INTERNATIONAL CRIMINAL RESPONSIBILITY AFTER *KATANGA*: OLD CHALLENGES, NEW SOLUTIONS

OLENA KUCHER,
Institute of International Relations,
Taras Shevchenko National University of Kyiv
(Kyiv, Ukraine),

ALEKSEY PETRENKO,
University of Göttingen
(Göttingen, Germany)

On March 7, 2014, the International Criminal Court delivered its most recent judgment convicting Mr. Katanga as an accessory of crime against humanity in the form of murder and four counts of war crimes within the meaning of Art. 25(3)(d) of the Rome Statute. This decision along with its previous final decisions in the Lubanga and Ngudjolo cases has raised similar concerns about individual criminal responsibility regarding, inter alia, application of control over a crime doctrine as evidenced from the dissenting / separate opinions to them. This doctrine has already firmly settled within the ICC jurisprudence and yet some judges doubt if its application is justified, especially given the peculiarities of national origin irrelevant in the realm of the Rome Statute. The other raised concern is a potential application of the legality principle, since both Ngudjolo and Katanga judgments have investigated the same situations and come to the completely different results.

While the Rome Statute contains the most complete provision determining the modes of individual responsibility, Art. 25 thus appears to be far from being out of debates. To dispel some of them, this article analyzes practical application of Art. 25(3)(a) and (d) by the ICC and different approaches in this regard as well as general grounds for raising question on the necessity for individual criminal responsibility.

Keywords: ICC; individual criminal responsibility; Rome Statute; control over a crime; blameworthiness.

DOI: 10.17589/2309-8678-2015-3-1-143-168

1. Introduction

2012 has become a new landmark in international criminal law [hereinafter ICL].[1] The International Criminal Court [hereinafter ICC, Court] delivered its first judgment convicting Mr. Lubanga of commission of war crimes under the Rome Statute.[2] Unsurprisingly, the basic concept of individual criminal responsibility was the main contentious issue raised before the Court, as follows from the Separate opinion of Judge Fulford.[3] Further ICC practice proves the ambiguity of this issue in its later judgments defining the mode of individual criminal responsibility for Mr. Katanga and Mr. Ngudjolo in 2013 and 2014 respectively. Both of them also contain dissenting opinions addressing the similar problems.

The issues raised in respect of international criminal responsibility have their roots in the history of the ICL. Being an actively developing separate branch of international law, the modern ICL has been evolving only for 70 years since the Nuremberg and Tokyo International Military Tribunals. Despite the promising begining, the real dawn in ICL occurred in 1990[s] with establishment of the international criminal tribunals *ad hoc* and later final setting up of the permanent court in 2002. Only then was the ICL finally crystallized as a branch of the contemporary international law.

Nevertheless, doubts remain whether ICL is a branch of law without any flaws. State practice as well as jurisprudence of international judicial bodies are still filling up the gaps and develop the early established concepts including general principles.

The following article elaborates on the genesis and further development of the principle of individual criminal responsibility. The first part provides with an understanding of the principle's roots and explains its status and content, while the second one provides an analysis of the ICC practice in the context of application of Art. 25 titled 'Individual Criminal Responsibility.' This article is pertinent, since today the Rome Statute's provisions contain not only merely the most exhaustive list of forms of individual criminal responsibility for commission of international crimes but also summarize the already existing approaches to understanding of this principle.

---

1 Thomas R. Liefänder, *The Lubanga Judgment of the ICC: More Than Just the First Step?*, 1(1) Cambridge J. Int'l & Comp. L. 191 (2012). doi:10.7574/cjicl.01.01.38

2 Situation in the Democratic Republic of the Congo (The Prosecutor v. Thomas Lubanga Dyilo) ¶ 1358, No. ICC-01/04-01/06 (Intl. Crim. Ct., Tr. Chamber I, Mar. 14, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (accessed Mar. 12, 2015) [hereinafter Lubanga, Tr. Chamber I].

3 Situation in the Democratic Republic of the Congo (The Prosecutor v. Thomas Lubanga Dyilo) ¶ 1, 3, No. ICC-01/04-01/06 (Intl. Crim. Ct., Tr. Chamber I, Mar. 14, 2012) (separate opinion of Judge Adrian Fulford) [hereinafter Fulford].

2. Individual Criminal Responsibility as a General Principle of International Criminal Law

Contemporary international law as a stem for the ICL originated as a system of prohibitions and authorizations specifically designed for and dedicated to players on the international stage. Previously only sovereign States were fully recognized as players.[4] State sovereignty was and still remains one of the cornerstones of international law, which was defined by the Permanent Court of International Justice in famous *Lotus* as a freedom of states to act in any manner that is not directly prohibited.[5]

The classic concept of international law did not recognize other actors as possessors of rights and obligations.[6] In particular, at times international organizations were not treated as separate subjects of international law until in 1949 the ICJ finally solved the disputes in this regard in *Reparation for injuries*.[7]

Parallel to these changes, an active development of international relations as well as numerous wars in the 20 century, leading to disastrous consequences, have raised one of the most important questions in the history of mankind: who is guilty and responsible for the commission of war atrocities and crimes against humanity? The international community has come forth with different possible answers: states, entities, corporates and individuals.

As it is evident, the classic concept of international law suggests only one answer to this question: state solely may bear the responsibility. However, this approach could not solve all existing disputes and provide effective means of preventing similar situations in the future. The following reasons give a basis for further research.

Above all, to convict the society as a whole or state for committing separate, now criminally punishable actions under international law, 'seem[s] to be too abstract and would have proved to be unproductive.'[8] In other words, if everybody is guilty, then nobody is, especially considering this aspect as applicable not to a small collective, but to the whole state with multimillion population. Taking this into account, the issue regarding identification of persons responsible for war crimes and crimes

---

4 Lassa Oppenheim, 1 International Law: A Treatise 107 (2nd ed., Longmanns, Green & Co. 1912), available at <https://archive.org/details/internationalla03oppegoog> (accessed Mar. 12, 2015); Kay Hailbronner & Martin Kau, *Der Staat und der Einzelne als Völkerrechtsubjekte*, in Völkerrecht 156 (Wolfgang G. Vitzthum. ed.) (5th ed., De Gruyter 2010).

5 Case of the S.S. 'Lotus' (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18–19 (Sep. 7), available at <http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf> (accessed Mar. 12, 2015).

6 Malcolm N. Shaw, International Law 197 (6th ed., Cambridge University Press 2008).

7 Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, at 179 (Apr. 11).

8 Vincenzo Militello, *The Personal Nature of Criminal Responsibility and ICC Statute*, 5(4) J. Int'l Crim. Justice 944 (2007). doi:10.1093/jicj/mqm039

against humanity cannot be avoided. The mere statement of fact that the crime has been committed without reference to people who have actually done it automatically shifts the responsibility from a person to the whole collective.[9]

By individualization of responsibility for the most serious crimes in the field of ICL one can reach more than enforcement of international law (that, as such, is not a goal itself). Individualization of responsibility can significantly facilitate the process of reconciliation in the society.[10] Holding some persons responsible 'opens possibility to [re-thinking] of the conflict itself' which has led to such consequences.[11]

Moreover, as a matter of fact the state / society responsibility in such cases does not correspond to the reality to a full extent. Here it is important to note that the issue at hand does not concern the formal legal attribution of war actions, which according to the International Law Commission's Draft Articles on States Responsibility might be considered as state actions.[12] Rather, the main issue here is to what the Nuremberg International Military Tribunal drew attention: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[13] International community has thus strongly inclined towards individualization of responsibility since then, as is further clearly evidenced in the Prosecutor's opening statement in the *Milošević* case focusing on the same issue.[14]

The same reasons likewise laid the foundation for denial of the French proposal to expand the Rome Statute's provisions on individual criminal responsibility for 'juridical' persons.[15] Apart from abovementioned considerations, inclusion of corporate liability would generate superfluous complications. For instance, it would lead to the necessity of further negotiations on the exact wording of the clause

---

9 Dennis Nitsche, Der Internationale Strafgerichtshof ICC und der Frieden: Eine vergleichende Analyse der Befriedungsfunktion internationaler Straftribunale 169 (Nomos 2007).

