony Arrest Warrant,* ICC-02/04-01/05-53, para 42; *Otti Arrest Warrant,* ICC-02/04-01/05-54, para 42; Pre-Trial Chamber II, *Odhiambo Arrest Warrant*, ICC-02/04-01/05-56, para 32; *Ongwen Arrest Warrant*, ICC-02/04-01/05-57, para 30. According to the decision of the Pre-Trial Chamber II of 11 July 2007, to terminate the proceedings against Lukwiya, the Warrant of Arrest was rendered without effect and the name of Lukwiya has been removed from the case. *Decision to Terminate the Proceedings Against Raska Lukwiya*, ICC-02/04-01/05-248.

397 At the time of the decision, Pre-Trial Chamber I was composed of Judge Akua Kuenyehia (Presiding Judge), Judge Claude Jorda and Judge Sylvia Steiner.

398 *Harun Arrest Warrant*, ICC-02/05-01/07-2, p 6. With respect to the count relating to Article 25(3)(b), the Chamber found that Haran induced the war crime of pillaging (Count 37).

399 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-RED, p 28-29; See also *Gender Report Card 2012*, p 174.

400 The decision to issue a Warrant of Arrest for Mudacumura is discussed in detail in the *Gender Report Card 2012*, p 123-128.

401 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.

402 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 59. See also *Decision on Summons to Appear for Ruto, Kosgey and Sang*, ICC-01/09-01/11-1, para 36, noting that: 'A person cannot be deemed concurrently as a principal and an accessory to the same crime'.

of the Statute,[403] the Chamber turned to the second alternative mode of liability presented by the Prosecutor, namely, Article 25(3)(b). Citing to the Confirmation of Charges Decisions in the Lubanga and Katanga & Ngudjolo cases, it observed that ordering under Article 25(3)(b) was 'a form of accessorial liability at this Court'.[404] Referencing this form of liability at the ad hoc tribunals, it held that individual criminal responsibility under Article 25(3)(b) of the Statute required the following objective and subjective elements:

i. The person was in a position of authority;

ii. The person instructed another person in any form to either: (i) commit a crime that in fact occurred or was attempted or (ii) perform an act or omission in the execution of which a crime was carried out;

iii. The order had a direct effect on the commission or attempted commission of the crime;

iv. The person was at least aware that the crime would be committed in the ordinary course of events as a consequence of the execution or implementation of the order.[405]

The Chamber further noted that the person could 'give the order through an intermediary and need not give the order directly to the physical perpetrator'.[406] Pre-Trial Chamber II concluded that there were reasonable grounds to believe that Mudacumura was criminally responsible under Article 25(3)(b) for the purpose of issuing the Arrest Warrant, but underscored that this did not prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings.[407]

403 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 62, finding insufficient evidence concerning the alleged common plan.
404 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 63, citing *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, paras 320-321 and *Katanga & Ngudjolo Confirmation Of Charges*, ICC-01/04-01/07-717, para 517.
405 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 63.
406 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 63.
407 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 69.

Comparison between decisions analysing the mode of liability under 25(3)(b)

<table>
<tr><th>Decisions to issue Arrest Warrants for Kony, Otti, Odhiambo, Ongwen and Lukwiya (PTC II)

Decision to issue an Arrest Warrant for Harun (PTC I)</th><th>Lubanga Confirmation of Charges Decision (PTC I)</th><th>Katanga & Ngudjolo Confirmation of Charges Decision (PTC I)</th><th>Decision to Issue an Arrest Warrant for Mudacumura (PTC II)</th></tr>
<tr><td rowspan="2">In these decisions, the suspects were charged under this mode of liability, but nothing was said about the standards for liability</td><td colspan="3">Ordering is a form of accessorial liability

(para 320) (para 517) (para 63)</td></tr>
<tr><td>Decision did not elaborate on the objective and subjective elements for liability</td><td>Decision did not elaborate on the objective and subjective elements for liability</td><td>1) The person was in a position of authority.
2) The person instructed another person in any form to either: (i) commit a crime that in fact occurred or was attempted or (ii) perform an act or omission in the execution of which a crime was carried out.
The order had a direct effect on the commission or attempted commission of the crime.
3) The person was at least aware that the crime would be committed in the ordinary course of events as a consequence of the execution or implementation of the order.

(para 63)</td></tr>
</table>

G. Article 25(3)(c): Aiding and abetting

No cases to date have been charged under Article 25(3)(c).

H. Article 25(3)(d): Liability for contributing 'in any other way' to the commission of a crime

As described in greater detail, above, in the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I[408] defined Article 25(3)(a) as distinguishing between perpetrators and accessories, characterising Article 25(3)(d) as a 'residual form of accessory liability', distinct from 'ordering, soliciting, inducing, aiding, abetting or assisting' pursuant to Article 25(3)(b) and (c) 'by reason of the state of mind in which the contributions were made'.[409] Article 25(3)(d) was applied for the first time by Pre-Trial Chamber I[410] in its decision to issue an Arrest Warrant for Kushayb based on Article 25(3)(a) and (d).[411] However, in that decision, the Chamber did not discuss in any detail the requirements for establishing liability under Article 25(3)(d). It was not until 28 September 2010 in Pre-Trial Chamber I's[412] decision to issue a Warrant of Arrest for Mbarushimana and its subsequent Confirmation of Charges Decision on 16 December 2011, in which the Majority declined to confirm any charges against the accused, that the requirements for liability under Article 25(3)(d) were more fully addressed.[413]

On 23 January 2012, Pre-Trial Chamber II[414] issued Confirmation of Charges Decisions for Joshua Arap Sang and Mohammed Hussein Ali under this provision in the Ruto, Kosgey & Sang and Muthaura, Kenyatta & Ali cases, respectively.[415] Finally, on 21 November 2012, in the Katanga & Ngudjolo case,[416] a Majority of Trial Chamber II[417] (Judge Van den Wyngaert dissenting), issued a decision, severing the cases

408 At the time of the decision, Pre-Trial Chamber I was composed of Judge Claude Jorda (Presiding Judge), Judge Akua Kuenyehia and Judge Sylvia Steiner.
409 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 337. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 354, referring to Article 25(3)(d) as 'a catch all form of liability'.
410 At the time of the decision, Pre-Trial Chamber I was composed of Judge Akua Kuenyehia (Presiding Judge), Judge Claude Jorda and Judge Sylvia Steiner.
411 *Kushayb Arrest Warrant*, ICC-02/05-01/07-3-Corr, p 6.
412 At the time of the decision, Pre-Trial Chamber I was composed of Judge Cuno Tarfusser (Presiding Judge), Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng.
413 *Mbarushimana Arrest Warrant*, ICC-01/04-01/10-2-tENG; *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red.
414 At the time of both decisions, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul, Judge Cuno Tarfusser.
415 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 285; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED.
416 The cases were joined on 10 March 2008. Pre-Trial Chamber I, *Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257, 10 March 2008. Prior to his transfer into ICC custody on 18 October 2007, Katanga had been held in detention at the central prison in Makala in the DRC since 9 March 2007. Ngudjolo was arrested in the DRC and transferred into the custody of the Court in February 2008.
417 At the time of this decision, Trial Chamber II was composed of Judge Bruno Cotte (Presiding Judge), Judge Fatoumata Dembele Diarra and Judge Christine Van den Wyngaert.

against Ngudjolo[418] and Katanga and giving notice to the parties and participants that it planned to invoke Regulation 55 of the Regulations of the Court concerning a possible legal recharacterisation of the mode of responsibility from Article 25(3)(a)[419] to common purpose liability under Article 25(3)(d)(ii) as applied to Katanga only.[420]

1. The elements of common purpose liability

Callixte Mbarushimana is the alleged Executive Secretary of the FDLR, and was charged with the broadest range of gender-based crimes to date at the ICC, including the war crimes of torture, rape, inhuman treatment, and mutilation; and torture, rape, other inhumane acts, and persecution as crimes against humanity, committed between in 2009 in North and South Kivu, Eastern DRC.[421] In its decision issuing the Arrest Warrant for Mbarushimana, Pre-Trial Chamber I held that the objective requirements for showing criminal liability under Article 25(3)(d)[422] included the following:

i. a crime within the jurisdiction of the Court is attempted or committed;

ii. the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; and

iii. the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.[423]

It held the following as subjective elements:

418 Unaffected by the proposed recharacterisation, the Trial Chamber severed the case against Ngudjolo pursuant to Article 64(5), as it would otherwise impermissibly lengthen his trial. *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 58-62. Trial Chamber II subsequently issued the Trial Judgement in the case *The Prosecutor v. Mathieu Ngudjolo Chui* on 18 December 2012, acquitting him of all charges, (Judge Van den Wyngaert concurring). *Ngudjolo Trial Judgement*, ICC-01/04-02/12-3-tENG. Judge Van den Wyngaert's concurrence is detailed in the section on indirect co-perpetration, above. For more detailed information about the Ngudjolo case, see the first, second and third Special Issues of the *Legal Eye on the ICC.*

419 As described in detail above, both Katanga and Ngudjolo were charged as indirect co-perpetrators under Article 25(3)(a) of the Statute with seven counts of war crimes: rape, sexual slavery, wilful killings, directing attack against a civilian population, destruction of property, and pillaging. Article 8(2)(b)(xxii); 8(2)(a)(i); 8(2)(b)(i); 8(2)(b)(xxvi); 8(2)(b)(xii); and 8(2)(b)(xvi) and with three counts of crimes against humanity: rape, sexual slavery and murder. Articles 7(1)(g) and 7(1)(a). They were charged as co-perpetrators for the war crime of using children under the age of 15 to take active part in the hostilities. Article 8(2)(b)(xxvi).

420 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA. As described in greater detail in the section on Regulation 55, below, this provision allows for the possibility of legally recharacterising the facts.

421 *Mbarushimana Arrest Warrant*, ICC-01/04-01/10-2-tENG; See also *Gender Report Card 2012*, p 116.

422 As noted above, although the Prosecution had alleged that Mbarushimana was liable as a co-perpetrator, the Pre-Trial Chamber found that as his contribution was not essential, it would examine his liability pursuant to Article 25(3)(d).

423 *Mbarushimana Arrest Warrant Decision*, ICC-01/04-01/10-1, para 39. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 351; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 421. In the Katanga case, a majority of Trial Chamber II required that the accused provided a 'significant contribution'. *Katanga Additional Information Decision,* ICC-01/04-01/07-3371-tENG, para 16.

i. the contribution shall be intentional; and

ii. shall either be made:

(a) with the aim of furthering the criminal activity or criminal purpose of the group; or

(b) in the knowledge of the intention of the group to commit the crime.[424]

Within the framework of this mode of liability, differences between the Chambers, and even between Judges within Pre-Trial Chamber I, arose concerning the level of contribution required, as described in greater detail below.

2. Objective elements

The first objective element requires commission of a crime within the jurisdiction of the Court, and has to date not elicited significant discussion. With respect to the second and third objective elements, however, there have been differing interpretations.

a. Common purpose

In the Confirmation of Charges Decision in the Mbarushimana case, Pre-Trial Chamber I did not find substantial grounds 'to believe that the FDLR pursued the policy of attacking the civilian population', and therefore found that it could not confirm any charges of crimes against humanity.[425] The Chamber therefore found that it did not need to examine the suspect's alleged responsibility for crimes against humanity[426] and went on to consider Mbarushimana's individual criminal responsibility only in respect to the war crimes which it found substantial grounds to believe were committed by the FDLR.

In the Mbarushimana Confirmation of Charges Decision, the Pre-Trial Chamber defined 'a group of persons acting with a common purpose' as 'functionally identical' to an 'agreement or common plan between two or more persons' under Article 25(3)(a), thus equating 'common purpose' with a 'common plan'.[427] Consequently, it held that a common purpose 'must include an element of criminality', but did

424 *Mbarushimana Arrest Warrant Decision*, ICC-01/04-01/10-1, para 39, FN 66, recognising 'the various interpretations of the word "intentional"' as applied to Article 25(3)(d), but not finding it necessary to address the issue. Applying these elements to the facts of the case, the Pre-Trial Chamber found that there were reasonable grounds to believe that Callixte Mbarushimana was criminally responsible under Article 25(3)(d) for the purposes of issuing the Arrest Warrant. *Mbarushimana Arrest Warrant Decision*, ICC-01/04-01/10-1, para 44. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 351; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-RED, para 421.

425 *Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-465-Red, para 263.

426 *Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-465-Red, para 266

427 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 271. See also *Gender Report Card 2012*, p 118-121.

not need to be 'specifically directed at the commission of a crime'.[428] It further held that, similar to the requirements under Article 25(3)(a), the agreement need not be explicit, 'and its existence can be inferred from the subsequent concerted action of the group of persons'.[429] The Chamber further interpreted Article 25(3)(d) as applying 'irrespective of whether the person is or is not a member of the group acting with a common purpose'.[430] As noted by the Appeals Chamber on this issue in the Mbarushimana case, 'the existence of a group acting with a common purpose' was 'a fundamental element' of Article 25(3)(d).[431]

Decision and opinions analyzing common purpose

Mbarushimana Confirmation of Charges Decision (PTC I)	Mbarushimana Appeal Judgement, Decision on the Confirmation of Charges (AC)
Equated 'common purpose' with 'common plan' under Article 25(3)(a). Must include element of criminality but does not need to be specifically directed at the commission of a crime. Agreement need not be explicit. Its existence can be inferred from the subsequent concerted action of the group of persons. Article 25(3)(d) applies irrespective of whether the person is or is not a member of the group acting with a common purpose. (paras 271, 275)	The existence of a group acting with a common purpose is a fundamental element of Article 25(3)(d). (para 66)

428 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 271. The majority of the Chamber declined to confirm the charges against Mbarushimana in part because it did not find, based on the evidence as a whole, that there were substantial grounds to believe that the FDLR leadership constituted a 'group of persons acting with a common purpose' as the common purpose must contain 'at least an element of criminality'. Judge Monageng disagreed with the majority, finding, *inter alia,* that the evidence established, to the required threshold, substantial grounds to believe that an order to create a humanitarian catastrophe was issued by Mudacumura and envisaged attacks against the civilian population primarily aimed at displacement of the population, and therefore found that the common purpose of the group had an element of criminality. See *Mbarushimana Confirmation of Charges*, *Dissenting opinion of Judge Monageng,* ICC-01/04-01/10-465-Red, paras 39-43.

429 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 271.

430 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 275.

431 *Appeals Chamber Judgement on Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-514, para 66, underscoring Pre-Trial Chamber I's decision in the Mbarushimana confirmation of charges decision. In the Kushayb case, Pre-Trial I indicated with respect to the counts relating to Article 25(3)(d) merely that Kushayb was 'part of a group of persons acting with a common purpose', and 'contributed' to the commission of war crimes and crimes against humanity.

b. Level of contribution

In the Mbarushimana Confirmation of Charges Decision, Pre-Trial Chamber I entered into an extensive discussion concerning the level of contribution required.[432] It found that individual criminal responsibility under Article 25(3)(d) needed to reach 'a certain threshold of significance below which responsibility under this provision [did] not arise'.[433] It found that the concept of the 'residual form of accessory liability' as determined in the Lubanga Confirmation of Charges Decision had bearing on the required level of contribution under this provision, and that '25(3)(d) liability would become overextended if any contribution were sufficient'.[434] It further noted that Article 25(3)(d) was 'aimed at combating group criminality', involving 'the commission of comparably more serious crimes', which also had bearing on the required level of contribution.[435]

In determining the level of contribution required to trigger individual criminal responsibility under Article 25(3)(d), Pre-Trial Chamber I in Mbarushimana also made reference to the hierarchy of responsibility as held in the Lubanga Confirmation of Charges Decision to distinguish Article 25(3)(d) from the 'essential contribution' required under Article 25(3)(a) and the 'substantial contribution' required by Article 25(3)(c).[436] It concluded that in light of the 'residual nature of Article 25(3)(d) and its focus on group criminality' that the contribution by a group acting with a common purpose to the commission of the crime must 'be at least significant'.[437] It explained:

> Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of Article 25(3)(d) liability for their infinitesimal contribution to the crimes committed.[438]

It indicated that the extent of the person's contribution was to be determined 'by considering the person's relevant conduct and the context in which this conduct is performed'.[439] While noting that what constituted a significant contribution had to be determined on a case-by-case basis, it listed several factors to assist in an assessment:

> i. the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose;

432 In the Kushayb case, the Pre-Trial Chamber noted that with respect to the counts relating to Article 25(3)(d) merely that Kushayb 'contributed' to the commission of war crimes and crimes against humanity. *Kushayb Arrest Warrant*, ICC-02/05-01/07-3-Corr.
433 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, paras 276, 283.
434 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, paras 277-278, emphasis in original.
435 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 278, FN 658, noting that Article 25(3)(d) contemplated criminal responsibility 'for acting with a mere knowledge of the group's intent to commit a crime'.
436 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 279. See also *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 354, stating: 'If both subparagraph (c) and (d) required a "substantial" contribution, the hierarchical structure of the different modes of participation envisaged by article 25(3) would be rendered meaningless'.
437 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 283. See also *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, para 16.
438 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 277, emphasis added.
439 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 285.

ii. any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes;

iii. whether the person created or merely executed the criminal plan;

iv. the position of the suspect in the group or relative to the group; and

v. 'perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed'.[440]

Similarly, in the Ruto, Kosgey & Sang Confirmation of Charges Decision, Pre-Trial Chamber II found that Article 25(3)(d) was 'satisfied by less than "substantial" contribution, as far as such contribution results in the commission of the crimes charged'.[441] It stated: 'If both subparagraph (c) and (d) required a "substantial" contribution, the hierarchical structure of the different modes of participation envisaged by article 25(3) would be rendered meaningless'.[442]

In light of the fact that the contribution alleged by the Prosecution in the Mbarushimana case included covering up crimes already committed, the Pre-Trial Chamber also examined the applicability of Article 25(3)(d) to contributions after the fact.[443] While recognising that ex post facto assistance was explicitly excluded from the liability foreseen in Article 25(3)(c), the Chamber noted that it had been recognised by the International Law Commission, Nuremberg case law and the ad hoc tribunals.[444] It concluded that Article 25(3)(d) liability could include contribution to a crime's commission after it had occurred 'so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime'.[445]

The Majority of Pre-Trial Chamber I declined to confirm the charges against Mbarushimana in part because it did not find as a factual matter that he significantly contributed to the commission of the alleged war crimes.[446] The Chamber therefore did not apply an interpretation of Article 25(3)(d) to the individual crimes for which he had been accused. In contrast, in her dissenting opinion, Judge Monageng found that Mbarushimana 'did facilitate the commission of crimes to such an extent that they can be classified as a significant contribution'.[447] On 30 May 2012, in its decision in response to the Prosecution appeal,[448] the Appeals Chamber refrained from addressing the level of contribution required under Article 25(3)(d) as it found that

440 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 283.
441 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 355.
442 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373, para 354.
443 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 286.
444 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 286.
445 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 287.
446 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 292.
447 *Mbarushimana Confirmation of Charges*, *Dissenting Opinion of Judge Monageng*, ICC-01/04-01/10-465-Red, para 105.
448 The Prosecution made three arguments on appeal: (i) a plain reading of Article 25(3)(d) of the Statute criminalises 'any' contribution to a crime by a group of persons acting with a common purpose; (ii) the drafting history of that provision corroborates that 'any' contribution suffices to give rise to criminal responsibility; and (iii) the Pre-Trial Chamber considered inappropriate factors which do not suffice to 'override the statutory language and the drafters' intent'. The Appeals Chamber, *Corrigendum to the "Prosecution's Document in Support of Appeal against the 'Decision on the Confirmation of Charges'"*, ICC-01/04-01/10-499-Corr, 13 March 2012, paras 52-68.

the threshold requirement of a group acting with a common purpose had not been met.[449] It thus confirmed Pre-Trial Chamber I's decision not to confirm the charges.