10 Nitsche, *supra* n. 9, at 170.

11 *Id.* at 170.

12 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* 2 Y.B. Int'l L. Comm'n 20 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1, at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed Mar. 12, 2015).

13 *International Military Tribunal (Nuremberg) Judgement and Sentences (Oct. 1, 1946)*, 41 Am. J. Int'l L. 172, 220–221 (1947).

14 *The Prosecutor v. Slobodan Milošević*, Prosecution Opening Statement ¶ 4, No. IT-02-54-T (Intl. Crim. Trib. for the Former Yugo., Feb. 12, 2002).

15 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June – 17 July 1998), 2 Official Records: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole at 133, U.N. Doc. A/CONF/183/13 (Vol. II), U.N. Sales No. E.02.I.5 (Art. 23 'Individual Criminal Responsibility,' proposal submitted by France (A/CONF.183/C.1/L.3)), available at <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> (accessed Mar. 12, 2015).

especially given the fact that such a provision does not exist in the most legal systems, as well as to increase the amount of required evidence.[16]

Despite all these considerations, there is still a strong contrary approach. Under the *system criminality* concept only collective entities like state or organized groups are in fact able to commit or encourage the commission of international crimes.[17] Opposed to what the Nuremberg Tribunal underlined, the International Military Tribunal for the Far East's Judge B. Röling has rightly pointed out that war crimes' commission had always served the purposes of system and had been caused by the system.[18] Yet, this concept is more suitable for general understanding of causes rather than as a practical guideline for criminal prosecution of guilty persons.

Thus, as a logical corollary of these thoughts international society has swiftly come to understand the necessity to invoke individual criminal responsibility for the most serious international crimes, which has become one of the main ICL principles. This basic idea has been reflected in plenty of sources: Statutes of Nuremberg and Tokyo International Military Tribunals;[19] recent Statutes of the International Criminal Tribunal for the Former Yugoslavia[20] and International Criminal Tribunal for Rwanda,[21] the Rome Statute.[22] The main principles recognized by the Statute of the Nuremberg tribunal were also upheld by the UN General Assembly in 1946.[23]

---

16 Ole K. Fauchald & Jo Stigen, *Corporate Responsibility before International Institutions*, 40 Geo. Wash. Int'l L. Rev. 1026, 1038–39 (2009), available at <http://www.jus.uio.no/ior/personer/vit/olefa/dokumenter/corporate-resp.pdf> (accessed Mar. 12, 2015).

17 System Criminality in International Law 15 (Harmen van der Wilt & André Nollkaemper, eds.) (Cambridge University Press 2009).

18 Bert V.A. Röling, *The Significance of the Laws of War*, in Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict 46 (Antonio Cassese, ed.) (Giuffrè 1975).

19 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, Art. 6, 82 U.N.T.S. 279, 284, at <http://www.refworld.org/docid/47fdfb34d.html> (accessed Mar. 12, 2015); Charter of the International Military Tribunal for the Far East, Apr. 26, 1946, Art. 5, T.I.A.S. No. 1589, at <http://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0020.pdf> (accesed Mar. 12, 2015).

20 Statute of the International Tribunal for the Former Yugoslavia, Art. 7 (adopted by U.N. Security Council Res. 808 (1993), U.N. Doc. S/RES/808 (February 22, 1993)), at <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (accessed Mar. 12, 2015).

21 Statute of the International Tribunal for Rwanda, Art. 6, U.N. Security Council Res. 955 (1994), U.N.Doc. S/RES/955 (November 8, 1994), <http://www1.umn.edu/humanrts/peace/docs/scres955.html> (accessed Mar. 12, 2015).

22 Rome Statute of the International Criminal Court, Jul. 17, 1998, Art. 25(3), 2187 U.N.T.S. 3, at <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> (accessed Mar. 12, 2015).

23 *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946), at <http://www1.umn.edu/humanrts/instree/1946a.htm> (accessed Mar. 12, 2015).

Consequently, international law stepped away from the initial understanding of liability for its violations through individual criminal responsibility. As regards the Rome Statute itself, the enumeration of individual criminal responsibility therein was not an innovative provision.[24] Yet, Art. 25 of the Rome Statute as such, being a list of individual criminal responsibility principles as well as its application by the ICC represents to date the most important and topical source for analysis in order to deduce not only already existent approaches to determination of individual criminal responsibility, but also for understanding the developing tendencies in this regard. The relevance of Art. 25 is predetermined by both the permanent character of the ICC activity, that celebrated the tenth anniversary in 2012, and the fact that the activity of international criminal tribunals *ad hoc* comes to an end soon.

3. Individual Criminal Responsibility on Art. 25 of the Rome Statute

Article 25(3) of the Rome Statute addresses the issues concerning individual criminal responsibility. The article lists six forms of individual criminal responsibility.[25] In some authors' opinions, this article represents the most exhaustive list of such forms to date.[26] Despite this, some basic issues still seem to be ambiguous. *Inter alia*, no consensus exists, whether the structure of Art. 25 indicates a hierarchy between

---

[24] Militello, *supra* n. 8, at 944.

[25] Rome Statute, *supra* n. 22, Art. 25(3), the text follows as:

'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 occures 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 abandonds 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.'

[26] Attila Bogdan, *Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia*, 6(1) Int'l Crim. L. Rev. 67 (2006). doi:10.1163/157181206777066727

different forms of individual criminal responsibility and whether they are exclusive.[27] The amplified practice of international criminal tribunals *ad hoc* opines that 'the various modes of liability available under their statutes are not mutually exclusive,'[28] while the ICC took a different approach, as might implicitly follow from its first judgment.[29]

As to the other details unclear from the provision's wording itself, the ICC practice specifies and elaborates on additional objective and subjective elements of each abovementioned form to apply provisions of the Rome Statute on a case-by-case basis.

To date the ICC Chambers considered a few grounds for individual criminal responsibility reflected in Art. 25(3)(a) and (d), while other sections remained untouched. As to the Art. 25(3)(a), and namely bringing to responsibility for commission of a crime through another person, the ICC has considered this form of liability in the decisions on confirmation of charges in five cases: *Lubanga*, *Katanga* and *Ngudjolo*, *Ruto*, *Bemba* and *Muthaura*.

In respect of the Art. 25(3)(d) the Pre-Trial Chamber I has analyzed this form of individual criminal responsibility when it decided to decline confirmation of the charges in *Mbarushimana* as well as in the final judgment in the most recent *Katanga* case. These conclusions were also upheld by Pre-Trial Chamber II in the decision on confirmation of charges in *Ruto*.

Besides, the issue of basing individual criminal responsibility on the grounds of other subsections of Art. 25 has been raised in the arrest warrants issued in *Kony*, *Harun* (Art. 25(3)(b)) and *Barasa* (Art. 25(3)(f)). Given the absence of decisions in these cases on confirmation of charges or on its declining the detailed additional criteria of abovementioned forms of individual criminal responsibility have not been formulated yet.

Hence, the ICC has sufficiently considered only two forms of a person with responsibility. They will be analyzed below separately.

3.1. Article 25(3)(a) of the Rome Statute in the Practice of the ICC

Pursuant to Art. 25(3)(a) a person is liable if he or she commits a crime 1) individually; 2) 'jointly with another' person; 3) 'through another person, regardless of whether that other person is criminally responsible.' The Chambers paid the most attention to the third described provision, while the joint responsibility was analyzed only in part and individual commission of crime was not scrutinized whatsoever.

---

[27] Fulford, *supra* n. 3, ¶¶ 7–8.

[28] *Id*. fn. 13; *The Prosecutor v. Vlastimir Đorđević*, Judgment ¶¶ 2193–94, No. IT-05-87-1-T (Intl. Crim. Trib. for the Former Yugo., Tr. Chamber II, Feb. 23, 2011), available at <http://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf> (accessed Mar. 12, 2015); *The Prosecutor v. Ferdinand Nahimana et al.*, Judgment ¶ 483, No. ICTR-99-52-A (Intl. Crim. Trib. for the Former Yugo., App. Chamber, Nov. 28, 2007), available at <http://www.refworld.org/docid/48b5271d2.html> (accessed Mar. 12, 2015).

[29] Lubanga, Tr. Chamber I, *supra* n. 2, ¶ 999.

3.1.1. Commission of a Crime Jointly with Another Person

The Pre-Trial Chamber II has partly considered the issue of charging a person with individual criminal responsibility *jointly with another person* in the decision on confirmation of charges in the *Ruto* case. Although the Chamber did not analyze the facts of the case in this regard due to the Prosecution's 'inconsistent labeling of criminal responsibility of the Suspects'[30] within its submission to charge them with responsibility simultaneously 'jointly' and 'through' another person omitting connective 'or'[31] referred to in Art. 25(3)(a),[32] the ICC confirmed the decision of Pre-Trial Chamber I in *Bemba*[33] regarding the 'notion of control over the crime.'[34] Therefore it concluded that this form of responsibility requires as a necessary element a suspect's control over a crime.[35]

The control over a crime doctrine, originating from the German national system,[36] is one of the possible legal ways to determine co-perpetrators of a crime. To put it in the words of Pre-Trial Chamber I in *Lubanga* 'a person can become a co-perpetrator of a crime only if he or she has "joint control" over the crime as a result of the "essential contribution" ascribed to him or her.'[37] Contrary to other theories, this doctrine still requires 'essential contribution' for co-perpetration and yet allows charging with criminal responsibility as co-perpetrators also those who were not present at the field of crime and especially so called masterminds of a crime.[38]

Despite the Court's general inclination towards this concept, also reflected in the recent judgments in the *Lubanga*,[39] *Ngudjolo*[40] and *Katanga*[41] cases, the ICC is not

---

30 Situation in the Republic of Kenya (The Prosecutor v. William Samoei Ruto et al.) ¶ 283, No. ICC-01/09-01/11 (Intl. Crim. Ct., Pre-Tr. Chamber II, Jan. 23, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> (accessed Mar. 12, 2015).

31 *Id.* ¶ 287.

32 *Id.* ¶ 284.

33 *Id.* ¶ 291.

34 *Id.*

35 *Id.*

36 Fulford, *supra* n. 3, ¶ 10.

37 Lubanga, Tr. Chamber I, *supra* n. 2, ¶ 322.

38 Situation in the Democratic Republic of the Congo (The Prosecutor v. Germain Katanga) ¶ 281, No. ICC-01/04-01/07 (Intl. Crim. Ct., Tr. Chamber II, Mar. 7, 2014) (minority opinion of Judge Christine Van den Wyngaert), available at <http://www.icc-cpi.int/iccdocs/doc/doc1744372.pdf> (accessed Mar. 12, 2015) [hereinafter Wyngaert, Katanga].

39 Lubanga, Tr. Chamber I, *supra* n. 2, ¶ 920.

40 Situation in the Democratic Republic of the Congo (The Prosecutor v. Mathieu Ngudjolo) ¶¶ 473, 484–486, No. ICC-01/04-02/12 (Intl. Crim. Ct., Tr. Chamber II, Dec. 18, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf> (accessed Mar. 12, 2015).

41 Summary of Trial Chamber II's Judgment of 7 March 2014, Pursuant to Article 74 of the Statute in the Case of *The Prosecutor v. Germain Katanga*, <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf> (accessed Mar. 12, 2015) [hereinafter Katanga, Summary].

unanimous in this respect. For instance, Judge Fulford in his Separate opinion to *Lubanga* has strongly criticized application of the control over the crime doctrine.[42] As he points out, being a national German theory 'of "functional control over the act" („funktionelle Tatherrschaft")'[43] this one may consequently include *national* peculiarities which are necessary for taking into account for the doctrine to be applied.[44]

Apart from a lack of such peculiarities within the realm of the Rome Statute, only a few *ad hoc tribunals* share the ICC's view, for example *Stakić*[45] and the Judge Schomburg's separate opinion in *Gacumbitsi*.[46] Moreover, in its practice of applying 'general principles of law derived from national legal systems' the ICC should pay attention to their compatibility with Rome Statute general framework and applicability of such states' policy by the ICC, which is not completely followed with respect to the 'control over the crime' doctrine, in Judge Fulford's opinion.[47]

In this particular instance, the problem lies in the disputable necessity of the theory's application. Unlike the German national law which distinguishes sentencing between principals and accessories,[48] the Rome Statute does not explicitly provide comparable different treatment of those accused under different subsections of Art. 25. As a consequence this distinction raises reasonable doubts about its necessity that only partially might be dispelled by implied motives of reconciliation and labeling 'masterminds' of crime.[49]

This has been one of the main concerns of Judge Van den Wyngaert who in two separate opinions (*Ngudjolo*'s confirmation of charges and *Katanga*'s judgment) raised an issue of blameworthiness, supporting Judge Fulford.[50] According to them, the Rome Statute does not explicitly contain differentiation in sentencing depending on what section person is accused. Nevertheless, the next considerations allow

---

42 Fulford, *supra* n. 3, ¶¶ 6, 10–11.

43 Kai Ambos, *Article 25. Individual Criminal Responsibility*, in Commentary on the Rome Statute of the International Criminal Court 752 (Otto Triffteter, ed.) (2nd ed., Beck; Hart; Nomos 2008).

44 Fulford, *supra* n. 3, ¶ 10.

45 *The Prosecutor v. Milomir Stakić*, Judgment ¶ 62, No. IT-97-24-A (Intl. Crim. Trib. for the Former Yugo., App. Chamber, Mar. 22, 2006), available at <http://www.icty.org/x/cases/stakic/acjug/en/sta-aj 060322e.pdf> (accessed Mar. 12, 2015).

46 *The Prosecutor v. Sylvestre Gacumbitsi*, Judgment ¶ 17, No. ICTR-2001-64-A (Intl. Crim. Trib. Rwanda, App. Chamber, Jul. 7, 2006) (separate opinion of Judge Schomburg), available at <http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-01-64/appeals-chamber-judgements/en/060707.pdf> (accessed Mar. 12, 2015).

47 Fulford, *supra* n. 3, ¶ 10.

48 *Id.* ¶ 11.

49 Jens D. Ohlin et al., *Assessing the Control-Theory*, 26(3) Leiden J. Int'l L. 745 (2013). doi:dx.doi.org/10.1017/S0922156513000319

50 Situation in the Democratic Republic of the Congo (The Prosecutor v. Mathieu Ngudjolo) ¶¶ 22–24, No. ICC-01/04-02/12 (Intl. Crim. Ct., Tr. Chamber II, Dec. 12, 2012) (concurring opinion of Judge Christine Van den Wyngaert); Wyngaert, Katanga, *supra* n. 38, ¶ 281.

avoiding this tricky issue with blameworthiness and thus lack necessity of the control over a crime doctrine's application.