In her separate opinion to the Appeals Chamber's confirmation of the Mbarushimana Confirmation of Charges Decision, Judge Fernández de Gurmendi compared the impugned decision with the text of Article 25(3)(d) to observe that the Pre-Trial Chamber had in effect 'added a criterion' to the wording of the provision, as the term 'significant' appeared nowhere in the text of Article 25(3)(d).[450] She found that the phrase 'in any other way' as it appeared in the provision indicated that 'there should not be a minimum threshold or level of contribution under the mode of liability'.[451] She found the Pre-Trial Chamber's arguments in support of the significant contribution threshold to be unconvincing, including its reference to the 'infinitesimal contribution'.[452] Rather, she found that the issue of such 'neutral' contributions were 'better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution'.[453] She would have thus 'held that the Pre-Trial Chamber erred in finding that the contribution to the crimes must be significant'.[454]

449 *Appeals Chamber Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-514, para 65, calling into question the Pre-Trial Chamber's decision to analyse the requisite level of contribution under Article 25(3)(d), despite having found there was no 'group of persons acting with a common purpose' and finding that it did so in a manner so 'ambiguous' that if it were to address the merits of the third ground of Appeal, the Appeals Chamber 'would be doing so in a vacuum and thereby be engaging in what would be a purely academic discussion'. ICC-01/04-01/10-514, paras 67-68. For a description of the Appeals Chamber decision, see *Gender Report Card 2012*, p 121-123.

450 *Appeals Chamber Mbarushimana Confirmation of Charges*, *Separate Opinion of Judge Silvia Fernandez de Gurmendi*, ICC-01/04-01/10-514, para 7.

451 *Appeals Chamber Mbarushimana Confirmation of Charges*, *Separate Opinion of Judge Silvia Fernandez de Gurmendi*, ICC-01/04-01/10-514, para 9.

452 *Appeals Chamber Mbarushimana Confirmation of Charges, Separate Opinion of Judge Silvia Fernández de Gurmendi*, ICC-01/04-01/10-514, paras 9-14, also contesting the Pre-Trial Chamber's reliance on the gravity threshold for the purpose of admissibility under Article 17 of the Statute, which had no relevance for interpreting the crimes under the jurisdiction of the Court, as well as its reliance on joint criminal enterprise as applied by the *ad hoc* tribunals.

453 *Appeals Chamber Mbarushimana Confirmation of Charges, Separate Opinion of Judge Silvia Fernández de Gurmendi*, ICC-01/04-01/10-514, para 12.

454 *Appeals Chamber Mbarushimana Confirmation of Charges, Separate Opinion of Judge Silvia Fernández de Gurmendi*, ICC-01/04-01/10-514, para 15.

Comparison of decisions and opinions analysing level of contribution

Mbarushimana Confirmation of Charges Decision (PTC I)	Ruto, Kosgey & Sang Confirmation of Charges Decision (PTC II)	Mbarushimana Appeal Judgement on the Confirmation of Charges Decision, Judge Fernández de Gurmendi Dissenting Opinion
The contribution of a group, acting with a common purpose to the commission of a crime, must be at least significant. Extent of contribution is to be determined by considering the relevant conduct and the context in which the conduct is performed. The determination should be case by case, but the Chamber listed certain factors enumerated above. Contributing to a crime's commission after it has occurred can also lead to liability, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime. (paras 276 – 287)	Article 25(3)(d) satisfied by less than 'substantial' contribution, as far as such contribution result in the commission of the crimes charged. (paras 354 – 355)	The term 'significant' did not appear in the text of Article 25(3)(d) and was added by the Pre-Trial Chamber. Based on the phrase 'in any other way,' found there should not be a minimum threshold or level of contribution under the mode of liability. (paras 7 – 15)

3. Subjective Elements

a. Intent

In defining the first subjective element, Pre-Trial Chamber I in the Mbarushimana Confirmation of Charges Decision relied on the definition provided in Article 30 to determine 'intentional contribution' for the purpose of Article 25(3)(d) liability. It held that the person must both: (i) mean to engage in the relevant conduct that allegedly contributed to the crime; and (ii) 'be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility'.[455]

b. Aim or knowledge

Noting the disjunctive nature of the second subjective element, the Pre-Trial Chamber in the Mbarushimana case found that knowledge was sufficient to incur liability under Article 25(3)(d). It explained:

> Since knowledge of the group's criminal intentions is sufficient for criminal responsibility, it is therefore not required for the contributor to have the intent to commit any specific crime and not necessary for him or her to satisfy the mental element of the crimes charged. This stands in sharp contrast with liability under article 25(3)(a) of the Statute, where the suspect must meet the subjective elements of the crimes charged.[456]

Although the Majority declined to confirm the charges against Mbarushimana based, in part, on its finding that the objective elements of criminal liability had not been met (eg, criminal purpose and significant contribution), in her dissent Judge Monageng found that all that was required to be held responsible under Article 25(3)(d) was that 'the contribution to the crime be made with the aim to further the general criminal activity or purpose of the group'.[457] At the same time, she found substantial grounds to believe that Mbarushimana 'acted in the knowledge of the intention of the FDLR leadership to commit the crimes within the scope of the common purpose'.[458]

In its consideration of the Prosecution appeal, the Appeals Chamber did not address the subjective elements of the individual criminal responsibility under Article 25(3)(d).

455 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 288.
456 *Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-465-Red, para 289.
457 *Mbarushimana Confirmation of Charges*, *Dissenting opinion of Judge Monageng*, ICC-01/04-01/10-465-Red, para 128, FN 289, citing the International Convention for the Suppression of Terrorist Bombings and the Convention Relating to Extradition between Member States of the European Union.
458 *Mbarushimana Confirmation of Charges*, *Dissenting opinion of Judge Monageng*, ICC-01/04-01/10-465-Red, para 133.

Comparison of decisions and opinions analysing subjective requirements

<table>
<tr><th>Subjective Requirement 1:</th><th>Subjective Requirement 2:</th></tr>
<tr><td colspan="2">Mbarushimana Confirmation of Charges Decision (PTC I)</td></tr>
<tr><td rowspan="2">Person must both:
i. Mean to engage in the relevant conduct that allegedly contributed to the crime; and
ii. Be at least aware that his or conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility
(para 288)</td><td>Knowledge of a group's criminal intentions is sufficient for criminal responsibility. Not required for the contributor to have the intent to commit any specific crime and not necessary for him or her to satisfy the mental element of the crimes charged.
(para 289)</td></tr>
<tr><td>Mbarushimana Confirmation of Charges Decision, Judge Sanji Mmasenono Monageng Dissenting Opinion</td></tr>
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(para 128)</td></tr>
</table>

I. Article 25(3)(e): Liability for direct incitement to genocide

No cases to date have been charged under Article 25(3)(e).

J. Article 25(3)(f): Liability for attempt to commit a crime

The Confirmation of Charges Decision[459] in the Banda & Jerbo case is the only decision to date addressing liability for attempt under Article 25(3)(f) for one count, attempted violence to life.[460] Article 25(3)(f) was also charged as an alternative mode of liability in The Prosecutor v. Laurent Gbagbo,[461] and Pre-Trial Chamber I[462] issued a Summons to Appear for Bahr Idriss Abu Garda under 25(3)(f) in the alternative.[463]

Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo) are Sudanese citizens of Zaghawa ethnicity.[464] Banda and Jerbo were charged, in their capacity as former leaders of Sudanese rebel groups, with war crimes, together with rebel leader Bahar Idriss Abu Garda (Abu Garda), in connection with an attack on the AU peacekeeping mission at the Haskanita Military Group Site in Sudan in September 2007.[465] As discussed above, the Pre-Trial Chamber declined to confirm charges against Abu Garda in February 2010.[466]

At the outset of its discussion, Pre-Trial Chamber I[467] in the Banda & Jerbo Confirmation of Charges Decision referred to the Confirmation of Charges Decision in the Katanga & Ngudjolo case, which noted that 'the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete'.[468] The first sentence of Article 25(3)(f) of the Rome Statute requires that the person attempt to commit the crime 'by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.' In light of this, Pre-Trial Chamber I in Banda & Jerbo found that it was 'of critical importance', in considering whether a crime could be considered as inchoate 'to determine whether the perpetrator's conduct was adequate to bring about as a consequence the crime in question'.[469] Such 'adequacy',

459 The Confirmation of Charges Decision was first issued on 8 December 2011, a corrigendum was issued on 7 March 2011.
460 For a further analysis of the Confirmation of Charges Decision, see *Gender Report Card 2011*, p 164-166.
461 *Gbagbo Confirmation of Charges Hearing*, ICC-02/11-01/11-T-14-ENG ET, 19 February 2013, p 4, line 4. The confirmation of charges hearing was adjourned. *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432.
462 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sylvia Steiner (Presiding Judge), Judge Sanji Mmasenono Monageng and Judge Cuno Tarfusser.
463 *Abu Garda Summons to Appear Decision*, ICC-02/05-02/09-15-AnxA, para 28.
464 *Gender Report Card 2011,* p 164. Proceedings against Jerbo were terminated due to his death, *Decision terminating the proceedings against Jerbo,* ICC-02/05-03/09-512-Red.
465 *Gender Report Card 2011,* p 164.
466 *Gender Report Card 2011,* p 163.
467 At the time of the decision, Pre-Trial Chamber I was composed of Judge Cuno Tarfusser (Presiding Judge), Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng.
468 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 460.
469 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 96.

the Chamber held, required that, 'in the ordinary course of events, the perpetrator's conduct will have resulted in the crime being completed, had circumstances outside the perpetrator's control not intervened'.[470] The Chamber further required that the attempted commission went 'beyond mere preparatory acts', as apparent from the term 'substantial step' within the text of the provision.[471]

As noted by Pre-Trial Chamber I in the Katanga & Ngudjolo case, under Article 25(3)(f), 'mens rea is to be inferred from the moment in which the perpetrator takes the action that commences its execution by means of a substantial step'.[472] In the Banda & Jerbo case, Pre-Trial Chamber I applied one subjective element to Article 25(3)(f), the knowledge and intent requirement set forth in Article 30. Acknowledging that the Prosecution did not allege that either Banda or Jerbo 'personally shot, killed or injured any victims', there were substantial grounds to believe that they 'were among the planners of the attack during which the murders--committed and attempted--took place', gave orders and personally participated in the attack.[473] It found that by orchestrating a heavily armed attack, Banda and Jerbo knew with 'virtual certainty' that 'the killings would ensue'.[474] It concluded that having 'meant to engage in the attack' without necessarily having meant to cause the consequences of the crime, Banda and Jerbo 'were at least aware that in the ordinary course of event, violence to life in the form of murder would occur in the course of such attack'.[475] The Banda & Jerbo case was the first in which a Pre-Trial Chamber confirmed charges for inchoate offences.

III. Article 28

A. The Court's approach to Article 28

Pre-Trial Chamber II's Decision Confirming the Charges against Jean-Pierre Bemba Gombo, represents the only case to date in which a Pre-Trial Chamber has relied upon Article 28 to confirm a suspect's individual criminal liability[476]. As noted above, the Prosecution also charged Mudacumura under Article 28 as an alternative form of liability.[477]

470 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 96.
471 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 97.
472 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 459.
473 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 155.
474 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 156. See also *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 369, requiring virtual certainty under the Article 30 knowledge and intent requirement.
475 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 157.
476 *Bemba Confirmation of Charges,* ICC-01/05-01/08-424.
477 As noted above, in Mudacumura the Prosecution had presented three alternative modes of liability in its application for a Warrant of Arrest, which included command responsibility pursuant to Article 28(a). However, the Pre-Trial Chamber did not consider Article 28(a) in its decision to issue the Arrest Warrant pursuant to Article 25(3)(a). *Mudacumura Arrest Warrant*, ICC-01/04-01/12-1-Red.

1. Pre–Trial Chamber II's Confirmation of Charges decision in *The Prosecutor v. Jean Pierre Bemba Gombo*

Jean-Pierre Bemba Gombo (Bemba) is the founder and former President and Commander-in-Chief of the *Mouvement de libération du Congo* (MLC), charged with war crimes and crimes against humanity, including gender-based crimes, in connection with the MLC's activities in the Central African Republic in 2002.[478] Pre-Trial Chamber III[479] issued an Arrest Warrant for Bemba, having found that there were reasonable grounds to believe that he was criminally responsible, jointly with another person or through other persons under Article 25(3)(a) of the Statute, for war crimes and crimes against humanity, as originally advanced by the Prosecution.[480] Subsequently, however, Pre-Trial Chamber III adjourned the confirmation of charges hearing,[481] requesting the Prosecutor to consider submitting an amended document containing the charges based on Article 28 as a possible mode of criminal liability.[482] The Chamber indicated that it appeared that 'the legal characterization of the facts of the case amount to a different mode of liability under article 28 of the Statute'.[483] Accordingly, in the amended document containing the charges, the Prosecution charged Bemba with criminal responsibility as a 'co-perpetrator' under Article 25(3)(a) of the Statute or, in the alternative, as a military commander or person effectively acting as a military commander or superior under Article 28(a) or (b) of the Statute.[484]

In the confirmation decision of 15 June 2009 Pre-Trial Chamber II[485] found that an examination of Bemba's alleged criminal responsibility under Article 28 of the Statute 'would only be required if there was a determination that there were no substantial grounds to believe that the suspect was, as the Prosecutor submitted, criminally responsible as a "co-perpetrator" within the meaning of Article 25(3)(a) of the Statute'.[486] As the Chamber did not find that there was sufficient evidence to establish substantial grounds to believe that Bemba was liable within the meaning of Article 25(3)(a) of the Statute,[487] it proceeded to examine Article 28.

478 *Gender Report Card 2011,* p 234-235. See also *Amicus Curiae observations of the Women's Initiatives for Gender Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 31 July 2009.
479 At the time of the decision, Pre-Trial Chamber III was composed of Judge Fatoumata Dembele Diarra (Presiding Judge), Judge Hans-Peter Kaul and Judge Ekaterina Trendafilova.
480 *Bemba Arrest Warrant*, ICC-01/05-01/08-1-tENG, para 21. This decision was issued on 23 May 2008.
481 Article 61(7))(c)(ii) of the Statute provides that: 'The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: … (c) Adjourn the hearing and request the Prosecutor to consider: … (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court'.
482 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388.
483 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 46.
484 *Bemba Second Amended Document Containing the Charges*, ICC-01/05-01/08-395-Anx3, paras 57-59.
485 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.
486 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 342.
487 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 344. See the section on Article 25(3)(a), above, for a description of the Pre-Trial Chamber II's analysis of co-perpetration.

Discussing the different interpretations of modes of liability charged under the Rome Statute, the Chamber first distinguished Article 28 from Article 25(3)(a) of the Statute 'in the sense that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities'.[488] Citing the jurisprudence of the ICTY, the Chamber underscored that superior responsibility was 'better understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act'.[489]

The Chamber further observed that Article 28 distinguished 'between two main categories of superiors and their relationships - namely, a military or military like commander (paragraph (a)) and those who fall short of this category such as civilians occupying de jure and de facto positions of authority (paragraph (b))'.[490] Finding that Bemba fell within the ambit of the first category, the Chamber confined its analysis to Article 28(a) of the Statute.[491]

2. Elements of command responsibility

The Chamber considered that in order to prove criminal responsibility within the meaning of Article 28(a), the following elements must be fulfilled:

i. The suspect must be either a military commander or a person effectively acting as such;

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

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

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

v. The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.[492]

a. Military commander

Pre-Trial Chamber II defined the term 'military commander' as:

> a category of persons who are formally or legally appointed to carry out a military commanding function (i.e., de jure commanders). The concept embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level. In this respect, a military commander could be a person

488 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 405.
489 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 405, internal citations omitted.
490 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 406.
491 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 406.
492 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 407.

> occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command. The notion of a military commander under this provision also captures those situations where the superior does not exclusively perform a military function.[493]

Regarding the definition of the term a 'person effectively acting as a military commander', the Chamber found that it covered 'a distinct as well as broader category of commanders' as compared to legal commanders.[494] It held that effective military commanders included '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'.[495] Citing the jurisprudence of the ICTY in the Čelebići case, the Chamber held that 'this category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command'.[496]

b. Effective command or authority and control over forces

The Chamber found 'effective control' to be the second element of command responsibility.[497] Addressing the alternatives offered in the text, the Chamber interpreted the terms 'effective command' and 'effective authority' 'as having close, but distinct meanings', and found the degree of control required under both terms to be the same.[498] In parsing the statutory language, the Chamber clarified that the term 'effective authority' referred to the 'modality, manner or nature' for exercising 'control' over forces or subordinates.[499]

The Chamber found that 'effective control' was 'generally a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates'.[500] It defined 'effective control' as 'the material ability or power to prevent and punish the commission of offences', as well as 'the material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities'.[501] It noted in this regard that 'effective control' did not contemplate any lower standard of control such as the 'simple ability to exercise', even substantial influence over subordinates or forces.[502]

Although concurring with the ad hoc tribunals that the indicia for the existence of effective control was 'more a matter of evidence than of substantive law', and was dependent upon the circumstances of each case, Pre-Trial Chamber II found that

493 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 408.
494 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 409.
495 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 409.
496 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 410.
497 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 411.
498 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, paras 412-413.
499 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 413.
500 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 414.
501 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 415.
502 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 415, citing the ICTY case *The Prosecutor v Hadžihasanović*.

there were a number of factors that could indicate a superior position of authority, namely:

i. the official position of the suspect;

ii. his power to issue or give orders;

iii. the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed);

iv. his position within the military structure and the actual tasks that he carried out;

v. the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities;

vi the capacity to re-subordinate units or make changes to command structure;

vii. the power to promote, replace, remove or discipline any member of the forces; and

viii. the authority to send forces where hostilities take place and withdraw them at any given moment.[503]

The Chamber further required a 'temporal coincidence between the "effective control" and the criminal conduct'.[504] It held that, 'the suspect must have had effective control at least when the crimes were about to be committed'.[505]

c. Failure to exercise proper control

Pre-Trial Chamber II held that the third element of command responsibility required proof that the 'crimes committed by the suspect's forces resulted from his failure to exercise control properly over them'.[506] It found that one could not fail to 'exercise control properly' without having had 'effective control', as well as a causal relationship 'between a superior's dereliction of duty and the underlying crimes'.[507] However, it found that the element of causality only applied to the commander's duty to prevent the commission of future crimes, as the failure to repress and report the crimes arises only after the crimes have been committed, and such failure cannot retroactively cause the crimes. Nonetheless, the Chamber observed that 'the failure of a superior to fulfil his duties during and after the crimes can have a causal impact on the commission of further crimes', as 'a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future'.[508] In light of the Statute's silence 'on the level of causality required', the Chamber rejected any direct causal link between the superior's omission and the crimes, including a 'but for' test. Rather, it held that it was 'only necessary to prove that the commander's

503 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, paras 416-417.
504 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 418.
505 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 419, emphasis in original.
506 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 420.
507 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, paras 422-423, finding this interpretation with strict construction pursuant to Article 22(2).
508 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 424.

omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible' under Article 28(a).[509]

d. The suspect either knew or should have known

In discussing the required mental elements for criminal liability under Article 28, Pre-Trial Chamber II first noted that the language of the Statute encompassed two standards: 'knew' and 'should have known'. It observed that the first required 'actual knowledge' while the 'should have known' was a form of negligence.[510] The Chamber first found that the suspect's actual knowledge could not be presumed, but 'must be obtained by way of direct or circumstantial evidence'.[511] It referred to the jurisprudence of the ad hoc tribunals in identifying several factors indicating actual knowledge. These included:

> the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.[512]

The Chamber further found that actual knowledge could be proven if, a priori, the commander was 'part of an organised structure with established reporting and monitoring systems'.[513]

The Chamber held that the 'should have known' standard required the superior to have 'merely been negligent in failing to acquire knowledge of his subordinates' illegal conduct'.[514] The Chamber concluded that the 'should have known' standard required 'more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.'[515] It noted that the 'had reason to know' standard at the ad hoc tribunals[516] and the Special Court for Sierra Leone, as well as the above-listed factors relating to actual knowledge, could be useful in applying the 'should have known' requirement. It held in this regard that the suspect could be considered 'to have known':

> if, inter alia, and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation.[517]

The Chamber reiterated that the 'failure to punish past crimes committed by the same group of subordinates may be an indication of future risk'.[518]

509 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 425.
510 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 429.
511 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 430.
512 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 431.
513 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 431.
514 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 432, internal citations omitted.
515 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 433.
516 The International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda.
517 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 434.
518 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 434.

e. Failure to take all necessary and reasonable measures

The Pre-Trial Chamber held that once the subjective element was satisfied, it was necessary to prove that the suspect 'failed at least to fulfil one of the three duties' listed in Article 28, namely: the duty to prevent the crimes, the duty to repress the crimes, and 'the duty to submit the matter to the competent authorities for investigation or prosecution'.[519] The Chamber underscored that these three duties arose 'at three different stages in the commission of crimes: before, during and after'.[520] It stated, 'a failure to fulfil one of these duties is itself a separate crime' under Article 28.[521] It thus held that a military commander could be held criminally responsible for one or more of these breaches of duty in relation to the same underlying crimes. In other words, 'a failure to prevent crimes which the commander knew or should have known about cannot be cured by fulfilling the duty to repress or submit the matter to the competent authorities'.[522]

i. The duty to prevent

Noting that the Statute was silent on the specific measures required by the duty to prevent crimes, the Chamber listed several relevant factors, including:

i) to ensure that superior's forces are adequately trained in international humanitarian law;

ii) to secure reports that military actions were carried out in accordance with international law;

iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war;

iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.[523]

ii. The duty to repress

The Chamber found that the duty to repress encompassed two separate duties. The first was 'a duty to stop ongoing crimes' that entailed an obligation 'to interrupt a possible chain effect, which may lead to other similar events'.[524] Secondly, it encompassed 'an obligation to punish forces after the commission of crimes'.[525] It held that the duty to punish could be fulfiled in two different ways: 'either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities'.[526] It thus found that the duty to punish as an element of the duty to repress, constituted an alternative to the third duty listed in Article 28(a)(ii), namely, the duty to submit the

519 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 435.
520 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 436.
521 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 436.
522 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 436.
523 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 438, citing extensively to the jurisprudence of the ICTY.
524 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 439, internal citations omitted.
525 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 439.
526 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 440.

matter to the competent authorities. It noted that as the superior's power will depend upon the circumstances of the case, his duty to punish rather than submit the matter to the competent authorities will depend upon the facts of the case.[527]

iii. The duty to submit the matter to the competent authorities for investigation and prosecution

The Chamber held that the duty to punish required that the commander take 'active steps in order to ensure that the perpetrators are brought to justice'. It noted that this remedied situations in which the commanders did not have the ability to sanction their forces, or were able to take measures that did not appear adequate.[528] It found that what constituted '"necessary and reasonable measures" must be addressed in concreto'.[529] It held in this regard that a commander would only be held responsible under Article 28(a) for the failure to take measures 'within his material possibility', which depended on 'the superior's degree of effective control over his forces at the time his duty arises'.[530] Consequently, it found that what constituted 'a reasonable and necessary measure' would be assessed 'on the basis of the commander's de jure power as well as his de facto ability to take such measures'.[531]

Pre-Trial Chamber II confirmed that Bemba was 'criminally responsible within the meaning of article 28(a) of the statute' for five of the eight crimes charged.[532] This determination was based on its finding that there was sufficient evidence to believe Bemba 'effectively acted as a military commander' over troops with 'effective authority and control', 'knew that the MLC troops were committing or were about to commit crimes', and 'failed to take all necessary and reasonable measures within his power to prevent or repress the commission' of the crime.[533]

As Pre-Trial Chamber II has been the only Chamber to date to elaborate the required elements for command responsibility under Article 28, there have been no alternative interpretations put forward in the Court's jurisprudence on this form of individual criminal responsibility.