First of all, it must be conceded that the Rome Statute does not indeed contain explicit provisions which say that Art. 25(3) includes various range for sentences formally depending on its applicable subsection in the case.[51] So, the only basis for difference in sentencing is how a judge comprehends the situation and the role of accused therein. As a matter of fact the perception of the role in crime is not the same for different activities. Contribution of a person deciding to pull a trigger will always be different from that of who merely gave the gun to him.

In other words, it appears even in the absence of certain provisions in the Rome Statute in this respect, the situation will still implicitly distinguish the contribution of persons and consequently their danger for international society. Therefore the problem with lack of blameworthiness can be avoided merely by interpretation of the Rome Statute as implicitly containing the different understanding of the role that accused has played on case by case basis. Hence, the control over a crime may be applicable to the proceedings before the ICC even in the absence of provisions in the Rome Statute on differentiation of sentences.

Based on the above, the form of responsibility *Jointly with another person* does cause controversies and, therefore, has room for progress, as specified by Judge Fulford. Indeed, a German theory 'control over a crime' predominantly applied by the Court does not seem to be completely and formally pertinent under the Rome Statute due to the worldwide character of the ICC. However, at least two points suggest that the application of the doctrine is not as problematic as it might appear at first sight. First, the dispute over its applicability (at least, for *Lubanga*) is rather theoretical, since as Judge Fulford admitted itself the outcome of the judgment still should be the same.[52] Second, nevertheless the raised problem may be crucial for one of the next cases and, thus, requires to be solved. The proposed understanding of Art. 25 as always having case by case basis might avoid part of this criticism.

3.1.2. Commission of a Crime Through Another Person

The third form of conduct leading to individual criminal responsibility under Art. 25(3)(a) *through another person* has been actively developed by the ICC. By application of this provision of the Rome Statute the respective Pre-Trial Chambers have concluded that this form of responsibility demands proof of objective and subjective elements of a crime commission.[53]

---

51 Ohlin et al., *supra* n. 49, at 745–746.

52 Fulford, *supra* n. 3, ¶¶ 19–21.

53 Situation in Democratic Republic of the Congo (The Prosecutor v. Thomas Lubanga Dyilo) ¶¶ 343–349, No. ICC-01/04-01/06 (Intl. Crim. Ct., Pre-Tr. Chamber I, Jan. 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> (accessed Mar. 12, 2015) [hereinafter Lubanga, Pre-Tr. Chamber I].

In this regard it is necessary to consider the ICC's position concerning the Joint Criminal Enterprise [hereinafter JCE] doctrine, widely used by the International Criminal Tribunal for the Former Yugoslavia jurisprudence, starting from the well-known *Tadić*.[54] This theory was recognized as inapplicable by the ICC due to the difference in functioning of tribunals *ad hoc* and the permanent Court. For instance, in the *Lubanga* case the Pre-Trial Chamber I decided that the Rome Statute not only contains detailed written forms of responsibility for participation in commission of international crimes, but also 'avoids the broader definitions' similar to the provisions of the Statute of International Criminal Tribunal for the former Yugoslavia.[55] Instead of the JCE doctrine the ICC preferred the control over the crime one.[56] From the point of Chamber's view, the JCE doctrine focuses mainly on the 'commission of the offence as the distinguishing criterion between principals and accessories' on the basis of their state of mind in comparison with the level of 'contribution to the commission of such offence,' supported by the ICC.[57] In comparison with the JCE doctrine, the joint control over the crime one recognizes as principals not only individuals having physically performed objective elements of the crimes' commission, but also those who decided whether and in which way such crime would be committed.[58]

The Pre-Trial Chamber I's decision on confirmation of charges in *Lubanga* the first time defines the determination of objective elements of charging individual criminal responsibility through another person: existence of 1) common plan[59] and 2) 'essential contribution to commission of a crime for establishment a fact of common control over the crime.'[60]

Subsequently the ICC clarified the objective elements in *Katanga*, *Mbarushimana*, *Ruto* and *Muthaura* as follows: 1) existence of agreement or common plan on commission of international crimes between two and more persons;[61] 2) existence of 'essential contribution of each of them to commission of such crimes in the coordinated manner, which, in turn, is proved by fulfillment of subjective elements of the respective

---

54 *The Prosecutor v. Du[ko Tadi] a/k/a/ 'Dule,'* Opinion and Judgment ¶¶ 191–192, No. IT-94-1-T (Intl. Crim. Trib. for the Former Yugo., Tr. Chamber, May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> (accessed Mar. 12, 2015).

55 Lubanga, Pre-Tr. Chamber I, *supra* n. 53, ¶¶ 323, 338.

56 *Id.* ¶¶ 330–335.

57 *Id.* ¶ 329.

58 *Id.* ¶ 330.

59 *Id.* ¶ 343.

60 *Id.* ¶ 346.

61 *Id.* ¶¶ 343–345; Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui) ¶¶ 522–523, No. ICC-01/04-01/07-717 (Intl. Crim. Ct., Pre-Tr. Chamber I, Sep. 30, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (accessed Mar. 12, 2015) [hereinafter Katanga & Ngudjolo, Pre-Tr. Chamber I].

crimes;"[62] 3) 'control over an organization;"[63] 4) existence of hierarchy and separation of authorities inside the organization;[64] and 5) providing the commission of crimes by inferiors on the leader's order.[65] Three last objective elements elaborated by the Pre-Trial Chamber(s) must be proven by automatic execution of orders given by the suspect, as it was described in the decision on confirmation of charges in the *Ruto* case.[66]

Proving an existence of 'agreement of common plan,' the ICC follows the next approach: execution of such a plan which has a risk of international crime commission should be performed together with the criminal purpose exclusively prescribing commission of a crime. Co-perpetrators should be aware of the purpose combined with this risk and agree on the execution of common plan[67] by acting in cooperation.[68] Article 25(3)(a) is not applicable, if participation of a single person is not coordinated with other co-perpetrators in the commission of crimes.[69] Common plan or agreement does not necessarily need to be explicit. Their existence is implied in the framework of coordinated joint actions of indirect co-perpetrators inferred from the concerted actions of the indirect co-perpetrators.[70]

The element of 'essential contribution to the commission of a crime' is fulfilled, when persons act under the common plan in accordance with their tasks which are crucial for execution of this plan.[71] Failure to perform these tasks can put under the threat the commission of a crime by all co-perpetrators.[72] Essentiality of a contribution can include a special trigger mechanism leading to the automatic execution of orders directed to the commission of international crimes.[73]

Another objective element, control over an organization is generally interpreted as control of one person over another due to existence of hierarchical structure and its functioning. Accordingly, inferiors would execute the leaders' orders leading to the criminal result. A leader's order implies its automatic execution by inferiors because of absolute control of leader over actions of inferior.[74]

---

62 Ruto et al., *supra* n. 30, ¶ 292.

63 Katanga & Ngudjolo, Pre-Tr. Chamber I, *supra* n. 61, ¶¶ 500–510.

64 *Id.* ¶¶ 511–514.

65 *Id.* ¶¶ 515–518.

66 Ruto et al., *supra* n. 30, ¶ 313.

67 Lubanga, Pre-Tr. Chamber I, *supra* n. 53, ¶ 344.

68 *Id.* ¶ 345.

69 *Id.* ¶ 343.