527 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 441.
528 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 442.
529 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 443.
530 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 443, citing the ICTY *Prosecutor v. Blaškić* case.
531 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 443.
532 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, p 184-185.
533 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, paras 446, 478, 490.

Analysis of the Elements of Article 28(a)

Bemba Confirmation of Charges Decision (PTC II)	
1) Suspect must be either a military commander or a person effectively acting as such (para 407)	A military commander is a person formally or legally appointed to carry out a military commanding function. All persons who have command responsibility within armed forces, irrespective of rank/level. Also includes situations where superior does not exclusively perform military function. The term 'effectively acting' as a military commander covers distinct and broad categories of commanders. It includes those not elected by law to carry out a military commander's roll, yet they perform it *de facto* by exercising control over a group. It may generally encompass superiors who have authority and control over regular government forces such as armed police units or non-government forces. (paras 408 – 410)
2) Suspect must have effective command and control or effective authority and control over forces who committed at least one crime set out in Articles 6 to 8 of the Statute (para 407)	Requires 'effective control' over forces which committed a crime as specified. The terms 'command' and 'authority' have no substantial effect on the required level of control. 'Effective control' is a general manifestation of a superior-subordinate relationship between the suspect and forces. Defined as the material ability or power to prevent and punish commission of offenses, and the material ability to prevent or repress the commission of the crimes or submit matters to proper authorities. Indicia for existence of 'effective control' are more a matter of evidence than law, and based on circumstances of the case. There are a number of factors that could indicate a superior position of authority: 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 level, to engage in hostilities; vi. The capacity to re-subordinate units or make changes to command structure; vii. The power to promote, replace, remove or discipline any member of the forces; and viii. The authority to send forces where hostilities take place and withdraw them at any given moment. (paras 413 – 419)
3) Crimes committed by forces resulted from suspect's failure to exercise control (para 407)	Requires proof that suspect failed to exercise control properly over forces resulting in crimes. The suspect must have 'effective control' to 'exercise control properly'. There must be a causal relationship between a 'dereliction of duties' by a superior and the underlying crimes. This causal relationship only applies to a commander's duty to prevent future crimes, but failure to fulfill duties during and after crimes can have a casual impact on commission of further crimes. It is only necessary to prove the commander's omission increased the risk of the commission of the crimes. (paras 420 – 425)
4) Suspect either knew or should have known that the forces were committing or about to commit the crime(s) (para 407)	'Knew' requires actual knowledge. Cannot be presumed but must be obtained by way of direct or circumstantial evidence. Several factors may be indicative. Can be proven if the commander was part of an organized structure with an established reporting and monitoring system. 'Should have known' requires commander to have been merely negligent in failing to acquire knowledge of subordinates' illegal conduct. Requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime. (paras 429 – 434)
5) Suspect failed to take necessary and reasonable measures to repress commission of the crime(s) or failed to submit matter to competent authorities (para 407)	Necessary to prove suspect failed to fulfill at least one of the three duties listed: 1) The duty to prevent the crimes 2) The duty to repress the crimes 3) The duty to submit the matter to the competent authorities for investigation or prosecution Failure by a military commander to fulfill one of these duties is itself a separate crime under Article 28, and therefore, a commander could be held criminally responsible for one or more of these breaches of duty in relation to the same underlying crimes. (paras 435 – 441)

Part II: Changing the mode of liability at different stages in the proceedings

In addition to the development of divergent interpretations of the Statute in the case law on the elements of the mode of liability, the specific forms of criminal responsibility alleged by the Prosecutor at the arrest warrant/summons to appear and later at the confirmation of charges stages of the proceedings have not always been accepted by the Pre-Trial Chamber. Furthermore, Trial Chambers have invoked Regulation 55 in order to consider an alternative mode of liability other than that confirmed by the Pre-Trial Chamber. Changes to the mode of liability as the proceedings progress from the arrest warrant to the trial stage could reflect the increasing burden of proof applied by the Chambers, as well as the increased availability and assessment of evidence during the proceedings, which may signal that another mode of liability is more appropriate. However, such changes to the mode of liability have raised fairness concerns among several Judges at the Court regarding the Defence's ability to respond to a new mode of liability at later stages of the proceedings, as well as the unreasonable broadening [of] the scope of Regulation 55.'[534].

Article 67(1)(a) of the Statute entitles the accused: 'To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks' at all stages of the proceedings. As applied to the pre-trial stages, Regulation 52(c) requires the document containing the charges to contain 'a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.'

Article 61(7) and Regulation 55 foresee changes to the legal characterisation of the facts—and thus to the mode of liability—at the confirmation of charges and trial stages of the proceedings, respectively.[535] In order to ensure the suspects' and accuseds' fair trial rights, both provisions require notification to the Defence of any potential future changes to the legal characterisation of the facts. This section details the case law to date on changes to the modes of liability at three stages of the proceedings: the arrest warrant/summons to appear, the confirmation of charges and trial phases.

Pre-Trial Chambers have rejected the mode of liability charged by the Prosecution at the arrest warrant stage in two cases. In The Prosecutor v. Bosco Ntaganda and in the Mbarushimana case, the modes of liability charged by the Prosecution in its application for the Arrest Warrant were not retained by the Pre-Trial Chamber, including those charged by the Prosecution in the alternative.

Article 61(7)(c) has been used to adjourn confirmation of charges hearings in the Bemba and Laurent Gbagbo cases, both discussed in more detail below.[536] In the Bemba case, this section was invoked to change the mode of liability asserted by the Prosecution in the document containing the charges. Specifically, Article 61(7)(c)(ii) was used by Pre-Trial Chamber III in its decision to adjourn the confirmation of charges hearing in order to request the Prosecution to amend the document containing the

534 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser,* ICC-01/04-01/07-3363, para 17.

535 Rule 121(1) of the Rules of Procedure and Evidence ensures the application of Article 67 at the confirmation of charges hearing.

536 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388; *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 44.

charges to reflect a different mode of criminal responsibility, namely command responsibility under Article 28, as discussed in the previous section.[537] In the Laurent Gbagbo case, Pre-Trial Chamber I adjourned the confirmation of charges hearing, pursuant to Article 61(7)(c)(i). The Chamber requested that to the extent possible, the Prosecutor consider providing further evidence or conducting further investigations, and additionally submit a new amended document containing the charges setting out the facts of the case 'in detail and with precision'.[538] Judge Fernández de Gurmendi dissented in a separate opinion, disagreeing with the Majority's interpretation of both the role of the Pre-Trial Chamber and the procedural and substantive law applicable to Article 61(7)(c)(i), and further stating that she considered 'that the additional evidence that is being requested is either not appropriate or not relevant to prove the charges as formulated by the Prosecutor.'[539]

In the Katanga and Bemba cases, the mode of liability confirmed by the Pre-Trial Chambers was later called into question by the Trial Chambers through the use of Regulation 55 of the Regulations of the Court. These cases are discussed in greater detail below.

I. Assessing the modes of liability sought by the Prosecutor in the arrest warrant/summons to appear

In their decisions to issue arrest warrants and summonses to appear upon the Prosecutor's application, Pre-Trial Chambers have addressed the initial modes of liability charged with varying degrees of willingness to diverge from the modes set forth by the Prosecutor. In general, the Pre-Trial Chambers have concurred that they are not bound at this early stage of the proceedings by the modes of liability asserted by the Prosecutor. They have further recognised that the mode of liability determined at this early stage may potentially need to be changed as the proceedings progress to the confirmation of charges and trial stages, in light of the additional evidence presented at these stages and the submissions by the parties and participants.

For example, in its decision issuing the Arrest Warrants for Gadaffi & Al-Senussi, Pre-Trial Chamber I[540] stated:

> In relation to the mode of criminal liability attributed to the suspects, the Chamber is of the view that it is not bound by the legal characterisation of the conduct put forth in the Prosecutor's Application. As previously held by the Chamber in the Lubanga case, pursuant to article 58(1) of the Statute, the Chamber is only bound by the factual basis and the evidence and information provided by the Prosecutor in his application. In the view of the Chamber, a warrant of arrest shall be issued when the Chamber is convinced that there are reasonable grounds to

537 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 49. See also FN 552.

538 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388; Decision Adjourning Gbagbo Confirmation of Charges, ICC-02/11-01/11-432, para 44.

539 *Dissenting opinion of Judge Silvia Fernández de Gurmendi*, ICC-02/11-01/11-432-Anx, 3 June 2013, paras 2 and 49.

540 At the time of the decision, Pre-Trial Chamber II was composed of Judge Sanji Mmasenono Monageng (Presiding Judge), Judge Sylvia Steiner and Judge Cuno Tarfusser.

> believe that the person has committed a crime within the jurisdiction of the Court even if the Chamber disagrees with the Prosecutor's legal characterisation of the relevant conduct.[541]

Pre-Trial Chambers have thus at times issued arrest warrants based on a mode of liability different from that asserted by the Prosecutor. For example, although the Prosecutor had sought charges against Bosco Ntaganda as a co-perpetrator pursuant to Article 25(3)(a), in its decision issuing the Arrest Warrant, Pre-Trial Chamber II[542] found that there were reasonable grounds to believe that he was liable as an indirect co-perpetrator. It further held that 'this conclusion does not prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings.'[543]

In other cases, while accepting the mode of liability asserted by the Prosecutor, the Pre-Trial Chambers expressly noted that the mode of liability could be subject to change. In its decisions issuing the Arrest Warrants for Laurent and Simone Gbagbo, Pre-Trial Chamber III[544] observed that 'it is undesirable, particularly at this early stage of the case, for the Chamber to limit the options that may exist for establishing criminal responsibility under the Rome Statute, because this will ultimately depend on the evidence and the arguments in the case'.[545] In this regard, the Chamber observed that until it had:

> heard full arguments from the parties, it is premature to decide, certainly with any finality, whether Article 25(3)(a) of the Statute is the correct basis for proceeding against Mr Gbagbo (either standing alone or along with other provisions) or whether the various elements of the prosecution's theory of "indirect co-perpetration" are relevant to, or applicable in, this case.[546]

In the decision issuing the Arrest Warrant for Laurent Gbagbo, the Chamber concluded by noting that although it was 'satisfied that this substantial test, as advanced by the Prosecutor, is therefore made out, as already indicated, it is likely that this issue (i.e. Mr Gbagbo's suggested liability as an "indirect co-perpetrator" under Article 25(3)(a) of the Statute) may well need to be revisited in due course with the parties and participants'.[547]

Similarly, in its decision issuing an Arrest Warrant for Mudacumura, Pre-Trial Chamber II[548] concluded that there were reasonable grounds to believe that Mudacumura

541 *Gaddafi & Al-Senussi Arrest Warrant Decision*, ICC-01/11-01/11-1, para 70, citing Pre-Trial Chamber I, *Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, 24 February 2006, para 15. This decision was issued on 27 June 2011.

542 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.

543 *Ntaganda Arrest Warrant Decision*, ICC-01/04-02/06-36-Red, para 66. This decision was issued on 13 July 2012.

544 At the time of both decisions, Pre-Trial Chamber III was composed of Judge Silvia Fernández de Gurmendi (Presiding Judge), Judge Elizabeth Odio Benito and Judge Adrian Fulford.

545 *Laurent Gbagbo Arrest Warrant Decision,* ICC-02/11-01/11-9-Red, para 74. See also *Simone Gbagbo Arrest Warrant Decision*, ICC 02/11-01/12-2-Red, para 27, using identical language. The decision issuing the Arrest Warrant for Simone Gbagbo was issued on 2 March 2012.

546 *Laurent Gbagbo Arrest Warrant Decision*, ICC-02/11-01/11-9-Red, para 74. See also *Simone Gbagbo Arrest Warrant Decision*, ICC 02/11-01/12-2-Red, para 27, using identical language.

547 *Laurent Gbagbo Arrest Warrant Decision*, ICC-02/11-01/11-9-Red, para 77.

548 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.

was criminally responsible under Article 25(3)(b), but underscored that this did not prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings.[549]

A. Alternative modes of liability at the arrest warrant/summons to appear stage

Pre-Trial Chambers have taken different approaches to addressing the alternative modes of liability asserted by the Prosecutor in the applications for arrest warrants and summonses to appear. Some Chambers have adopted the alternative modes of liability asserted by the Prosecution, including the adoption of more than one mode as potential alternatives to be decided at the confirmation of charges stage; others have expressly declined to address the alternative modes of liability presented by the Prosecution.

The Kenya Situation arose out of post-election violence in relation to the General Elections in December 2007. Following the Prosecution's application, in March 2011 the Pre-Trial Chamber issued summonses to appear for six suspects in two separate cases. The first case initially involved three suspects aligned with the Orange Democratic Movement at the time of the post-election violence, namely William Samoei Ruto (Ruto), Joshua Arap Sang (Sang) and Henry Kiprono Kosgey (Kosgey). The second case initially involved three suspects aligned with the Party of National Unity at the time of the post-election violence, namely Francis Kirimi Muthaura (Muthaura), Uhuru Muigai Kenyatta (Kenyatta) and Mohammed Hussein Ali (Ali). In January 2012, Pre-Trial Chamber II confirmed charges against Ruto, Sang, Muthaura and Kenyatta, but declined to confirm the charges against Kosgey and Ali.[550]

In the Ruto, Kosgey & Sang case, the Prosecution had alleged three alternative modes of liability for each suspect: indirect co-perpetrator and in the alternative co-perpetrator, both principal forms of liability under Article 25(3)(a); and, in the alternative, common purpose liability, a form of accessory liability under Article 25(3)(d). For Ruto and Kosgey, Pre-Trial Chamber II[551] issued the Summonses to Appear as indirect co-perpetrators pursuant to Article 25(3)(a); for Sang it issued the Summons to Appear under common purpose liability under Article 25(3)(d). It explained:

> the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner. In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative. A person cannot be deemed concurrently as a principal and an accessory to the same crime. Thus, it is the Chamber's view that an initial decision has to be made on the basis of the material provided, as to whether there are reasonable grounds to believe that Ruto, Kosgey and Sang bear criminal responsibility . . . either as co-perpetrators, indirect co-

549 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 69.

550 *Ruto, Kosgey & Sang Confirmation of Charges*, ICC-01/09-01/11-373; *Muthaura, Kenyatta & Ali Confirmation of Charges*, ICC-01/09-02/11-382-Red. For a more detailed analysis of the decisions on the confirmation of charges, see *Gender Report Card 2012,* p 128-130.

551 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.

perpetrators, or any other form of liability presented or that the Chamber finds appropriate.[552]

As described above, in its decision to issue a Warrant of Arrest for Mudacumura,[553] Pre-Trial Chamber II[554] observed that the Prosecutor had presented three alternative modes of liability for Mudacumura's individual criminal responsibility, namely: (i) indirect co-perpetration pursuant to Article 25(3)(a) of the Statute, (ii) ordering pursuant to Article 25(3)(b) of the Statute; and (iii) command responsibility pursuant to Article 28(a) of the Statute.[555] The Prosecution had thus alleged Mudacumura's criminal liability under three disparate modes: as a principal, as an accessory and under command responsibility. Finding no reasonable grounds to believe that Mudacumura was criminally responsible as an indirect co-perpetrator within the meaning of Article 25(3)(a) of the Statute,[556] it issued the Arrest Warrant based on the second alternative mode of liability presented by the Prosecutor, namely as an accessory under Article 25(3)(b).

In contrast, in its decision issuing the second Arrest Warrant for Al'Bashir, Pre-Trial Chamber I[557] found reasonable grounds to believe he was criminally responsible as either an indirect perpetrator or, in the alternative, an indirect co-perpetrator, both forms of principal liability under Article 25(3)(a).[558]

Alternatively, Pre-Trial Chamber II issued Summonses to Appear in the Muthaura, Kenyatta & Ali case for two of the suspects, Muthaura and Kenyatta, on the bases of indirect co-perpetration, although the Prosecution had asserted co-perpetration and common purpose liability as alternate modes of criminal responsibility for all three of them. It issued the Summons to Appear for Ali based on common purpose liability, as asserted by the Prosecution in the alternative.[559] The Chamber made no mention of co-perpetration , the first mode of liability alleged by the Prosecution, in its decision. However, the Chamber concluded by clarifying that 'all the findings in the present section are without prejudice to further evidence at a later stage of the proceedings which would establish individual criminal responsibility for the crimes under a different mode of liability'.

Article 61(7)

The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

552 *Decision on Summons to Appear for Ruto, Kosgey and Sang*, ICC-01/09-01/11-1, para 36.
553 The decision to issue a Warrant of Arrest for Mudacumura is discussed in detail in the *Gender Report Card 2012*, p 123-128.
554 At the time of the decision, Pre-Trial Chamber II was composed of Judge Ekaterina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser.
555 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 59. See also *Decision on Summons to Appear for Ruto, Kosgey and Sang*, ICC-01/09-01/11-1, para 36, noting that: 'A person cannot be deemed concurrently as a principal and an accessory to the same crime'.
556 *Mudacumura Arrest Warrant Decision*, ICC-01/04-01/12-1-Red, para 62, finding insufficient evidence concerning the alleged common plan.
557 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sylvia Steiner (Presiding Judge), Judge Sanji Mmasenono Monageng and Judge Cuno Tarfusser.
558 *Al'Bashir Second Arrest Warrant Decision*, ICC-02/05-01/09-94, para 43.
559 *Decision on Summons to Appear for Muthaura, Kenyatta & Ali*, ICC-01/09-02/11-1, para 38.

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

II. Changing the mode of liability in decisions confirming the charges

As described by the Appeals Chamber: 'the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial'.[560] As noted above, the evidentiary threshold at this stage is 'substantial grounds to believe',[561] higher than at the arrest warrant/summons to appear stage and lower than the 'beyond reasonable doubt' standard required for a conviction at the trial stage. In contrast to the arrest warrant/summons to appear stage of the proceedings, Pre-Trial Chambers have taken different approaches to their assessment of the modes of liability asserted by the Prosecution in the document containing the charges. While at least one has found that in principle the charging document did not limit its consideration of other modes of liability, Pre-Trial Chambers have frequently cited to Article 67(1)(a), Rule 121(1) and Regulation 52(c) in limiting their analysis to the mode(s) of criminal responsibility alleged by the Prosecution in the charging document. Indeed, Chambers have found that the appropriate procedural mechanism for confirming the charges based on a different mode of criminal responsibility than that asserted by the Prosecution requires adjourning the confirmation of charges hearing, pursuant to Article 61(7) and requesting an amended charging document from the Prosecution.

A. Confirming the mode of liability as alleged by the Prosecution

In the Confirmation of Charges Decision in *The Prosecutor v. Bahar Idriss Abu Garda* (Abu Garda), Pre-Trial Chamber I[562] held that even though the Prosecution had charged him as a co-perpetrator or, in the alternative, as an indirect co-perpetrator, it was not excluded from considering the application of another mode of liability. However, despite finding that it was not in principle restricted, the Chamber in fact limited its analysis to the modes of liability alleged in the document containing the charges, finding that the suspect must be informed of the nature, cause and content of the

560 *Appeals Chamber Mbarushimana Confirmation of Charges*, ICC-01/04-01/10-514, para 47.
561 Article 61(7), Rome Statute.
562 At the time of the decision, Pre-Trial Chamber I was composed of Judge Sylvia Steiner (Presiding Judge), Judge Sanji Mmasenono Monageng and Cuno Tarfusser.

charges brought against him pursuant to Article 67(1)(a) and Rule 121(1), and that Regulation 52(c) required the Prosecution to indicate the precise form of participation in the charging document.[563] Similarly, in the Confirmation of Charges Decision for Banda & Jerbo, Pre-Trial Chamber I[564] noted that the Prosecution had charged the suspects as co-perpetrators or as indirect co-perpetrators, 'without excluding any other applicable mode of liability'.[565] However, the Chamber recalled Article 67(1)(a), Rule 121(1) and Regulation 52(c) and restricted its analysis to the modes of liability specifically asserted in the document containing the charges.[566] In contrast, in both the Lubanga and Katanga & Ngudjolo Confirmation of Charges Decisions, Pre-Trial Chamber I[567] held that once it had found sufficient evidence to establish substantial grounds to believe that the first mode of liability charged by the Prosecution, any other possible forms of liability were rendered moot.[568]

B. Adjourning the confirmation of charges hearing pursuant to Article 61(7)(c)

As noted above, Pre-Trial Chambers have adjourned proceedings twice under this provision of the Statute: Pre-Trial Chamber I adjourned the confirmation of charges hearing in the Gbagbo case pursuant to Article 61(7)(c)(i); and Pre-Trial Chamber III adjourned the confirmation of charges hearing in the Laurent Bemba case pursuant to Article 61(7)(c)(ii).

1. Adjournment under 61(7)(c)(i) in *The Prosecutor v. Laurent Koudou Gbagbo*

The case against Laurent Koudou Gbagbo, the former President of Côte d'Ivoire, was the first case brought before the Court in the Situation in the Republic of Côte d'Ivoire, and is the only case to date from that situation to reach the confirmation stage of proceedings. The arrest warrant against Laurent Gbagbo was issued on 23 November

563 *Abu Garda Confirmation of Charges*, ICC-02/05-02/09-243-Red, para 158.
564 At the time of the decision, Pre-Trial Chamber I was composed of Judge Cuno Tarfusser (Presiding Judge), Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng.
565 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 114. Similarly, Pre-Trial Chamber II in the Hussein arrest warrant decision noted that the Prosecution's application for an arrest warrant was based on co-perpetration or indirect co-perpetration 'without excluding any other applicable mode of liability'. *Hussein Arrest Warrant Decision*, ICC-02/05-01/12-1-Red, para 20.
566 *Banda & Jerbo Confirmation of Charges*, ICC-02/05-03/09-121-Corr-Red, para 124. See also *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 41.
567 At the time of the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I was composed of Judge Claude Jorda (Presiding Judge), Judge Akua Kuenyehia and Judge Sylvia Steiner. At the time of the Katanga and Nugudjolo Confirmation of Charges Decision, Pre-Trial Chamber I was composed of Judge Akua Kuenyehia (Presiding Judge), Judge Anita *Ušacka and Judge Sylvia Steiner.*
568 *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803-tEN, para 321; *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717, para 471. While the Prosecution had only charged Lubanga with co-perpetration, it had charged Katanga & Ngudjolo with co-perpetration and, in the alternative, ordering the commission of the crimes. ICC-01/04-01/06-803-tEN, para 319; ICC-01/-04-01/07-717, para 470.

2011.[569] In issuing the Arrest Warrant, Pre-Trial Chamber III[570] was satisfied that there were reasonable grounds to believe that Laurent Gbagbo was responsible as an indirect co-perpetrator, under Article 25(3)(a) of the Statute, for four counts of crimes against humanity - murder, rape and other forms of sexual violence, other inhumane acts and persecution - committed in Côte d'Ivoire between 16 December 2010 and 12 April 2011. These crimes were allegedly committed against civilians who were believed to be supporters of Outtara, Laurent Gbagbo's political opponent, in the period that followed the disputed presidential elections in Côte d'Ivoire of 28 November 2010.[571] Laurent Gbagbo was transferred to the custody of the ICC on 30 November 2011[572], and the Confirmation of Charges hearing took place from 19 to 28 February 2013.

Following the confirmation of charges hearing, Pre-Trial Chamber I issued a decision on 3 June 2013 adjourning the hearing on the confirmation of charges and requesting the Prosecution to consider providing further evidence or conducting further investigation with respect to all charges pursuant to Article 61(7)(c)(i) of the Statute.[573] Presiding Judge Silvia Fernández de Gurmendi issued a dissenting opinion.[574]

In its decision to adjourn the Confirmation of Charges Hearing, the Majority of Pre-Trial Chamber I cited the decision of Pre-Trial Chamber III in the Bemba case, discussed below. In adjourning the hearing pursuant to Article 61(7)(c)(ii) in the Bemba case, Pre-Trial Chamber III determined that such an adjournment could take place subsequent to the oral sessions and prior to the final determination on the merits by the Chamber.[575] The Laurent Gbagbo Pre-Trial Chamber added that Article 61(7)(c)(i), which includes the phrase 'with respect to a particular charge' allows the Chamber to adjourn the confirmation of charges hearing 'with respect to one or more charges, including any element within the charge(s) in question'.[576]

The Majority of Pre-Trial Chamber I considered that the evidence presented by the Prosecution in the Laurent Gbagbo case 'viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges'.[577] The Chamber recalled that the evidentiary threshold established by Article 61(7) for the confirmation of charges phase requires 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged', and that, as established by other Pre-Trial Chambers, the Prosecutor must offer 'concrete and

569 *Laurent Gbagbo Arrest Warrant,* ICC-02/11-01/11-1.
570 Pre-Trial Chamber III was composed of Presiding Judge Silvia Fernández de Gurmendi, Judge Elizabeth Odio Benito and Judge Adrian Fulford. On 15 March 2012, the Presidency dissolved Pre-Trial Chamber III and assigned the Situation of Côte d'Ivoire and the related proceedings to Pre-Trial Chamber I, composed of Presiding Judge Silvia Fernández de Gurmendi, Judge Hans Peter-Kaul and Judge Christine Van den Wyngaert. *Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of Congo, Darfur, Sudan and Côte d'Ivoire situations,* ICC-02/11-01/11-59, *15 March 2012.*
571 *Laurent Gbagbo Arrest Warrant Decision,* ICC-02/11-01/11-9-Red.
572 See further *Gender Report Card 2012,* p 101 and 130-131.
573 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432.
574 *Decision Adjourning Gbagbo Confirmation of Charges*, *Dissenting Opinion of Judge Fernández de Gurmendi*, ICC-02/11-01/11-432-Anx.
575 *Decision Adjourning Gbagbo Confirmation of Charges,* ICC-02/11-01/11-432, para 13 citing ICC-01/05-01/08-388.
576 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 14.
577 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 15.

tangible' proof.[578] The Chamber held that the same evidentiary threshold applies to all factual allegations, including those related to the individual crimes charged, the contextual elements of the crimes and the criminal responsibility of the suspect.[579] However, the Chamber also noted that there is a difference between the crimes that 'underlie a suspect's individual criminal responsibility', which must be 'linked to the suspect personally', and crimes 'committed as part of incidents which only establish the relevant context', which do not require the same 'individualised link'.[580] The information adduced as proof of the latter may be 'less specific' than what is needed to prove the crimes charged, but must still include the identity of the perpetrators, or which group they belong to, and the identity of the victims or at least their real or perceived political, ethnic, religious or national allegiance(s).[581] The Chamber further held that when the existence of 'an attack directed against any civilian population' is alleged by describing a series of incidents, the Prosecutor must establish 'a sufficient number of incidents' to that same evidentiary threshold of substantial grounds to believe.[582]

As to the type of evidence that must be provided at the confirmation stage, and noting that Article 61(5) only requires the Prosecution to present 'sufficient evidence' and that the Prosecutor 'may rely on documentary and summary evidence and need not call the witnesses expected to testify at the trial', the Chamber stated that it 'must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation'.[583] In the Majority Decision, the Pre-Trial Chamber discussed the types of evidence that may be provided, and explained that 'heavy reliance' on anonymous hearsay that is contained in documentary evidence such as press articles and NGO reports is 'problematic' because it 'unduly' limits the Defence's right to investigate and challenge the evidence presented by the Prosecution, and limits the Chamber's ability to assess the trustworthiness of the source and determine the probative value of that information.[584] The Chamber noted 'with serious concern' that in the present case the Prosecutor 'relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity', and affirmed that 'such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation'.[585] The Chamber further noted that many of those incidents were 'described in very summary fashion' making its assessment of whether the perpetrators were acting pursuant to or in furtherance of a policy to attack a civilian population difficult. It also noted that there was an 'incomplete picture' as to the structural connections between the pro-Gbagbo forces involved in the various incidents and the presence and activities of the armed forces who opposed them.[586]

However, the Chamber considered that these 'difficulties in the evidentiary record of the Prosecutor' did not have to automatically lead to the 'immediate refusal to

578 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, paras 16-17. See also *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 29.
579 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 19.
580 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 22.
581 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 22.
582 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 23.
583 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, paras 24-25.
584 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, paras 29-30.
585 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 35.
586 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 36.

confirm the charges'.[587] Although the Chamber did not want to accept 'allegations proved solely through anonymous hearsay in documentary evidence', it noted that past jurisprudence that predated the Appeals Chamber decisions in Mbarushimana and the Kenyatta cases[588] may have appeared 'more forgiving in this regard', and for that reason, it was prepared, 'out of fairness', to give the Prosecution additional time to present or collect further evidence as the Prosecutor might have not 'deemed it necessary to present all her evidence or largely complete her investigation'.[589]Finally, the Chamber considered the implications of this decision for the Defence and concluded that it did not infringe upon the defendant's right to be tried without undue delay given the particularities of this case, namely the seriousness of the charges and the complexity of the case, and having in mind that the adjournment is a possibility foreseen by the Statute.[590]

Based on all of the foregoing considerations, the Chamber requested the Prosecutor to consider providing further evidence or conducting further investigation with respect to six concrete issues,[591] to submit a new amended Document Containing the Charges, a new list of evidence, and an updated consolidated Elements Based Chart.[592]

In her dissenting opinion, Presiding Judge Silvia Fernández de Gurmendi disagreed with the majority on three main grounds: (i) the Majority's 'expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute',[593] (ii) on which facts

587 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 37.

588 *Appeals Chamber Mbarushimana Confirmation of Charges,* ICC-01/04-01/10-514 (OA4); *Appeals Chamber, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute",* ICC-01/09-02/11-425, 24 May 2012.

589 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 37. The Chamber cited the Appeals Chamber judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", in which it stated that the 'Pre-Trial Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence' (ICC-01/04-01/10-514 (OA4), para 48).

590 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 41.

591 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 44. The six concrete issues with respect to which the Chamber asked the Prosecutor to consider providing further evidence or conducting further investigation relate to: (i) the positions, movements and activities of all armed groups opposed to the 'pro-Gbagbo forces' between November 2010 and May 2011, (ii) the organizational structure of the 'por-Gbagbo forces', (iii) information about the alleged policy/plan to attack the pro-Ouattara civilian population, (iv) more detailed information related to each of the incidents allegedly constituting the attack against the pro-Ouattara civilian population (such as whether the physical perpetrators were acting pursuant to or in furtherance of the alleged policy, to which sub-groups of the 'pro-Gbagbo forces' they belonged to, the number of victims, their real or perceived allegiances and the harm they suffered, and the links between incidents inside and outside Abidjan), (v) more specific evidence related to each of the sub-incidents that are part of the 'RTI' and 'Yopougon' incidents, including more detailed evidence for the alleged cases of sexual violence, and finally, (vi) evidence indicating who fired the ammunitions and who was the alleged target at the 'Women's March' and the 'Shelling of Abobo' events.

592 *Decision Adjourning Gbagbo Confirmation of Charges*, ICC-02/11-01/11-432, para 45.

593 *Decision Adjourning Gbagbo Confirmation of Charges*, *Dissenting Opinion of Judge Fernández de Gurmendi*, ICC-02/11-01/11-432-Anx, para 3.

and circumstances need to be proven to the applicable evidentiary standard,[594] and (iii) on the list of issues for which further evidence was requested from the Prosecutor, which she found is 'either not relevant or not appropriate to prove or disprove the charges', and with the majority's request for an amended Document Containing the Charges because it 'exceeds the role and functions assigned by the Statute to the Pre-Trial Chamber'.[595] While recognising that adjourning this hearing is a procedural avenue permitted by the Statute, she did not agree with the terms of the adjournment as formulated by the Majority.[596]

2. Adjournment under 61(7)(c)(ii) in *The Prosecutor v. Jean-Pierre Bemba Gombo*

Pre-Trial Chambers are also empowered to reject the mode of liability asserted by the Prosecution in the document containing the charges at the confirmation of charges stage of the proceedings. As described by Pre-Trial Chamber I in the Lubanga Confirmation of Charges Decision:

> Under article 61(7)(c)(ii) of the Statute, the Chamber is required to adjourn the hearing and request the Prosecutor to consider amending the charges if it finds that the evidence before it appears to establish that a crime other than those detailed in the Document Containing the Charges has been committed.[597]

Pre-Trial I further explained:

> The purpose of [Article 61(7)(c)(ii)] is to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing.[598]

A decision by the Pre-Trial Chamber not to adopt the mode of liability asserted by the Prosecution at the confirmation of charges stage, but instead finding sufficient evidence to establish a different crime within the jurisdiction of the Court pursuant to Article 61(7)(c)(ii), has occurred in only one case to date, against Bemba.[599] Although Pre-Trial Chamber III had issued the Arrest Warrant for Bemba on the basis of his responsibility either as a co-perpetrator or as an indirect perpetrator under Article 25(3)(a), it subsequently decided to adjourn the confirmation of charges hearing on the basis of Article 61(7)(c)(ii), as it found that after the oral hearing and the submission of additional written material by the parties, the evidence appeared to establish a 'different crime'.[600] In this regard, it held that the term 'different crime' as it appeared

594 *Decision Adjourning Gbagbo Confirmation of Charges*, *Dissenting Opinion of Judge Fernández de Gurmendi*, ICC-02/11-01/11-432-Anx, para 4.
595 *Decision Adjourning Gbagbo Confirmation of Charges*, *Dissenting Opinion of Judge Fernández de Gurmendi*, ICC-02/11-01/11-432-Anx, para 5.
596 *Decision Adjourning Gbagbo Confirmation of Charges*, *Dissenting Opinion of Judge Fernández de Gurmendi*, ICC-02/11-01/11-432-Anx, para 2.
597 *Lubanga Confirmation of Charges*, ICC-01/-04-01/06-803-tEN, para 202. The legal characterisation of the facts at issue in the Lubanga confirmation of charges hearing was the nature of the armed conflict (international or non-international).
598 *Lubanga Confirmation of Charges*, ICC-01/-04-01/06-803-tEN, para 203.
599 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, p 3. See also para 49.
600 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, paras 1, 6, 7.

in Article 61(7)(c)(ii) applied to both the crime as well as to the mode of liability, as the two were correlated.[601]

Pre-Trial Chamber III noted that Article 61(7) reflected 'the filtering function of the Pre-Trial Chamber' as it permitted the Chamber to adjourn the hearing when it could 'not issue a decision on the merits'.[602] In its interpretation of Article 61(7)(c)(ii), Pre-Trial Chamber III found that at the confirmation of charges stage of the proceedings, 'a complete and in-depth analysis of all the evidence' was unwarranted for the 'limited examination' required under Article 61(7)(c)(ii).[603] In this regard, it held that 'the word "appear" means to "give a specified impression"', and thus that 'the threshold required for a determination under sub-paragraph (c)(ii) must inevitably be lower' than the 'substantial grounds to believe' criteria governing a decision on the merits.[604] It stated:

> At this stage the Chamber is not called upon to prove that the requirements of the "different crime" are definitely satisfied. To make its determination under article 61(7)(c)(ii) of the Statute, the Chamber deems it sufficient to rather make a prima facie finding that it has doubts as to the legal characterisation of the facts as reflected in the document containing the charges.[605]

In this regard it found that Article 61(7)(c)(ii) required only 'an intermediate determination of the Chamber to request the Prosecutor to consider remedying the deficiency detected by the Chamber'.[606] Once the Prosecutor submitted the requested changes, the Pre-Trial Chamber found that it would 'be in a position to make its final determination on the merits of the case . . . based on the criterion of "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged"'.[607] The Chamber thus concluded that it only needed 'to indicate certain elements' that could lead it to determine that a different crime had been committed.[608] Pre-Trial Chamber III underscored that the use of Article 61(7)(c)(ii) was 'warranted by considerations of fairness whenever the parties, and in particular the Defence, must be notified of any material change to the document containing the charges'.[609]

In concluding its analysis of Article 61(7)(c)(ii), Pre-Trial Chamber III adopted a 'teleological' interpretation of the words 'adjourn' and 'hearing', to find that they referred more broadly to the confirmation of charges stage, and not just to the oral

601 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 26. The Chamber noted in this regard: 'Depending on the mode of participation as set out in articles 25 and 28 of the Statute, the material (objective) elements of the crime are shaped differently. It does have a bearing on the structure of *the crime* whether the person held liable for committing the crime acted as a principal, as an accomplice or as a superior'. Emphasis in original. It further found that excluding the mode of liability from its interpretation of 'different crime' in Article 61(7)(c)(ii) would raise fair trial concerns under Article 67(1)(a), which ensures the Defence rights to be 'informed promptly and in detail of the nature, cause and content of the charge', and would deprive it of the opportunity to submit observations. ICC-01/05-01/08-388, para 28.
602 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, paras 9, 15.
603 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 17.
604 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 25.
605 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 25, emphasis in original.
606 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 20.
607 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 20.
608 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 25.
609 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, paras 23, 28.

hearings.[610] Finally, it noted that it remained within the Prosecution's discretion to decide to amend the document containing the charges.

As described in detail in the section on Article 28, above, Pre-Trial Chamber II subsequently confirmed charges against Bemba under Article 28. In the Confirmation of Charges Decision, the Chamber first assessed Bemba's criminal liability under Article 25(3)(a), but found that he lacked the required mens rea.[611]

III. Changing the mode of liability during trial using Regulation 55

Regulation 55 enables Chambers to change the legal characterisation of the facts at the trial stage of the proceedings. While Regulation 55 has been invoked by a number of Chambers on diverse legal issues, it was specifically applied to potential changes to the mode of liability by Trial Chambers II and III in the Katanga and Bemba cases, respectively. The Prosecution has also requested that Trial Chamber 5(a) invoke Regulation 55 as applied to the mode of liability upon which the charges against Ruto are based in the Ruto & Sang case, as well as to the mode of liability underlying the charges against Muthaura in the Muthaura & Kenyatta case.[612]

Although Regulation 55 explicitly entails procedural protections for the Defence, Chambers and Counsel have raised fair trial concerns, especially regarding the timing of the notice and the details provided concerning the potential change. Litigation involving the application of Regulation 55 to the mode of liability has also been characterised by divisions within Chambers, as particularly evident in the Katanga case.