70 Ruto et al., *supra* n. 30, ¶ 301.

71 Lubanga, Pre-Tr. Chamber I, *supra* n. 53, ¶ 347.

72 *Id.*

73 Ruto et al., *supra* n. 30, ¶ 306.

74 Katanga & Ngudjolo, Pre-Tr. Chamber I, *supra* n. 61, ¶ 515.

With a purpose to establish subjective elements, being necessary for charging individual criminal responsibility, primarily applied Art. 30 of Rome Statute states that a person should act 'with intent and knowledge.'[75] However, the Pre-Trial Chamber I in its decision on confirmation of charges in *Lubanga* noted that in this context subjective element means: 1) satisfaction of general subjective elements of crimes under Art. 30 of the Rome Statute; 2) joint awareness that results in implementation of the common plan shall constitute fulfillment of the material elements of the crimes; and 3) awareness of circumstances enabling the person to exercise control over the commission of the crime through another person.[76] These criteria found their confirmation in decision on confirmation of charges in the *Ruto* case.[77]

The first element was construed as 'intent' in the decision on confirmation of charges in *Bemba*.[78] There for the first time in the ICC practice it emphasized the importance of subjective elements when it comes to the commission of crimes through another person.[79]

The second element purports the co-penetrators' awareness that implementation of common plan will lead to the commission of crime satisfying all objective elements necessary for its establishment. However, despite the awareness co-perpetrators continued performing actions leading to the commission of such a crime.[80]

The third element was interpreted by the ICC as awareness of the essential role of the person in the commission of the crime. In this regard level of role 'essentiality' means that failure of this person to perform his task puts under risk the commission of the whole collective crime.[81]

In sum, Art. 25(3)(a) has successfully gone through its first scrutiny by the ICC. Having been created in *Lubanga* and developed in *Catanga* and *Mbarushimana*, additional objective and subjective criteria were fully confirmed in recent *Ruto* and *Muthaura*. Their practical application resulted in Thomas Lubanga Dyilo's sentencing to 14 years of imprisonment.

Besides, as a striking tendency one may indicate the Court's refusal to apply the widely used by the *ad hoc* tribunals JCE doctrine. Instead, the ICC prefers the control over a crime which application is rather justified. Although there are not so far deviations, the ICC's inclination to this concept has to be further confirmed in the future.

---

75 Rome Statute, *supra* n. 22, Art. 30(2), (3).

76 Lubanga, Pre-Tr. Chamber I, *supra* n. 53, ¶¶ 349–367.

77 Ruto et al., *supra* n. 30, ¶ 333.

78 Situation in the Central African Republic (The Prosecutor v. Jean-Pierre Bemba Gombo) ¶ 369, No. ICC-01/05-01/08 (Intl. Crim. Ct., Pre-Tr. Chamber II, Jun. 15, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (accessed Mar. 12, 2015).

79 *Id.*

80 *Id.* ¶ 370; Lubanga, Pre-Tr. Chamber I, *supra* n. 53, ¶ 352.

81 Lubanga, Pre-Tr. Chamber I, *supra* n. 53, ¶ 347.

3.2. The Practice of Interpretation and Application of Art. 25(3)(d) of the Rome Statute

Article 25(3)(d) deals with contributions 'in any other way.' It was included with the purpose to the person with individual criminal responsibility in situations not falling under Art. 25(3)(a)–(c). Thus, it may be marked as the most restricted expansion to contribution to international crimes' commission.[82]

Turning back to the drafting history, Art. 25(3)(d) represents a compromise with early similar provisions being controversial since the Nuremberg trial.[83] For instance, so-called *'conspiracy provisions'* were already reflected in the Draft Code of Crimes against the Peace and Security of Mankind (1991) as participation of an individual in 'common plan for the commission of a crime against the peace and security of mankind.'[84] The later edition of the Draft Code (1996) includes an individual's 'direct participation in planning or conspiring to commit such a crime which in fact occurs,'[85] restricting the abovementioned responsibility to a 'direct participation and an effective commission of the crime.'[86] In comparison with the previous considerations, the Rome Statute reflects this more restrictive approach, requiring at least a 'contribution to a collective attempt of a crime.'[87]

For the time being the Court has applied Art. 25(3)(d) only in a few decisions. Under this form of responsibility it issued a judgment in the *Katanga* case,[88] declined the charges in *Mbarushimana*.[89] Also, the ICC confirmed the similar conclusions in *Ruto*.[90]

The facts of *Mbarushimana* are relevant for the understanding of this provision. The reasoning of the Court was based, *inter alia*, on interpretation of the Mbarushimana's

---

82 Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 Crim. L. Forum 1, 12 (1999), available at <http://papers.ssrn.com/abstract_id=1972243> (accessed Mar. 12, 2015) [hereinafter Ambos, *General Principles*].

83 *Id.* at 12.

84 *Draft Code of Crimes against the Peace and Security of Mankind*, in Report of the International Law Commission, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991), *reprinted in* 2(2) Y.B. Int'l L. Comm'n 99 (1991), U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), at <http://legal.un.org/ilc/documentation/english/A_46_10.pdf> (accessed Mar. 12, 2015).

85 *Draft Code of Crimes against the Peace and Security of Mankind*, in Report of the International Law Commission, U.N. GAOR, 51th Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), *reprinted in* 2(2) Y.B. Int'l L. Comm'n 18 (1996), U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), at <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf> (accessed Mar. 12, 2015).

86 Ambos, *General Principles*, *supra* n. 82, at 13.

87 *Id.*

88 Katanga, Summary, *supra* n. 41.

89 Situation in Democratic Republic of the Congo (The Prosecutor v. Callixte Mbarushimana) ¶ 269, No. ICC-01/04-01/10 (Intl. Crim. Ct., Pre-Tr. Chamber I, Dec. 16, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf> (accessed Mar. 12, 2015).

90 Ruto et al., *supra* n. 30, ¶ 351.

press releases in his capacity of Executive Secretary of *Forces Démocratiques pour la Libération du Rwanda* [hereinafter FDLR] and his role in the corresponding media campaign as a part of this organization's agenda, which is not exclusively aimed at the commission of international crimes. The ICC similarly took into consideration the Mbarushimana's participation in the Saint Egidio peace process between the Government of the Congo and the FDLR[91] as a spokesperson[92] for the purposes of peace negotiations. Hence, although Mbarushimana had actively participated in the activities of the FDLR, still the criterion of substantial contribution, which would be analyzed further, has not been fulfilled. It indicates the relatively high threshold of Art. 25(3)(d). It is worth mentioning that despite different results for primarily accused in *Mbarushimana* decision and recent *Katanga* judgment the following objective and subjective criteria were confirmed and fully applied by the Trial Chamber II in *Katanga*.

As regards the objective elements, they include: 1) commission or attempted commission of a crime within the ICC jurisdiction;[93] 2) commission of such crime by 'group of persons acting with a common purpose;'[94] 3) contribution of a person to the commission of a crime differs from one needed for Art. 25(3)(a)–(c).[95] The JCE doctrine was also recognized as inapplicable due to its lower threshold for bringing to responsibility in comparison with Art. 25(3)(d) requirements.[96] The differences between the applied concept and the JCE doctrine include 1) whether a 'defendant found guilty is convicted as principal or accessory;' 2) whether he 'must be in the group acting with the common purpose' or not; 3) whether his contribution amounts to the common purpose or international crimes' commission; and 4) whether some form of 'intent or mere knowledge is sufficient for bringing to responsibility.'[97]

Within the context of the second objective element, the Pre-Trial Chamber I confirmed its definition of 'the group of persons acting with a common purpose' given in *Lubanga* within the context of 'existence of agreement or common plan for commission of crimes between two or more persons.'[98] Such an agreement or common plan should 'necessarily include the element of criminality but does not need to be specifically directed at the commission of a crime.'[99]

---

91 Mbarushimana, *supra* n. 89, ¶ 318.

92 *Id.* ¶ 319.

93 *Id.* ¶ 270.