This section addresses the issues that have arisen in the Court's jurisprudence to date on potential changes to the modes of liability at the trial stage of the proceedings through the use of Regulation 55.

Regulation 55

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities

610 *Decision Adjourning Bemba Confirmation of Charges*, ICC-01/05-01/08-388, para 36.
611 *Bemba Confirmation of Charges*, ICC-01/05-01/08-424, para 344. The Pre-Trial Chamber's assessment of Bemba's liability under Article 25(3)(a) is described in the section on co-perpetration, above.
612 On 18 March 2013, the charges against Frances Kirimi Muthaura were withdrawn. Trial Chamber V, *Decision on the withdrawal of charges against Mr Muthaura*, ICC-01/09-02/11-696, 18 March 2013.

for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

A. The application of Regulation 55 in *The Prosecutor v. Thomas Lubanga Dyilo*

Regulation 55 was first applied by the Majority Trial Chamber I in the Lubanga case.[613] The Legal Representatives of Victims in the case submitted, at the end of the Prosecution's presentation of the evidence, a joint application to Trial Chamber I, requesting a change to the legal characterisation of the facts pursuant to Regulation 55 to include the crimes of sexual slavery and inhuman or cruel treatment.[614] The Majority of Trial Chamber I granted the application, reading the first provision of Regulations 55 as separate from Regulations 55 (2) and (3), and issued notice to the parties that the legal characterisation of the facts was subject to change.[615] Judge Fulford dissented on the Majority's interpretation of Regulation 55. In its reversal of the Trial Chamber Decision, the Appeals Chamber established the parameters for the application of Regulation 55, which have been drawn upon extensively in the Court's subsequent case law. Principally, the Appeals Chamber held that Regulation 55 could not be used 'to exceed the facts and circumstances described in the charges or any amendment thereto'.[616] It further found that 'Regulation 55(2) and (3) must be respected in order to safeguard the rights of the accused, and a change in the re-characterisation must not lead to an unfair trial'.[617]

The Appeals Chamber in Lubanga specifically found Regulation 55 to be consistent with the rights of the accused. For example, it held that the right to 'be informed promptly and in detail of the nature, cause and content of the charge' pursuant to Article 67(1)(a) did not 'preclude the possibility that there may be a change in the legal characterisation of the facts in the course of the trial, and without a formal amendment to the charges'.[618] In this regard, it observed that Regulation 55(2) and (3) 'set out several stringent safeguards for the protection of the rights of the accused', which also included the right to 'have adequate time and facilities for the preparation of the defence', as provided in Article 67(1)(b). It held that the manner for applying these safeguards to 'protect the rights of the accused fully and whether additional

613 *Lubanga Regulation 55 Notice Decision,* ICC-01/04-01/06-2049.
614 Trial Chamber I, *Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court,* ICC-01/04-01/06-1891, 22 May 2009. For a detailed description of the Court's treatment of sexual violence in the Lubanga case, see *Gender Report Card 2012*, p 158-163.
615 *Lubanga Regulation 55 Notice Decision*, ICC-01/04-01/06-2049.
616 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, paras 88, 100.
617 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 100.
618 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 84.

safeguards must be implemented' depended on the circumstances of the case.[619] Similarly, it found that a legal recharacterisation of the facts pursuant to Regulation 55 did not 'automatically lead to an undue delay of the trial', but depended on the specific circumstances of the case.[620]

Finding that 'a principal purpose of Regulation 55 is to close accountability gaps', the Appeals Chamber confirmed that Regulation 55 was not incompatible with Article 61(9), which empowers the Prosecution to amend the charges prior to trial, as the two provisions applied to different organs of the Court at different stages of the trial.[621] In light of the language of Regulation 52(c), which governs the content of the document containing the charges, the Appeals Chamber emphasized that:

> The distinction between facts and their legal characterisation should be respected for the interpretation of Regulation 55 as well. The text of Regulation 55 only refers to a change in the legal characterisation of the facts, but not to a change in the statement of the facts. This indicates that only the legal characterisation ... could be subject to change, but not the statement of the facts'.[622]

In a footnote, the Appeals Chamber further explained:

> the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.[623]

As discussed below, this footnote was cited in subsequent litigation in both the Bemba and Katanga cases concerning the distinction between material facts and 'background or other information' when providing notice under Regulation 55.

The Appeals Chamber decision on Regulation 55 in the Lubanga case has been consistently referenced in the litigation at the Court on this issue, including in the four cases in which Regulation 55 has been invoked concerning changes to the mode of liability. While Regulation 55 has been invoked in a number of cases on diverse issues, this section focuses only on those decisions and filings related to its application to the mode of liability.

B. The application of Regulation 55 to the mode of liability in *The Prosecutor v. Jean-Pierre Bemba Gombo*

On 22 November 2010, the Bemba trial commenced before Trial Chamber III.[624] On 21 September 2012, during the presentation of the Defence case, the Chamber issued

619 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 85.
620 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 86.
621 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, paras 77-78.
622 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 97.
623 *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, FN 163.
624 Trial Chamber III was composed of Judge Sylvia Steiner (Presiding Judge), Judge Joyce Aluoch and Judge Kuniko Ozaki.

a decision giving notice of a potential recharacterisation of the legal characterisation of the facts pursuant to Regulation 55.[625] The legal modification considered by the Chamber involved an alternative mental element listed within Article 28(a)(i) as applied by the Pre-Trial Chamber in the Confirmation of Charges Decision.[626] The Trial Chamber noted that in confirming the charges, Pre-Trial Chamber II had found 'sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba knew that MLC troops were committing or were about to commit [...] crimes', but that it had not considered the "should have known" standard set out as an alternative within the same mode of liability, Article 28(a)(i)'.[627]

The Trial Chamber noted that pursuant to Regulation 55, in the forthcoming trial judgement, it could change 'the legal characterisation of the facts to accord with the form of participation of the accused under Article 28, without exceeding the facts and circumstances described in the charges and any amendment thereto'.[628] The Trial Chamber's decision thus informed the parties and participants that 'after having heard all the evidence', that in the forthcoming trial judgement, 'the Chamber may modify the legal characterisation of the facts so as to consider in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i)'.[629] The specific possible change contemplated by the Chamber was that 'owing to the circumstances at the time, the accused "should have known" that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed in the Decision on the Confirmation of Charges'.[630] The Chamber ordered the parties and participants to submit their observations on the proposed recharacterisation.

While the Prosecution indicated that the proposed modification did not affect its case, and that the same evidence applied to the alternative mental element now under consideration by the Chamber,[631] the Defence raised numerous substantive objections. Specifically, the Defence submitted that:

> at a minimum, the envisaged change may require (i) recalling prosecution witnesses; (ii) being provided with a detailed notice of the relevant material facts; (iii) further defence investigations; (iv) additional time to identify and interview potential witnesses; (v) further requests for assistance from various governments and/or organisations; (vi) additional disclosure requests from the prosecution; and (vii) a meaningful period of time to investigate and prepare.[632]

625 *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324.
626 Article 28(a)(i) provides: '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'.
627 *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324, para 1.
628 *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324, para 3.
629 *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324, para 5.
630 *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324, para 5.
631 *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, para 2, citing Trial Chamber III, *Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court*, ICC-01/05-01/08-2334, 8 October 2012, para 13.
632 *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, para 4, citing Trial Chamber III, *Defence Submissions on the Trial Chamber's Notification under Regulations of the Court*, ICC-01/05-01/08-2365-Red, 18 October 2012, para 51.

Consequently, on 19 November 2012, the Trial Chamber issued a decision, requesting the Defence to provide concrete information and relevant justifications concerning its request to recall Prosecution witnesses and the time needed to conduct additional investigations.[633] On 30 November, the Defence submitted the requested material and a motion for notice of the material facts and circumstances underlying the proposed amended charge.[634] Specifically, the Defence requested 'precise details of the facts and circumstances' in the Confirmation of Charges Decision upon which the Chamber intended to rely for the proposed recharacterisation without which it would be 'impossible for the defence to respond to the Chamber's request in any meaningful way'.[635] It further requested a suspension of the proceedings from six to nine months for the additional investigations, and identified a number of Prosecution witnesses it would seek to recall.

On 13 December 2012, the Trial Chamber issued a decision, responding to the Defence requests. Recalling that it was bound by the facts and circumstances set forth in the Confirmation of Charges Decision, the Trial Chamber cited to the relevant paragraphs of the Confirmation of Charges Decision and the Amended Document Containing the Charges concerning the material facts at issue. The Chamber further indicated that:

> given the prosecution's submission that the possible change envisaged by the Chamber would have no impact on the prosecution case and that no additional evidence would be presented to prove it, the defence's allegation that it "cannot be expected to guess what such a case might have consisted of and what evidence would have been advanced in support of it" is not tenable. To the contrary, the facts and circumstances, as well as the evidence submitted in order to prove them, are exactly the same. There is therefore no new "case to answer", as alleged by the defence.[636]

In response to the Defence request for additional investigations, pursuant to Regulation 55(2), the Trial Chamber temporarily suspended the proceedings for approximately 2 1/2 months.[637] In this regard, it noted the need 'to strike a balance between its obligation to ensure that the trial is fair and expeditious and that the accused is tried without undue delay and its duty to ensure the right of the accused to have adequate time and facilities for the preparation of his defence'.[638] It noted again in this regard that the Prosecution would not submit additional evidence in support of the potential change. Concerning the Defence request to recall Prosecution witnesses

633 Trial Chamber III, *Decision requesting the defence to provide further information on the procedural impact of the Chamber's notification pursuant to Regulation 55(2) of the Regulations of the Court*, ICC-01/05-01/08-2419, 19 November 2012, para 8.

634 *Bemba Defence Regulation 55 Submission*, ICC-01/05-01/08-2451-Red. The Defence submitted the requested information in a confidential, ex parte Defence only annex, ICC-01/05-01/08-2451-Conf-Exp-AnxA. The Prosecution subsequently filed a request to reclassify the document. *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, para 7, citing Trial Chamber III, *Prosecution's Request for Re-Classification of a Document pursuant to Regulation 23(7)(3) of the Regulations of the Court and Leave to Respond*, ICC-01/05-01/08-2477-Conf, 11 December 2012.

635 *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, para 9, quoting *Bemba Defence Regulation 55 Submission*, ICC-01/05-01/08-2451-Red, paras 13, 23.

636 *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, para 12, quoting *Bemba Defence Regulation 55 Submission*, ICC-01/05-01/08-2451-Red, paras 13, 35.

637 The Trial Chamber suspended the proceedings until 4 March 2013.

638 *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, para 15.

pursuant to Regulation 55(3), the Chamber requested 'more detailed information on the justification for questioning on the alternative form of knowledge', and indicated its need to receive Prosecution observations on the issue; it established a deadline for the Defence to submit any additional evidence.[639]

1. Trial Chamber III's decision denying Bemba Defence request for leave to appeal

On 18 December 2012, the Bemba Defence filed a request for leave to appeal the Trial Chamber's decision ordering the temporary suspension of the proceedings.[640] It argued that: (i) the Chamber went beyond a legal recharacterisation of the facts to add a new set of facts and factual allegations to the charges, and provided no notice of the material facts relevant to the envisaged change; (ii) the timing of the decision (two years into the case) constituted a violation of the right to 'prompt' notice of the charges; (iii) a violation of his 'right to have adequate time and resources to prepare'; (iv) a violation of his right to be tried without undue delay; (v) a violation of the right to liberty; (vi) a violation of the right to be presumed innocent; (vii) a violation of his right that the Prosecution bear the burden of proof; and (viii) a violation of the right to an impartial trial.[641]

On 11 January 2013, Trial Chamber III issued its decision, denying the Defence request for leave to appeal, noting at the outset that the issues identified by the Defence in its request to appeal arose out of its decision giving notice of Regulation 55, rather than its decision on suspending the proceedings. The Chamber rejected the first issue raised by the Defence, finding that it had 'made it abundantly clear that the proposed recharacterisation would not exceed the facts and circumstances set out in the charges', and that the 'material facts' underlying the potential alternate form of responsibility were the same.[642] It concluded that these Defence contentions were incorrect and did not arise from the impugned decision.[643] Concerning the second issue, the Chamber underscored that the language of Regulation 55 provides 'at any time during the trial'. It concluded that the Defence disagreement concerning the appropriate timing of the application of Regulation 55 was not an appealable issue.

The Trial Chamber addressed the Defence claims concerning violations to the accused's right to liberty, to be presumed innocent, to an impartial trial and that the Prosecution bear the burden of proof, as all relating to the legality of Regulation 55 per se—that is, its compatibility with the rights of the accused. It relied on the Appeals Chamber holding in the Lubanga case, described above, which 'determined that the application of Regulation 55 during a trial does not per se breach the rights

639 *Bemba Proceedings Suspension Decision*, ICC-01/05-01/08-2480, paras 17, 19. The deadline set by the Chamber was 4 March 2013. Further, the Chamber indicated that in the event that the Defence intended to call new witnesses for the specific purpose of providing testimony relevant to the alternative form of knowledge contained in Article 28(a)(i) of the Statute, it should seek the Chamber's authorisation to do so. ICC-01/05-01/08-2480, para 20.

640 *Bemba Defence Leave to Appeal Suspension of Proceedings*, ICC-01/05-01/08-2483-Red.

641 *Bemba Defence Leave to Appeal Suspension of Proceedings*, ICC-01/05-01/08-2483-Red, para 20.

642 *Trial Decision on Bemba Defence Leave to Appeal Suspension of Proceedings*, ICC-01/05-01/08-2487-Red, para 19.

643 *Trial Decision on Bemba Defence Leave to Appeal Suspension of Proceedings*, ICC-01/05-01/08-2487-Red, paras 19-20.

of an accused to a fair trial'.[644] It thus found that these were not appealable issues arising from the impugned decision. Regarding Defence claims that the time allotted by the Chamber for additional Defence investigations was 'manifestly inadequate', the Chamber recalled that it had granted the Defence request, even though it was not obliged to do so. It observed that the time alloted reflected the fact that the Prosecution would not present any additional evidence, as well as the limited nature of the potential change. The Chamber reiterated its obligation to balance the Defence need for adequate time and facilities to prepare its defence with the right to be tried without undue delay.

2. Decision on Defence motion to vacate the suspension Decision

On 28 January 2013, the Defence filed a motion to vacate the Trial Chamber's decision granting a temporary suspension of the proceedings, renouncing the rights granted therein.[645] In other words, the Defence no longer required suspended proceedings, and sought to annul the Chamber's decision granting its original request. The Defence, however, maintained:

> its submission that the "should have known" standard that the Trial Chamber seeks to consider in relation to the charges against Mr. Bemba does not form part of the charges, as presently exist, and its application in these proceedings would result in manifest unfairness and actual prejudice to him.[646]

It asserted that 'absent a formal decision to amend the charges accordingly or to render a decision that Regulation 55 is in fact being relied upon in the proceedings for that purpose, the Trial Chamber has no lawful authority to prosecute the accused under [the alternative] theory of liability'.[647] Specifically, it informed the Chamber that it would not be recalling any Prosecution witnesses, and that it declined to conduct additional investigations. It further requested that the trial recommence as soon as possible.

In a decision issued 6 February 2013, the Trial Chamber reiterated that pursuant to Regulation 55(1), a legal recharacterisation of the facts would only be undertaken in the forthcoming trial judgement. It observed that the Defence interpretation rested 'on a misconception of the rationale behind and the procedural effects of Regulation 55'.[648] It stressed that, as held by the Appeals Chamber, Regulation 55 could be applied to change the legal characterisation of the facts 'without a formal amendment to the charges'.[649] The Chamber recalled that the onus of proving the accused's guilt was on the Prosecution, and that pursuant to Article 67(1)(g) and (i), he had the right to remain silent, and 'not to have imposed on him ... any reversal of the burden of

644 *Trial Decision on Bemba Defence Leave to Appeal Suspension of Proceedings*, ICC-01/05-01/08-2487-Red, para 28, citing *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, paras 78, 81-87.
645 *Defence Motion to Vacate Decision on Bemba Suspension of Proceedings*, ICC-01/05-01/08-2490-Red.
646 *Defence Motion to Vacate Decision on Bemba Suspension of Proceedings*, ICC-01/05-01/08-2490-Red, para 9.
647 *Defence Motion to Vacate Decision on Bemba Suspension of Proceedings*, ICC-01/05-01/08-2490-Red, para 9.
648 *Decision Lifting Suspension,* ICC-01/05-01/08-2500, para 14.
649 *Decision Lifting Suspension*,ICC-01/05-01/08-2500, para 16, citing *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 84.

proof or any onus of rebuttal'.[650] Noting that it had granted the Defence request to collect and submit additional evidence, the Chamber found, however, that 'since the accused is not obliged to present evidence, the defence may voluntarily decide not to do so'.[651] It acknowledged that 'the accused has waived the opportunity to conduct further investigations, recall witnesses or submit additional evidence relevant to the potential legal recharacterisation of the facts and circumstances related to the alternate form of knowledge contained in Article 28(a)(i) of the Statute'.[652] As the rationale for the temporary suspension no longer existed, the Chamber ordered the trial to resume 'as soon as practicable'.[653]

C. The application of Regulation 55 to the mode of liability in *The Prosecutor v. Germain Katanga*

On 21 November 2012, at the end of the deliberations phase of the Court's second trial, in the Katanga & Ngudjolo case, a Majority of Trial Chamber II[654] (Judge Van den Wyngaert dissenting), issued a decision, severing the cases against Ngudjolo[655] and Katanga and giving notice to the parties and participants that it planned to invoke Regulation 55 concerning a possible legal recharacterisation of the facts as applied to Katanga only.[656] The recharacterisation specifically under consideration by the Majority related to the mode of responsibility pursuant to which Katanga was charged, from Article 25(3)(a)[657] (indirect co-perpetration) to Article 25(3)(d)(ii) (common

650 *Decision Lifting Suspension*, ICC-01/05-01/08-2500, para 20.
651 *Decision Lifting Suspension*, ICC-01/05-01/08-2500, para 21.
652 *Decision Lifting Suspension*, ICC-01/05-01/08-2500, para 21.
653 *Decision Lifting Suspension*, ICC-01/05-01/08-2500, para 21.
654 Trial Chamber II was composed of Judge Bruno Cotte (Presiding Judge), Judge Fatoumata Dembele Diarra and Judge Christine Van den Wyngaert.
655 Unaffected by the proposed recharacterisation, the Trial Chamber severed the case against Ngudjolo pursuant to Article 64(5), as it would otherwise impermissibly lengthen his trial. *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 58-62. Trial Chamber II subsequently issued the Trial Judgement in the case *The Prosecutor v. Mathieu Ngudjolo Chui* on 18 December 2012, acquitting him of all charges. *Ngudjolo Trial Judgement, Concurring Opinion of Judge Van den Wyngaert, ICC-01/04-02/12-4;* See also *Ngudjolo Trial Judgement,* ICC-01/04-02/12-3-tENG. Judge Van den Wyngaert's concurrence is detailed in the section on indirect co-perpetration, above. For more detailed information about the Ngudjolo case, see Women's Initiative for Gender Justice, ' DRC: Trial Chamber II acquits Ngudjolo in second trial judgement at the ICC', *Legal Eye on the ICC eLetter*, February 2013, available at http://www.iccwomen.org/news/docs/WI-LegalEye2-13-FULL/LegalEye2-13.html; Women's Initiatives for Gender Justice, 'DRC: Ngudjolo's immediate release and request for protective measures and asylum' and 'DRC: Judge Van den Wyngaert's concurrence to the Ngudjolo trial judgement', *Legal Eye on the ICC eLetter*, April 2013, available at http://www.iccwomen.org/WI-LegalEye4-13-FULL/LegalEye4-13.html.
656 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA.
657 As described in the section on indirect co-perpetration, above, both Katanga and Ngudjolo were charged as indirect co-perpetrators under Article 25(3)(a) of the Statute with seven counts of war crimes: rape, sexual slavery, wilful killings, directing attack against a civilian population, destruction of property, and pillaging, and with three counts of crimes against humanity: rape, sexual slavery and murder. Articles 8(2)(b)(xxii); 8(2)(a)(i); 8(2)(b)(i); 8(2)(b)(xii); and 8(2)(b)(xvi), Rome Statute; Articles 7(1)(g) and 7(1)(a), Rome Statute. They were charged as co-perpetrators for the war crime of using children under the age of 15 to take active part in the hostilities. Article 8(2)(b)(xxvi), Rome Statute.

purpose liability). The Majority indicated that the recharacterisation would apply to all the charges with the exception of the crimes of the enlistment, conscription and use of child soldiers. As described in greater detail, below, Judge Van den Wyngaert issued a dissent.

1. Majority Decision of Trial Chamber II implementing Regulation 55

In its decision implementing Regulation 55, providing notice of a proposed legal recharacterisation of the facts related to Katanga's criminal responsibility, the Majority of Trial Chamber II indicated that the possible recharacterisation came after an objective examination of the totality of the evidence, and acknowledged the advanced stage of the proceedings.[658] It underscored its discretion to invoke Regulation 55 as long as it did not exceed the facts and circumstances as described in the Confirmation of Charges Decision.[659] Specifically, it found that there was no temporal limitation to invoking Regulation 55, absent fair trial concerns, especially in light of the protections afforded by subsections (2) and (3).[660] The Chamber cited extensively to the jurisprudence of the European Court of Human Rights (ECHR), finding that legal recharacterisations after the first instance decision in national courts did not create fair trial concerns.[661]

As the Decision served as notice to the parties of the possible recharacterisation, the Trial Chamber ordered the Defence to indicate whether it planned to utilise the measures foreseen in Regulation 55(3)(b), namely: the opportunity to re-examine witnesses, to call new witnesses and to present additional evidence. In contrast, it also indicated that in its observations, the Prosecution could not refer to any new evidence on the alternate mode of responsibility.[662] The Majority extensively examined the specific fair trial rights at issue in its decision to invoke Regulation 55 at such an advanced stage of the proceedings, namely: the right to be informed promptly and in detail of the nature, cause and content of the charges;[663] the right to the time and facilities necessary for the preparation of one's defence;[664] the right to be tried without excessive delays;[665] and the right against self-incrimination.[666]

Concerning the right to be informed promptly and in detail of the nature, cause and content of the charges, the Majority cited to ECHR jurisprudence and concluded that it was essential to ensure that the facts underlying the charges upon which the legal recharacterisation was based were initially contained within the Confirmation of

658 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 8, 14. The decision was issued over one year after the evidentiary hearings had ended (11 November 2011), after the formal closing of the evidence (7 February 2012), and six months after the closing arguments (15-23 May 2012).
659 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 10-14.
660 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 15, 20.
661 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 16-18.
662 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 56.
663 Article 67(1)(a), Rome Statute.
664 Article 67(1)(b), Rome Statute.
665 Article 67(1)(c), Rome Statute.
666 Article 67(1)(g), Rome Statute.

Charges Decision. The Majority indicated that the proposed legal recharacterisation was based on the facts supporting the legal elements of the confirmed charges against Katanga, which he had the opportunity to contest during trial.[667] Specifically, it indicated that in contrast to Pre-Trial Chamber I's finding that Katanga acted as supreme commander of the FRPI, which was hierarchical in nature, and that he provided an essential contribution to the common plan, the Majority considered that Katanga contributed in another manner to the commission of the crimes by a group of commanders and combatants from Walendu-Bindi,[668] and that his contribution was intentional and made with full knowledge of the intention of the group that committed the crimes.[669]

The Majority of Trial Chamber II found that the joint action of the commanders and combatants of Walendu-Bindi, as envisaged in the recharacterisation, accorded with the Confirmation of Charges Decision, as it fell within the confirmed facts and were inscribed within the objective and subjective elements of the crimes.[670] In this regard, the Majority indicated that it 'was situating itself within the interior of the factual description', to which the Defence had a full opportunity to express itself throughout the trial, in order to 'extract its own narrative of co-perpetration and the common plan'.[671] In other words, it was proposing a 'different assessment of the facts'.[672] The Majority further suggested that all of the facts retained by the recharacterisation constituted an 'integral part' of the material elements under the prior characterisation.[673]

Regarding the right to the time and facilities necessary for the preparation of one's defence, the Majority noted the close relationship between Regulation 55(2), (3) and Article 67(1)(b), and that the Appeals Chamber, in the Lubanga case, had underscored the necessity to rigorously apply these protections.[674] Specifically, citing to ECHR jurisprudence, it found that by issuing the present decision giving notice to the parties and participants and providing for their effective exercise of their right to submit observations, Article 67(1)(b) was not jeopardised.[675] The Majority underscored that the Defence had already had the opportunity to present exhaustively on the majority

667 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 22-23.
668 The majority noted that although the name FRPI, as used in the confirmation decision, would change, its structure was the same. *Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, FN 44.
669 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 25-26.
670 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 28-30.
671 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 31, emphasis in original.
672 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 32.
673 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 33.
674 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 35-36. On 8 December 2009, the Appeals Chamber issued a Judgement in the Lubanga case, reversing Trial Chamber I's decision to invoke Regulation 55 upon the request of the Legal Representatives of Victims, which had sought to modify the legal characterisation of the facts presented by the Prosecution in order to add the crimes of inhuman and cruel treatment and sexual slavery. *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205. The Appeals Chamber Judgement in the Lubanga case was referenced repeatedly in these proceedings. For detailed information on the Appeals Chamber's judgement on the use of Regulation 55 in the Lubanga case, see *Gender Report Card 2010*, p 130-133.
675 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 38.

of factual and legal issues to be raised under Article 25(3)(d).[676] It thus invited the Defence to focus on the points that so far had been insufficiently or too succinctly addressed.[677]

Regarding the right to be tried without undue delay, the Majority noted the Appeals Chamber's findings in its decision in the Lubanga case that the application of Regulation 55 did not necessarily imply a violation of Article 67(1)(c), but depended on the circumstances of the particular case.[678] It underscored that in the ICTR Bagosora case, a 10-month delay was not found to be excessive. It also noted that the ECHR had found that excessive delays could be compensated, such as by a reduction in sentence.[679] Specifically, the Majority found that the application of Regulation 55 would not result in excessive delays as: i) Ngudjolo would be addressed separately; and ii) the Majority was convinced that the Katanga Defence could prepare an efficacious and effective defence without excessive delays. In this regard, it noted that it had provided the Defence with information to assist it, and that the Chamber had a wide latitude to define the modalities of applying Regulation 55 to prevent excessive delays, which it could re-evaluate later in light of any delays actually occasioned.[680]

In addressing the right against self-incrimination,[681] the Majority noted that the relationship between Regulation 55 and Article 67(1)(g) was a question of first instance for the Court, but that according to ECHR jurisprudence, a legal recharacterisation did not violate the right against self-incrimination.[682] It further emphasised that the right against self-incrimination aimed to prevent illegally obtained confessions, and related to the accused's decision whether to testify. In this regard, it noted that Katanga freely chose to testify, to answer the Chamber's questions and to spontaneously provide additional explanations and descriptions, assisted by counsel. It thus found that he was not subjected to any pressure or restraint.[683] The Majority underscored the accused's free choice to testify and the Defence's knowledge of the existence, and thus potential application, of Regulation 55, especially as it had already been invoked

676 Referring specifically to the contextual elements of the crimes, Katanga's role within the FRPI, his contribution to planning the attack, and his knowledge and intention. Furthermore, in order to provide the Defence with the maximum amount of information, and to enable it to effectively prepare its defence, the Majority referred to the Chamber's unanimous conclusions concerning the lack of credibility of Prosecution Witnesses 219 and 250, upon whose testimony the Chamber would not rely. *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 39.

677 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, paras 40-41.

678 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 43, citing *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 86.

679 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319t-ENG/FRA, para 43.

680 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319t-ENG/FRA, para 44.

681 Germain Katanga testified under oath and made a closing statement. *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319t-ENG/FRA, paras 51-52.

682 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319t-ENG/FRA, paras 47-48.

683 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319t-ENG/FRA, paras 49-51.

as early as October 2009 in this case concerning a possible recharacterisation of the nature of the conflict.[684]

2. Judge Van den Wyngaert's dissenting opinion to *The Prosecutor v. Germain Katanga* Decision on Regulation 55

Judge Van den Wyngaert dissented 'in the strongest possible terms' from the Majority's decision to trigger Regulation 55 as it went 'well beyond any reasonable application of the provision and fundamentally encroaches on the accused's right to a fair trial'.[685] She found that the mode of liability was 'noticeably' different, and could potentially lead to a re-opening of the trial.[686] She further argued that the cases should not have been severed.[687]

Citing the Appeals Chamber Judgement on Regulation 55 in the Lubanga case, Judge Van den Wyngaert highlighted the two purposes of Regulation 55: more focused trials and to avoid impunity caused by technical acquittals. She argued that the fight against impunity did not justify infringing on the rights of the accused, and that given the case-by-case determination required pursuant to the Appeals Chamber's judgement, the 'formal application' of Regulation 55(2), and (3) did not constitute a sufficient safeguard.[688]

Following the Appeals Chamber decision in the Lubanga case, Judge Van den Wyngaert asserted that the decision to give notice under Regulation 55(2) implied a two-step analysis, namely: i) whether the proposed recharacterisation accorded with the crimes and mode of participation without exceeding the facts and circumstances set forth in the charges; and ii) a determination as to whether the recharacterisation was unfair, according to the Chamber's discretion. She argued that the Majority decision violated both steps, and was thus contrary to Regulation 55 and Articles 64(2) and 67(1).[689]

Specifically, Judge Van den Wyngaert argued that the Majority could not rely on allegations mentioned in the Confirmation Decision that did not constitute factual allegations supporting the legal elements of the crimes charged. She also argued that the Majority could not change the narrative of the facts underlying the charges so fundamentally as to exceed the facts and circumstances described in the charges.[690]

684 *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319t-ENG/FRA, para 52. The potential use of Regulation 55 to recharacterise the conflict from international to non-international was debated during the closing arguments in the Katanga and Ngudjolo case. For a detailed account of the parties' oral submissions on this issue, see *Gender Report Card 2012*, p 230-232.

685 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 1.

686 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, paras 2-3.

687 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 6.

688 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 8.

689 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, paras 10-11.

690 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 13.

Distinguishing between subsidiary and material facts, which she noted had not been clearly differentiated in the case, Judge Van den Wyngaert argued that only material facts could be relied upon for a proposed recharacterisation.[691] She stated that the Majority could not 'pick and choose' from any facts from the Confirmation Decision. She argued that it was incumbent on the Majority to clarify the material facts in the present decision, and that any ambiguity should be resolved in favour of the accused. She further suggested that the Majority was concealing its reliance on subsidiary facts.[692] Judge Van den Wyngaert stated, 'I am in no doubt that the Majority's proposed migration to Article 25(3)(d)(ii) inevitably forces it to engage in extensive factual acrobatics in order to find sufficient factual support in the Confirmation Decision to meet the elements of this new form of criminal responsibility.'[693]

Relying on the assertion that subsections (2) and (3) of Regulation 55 alone were not sufficient to guarantee the Defence's rights, Judge Van den Wyngaert argued that the decision violated the right to a fair and impartial trial, as the recharacterisation was not reasonably foreseeable. She noted that the Prosecution had charged Katanga under Article 25(3)(a) and 3(b) as alternatives, and had never considered allegations under Article 25(3)(d).[694] She found that the Majority decision created the perception that it would have to acquit the accused under the mode of responsibility currently retained, and that it could obtain a conviction under Article 25(3)(d)(ii). She asserted that the perception of the lack of impartiality was enough to sustain a breach of the Chamber's obligations in that regard.[695] She further stated that the Chamber's truth-seeking function was 'not a license to start an independent investigation'.[696]

Judge Van den Wyngaert underscored that the recharacterisation was being proposed at the end of the deliberation phase, thus 'springing Article 25(3)(d)(ii) at the end of the trial',[697] and noted that the mode of liability was a central and live issue throughout the proceedings. She argued that if the recharacterisation was reasonably foreseen, the Katanga Defence might have adopted a different strategy.[698] She disagreed with the Majority argument that the elements of Article 25(3)(d) were subsumed by the elements of Article 25(3)(a), as the latter required a contribution to a common plan, and the former required contribution to the crime itself.[699]

691 Judge Van den Wyngaert also noted the Katanga Defence had requested a clarification regarding the material facts, to which the Chamber did not respond. *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, FN 22.

692 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, paras 14-17.

693 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 21.

694 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 30.

695 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, paras 31-32.

696 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 35.

697 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 44.

698 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, paras 37-39.

699 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, paras 42-43.

Judge Van den Wyngaert found that the Majority's reliance on Katanga's testimony to justify the application of Regulation 55 'aggravated the unfairness of the decision', especially if his testimony were to result in a conviction under Article 25(3)(d).[700] She found that had Katanga known that he would have to defend himself based on this provision, it could not 'be discounted that he may not have testified'.[701] She disagreed with the Majority assertion that the 'mere existence of Regulation 55' constituted sufficient notice.[702] Judge Van den Wyngaert concluded that the decision, issued at a late stage of the trial, caused irreparable prejudice to the accused, which Regulation 55(2) and (3) could not repair.[703]

3. Trial Chamber granted Defence request for leave to appeal

On 21 December 2012, the Defence sought leave to appeal[704] the Trial Chamber's decision implementing Regulation 55 on the following issue:

> Is the [Impugned Decision], informing the parties and participants that the legal characterisation of the facts relating to Germain Katanga's mode of participation is likely to be changed, lawful and appropriate in the circumstances of the case?[705]

On 28 December 2012, Trial Chamber II granted the Defence request for leave to appeal.[706] It found that the issue identified by the Defence was an appealable issue, and recognised that it affected the fairness and expeditiousness of the

700 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 45.
701 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 45.
702 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 47.
703 *Katanga Regulation 55 Implementation, Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para 53.
704 Trial Chamber II, *Defence Request for Leave to Appeal the Decision 3319*, ICC-01/04-01/07-3323, 21 December 2012.
705 *Katanga Decision on Defence Leave to Appeal*, ICC-01/04-01/07-3327, para 4. In its document in support of the appeal, the Defence further requested suspensive effect. *Defence's Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons,* ICC-01/04-01/07-3339, 10 January 2013. The Appeals Chamber granted the Defence request given that its judgement could have a significant impact on the proceedings. Appeals Chamber, *Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court*, ICC-01/04-01/07-3344, 16 January 2013, para 9. In light of the suspension of the proceedings accorded by the Appeals Chamber, the Trial Chamber suspended the deadline extensions for the parties and participants to submit their observations on the new mode of liability contemplated by the Chamber. Trial Chamber II, *Decision setting the time limits for filing the submissions invited in the Decision on the implementation of regulation 55*, ICC-01/04-01/07-3345, 17 January 2013.
706 *Katanga Decision on Defence Leave to Appeal*, ICC-01/04-01/07-3327, para 20. Although granting the Defence request for leave to appeal, the Trial Chamber declined to grant the request by both the Defence and the Legal Representatives of Victims for a deadline extension in filing their observations on the proposed recharacterisation. It found that the effect of the requested indeterminate extension by the Defence would be to freeze the process until the Appeals Chamber had ruled, amounting to suspensive effect, which must be decided by the Appeals Chamber pursuant to Article 82(3).

proceedings.[707] It stated: 'Although it is too early to say, at this stage, how long the trial proceedings may continue as a consequence of the Impugned Decision, it is clear that a swift intervention by the Appeals Chamber, indicating whether or not the activation of Regulation 55 ... was permissible under the present circumstances, could materially advance the proceedings.'[708]

4. Appeals Chamber decision affirming the Trial Chamber's Regulation 55 decision

On 27 March 2013, the Majority of the Appeals Chamber (Judge Cuno Tarfusser, dissenting) issued its second decision concerning the application of Regulation 55, affirming the Trial Chamber's decision.[709] It held that Regulation 55 could be invoked at any stage during the proceedings, including at the deliberations stage of the trial, but cautioned the Trial Chamber to take the necessary measures to ensure the Defence's fair trial rights.[710] In its decision, the Majority assessed whether both the timing and the scope of the considered change were in conformity with Regulation 55, and whether the decision violated the right to a fair trial.[711] It suggested that the Trial Chamber would need to be vigilant over excessive delays, and that more detailed information about the possible recharacterisation would need to be provided in order to ensure the Defence's right to be informed promptly and in detail of the nature, cause and content of the charges.[712]

The Appeals Chamber found no violation with respect to the timing of the Trial Chamber's decision as Regulation 55(2) clearly indicated that notice can be given 'at any time during the trial' and noted in this regard that the trial remained ongoing until the issuance of the Article 74 judgement.[713] It found that if Regulation 55 were not applicable at the deliberations phase, the Chamber would have to acquit the accused, even if the evidence clearly established his guilt under the appropriate legal characterisation of the facts[714]. In this regard, it noted its prior holding in the Lubanga case that the purpose of Regulation 55 was 'to close accountability gaps'.[715] It cautioned, however, that notice should be given as early as possible.[716]

The Majority of the Appeals Chamber then considered the Defence argument that the proposed recharacterisation fell outside of the scope of the facts and circumstances described in the charges by fundamentally altering the narrative of the charges and relying on subsidiary facts.[717] It noted that the proposed change would actually take place in the forthcoming Article 74 trial judgement as the impugned decision was only notice of a proposed change. It thus found that its standard of review of the Trial

707 *Katanga Decision on Defence Leave to Appeal*, ICC-01/04-01/07-3327, paras 12-13.
708 *Katanga Decision on Defence Leave to Appeal*, ICC-01/04-01/07-3327, para 15.
709 *Appeals Katanga Decision on Regulation 55,* ICC-01/04-01/07-3363.
710 *Appeals Katanga Decision on Regulation 55,* ICC-01/04-01/07-3363, paras 1, 17.
711 *Appeals Katanga Decision on Regulation 55,* ICC-01/04-01/07-3363, para 10.
712 *Appeals Katanga Decision on Regulation 55*, ICC-01/04-01/07-3363, paras 99, 101.
713 *Appeals Katanga Decision on Regulation 55*, ICC-01/04-01/07-3363, paras 17, 23. It further found that the last sentence of Regulation 55(2), indicating that a hearing can be ordered if necessary, implied that the provision applied after the closing of the evidence.
714 *Appeals Katanga Decision on Regulation 55*, ICC-01/04-01/07-3363, para 20
715 *Appeals Katanga Decision on Regulation 55*, ICC-01/04-01/07-3363, paras 21-22, citing *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 77. Judge Tarfusser concurred on this issue. *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, paras 1-2.
716 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 24.
717 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 44.