94 *Id.* ¶ 271.

95 *Id.* ¶ 276.

96 *Id.* ¶ 273.

97 *Id.* ¶ 282.

98 *Id.* ¶ 271.

99 *Id.*

Interpretation of the third objective element resulted in additional division of two criteria within it, which include 1) level of contribution to the commission of crime[100] and 2) contribution after the commission of crime.[101] The Pre-Trial Chamber I paid special attention to the fact that such contribution cannot be *any* and that it is necessary to prove its substantiality.[102]

The Chamber also emphasizes the intention of the Rome Statute drafters to establish rather serious threshold for charging individual criminal responsibility under Art. 25 in general.[103] For instance, public knowledge about any activity does not satisfy the criteria necessary for charging criminal responsibility under Art. 25(3)(d).[104] *Pro tanto*, proving the existence namely of the *substantial* contribution is necessary for the abovementioned charging.[105]

In order to establish such contribution to the commission or attempted commission of the crime the Chamber may take into consideration several factors, such as 1) knowledge about general aim of 'the group of people acting with a common purpose;' 2) the tainted reputation due to the participation in this group's criminal activity; 3) efforts made to prevent the commission of crimes; 4) creation of the criminal plan; 5) 'the position of the suspect in the group;' and 6) 'the role the suspect played *vis-à-vis* the seriousness and scope of the crimes.'[106] However, as the Pre-Trial Chamber II stated in the decision of confirmation of charges in *Ruto*, the substantiality of the contribution first of all should 'result in the commission of the international crimes charged.'[107]

In order to establish the contribution *ex post facto* of the commission of international crime it is necessary to prove the existence of an agreement between the suspect and the group of persons acting with a common purpose regarding such contribution before the commission of this crime.[108]

In its decision declining to confirm the charges in *Mbarushimana* the Pre-Trial Chamber I also analyzed an issue of additional criteria for the subjective element for charging individual criminal responsibility under Art. 25(3)(d) and stated that subjective element in this regard shall include 1) an intent to 'engage in the relevant conduct that allegedly contributes to the crime;'[109] and 2) an intent of subsequent

100 Mbarushimana, *supra* n. 89, ¶¶ 276–284.

101 *Id.* ¶¶ 286–287.

102 *Id.* ¶ 276.

103 *Id.*

104 *Id.* ¶ 277.

105 *Id.* ¶ 284.

106 *Id.*

107 Ruto et al., *supra* n. 30, ¶ 354.

108 Mbarushimana, *supra* n. 89, ¶ 287.

109 *Id.* ¶ 288.

realization of criminal aim of the group of persons acting with a common purpose or awareness of the group's plan to commit a crime.[110]

The existence of intent shall be construed as simultaneous awareness of the suspect regarding his participation in conduct aimed at the commission of international crime and awareness of understanding his conduct as contribution to commission of crimes by the group of persons acting with a common purpose due to which he will be charged with individual criminal responsibility.[111] In order to establish the second subjective element the suspect's knowledge about his conduct as a contribution to the commission of crimes by the abovementioned group, purpose is sufficient.[112]

4. *Katanga* and *Ngudjolo*: A Trend for Changing Modes of Individual Criminal Responsibility?

On March 7, 2014, the Trial Chamber II found Mr. Katanga guilty under Article 25(3)(d) as an accessory[113] of the commission of crime against humanity in the form of murder and four counts of war crimes committed in Democratic Republic of the Congo.[114] Previously the Prosecutor argued that both Mr. Katanga and Mr. Ngudjolo should be subjected to individual criminal responsibility within the meaning of Art. 25(3)(a)[115] as principals. However, the Trial Chamber II in its *Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons* changed the mode of individual criminal responsibility of Mr. Katanga from Art. 25(3)(a) to Art. 25(3)(d) while the Court did not undertake the similar action towards Mr. Ngudjolo and further separated their cases.[116]

The Pre-Trial Chamber II approved the legality of its abovementioned decision referring, *inter alia*, to the *Lubanga* case[117] where the Appeal Chamber recognized

---

110 Mbarushimana, *supra* n. 89, ¶ 289.

111 *Id.* ¶ 288.

112 *Id.* ¶ 289.

113 Situation in Democratic Republic (Prosecutor v. Germain Katanga), <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx> (accessed Mar. 12, 2015).

114 *Id.*

115 Katanga & Ngudjolo, *supra* n. 61, ¶ 540.

116 Situation in the Democratic Republic of the Congo (The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui), No. ICC-01/04-01/07 (Intl. Crim. Ct., Tr. Chamber II, Nov. 21, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1529337.pdf> (accessed Mar. 12, 2015) [hereinafter Katanga & Ngudjolo, Tr. Chamber II].

117 *Id.* ¶ 12.

the validity of Regulation 55,[118] having emphasized that 'applicable human rights standards allow the modification of the legal characterization in the course of a trial, as long as this does not adversely affect the fairness of the trial.'[119] This reference to the human rights standards is controversial. While the ICC is empowered to recharacterize the mode of responsibility, it did so after 288 days after the closure of representing the evidence and 182 days after closure of arguments.[120] By virtue of this act the Court had deprived Mr. Katanga from further possibility to present his defence in a better way, which was essential because of the complete change of grounds for accusation. Such actions *prima facie* may be construed as violation of the procedural rights of the accused (or right for fair trial).

Apart from the human rights implications, the Pre-Trial Chamber justified its decision of changing the mode of individual criminal responsibility of Mr. Katanga by 1) resulting his contribution to the general criminal plan in the international crimes' commission and 2) the conformity of Mr. Katanga's behaviour with objective and subjective elements necessary for application of Art. 25(3)(d),[121] drawing extreme attention that it 'has not exceed the facts contained in the decision on the confirmation of charges'[122] and that the changing of mode of individual criminal responsibility is 'only a relatively limited step.'[123] The Pre-Trial Chamber also emphasized that its Majority intended to 'restrict itself to the facts pertaining solely to Mr. Katanga'[124] and noted that

> *actus reus* of participation in a crime within the meaning of Article 25(3)(d), especially the requirement of a significant and important contribution,[125] are in this case an integral part of the material elements characterizing the commission of the crime within the meaning of Article 25(3)(a), *i.e.* the requirement of an essential contribution resulting in the realization of the objective elements of the crimes.[126]

---

[118] Regulations of the Court, Regulation 55(1), at <http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> (accessed Mar. 12, 2015), the text follows as:

'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.'

[119] Katanga & Ngudjolo, Tr. Chamber II, *supra* n. 116, ¶ 12.

[120] Wyngaert, Katanga, *supra* n. 38, ¶ 124.

[121] Katanga & Ngudjolo, Tr. Chamber II, *supra* n. 116, ¶¶ 28, 30.

[122] *Id.* ¶ 31.

[123] *Id.*

[124] *Id.* ¶ 32.

[125] *Id.* ¶ 33.

[126] *Id.*

It also indicated that Mr. Katanga's knowledge regarding realization of the crimes, *inter alia*, during the attack on the Bogoro village, 'allows the Majority to deduce that the subjective element considered under Article 25(3)(d) is consistent with the previously described facts and circumstances.'[127]

The change in the mode of responsibility has been apparently a hot issue before the panel. Judge Van den Wyngaert in her Dissenting opinion to the *Katanga* judgment strongly opposed to this Majority's decision. She states that 'recharacterizarion of the charges in this case from Article 25(3)(a) to Article 25(3)(d) without fundamental change of "facts and circumstances" of the Confirmation Decision' is impossible and therefore violates Art. 74 of the Rome Statute.[128]

As a response, instead of being merely silent, the Majority reacted in an interesting way by presenting its Concurrent opinion. While the Concurrent opinion appears to be a rebuttal to what Judge Van den Wyngaert had written, the Majority's reasoning is rather poor and aims to negate all allegations by simply denying them. This might raise an issue of belief in their confidence in what has been decided.