Chamber's decision was limited to whether it was immediately apparent that the facts and circumstances would be exceeded.[718] It concluded that, at the present stage of the proceedings, it was not immediately apparent that the contemplated change would exceed the facts and circumstances as described in the charges.[719] Furthermore, it did not accept the Defence's distinction between material and subsidiary facts, which was based on a footnote in its judgement in the Lubanga case.[720]

The Majority of the Appeals Chamber reviewed the scope of the envisaged change by reference to three relevant documents: the Amended Document Containing the Charges,[721] the Decision on the Confirmation of Charges,[722] and the Document Summarising the Charges.[723] It first underscored that the Trial Chamber's declared purpose was truth seeking.[724] It also observed that in the impugned decision, the Trial Chamber had found that the proposed legal recharacterisation under 25(3)(d)(ii), 'precisely reflects the facts' described in the Confirmation Decision, and that the Confirmation Decision had 'already confirmed the concerted action of this group'.[725] It further noted that the Trial Chamber had also found that it remained to be determined whether the existence of a common plan was necessary under Article 25(3)(d), and had requested submissions on this issue.[726]

The Majority of the Appeals Chamber rejected the Defence argument that it was 'obviously impermissible' to recharacterise the facts so that Katanga's role changed from an essential contribution to a significant, non-essential contribution, as such recharacterisations necessarily involved a change in role.[727] It stated: 'The Trial Chamber would be constrained exclusively to using the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole'.[728] It further found that it was inevitable that a recharacterisation would result in a change in the narrative.[729]

The Majority of the Appeals Chamber concluded that it could not yet determine if the trial would be unfair.[730] It reiterated its prior holding in the Lubanga case that safeguards in the implementation of Regulation 55 depended on the circumstances of each case. It observed that the Trial Chamber was aware of all of the potential fair trial violations, and had requested observations on Regulation 55(3), which it had not yet received as the case had been suspended.[731] Concerning the right to an effective defence, the Majority found that it was premature for the Defence to argue that the

718 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, paras 45-46.
719 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 56.
720 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 50, referring to *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, FN 163, quoted above.
721 *Katanga & Ngudjolo Document Containing the Charges,* ICC-01/04-01/07-649-Anx1A.
722 *Katanga & Ngudjolo Confirmation of Charges*, ICC-01/04-01/07-717.
723 Trial Chamber II, *Document Summarising the Charges Confirmed by the Pre-Trial Chamber*, ICC-01/04-01/07-1588-Anx1, 3 November 2009.
724 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 30.
725 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, paras 31, 56, citing *Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319, para 23.
726 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 56.
727 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 57.
728 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 57.
729 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 58.
730 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 91.
731 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, paras 89-90.

impugned decision had affected its defence strategy. At the same time, it set forth future considerations for the Trial Chamber in order to ensure fairness.[732]

The Majority of the Appeals Chamber further found Defence arguments concerning the right to be tried without undue delay to be speculative and premature.[733] Although expressing concern regarding the timing of the notice, it found that it was not 'clear' that an undue delay would be caused. It noted that the Trial Chamber would have to be particularly vigilant in this regard.[734] Concerning the right to be informed of the nature, cause and content of the charges, the Majority recalled that the impugned decision constituted notice, informing the Defence.[735] In this regard, it cautioned that the Trial Chamber would need to indicate specific facts in order to enable an effective defence, but found that the information could be provided either at the time of notice or in subsequent proceedings.[736] It observed that although the Trial Chamber had only set out general facts in the impugned decision, the Appeals Chamber could only conclude on this issue at the end of trial.[737] Concerning the right to an impartial trial, the Majority found that giving notice under Regulation 55 was 'a neutral judicial act', and did not implicate the impartiality of the Judges.[738] It specifically found that the late stage of the proceedings at which the notice was issued did not give rise to an appearance of bias.[739]

5. Judge Tarfusser dissenting opinion to *The Prosecutor v. Germain Katanga Appeals Decision on Regulation 55*

Judge Tarfusser concurred that notice of Regulation 55 could be given at any time during trial, finding the language of the Regulation 'unequivocal'.[740] However, he dissented on two issues. First, he did not find that Regulation 55 applied to the type of change contemplated by the Trial Chamber from Article 25(3)(a) to Article 25(3)(d). Second, he found that the decision violated Katanga's right to be informed in detail of the nature, cause and content of the charges.

Judge Tarfusser first observed that the Majority of the Appeals Chamber based its decision on the 'assumption' that Regulation 55 applied to the type of change contemplated by the Trial Chamber, namely from subsection (a) in Article 25(3) to subsection (d) of the same provision.[741] He dissented 'from this assumption' based on 'both the nature, scope and purpose of regulation 55' and 'the relationship between the various forms of responsibility' set forth in Articles 25 and 28.[742]

732 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 95.
733 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 98.
734 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 99.
735 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 100.
736 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 101.
737 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 102.
738 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 104.
739 *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 105.
740 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, paras 1-2.
741 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 3.
742 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 4.

According to Judge Tarfusser, Regulation 55 is of an exceptional nature, and therefore should be strictly interpreted.[743] He observed that it implicated two conflicting fair trial rights, the right to be tried without undue delay, and the right to be informed of the nature, cause and content of the charges, both 'duly enshrined in the Statute'.[744] He found that it was 'beyond controversy' that triggering Regulation 55 would result in delaying the proceedings; 'hence the need to read the provision through the lens of a narrow interpretive criterion which will make the adverse impact on the expeditiousness of the proceedings as limited as feasible'.[745] He found that 'it should be read so as to encompass only those modifications which, being significant, are suitable to have a meaningful impact on the 'nature, cause and content' of the charges.'[746]

He suggested that the decision on whether a particular recharacterisation qualified for the application of Regulation 55 must be made on a case-by-case basis, and thus no 'comprehensive and detailed guidance' was appropriate.[747]

Judge Tarfusser found that Regulation 55 could only apply to shifts from Article 25 to Article 28, and vice versa, and not to shifts within the sub-provisions of one Article. He explained that sub-paragraphs (a) to (d) set forth 'different expressions of the broad idea of (commission by) participation in the execution of a crime; in any and all of the scenarios contemplated by the provision the accused has taken part in the commission of a given crime and the difference among the different sub-paragraphs is one of degree rather than of nature'.[748] He observed that Article 28 was premised on a different rationale, 'triggered by the fact that the accused violated duties arising in connection with his position vis-à-vis those individuals executing the crime'.[749] Judge Tarfusser thus concluded that 'no envisaged shift from one form of responsibility listed in respectively article 25 and 28 to another form included in the same provision' amounted to a change triggering Regulation 55.[750]

Judge Tarfusser based his interpretation on the text of Regulation 55, which refers to the 'form' of participation, in the singular, and to the plural, 'crimes'.[751] He found that the application of Regulation 55 to shifts within the provisions of the same article would introduce 'a degree of uncertainty and unpredictability in the proceedings'.[752] Specifically concerning Article 25(3), he noted that 'both the legal doctrine and, more

743 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 5.
744 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 6.
745 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 6.
746 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser,* ICC-01/04-01/07-3363, para 8.
747 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 9.
748 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 10.
749 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 10.
750 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 11.
751 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 13.
752 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 15.

significantly the relevant case law of the Court show that its interpretation is far from being uncontentious or settled'.[753]

While noting that it was 'obviously neither for these appeal proceedings, nor for this dissent, to take a position vis-à-vis the current doctrinal and judicial debate' on Article 25, Judge Tarfusser explained that his 'allusion to the existence of different interpretive options' was aimed at highlighting that the decision to trigger Regulation 55 for the shift of one mode of liability to another within the same article would 'depend on the particular theoretical angle taken by the relevant Chamber'.[754] Specifically, he noted that those Chambers that interpret Article 25(3) as having 'at least as many distinct forms of responsibilities as it has sub-paragraphs' would apply Regulation 55, while those that read Article 25(3) as 'a unitary set' would not.[755]

Moreover, Judge Tarfusser postulated that once one accepted the triggering of Regulation 55 for modifications between the sub-paragraphs of Article 25(3), 'it seems reasonable, if not inevitable, to assume that the same conclusion would also apply to shifts occurring within the same sub-paragraphs', such as from individually committing the crime to committing the crime through another person, as set forth within Article 25(3)(a).[756] In this regard, he opined that there was a greater difference between individual commission and commission through another person, as set forth in subparagraph (a), than between indirect co-perpetration and contributing 'in any other way' to the commission of a crime pursuant to subparagraph (d), which was the modification at issue in the Katanga case[757]. He further observed that in this example, applying Regulation 55 to a shift of the modes of liability within the same subparagraph appeared 'even more warranted'.[758]

Furthermore, Judge Tarfusser opined that the current practices of the Pre-Trial Chamber in confirming charges should be reviewed in light of the exceptional nature of Regulation 55. He stated:

> I am also mindful that a restrictive interpretation of regulation 55 ... may have an impact on the practice so far established before the Pre-Trial Chambers, where it has become customary, whether for the purposes of the issuance of warrants of arrest or summonses to appear, or for the purposes of the confirmation of charges, not to address alternative modes of liability which were brought forward

753 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 15, referring to the Pre-Trial Chambers' decision on indirect co-perpetration, and citing Judge Fulford's concurrence to the Lubanga Trial Judgement, finding that the modes listed in Article 25(3)(a)-(d) were not intended to be mutually exclusive nor hierarchical. *Lubanga Trial Judgement, Concurring Opinion of Judge Fulford*, ICC-01/04-01/06-2842, para 7.

754 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 16.

755 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 16.

756 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 17. See also *Bemba Notice of Regulation 55 Change*, ICC-01/05-01/08-2324, para 1, invoking Regulation 55 for a change within the same subsection of Article 28, as described above.

757 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser,* ICC-01/04-01/07-3363, para 17

758 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 17. As described above, the possible legal recharacterisation considered by Trial Chamber III in the Bemba case involved a shift between mental elements *within* the same provision.

> by the Prosecutor. In some instances, reference has been made to regulation 55 ... as an available remedy for any changes which might prove necessary at a later stage of the trial.[759]

He suggested that 'the present case might indeed prompt the Pre-Trial Chambers to revisit - and possibly amend - their current approach'.[760]

Finally, Judge Tarfusser found that the Trial Chamber's decision to implement Regulation 55 violated Katanga's 'right to be informed of the charges in detail'.[761] He found that the impugned decision fell short of 'providing an adequate amount of information to the accused'.[762] He thus dissented from the Majority of the Appeals Chamber in 'failing to censure the Trial Chamber for providing so little information as to make it impossible for it to even take a position on the arguments raised by the Defence'.[763] Judge Tarfusser specifically dissented from the Majority's holding that more detailed information about the proposed recharacterisation could be provided 'not only at the time of giving notice ... but also, in an adequate manner, subsequently in the proceedings'.[764] He argued that this resulted in splitting Regulation 55 into two sub-procedures; the first triggering Regulation 55, and the second, determining the precise factual and legal scope of the envisaged change.[765] He indicated that he would have granted the Defence appeal and reversed the impugned decision, requiring the Trial Chamber to issue an Article 74 judgement on the basis of the evidence heard.[766]

6. Trial Chamber II Decision, transmitting additional legal and factual material

In light of the Appeals Chamber judgement, on 15 May 2013, Trial Chamber II issued a decision, providing additional factual and legal information to the Defence related to the possible recharacterisation of Katanga's criminal responsibility under Regulation 55.[767] As described above, in its judgement upholding the Trial Chamber's decision, the Appeals Chamber had advised the Trial Chamber that it would be necessary to indicate to the Defence the specific facts on which it intended to rely. To this end,

759 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser,* ICC-01/04-01/07-3363, para 21, citing Pre-Trial Chamber II, *Decision on the Prosecutor's Application for Leave to Appeal the "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-01/05-01/08-532, 18 September 2009, para 56, referencing Regulation 55 in the context of justifying a decision to decline to confirm cumulative charges; Bemba Confirmation of Charges, ICC-01/05-01/08-424, para 203.

760 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 21.

761 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 22.

762 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 24.

763 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 24.

764 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 26, citing the majority opinion, *Appeals Katanga Regulation 55 Decision*, ICC-01/04-01/07-3363, para 101.

765 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, paras 25-27.

766 *Appeals Katanga Decision on Regulation 55, Dissenting Opinion of Judge Tarfusser*, ICC-01/04-01/07-3363, para 28.

767 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG.

the Trial Chamber first 'enlighten[ed] the Defence' as to how it would interpret Article 25(3)(d)(ii).[768]

The Trial Chamber indicated that all of the factual allegations were included in the Confirmation of Charges Decision, providing citations to the relevant paragraphs throughout the decision. It noted, however, that it could not provide the Defence with reference to all of the supporting evidence, as it had not yet deliberated on this aspect of the case against Katanga. Furthermore, it recalled that the Appeals Chamber had not required that the Trial Chamber disclose the evidence supporting the factual allegations.[769] The Chamber also noted that the Defence had already benefitted from the Chamber's analysis of the credibility of Defence witnesses, as set forth in the Ngudjolo Trial Judgement, as well as its decision not to rely on two Prosecution witnesses concerning Katanga's criminal responsibility, as set forth in its decision implementing Regulation 55.[770]

The Trial Chamber then set out a list of the factual elements and main factual allegations on which it would carry out the possible recharacterisation.[771] Specifically, the Chamber indicated that the implementation of Article 25(3)(d)(ii) assumed:

i) a crime within the jurisdiction of the Court was committed;

ii) the persons who committed the crime belonged to a group with a common purpose, which was to commit the crime;

iii) the accused made a significant contribution to the commission of the crime;

iv) the contribution was made with intent, insofar as the accused meant to engage in the conduct and was aware that it contributed to the common purpose; and,

v) the accused's contribution was made in the knowledge of the intention of the group to commit the crime forming part of the common purpose.[772]

The Trial Chamber reiterated that all of the relevant issues were addressed during the proceedings with Ngudjolo under the other mode of liability, Article 25(3)(a), but 'were not all of paramount importance'.[773] The Chamber listed the relevant factual elements. [774] Finally, the Trial Chamber invited the Prosecution, Defence and the Legal Representatives of Victims to submit additional observations. It ordered the Defence, if it wanted to carry out further investigations or recall witnesses as provided

768 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, para 11.
769 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, paras 12-13.
770 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, para 14. These witnesses were Witness 219 and Witness 250, see *Katanga Regulation 55 Implementation Decision*, ICC-01/04-01/07-3319-tENG/FRA, para 39. Witness 219 had previously testified about forced marriage and the *gilet* system which involved the mutilation and killing of men and women. *Gender Report Card 2011,* p 227. Witness 250 had previously made reference to women and girls fighting or serving as female military personnel. *Gender Report Card 2012,* FN 1662. The testimony of Witness 250 was challenged by the Defence on the basis of the links between the witness and Intermediary 316 who had been discredited in the Lubanga case for interfering with witnesses. *Gender Report Card 2012*, p 143, 239-240 and FN 1576, 1578, 1585-1587.
771 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, para 15.
772 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, para 16.
773 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, para 17.
774 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, paras 18-25.

for under Regulation 55(3), to provide all of the evidence in support of such a request, indicating whether these measures were necessary to adopt a particular line of defence, and how the evidence on the record would not otherwise allow it to do so.[775]

D. The Prosecution's applications for notice of Regulation 55 in *The Prosecutor v. William Samoei Ruto* and *Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura* and *Uhuru Muigai Kenyatta*

In both the Muthaura & Kenyatta and the Ruto & Sang cases (but as applied to Ruto only), prior to the commencement of trial the Prosecution requested that Trial Chamber V give notice under Regulation 55(2) that the form of individual criminal responsibility may be subject to legal recharacterisation by the Chamber.[776] As described above, the charges against three of the accused, Muthaura, Kenyatta and Ruto, had been confirmed based on indirect co-perpetration. While asserting the continued applicability of Article 25(3)(a) to the three accused, the Prosecution requested that the notice concerning the possible recharacterisation encompass the modes of liability set forth in Article 25(3)(b), (c) and (d) of the Statute.

1. Prosecution request for Regulation 55 notice as applied to Ruto

Five months after the Confirmation of Charges Decision, in an order issued on 14 May 2012, scheduling a status conference prior to the commencement of trial,[777] Trial Chamber V requested the parties make a submission concerning a number of issues, including any intention to request a legal recharacterisation of the facts based on Regulation 55. It also specifically requested the parties 'to make written submissions on their interpretation in law of the modes of individual criminal responsibility applicable to the present case'.[778] Following the status conference, held on 11 June 2012, at which both the Prosecution and the Legal Representative of Victims referenced future submissions on Regulation 55, the Chamber issued another order, establishing new deadlines for those submissions, and for the Defence response.[779]

775 *Katanga Additional Information Decision*, ICC-01/04-01/07-3371-tENG, paras 26-27.
776 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 1. *Kenyatta Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-02/11-444.
777 The Ruto & Sang trial subsequently commenced on 10 September 2013.
778 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-413, paras 3, 5.
779 Trial Chamber V, *Order setting the deadline for submissions on Regulation 55 and Article 25(3)*, 15 June 2012, ICC-01/09-01/11-426, paras 1-2.

In response to the Trial Chamber's order, on 3 July 2012, the Prosecution requested that it give notice on or before the first day of trial as to the possible, future use of Regulation 55 to recharacterise the mode of liability as applied to Ruto under Article 25(3)(b), (c) or (d).[780] Noting that 'Trial Chamber I took a similar approach in Lubanga, giving notice to the parties before the presentation of evidence began', the Prosecution clarified that it was 'not requesting the Chamber to invoke Regulation 55(1) to recharacterize the facts at this stage', but was rather 'suggesting that the Chamber should give notice to the participants under Regulation 55(2) that there is a possibility that Regulation 55(1) may be employed at a later date to recharacterize certain facts'.[781] It asserted that notice under Regulation 55(2) could be given prior to trial as 'on the limited factual record' it was already 'apparent that the accused's individual criminal responsibility may be subject to multiple legal characterisations'.[782]

The Prosecution emphasised: 'The possibility that the Chamber may ultimately decide to base its Article 74 decision on Articles 25(3)(b), (c) or (d) is demonstrated by even a cursory analysis of the evidentiary record now available to the Chamber'.[783] The Prosecution further emphasised the overlap of the elements across the different modes of liability. It argued specifically, for example, that the issuance of orders required for Article 25(3)(b) was one part of the test to establish co-perpetration.[784] In this regard, the Prosecution application asserted that, 'if one accepts the prevailing Article 25(3) jurisprudence, the forms of liability contained in Article 25(3)(b), (c) and (d) are to a large degree "lesser included" forms of liability, which involve a lesser degree of participation than indirect co-perpetration under Article 25(3)(a)'.[785]

The Prosecution further argued that Regulation 55 created 'a procedure -- separate and apart from the pre-trial charging and confirmation process -- that enables the Trial Chamber to properly adjudicate cases that fit more than one legal theory, and to ensure against "accountability gaps"'.[786] The Prosecution posited: 'In a case such as this, where it is possible to characterize the facts in multiple ways, Regulation 55 enables the Trial Chamber to recharacterize the facts itself.'[787] Finally, the Prosecution submitted that: '[u]nder the terms of Regulation 55(2) notice could not actually be given until trial commences, 'but this does not prevent the Prosecution from applying, and the Chamber from considering the issue now'.[788]

In her submission on 4 July 2012, the Victims' Legal Representative submitted that:

> the reference to "the facts" in regulation 55(1) and (2) is not necessarily confined to the specific facts charged that would constitute the legal elements of the substantive crime or mode of liability originally charged. According to the plain

780 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 24.
781 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, paras 24, 25, emphasis in original.
782 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 28.
783 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 30.
784 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 31.
785 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, FN 96, citing *Lubanga Trial Judgement*, ICC-01/04-01/06-2842, para 997, and *Lubanga Confirmation of Charges*, ICC-01/04-01/06-803t-ENG, para 203.
786 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 39, citing *Appeals Lubanga Decision on Regulation 55*, ICC-01/04-01/06-2205, para 77.
787 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 39.
788 *Ruto Prosecution's Submission on Indirect Co-perpetration*, ICC-01/09-01/11-433, para 36, emphasis in original.