Returning to the essence of the Trial Chamber II's Judgment pursuant to Art. 74 of the Rome Statute in the case of *The Prosecutor v. Germain Katanga* it is worth mentioning that this Chamber accepted and agreed with the logic of the Pre-Trial Chamber II regarding changing the mode of individual criminal responsibility of Mr. Katanga. The Trial Chamber examined objective and subjective elements necessary for application of Art. 25(3)(d) and came to the conclusion that all of them were confirmed.[129] Having analyzed all the facts, circumstances and evidence provided by the Parties the Trial Chamber II stated that 'the activity engaged in by Mr. Katanga … had a significant effect or impact on the commission of the crimes within the meaning of Article 25(3)(d).'[130] The Chamber paid special attention to the issue of the contribution of Mr. Katanga to the commission of crimes and came to the conclusion that facts and circumstances prove its significance.[131]

The opposite situation happened with Mr. Ngudjolo Chui. After separation of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* case and changing the mode of individual criminal responsibility of Mr. Katanga, the Trial Chamber II in its Judgment pursuant to Art. 74 of the Rome Statute in the case of *The Prosecutor v. Mathieu Ngudjolo Chui* acquitted Mr. Ngudjolo of his previous charges and ordered his immediate release.[132] The main argumentation of the Chamber in this regard

---

127 Katanga & Ngudjolo, Tr. Chamber II, *supra* n. 116, ¶ 33.

128 Wyngaert, Katanga, *supra* n. 38, ¶ 32; Katanga, Summary, *supra* n. 41, ¶ 55.

129 Katanga, Summary, *supra* n. 41, ¶ 73.

130 *Id*. ¶ 77.

131 *Id*. ¶¶ 82, 84.

132 Situation in Democratic Republic of the Congo (Prosecutor v. Mathieu Ngudjolo Chui), <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx> (accessed Mar. 12, 2015).

may be summarized as its inability to establish beyond the reasonable doubt facts necessary for bringing to individual criminal responsibility under Art. 25 *lato sensu* and insufficiency of the received evidence.[133]

Therefore last events of ICC practice seem to be rather controversial. On the one hand it remains evident that ICC supports the trend of acquitting individuals where there is insufficient evidence like in the *Mbarushimana* case. On the other hand the *Katanga* case may become a new trend in ICC practice due to additional practical recognition of the legality of Regulation 55 and further ability to change a previously declared mode of individual criminal responsibility.

In our opinion, the contradictory decisions concerning Mr. Katanga and Mr. Ngudjolo, whose cases were originally joined but later divided, may in the future lead to legal uncertainty. The Pre-Trial Chamber II and the Trial Chamber II have analyzed the same situation, the same plan, the same events and yet they have come to different conclusions. Indeed, Mr. Katanga has to consider the outcome of his case unfair in comparison to the Ngudjolo's one.

In this regard aligning with the principle of legal certainty seems to be the best solution for preventing such controversies in further ICC practice. However, its application by ICC is still to be fully introduced to the full extent. For instance, Judges Fatoumata Diarra and Bruno Cotte in their concurring opinion to the *Katanga* case clearly indicated the importance of possible implications imposed by the principle of legality by saying '[w]e understand the principle of legality as well as that of fair and impartial proceedings, which have informed our approach throughout this case.'[134] Yet those implications are quite unclear since no explanations follow that sentence.

However, even without taking into account the abovementioned ambiguity, the international criminal law is initially apparently not the most suitable branch for this principle up to date, as the former Associate Legal Officer at the ICTY S. Dana indicated: '[I]n the context of prosecuting . . . genocide, crimes against humanity, and war crimes, international criminal law appears to be resigned to such a principle . . .'[135] The starting point for this perception has undoubtedly been the Nuremberg process where the main argument of the defence was referring to the lack of legal rule prohibiting the acts under consideration at the time of their conducting.

---

133 Ngudjolo, *supra* n. 40, ¶¶ 404, 503, 516.

134 Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga) ¶ 3, No. ICC-01/04-01/07 (Intl. Crim. Ct., Tr. Chamber II, Mar. 7, 2014) (concurring opinion of Judges Fatoumata Diarra and Bruno Cotte), available at <http://www.icc-cpi.int/iccdocs/doc/doc1748105.pdf> (accessed Mar. 12, 2015).

135 Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99(4) J. Crim. L. & Criminology 858 (2009), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7335&context=jclc> (accessed Mar. 12, 2015).

Nevertheless, the ICC should stick to this principle to avoid further unfairness. Otherwise, not only will the Court give its opponents more grounds for rational criticism and therefore undermine the whole system of international criminal justice but also sow the seeds for personal tragedy of innocent convicted by the ICC.

5. Conclusions

Individual criminal responsibility originated as a response to modern challenges of necessity to hold selected persons liable for war atrocities and crimes against humanity. Development of this concept has led to the adoption of the Rome Statute in 1998 containing Art. 25 devoted to the forms of individual criminal responsibility. In this regard, Art. 25 is fairly the most exhaustive list of such forms, compared with its predecessors: international military tribunals and *ad hoc* tribunals.

In spite of this, already the first judgment of the Court has shown that the concept of individual criminal responsibility is far from complete. Judge Fulford in his Separate opinion addressed the contentious aspects concerning not only detailed issues like the necessity for a doctrine determining the level of perpetrator's participation, but also such general matters as whether Art. 25(3) contains in itself a hierarchy of individual criminal responsibility forms. While it is doubtful if Fulford will have an opportunity to convince the Chambers to apply his arguments later, since he is already a resigned judge, no doubt exists that the concept at stake will only be developed through the subsequent practice of the ICC. Nevertheless he has a worthy and vigorous successor in Judge Van den Wyngaert. Later, she consistently criticizes chiefly the control over a crime doctrine and its application by the ICC which was reflected in her solid dissenting opinions to *Ngudjolo* and *Katanga*.

These cases represent an interesting instance of potential application of the legality principle. Whereas they both concerned the situation at the Bogoro village, the Court divided the cases and later changed the mode of responsibility for Mr. Katanga, which did not happen with acquitted Mr. Ngudjolo. The recharacterization of accused's actions is not contentious *per se*. This occurred after the closure of pleadings leaving Mr. Katanga without any opportunity not only merely to think over the new strategy of defence but also to act accordingly. This fact raises serious concerns in respect of human rights and the legality principle. Whether there has been indeed violation of those principles, it is difficult to say. In any case, the Court should be more careful in its decisions, as what can seem just a single mistake of system of justice is always a personal tragedy. Although the Rome Statute aims to put an end to impunity of those guilty for grave crimes, this principle does not imply the need to have as many accusatory judgments as possible.

Apart from these implications, the current practice brought to light also a strong critic towards the control over a crime doctrine applied by the Majority in the *Lubanga*, *Ngudjolo* and *Katanga* cases. As Judges Fulford and Van den Wyngaert, *inter alia*,

argue, it is questionable whether this doctrine may be applicable due to the issue of blameworthiness. The doctrine under consideration was specifically designed for the German legal system where the necessity to understand who is a principal or an accessory was caused by different sentencing of them, while the Rome Statute does not explicitly require the same. This issue however might be avoided by interpreting the Rome Statute in such way as implicitly requiring assessing each situation on the case by case basis and therefore causing differentiation in the sentencing in any way.

As seen, the current ICC case law shows a lack of clear understanding of some concepts under Art. 25(3). The same can be said regarding other forms of liability, especially those that have not been applied by the ICC yet. However, given the cost of the necessity to apply the Rome Statute means to humanity, it would be better to preserve the *status quo* of its unapplied provisions.