> text of regulation 55, recharacterisation may be undertaken on the basis of any of "the facts and circumstances described in the charges and any amendments to the charges", whether or not a specific fact or circumstances is (or is alleged to be) a necessary element of any of the existing substantive charge or mode of liability.[789]

Acknowledging the Appeals Chamber decision in the Lubanga case, which held that Regulation 55 could not be used to exceed the facts and circumstances described in the charges, the Legal Representative nevertheless asserted that there was 'no reason why regulation 55 should be confined to such of the facts and circumstances described in the charges that constitute a necessary element of one of the existing substantive charges or modes of liability'.[790] She observed that footnote 163 in the Appeals Chamber decision in the Lubanga case referred to facts that 'support' the legal elements of the crime charge, to distinguish those facts from 'background or other information', but submitted that 'an alleged fact in the Document Containing the Charges may "support" the legal elements of the crime charged without being a necessary element of the crime'.[791]

Concerning the applicable mode of liability, the victims' Legal Representative observed the 'limited jurisprudence' on individual criminal responsibility, especially at the Appeals Chamber level', and thus asserted that 'the Court should be open to exploring the potential applicability of other modes of liability under Article 25 as the case progresses'.[792] Noting that the Court was in an early stage of development, she observed that it could 'not be taken as settled to what extent some modes of liability under Article 25 may be "lesser included" forms of other modes of liability'.[793] She specifically requested that the Chamber issue notice concerning the potential application of Article 25(3)(c), aiding and abetting, as applied to both Ruto and Sang.

a. Defence response

In its response to the Prosecution filing, on July 24, 2012, the Ruto Defence argued that the Prosecution should 'make a decision now and apply, on clear grounds, for recharacterisation',[794] and not refer generally to 'the Chamber's capacity to recharacterise'.[795] It stated: 'The Prosecution's approach is contrary to the rights of the accused and judicial economy and should not be condoned as a legitimate use of the Chamber's Regulation 55 powers'.[796] The Defence invoked its right to be informed promptly and in detail of the nature, cause and content of the charges, and submitted that this must be done in a 'clear and unambiguous' manner that does not leave room 'for surprise or the moulding of the case by the prosecution as the evidence unfolds'.[797] It described the Prosecution's submissions as 'too hypothetical to be

789 *Victims Submission on Regulation 55,* ICC-01/09-01/11-436, para 10.
790 *Victims Submission on Regulation 55*, ICC-01/09-01/11-436, para 11.
791 *Victims Submission on Regulation 55*, ICC-01/09-01/11-436, para 13.
792 *Victims Submission on Regulation 55*, ICC-01/09-01/11-436, para 52. The Victims' Legal Representatives also requested that the Chamber consider legally recharacterising the facts to include the crimes of burning/destruction of property, looting and the infliction of physical injuries. ICC-01/09-01/11-436, para 47.
793 *Victims Submission on Regulation 55*, ICC-01/09-01/11-436, para 54.
794 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 32.
795 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 32.
796 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 32.
797 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 33.

helpful'.[798] It further stated: 'They are inappropriate in that they are of little assistance to the Chamber in specifying what mode of liability it submits may be most appropriate, given the Prosecution's knowledge of its own evidence and case theory'.[799]

The Ruto Defence further recalled that Regulation 52 required that the document containing the charges include 'the precise form of participation under articles 25 and 28', and argued that the 'Prosecution's approach to recharacterization undermines the utility of the provision', as the Defence 'would effectively be on notice for, and have to defend himself against, all forms of participation under Article 25'. [800]

2. Trial Chamber V(a)'s order to exhaustively set forth the facts

On 5 September 2013, Trial Chamber V(a)[801] ordered both the Prosecution and the Legal Representatives of Victims to 'exhaustively indicate the facts and circumstances described in the charges that would support the proposed recharacterisations'.[802] Referring to the decision in the Katanga case, the Trial Chamber noted that the Appeals Chamber had found it permissible to provide additional details subsequent to giving notice. The Trial Chamber observed that such a showing would allow 'for the Defence to be able to make full submissions on whether the facts and circumstances described in the charges are exceeded and, if notice under Regulation 55(2) ... is given, to be informed in detail of the factual allegations to which any potential change in the legal characterisation of the facts relate'.[803]

a. Prosecution response

On 17 September 2013, the Prosecution submitted a 13-page chart annexed to its filing, detailing the facts and circumstances from within the updated Document Containing the Charges that supported several modes of criminal liability under Article 25(3).[804] The Legal Representative of Victims made no submission.

b. Ruto Defence response

In its filing of 24 September 2013, the Ruto Defence stated: 'No Chamber has previously been presented with such a bold proposal as that made by the Prosecution in this case', and referred to the jurisprudence on Regulation 55 by Trial Chambers I, II, III and the Appeals Chamber in the Lubanga, Katanga and Bemba cases.[805] Noting that in the prior jurisprudence the Chambers invoked Regulation 55 proprio motu, and 'not at the behest of the prosecution', it argued that: 'The power created by Regulation 55 is vested in the Trial Chamber itself . . It does not exist as a means for extending the Prosecution's choices as to the charges to be considered by the Chamber'.[806]

798 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 34.
799 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 34.
800 *Ruto & Sang Defence Response to Prosecutions Submissions*, ICC-01/09-01/11-442, para 36.
801 Trial Chamber V(a) was composed of: Judge Chile Eboe-Osuji (Presiding Judge), Judge Olga Herrera Carbuccia and Judge Robert Fremr.
802 *Ruto & Sang Trial Chamber Order on Legal Characterisation*, ICC-01/09-01/11-907, para 10.
803 *Ruto & Sang Trial Chamber Order on Legal Characterisation*, ICC-01/09-01/11-907, para 10.
804 *Ruto Prosecution Submission on Regulation 55*, ICC-01/09-01/11-943-AnxA.
805 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 15.
806 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, paras 11, 16.

Echoing Judge Tarfusser's dissent in the Appeals Chamber decision in the Katanga case, the Ruto Defence asserted that Regulation 55 was 'an exceptional power to be used sparingly'.[807] The Defence underscored that the Prosecution was not seeking a specific reclassification, but rather that the Chamber give notice of a possible recharacterisation. It quoted Prosecution remarks at an oral hearing: 'the Prosecution submits that if the case goes according to plan, if all the Prosecution witnesses arrive at trial, if all Prosecution witnesses come up to proof, then recharacterisation may not be necessary'.[808]

The Ruto Defence reiterated that 'such a general notice would undermine the statutory structure of the Court and in particular the fundamental rights of Mr. Ruto', namely: the right to be informed 'promptly and in detail of the nature, cause and content of the charges' and to 'have adequate time and facilities for the preparation of the defense' as provided in Article 67.[809] In this regard, it noted that 'the objective of early notice is fairness, which is lost when the notice relates, as in the present case, to an unfocused and general invoking of all modes of liability'.[810]

Referring to the Appeals Chamber decision in the Katanga case, the Defence noted that each mode of liability carried 'with it a different narrative and a different slant'.[811] It further underscored in this regard that the application of Article 25(3) at the Court was 'not settled'.[812] It declined to respond to the itemised list of facts and circumstances submitted by the Prosecution, arguing generally that facts and circumstances did not necessarily 'translate or transmute' into facts and circumstances that support another mode of liability.[813] It requested the Chamber reject the Prosecution request.

3. Prosecution request for Regulation 55 notice as applied to Muthaura[814] & Kenyatta

In a response to a similar order by Trial Chamber V,[815] requesting submssions on diverse issues for the purpose of scheduling a status conference in the Muthaura & Kenyatta case,[816] in a submission dated 3 July 2012, prior to the commencement of the trial, the Prosecution requested that the Chamber give notice to the parties 'that the issue of the accuseds' individual criminal responsibility is "in play" and is subject to a determination by the Chamber at a later date'.[817] In a filing similar to that in the Ruto case, it requested that Chamber give notice 'before or on the first day of trial'.[818] Filed on the same day, the content of the Prosecution submission closely paralleled that submitted in the Ruto case, described above.

807 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 11.
808 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 12, citing ICC-01/09-01/11-T-24-Red-eNG, p 4 lines 23-25.
809 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, paras 14, 17.
810 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 18.
811 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 19.
812 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 20.
813 *Ruto Defence Submission on Regulation 55*, ICC-01/09-01/11-985, para 23.
814 On 18 March 2013, the charges against Frances Kirimi Muthaura were withdrawn.
815 Trial Chamber V was composed of: Judge (Presiding Judge), Judge Christine Van den Wyngaert and Judge Chile Eboe-Osuji.
816 Trial Chamber V, *Order scheduling a status conference*, ICC-01/09-02/11-422, 14 May 2012; Trial Chamber V, *Scheduling order and amended agenda for the status conference*, ICC-01/09-02/11-431, 6 June 2012.
817 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 3.
818 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 24.

In its filing, the Prosecution emphasised that Regulation 55 was 'triggered by a "possibility" that the Chamber "may" decide to engage in a legal recharacterisation of the facts. When triggered by such a possibility, Regulation 55(2)'s notice requirement is mandatory -- "the Chamber shall give notice'.[819] The Prosecution asserted, 'it is clear from the factual record now before the Chamber that there are multiple ways to characterize the accuseds' individual criminal responsibility under Article 25(3) of the Statute. This is a function of the breadth of their alleged contributions to the crimes charged, which span the entirety of Article 25(3)'.[820] As noted above, both Muthaura and Kenyatta had charges confirmed against them on the basis of indirect co-perpetration pursuant to Article 25(3)(a).[821] For the purpose of Regulation 55 notice, the Prosecution noted that 'indirect coperpetration is not the sole manner in which the accuseds' criminal responsibility can be characterized', and argued that 'the accuseds' criminal responsibility could equally be characterized as:

> i. ordering, soliciting or inducing under Article 25(3)(b);
>
> ii. aiding, abetting or otherwise assisting under Article 25(3)(c); or
>
> iii. contributing "[i]n any other way" to a crime committed by a "group of persons acting with a common purpose" under Article 25(3)(d).'[822]

The Prosecution then argued that the factual elements in the case leading the Pre-Trial Chamber to base the Confirmation of Charges Decision on co-perpetration could also 'demonstrate liability under Article 25(3)(b) because the issuance of "orders" is part of the Pre-Trial Chamber's eight element co-perpetration test'.[823] Similarly, the Prosecution argued that other elements of indirect co-perpetration could be characterised as aiding and abetting under Article 25(3)(c). Finally, the Prosecution argued that all of the aforementioned factual elements in the case could be considered as contributing in any other manner to the commission of the crimes under Article 25(3)(d).[824]

The Prosecution clarified that it was 'not suggesting any alteration of the charging document, but was rather 'informing the Chamber, at the earliest available opportunity, that the accuseds' criminal acts lend themselves to multiple legal characterizations', which were 'a function of the facts of the case'.[825] As in its filing related to Ruto, it suggested that: 'Regulation 55 caters for this precise scenario.'

819 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 27, emphasis in original.
820 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 3.
821 In its filing, the Prosecution noted that the Pre-Trial Chamber had issued the summons to appear based on indirect co-perpetration without addressing the alternative mode of liability alleged by the Prosecution, namely Article 25(3)(d), but indicated that the decision 'was without prejudice to further evidence at a later stage of the proceedings which would establish individual criminal responsibility for the crimes under a different mode of liability'. *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 4, citing ICC-01/09-02/11-1, para 52.
822 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 29.
823 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 31.
824 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, paras 32-35. See also FN 98, observing that under 'the prevailing Article 25(3) jurisprudence, the forms of liability contained in Article 15(3)(b),(c) and (d) are to a large degree "lesser included" forms of liability, which involve a lesser degree of participation than indirect co-perpetration under Article 25(3)(a)', citing *Lubanga Trial Judgement,* ICC-01/04-01/06-2842, para 997.
825 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 38.

The Prosecution assured the Chamber that the proposed recharacterisation would not go beyond the facts and circumstances contained in the charges, and thus would not 'require burdensome additional preparation on the part of the Defence'.[826] It observed that:

> Any possibility of additional burden is further reduced due to the overlap between the requirements of Article 25(3)(a) on the one hand and Articles 25(3)(b), (c) and (d) on the other, and the fact that subsections (b), (c) and (d) are, in large measure, lesser included forms of the mode of liability delineated in subsection (a).[827]

The Prosecution argued that the Trial Chamber should give notice 'as soon a feasible, to protect the fair trial rights of the parties'.[828]

a. Defence response

In its response to the Prosecution, filed on 25 July 2012, the Muthaura Defence argued that 'the accused person should be tried for only those charges that have been confirmed against him'.[829] It asserted that Regulation 55 should only be invoked after the trial has begun.[830] The Muthaura Defence described the Prosecution's use of Regulation 55 as 'alternative charging by the back door'.[831] The Kenyatta Defence did not submit a response to the Prosecution's arguments concerning Regulation 55.

In March 2013, charges against Muthaura were dropped by the Prosecutor who stated that her Office had proceeded with the case against Muthaura in 'good faith, believing that there was a case against him', but had come to the conclusion that there is no longer 'a reasonable prospect of conviction at trial' and that there is no prospect that further investigations will remedy this.[832] The Prosecutor stated that there have been 'post-confirmation developments with respect to a critical witness' against Muthaura, who recanted a significant part of his incriminating evidence after the confirmation decision was issued, and who admitted accepting bribes from persons allegedly holding themselves out as 'representatives of both accused'.[833]

Permission to withdraw the charges was granted by Trial Chamber V on 18 March 2013.[834]

826 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 46.
827 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 46.
828 *Kenyatta Prosecution's Sumbission on Indirect Co-perpetration*, ICC-01/09-02/11-444, para 36.
829 Trial Chamber V, *Defence Response to the "Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accused's individual criminal responsibility*, ICC-01/09-02/11-460, 25 July 2012, para 7.
830 Trial Chamber V, *Decision on the withdrawal of charges against Mr Muthaura*, ICC-01/09-02/11-696, 18 March 2013. Trial Chamber V, *Partial Dissenting Opinion of Judge Ozaki and Concurring Separate Opinion of Judge Eboe-Osuji Decision on the Withdrawal of charges against Mr Muthaura*, ICC-01/09-02/11-698, 19 March 2013.
831 *Kenyatta Prosecution's Submission on Indirect Co-perpetration,* ICC-01/09-02/11-444, para 37, citing 12 June 2012 Status Conference Transcript, ICC-01/09-02/11-T-18-ENG p 35, lines 13-22.
832 11 March 2013 Status Conference Transcript, ICC-01/09-02/11-T-23-ENG, p 3, lines 9-24 See also Women's Initiatives for Gender Justice, 'Kenya: Prosecution withdraws all charges against Francis Kirimi Muthaura', *Legal Eye on the ICC* eLetter, June 2013, available at http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html.
833 Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687, 11 March 2013, para 11.
834 Pre-Trial Chamber II, *Decision on the withdrawal of charges against Mr Muthaura*, ICC-01/09-02/11-696, 18 March 2013.

Composition of the Chambers

Decision (Short Title)	Chamber and Composition
CAR: The Prosecutor v. Jean-Pierre Bemba Gombo	
Bemba Arrest Warrant	Pre-Trial Chamber III: • Judge Fatoumata Dembele Diarra (Presiding Judge) • Judge Hans Peter Kaul • Judge Ekaterina Trendafilova
Bemba Confirmation of Charges	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser
Bemba Notice of Regulation 55 Change	Trial Chamber III: • Judge Sylvia Steiner (Presiding Judge) • Judge Joyce Aluoch • Judge Kuniko Ozaki
DRC: The Prosecutor v. Thomas Lubanga Dyilo	
Lubanga Arrest Warrant	Pre-Trial Chamber I: • Judge Claude Jorda (Presiding Judge) • Judge Akua Kuenyehia • Judge Sylvia Steiner
Lubanga Confirmation of Charges	Pre-Trial Chamber I: • Judge Claude Jorda (Presiding Judge) • Judge Akua Kuenyehia • Judge Sylvia Steiner
Lubanga Trial Judgement	Trial Chamber I: • Judge Adrian Fulford (Presiding Judge) • Judge Elizabeth Odio Benito • Judge René Blattmann
DRC: The Prosecutor v. Bosco Ntaganda	
Ntaganda Arrest Warrant 1	Pre-Trial Chamber I: • Judge Claude Jorda (Presiding Judge) • Judge Akua Kuenyehia • Judge Sylvia Steiner
Ntaganda Decision on Arrest Warrant 2	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser

DRC: The Prosecutor v. Callixte Mbarushimana	
Mbarushimana Arrest Warrant	Pre-Trial Chamber I: • Judge Cuno Tarfusser (Presiding Judge) • Judge Sylvia Steiner • Judge Sanji Mmasenono Monageng
Mbarushimana Confirmation of Charges	Pre-Trial Chamber I: • Judge Sanji Mmasenono Monageng (Presiding Judge) • Judge Sylvia Steiner • Judge Cuno Tarfusser
DRC: The Prosecutor v. Sylvestre Mudacumura	
Mudacumura Arrest Warrant	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser
DRC: The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui	
Katanga & Ngudjolo Arrest Warrants	Pre-Trial Chamber I: • Judge Akua Kuenyehia (Presiding Judge) • Judge Anita Ušacka • Judge Sylvia Steiner
Katanga & Ngudjolo Confirmation of Charges	Pre-Trial Chamber I: • Judge Akua Kuenyehia (Presiding Judge) • Judge Anita Ušacka • Judge Sylvia Steiner
Ngudjolo Trial Judgement	Trial Chamber II: • Judge Bruno Cotte (Presiding Judge) • Judge Fatoumata Dembele Diarra • Judge Christine Van den Wyngaert
Uganda: The Prosecutor v. Kony et al	
Kony, Otti, Odhiambo, Ongwen, Lukwiya Arrest Warrants	Pre-Trial Chamber II: • Judge Tuiloma Neroni Slade (Presiding Judge) • Judge Mauro Politi • Judge Fatoumata Dembele Diarra

Darfur, Sudan: The Prosecutor v. Ahmad Muhammad Harun and Ali Muhamad Ali Abd-Al-Rahman ("Ali Kushayb")	
Harun Arrest Warrant	Pre-Trial Chamber I: • Judge Akua Kuenyehia (Presiding Judge) • Judge Claude Jorda • Judge Sylvia Steiner
Kushayb Arrest Warrant	Pre-Trial Chamber I: • Judge Akua Kuenyehia (Presiding Judge) • Judge Claude Jorda • Judge Sylvia Steiner
Darfur, Sudan: The Prosecutor v. Omar Hassan Ahmad Al'Bashir	
Al'Bashir Arrest Warrant 1	Pre-Trial Chamber I: • Judge Akua Kuenyehia (Presiding Judge) • Judge Anita Ušacka • Judge Sylvia Steiner
Al'Bashir Arrest Warrant 2	Pre-Trial Chamber I: • Judge Sylvia Steiner (Presiding Judge) • Judge Sanji Mmasenono Monageng • Judge Cuno Tarfusser
Darfur, Sudan: The Prosecutor v. Abdel Raheem Muhammad Hussein	
Hussein Arrest Warrant	Pre-Trial Chamber I: • Judge Sanji Mmasenono Monageng (Presiding Judge) • Judge Sylvia Steiner • Judge Cuno Tarfusser
Darfur, Sudan: The Prosecutor v. Bahar Idriss Abu Garda	
Abu Garda Summons to Appear	Pre-Trial Chamber I: • Judge Sylvia Steiner (Presiding Judge) • Judge Sanji Mmasenono Monageng • Judge Cuno Tarfusser
Abu Garda Confirmation of Charges	Pre-Trial Chamber I: • Judge Sylvia Steiner (Presiding Judge) • Judge Sanji Mmasenono Monageng • Judge Cuno Tarfusser

Darfur, Sudan: Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus	
Banda Summons to Appear	Pre-Trial Chamber I: • Judge Sylvia Steiner (Presiding Judge) • Judge Sanji Mmasenono Monageng • Judge Cuno Tarfusser
Jerbo Summons to Appear 1 and 2	Pre-Trial Chamber I: • Judge Sylvia Steiner (Presiding Judge) • Judge Sanji Mmasenono Monageng • Judge Cuno Tarfusser
Banda & Jerbo Confirmation of Charges	Pre-Trial Chamber I: • Judge Cuno Tarfusser (Presiding Judge) • Judge Sylvia Steiner • Judge Sanji Mmasenono Monageng
Libya: The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi	
Muammar Gaddafi Arrest Warrant	Pre-Trial Chamber I: • Judge Sanji Mmasenono Monageng (Presiding Judge) • Judge Sylvia Steiner • Judge Cuno Tarfusser
Saif Gaddafi Arrest Warrant	Pre-Trial Chamber I: • Judge Sanji Mmasenono Monageng (Presiding Judge) • Judge Sylvia Steiner • Judge Cuno Tarfusser
Al-Senussi Arrest Warrant	Pre-Trial Chamber I: • Judge Sanji Mmasenono Monageng (Presiding Judge) • Judge Sylvia Steiner • Judge Cuno Tarfusser
Kenya: The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang	
Ruto, Kosgey & Sang Summons to Appear	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser

Ruto, Kosgey & Sang Confirmation of Charges	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser

Kenya: The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

Muthaura, Kenyatta & Ali Summons to Appear	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser
Muthaura, Kenyatta & Ali Confirmation of Charges	Pre-Trial Chamber II: • Judge Ekaterina Trendafilova (Presiding Judge) • Judge Hans-Peter Kaul • Judge Cuno Tarfusser

Kenya: The Prosecutor v. Walter Osapiri Barasa

Barasa Arrest Warrant	Pre-Trial Chamber II: • Judge Cuno Tarfusser (Single Judge)

Côte d'Ivoire: The Prosecutor v. Laurent Gbagbo

Laurent Gbagbo Arrest Warrant	Pre-Trial Chamber III: • Judge Silvia Fernandez de Gurmendi (Presiding Judge) • Judge Elizabeth Odio Benito • Judge Adrian Fulford
Gbagbo Decision Adjourning Confirmation of Charges	Pre-Trial Chamber I: • Judge Silvia Fernandez de Gurmendi (Presiding Judge) • Judge Hans-Peter Kaul • Judge Christine Van den Wyngaert

Côte d'Ivoire: The Prosecutor v. Simone Gbagbo	
Simone Gbagbo Arrest Warrant	Pre-Trial Chamber III: • Judge Silvia Fernandez de Gurmendi (Presiding Judge) • Judge Elizabeth Odio Benito • Judge Adrian Fulford

Côte d'Ivoire: The Prosecutor v. Charles Blé Goudé	
Goudé Arrest Warrant	Pre-Trial Chamber III: • Judge Silvia Fernandez de Gurmendi (Presiding Judge) • Judge Elizabeth Odio Benito • Judge Adrian Fulford

Short Titles for Frequently Cited Cases

The following citations, referenced repeatedly throughout this paper, will be short cited as follows:

Situation in Uganda

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