References

Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946), at <http://www1.umn.edu/humanrts/instree/1946a.htm> (accessed Mar. 12, 2015).

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, Art. 6, 82 U.N.T.S. 279, 284, at <http://www.refworld.org/docid/47fdfb34d.html> (accessed Mar. 12, 2015).

Ambos, Kai. *Article 25. Individual Criminal Responsibility*, in Commentary on the Rome Statute of the International Criminal Court 752 (Otto Triffteter, ed.) (2nd ed., Beck; Hart; Nomos 2008).

Ambos, Kai. *General Principles of Criminal Law in the Rome Statute*, 10 Crim. L. Forum 1, 12–13 (1999), available at <http://papers.ssrn.com/abstract_id=1972243> (accessed Mar. 12, 2015).

Bogdan, Attila. *Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia*, 6(1) Int'l Crim. L. Rev. 67 (2006). doi:10.1163/157181206777066727

Case of the S.S. 'Lotus' (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18–19 (Sep. 7), available at <http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf> (accessed Mar. 12, 2015).

Charter of the International Military Tribunal for the Far East, Apr. 26, 1946, Art. 5, T.I.A.S. No. 1589, at <http://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0020.pdf> (accesed Mar. 12, 2015).

Dana, Shahram. *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99(4) J. Crim. L. & Criminology

858 (2009), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7335&context=jclc> (accessed Mar. 12, 2015).

Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* 2 Y.B. Int'l L. Comm'n 20 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1, at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed Mar. 12, 2015).

Draft Code of Crimes against the Peace and Security of Mankind, in Report of the International Law Commission, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991), *reprinted in* 2(2) Y.B. Int'l L. Comm'n 99 (1991), U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), at <http://legal.un.org/ilc/documentation/english/A_46_10.pdf> (accessed Mar. 12, 2015).

Draft Code of Crimes against the Peace and Security of Mankind, in Report of the International Law Commission, U.N. GAOR, 51th Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), *reprinted in* 2(2) Y.B. Int'l L. Comm'n 18 (1996), U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), at <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf> (accessed Mar. 12, 2015).

Fauchald, Ole K., & Stigen, Jo. *Corporate Responsibility before International Institutions*, 40 Geo. Wash. Int'l L. Rev. 1026, 1038–39 (2009), available at <http://www.jus.uio.no/ior/personer/vit/olefa/dokumenter/corporate-resp.pdf> (accessed Mar. 12, 2015).

Hailbronner, Kay, & Kau, Martin. *Der Staat und der Einzelne als Völkerrechtsubjekte*, in Völkerrecht 156 (Wolfgang G. Vitzthum. ed.) (5th ed., De Gruyter 2010).

International Military Tribunal (Nuremberg) Judgement and Sentences (Oct. 1, 1946), 41 Am. J. Int'l L. 172, 220–221 (1947).

Liefänder, Thomas R. *The Lubanga Judgment of the ICC: More Than Just the First Step?*, 1(1) Cambridge J. Int'l & Comp. L. 191 (2012). doi:10.7574/cjicl.01.01.38

Militello, Vincenzo. *The Personal Nature of Criminal Responsibility and ICC Statute*, 5(4) J. Int'l Crim. Justice 944 (2007). doi:10.1093/jicj/mqm039

Nitsche, Dennis. Der Internationale Strafgerichtshof ICC und der Frieden: Eine vergleichende Analyse der Befriedungsfunktion internationaler Straftribunale 169–170 (Nomos 2007).

Ohlin, Jens D., et al. *Assessing the Control-Theory*, 26(3) Leiden J. Int'l L. 745–746 (2013). doi:dx.doi.org/10.1017/S0922156513000319

Oppenheim, Lassa. 1 International Law: A Treatise 107 (2nd ed., Longmanns, Green & Co. 1912), available at <https://archive.org/details/internationalla03oppegoog> (accessed Mar. 12, 2015).

Regulations of the Court, at <http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> (accessed Mar. 12, 2015).

Röling, Bert V.A. *The Significance of the Laws of War*, in Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict 46 (Antonio Cassese, ed.) (Giuffrè 1975).

Rome Statute of the International Criminal Court, Jul. 17, 1998, Art. 25(3), 2187 U.N.T.S. 3, at <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> (accessed Mar. 12, 2015).

Shaw, Malcolm N. International Law 197 (6th ed., Cambridge University Press 2008).

Situation in Democratic Republic (Prosecutor v. Germain Katanga), <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx> (accessed Mar. 12, 2015).

Situation in Democratic Republic of the Congo (Prosecutor v. Mathieu Ngudjolo Chui), <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx> (accessed Mar. 12, 2015).

Situation in Democratic Republic of the Congo (The Prosecutor v. Thomas Lubanga Dyilo) ¶¶ 323, 329–335, 338, 343–367, No. ICC-01/04-01/06 (Intl. Crim. Ct., Pre-Tr. Chamber I, Jan. 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> (accessed Mar. 12, 2015).

Situation in Democratic Republic of the Congo (The Prosecutor v. Callixte Mbarushimana) ¶¶ 269–271, 273, 276–284, 286–289, 318–319, No. ICC-01/04-01/10 (Intl. Crim. Ct., Pre-Tr. Chamber I, Dec. 16, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf> (accessed Mar. 12, 2015).

Situation in the Central African Republic (The Prosecutor v. Jean-Pierre Bemba Gombo) ¶¶ 369–370, No. ICC-01/05-01/08 (Intl. Crim. Ct., Pre-Tr. Chamber II, Jun. 15, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (accessed Mar. 12, 2015).

Situation in the Democratic Republic of the Congo (Prosecutor v. Thomas Lubanga Dyilo) ¶¶ 322, 920, 999, 1358, No. ICC-01/04-01/06 (Intl. Crim. Ct., Tr. Chamber I, Mar. 14, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (accessed Mar. 12, 2015).

Situation in the Democratic Republic of the Congo (Prosecutor v. Thomas Lubanga Dyilo) ¶¶ 1, 3, 6–8, 10–11, 19–21, No. ICC-01/04-01/06 (Intl. Crim. Ct., Tr. Chamber I, Mar. 14, 2012) (separate opinion of Judge Adrian Fulford).

Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui) ¶¶ 500–518, 522–523, 540, No. ICC-01/04-01/07-717 (Intl. Crim. Ct., Pre-Tr. Chamber I, Sep. 30, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (accessed Mar. 12, 2015).

Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga) ¶ 3, No. ICC-01/04-01/07 (Intl. Crim. Ct., Tr. Chamber II, Mar. 7, 2014)

(concurring opinion of Judges Fatoumata Diarra and Bruno Cotte), available at <http://www.icc-cpi.int/iccdocs/doc/doc1748105.pdf> (accessed Mar. 12, 2015).

Situation in the Democratic Republic of the Congo (The Prosecutor v. Germain Katanga) ¶¶ 32, 124, 281, No. ICC-01/04-01/07 (Intl. Crim. Ct., Tr. Chamber II, Mar. 7, 2014) (minority opinion of Judge Christine Van den Wyngaert), available at <http://www.icc-cpi.int/iccdocs/doc/doc1744372.pdf> (accessed Mar. 12, 2015).

Situation in the Democratic Republic of the Congo (The Prosecutor v. Mathieu Ngudjolo) ¶¶ 404, 473, 484–486, 503, 516, No. ICC-01/04-02/12 (Intl. Crim. Ct., Tr. Chamber II, Dec. 18, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf> (accessed Mar. 12, 2015).

Situation in the Democratic Republic of the Congo (The Prosecutor v. Mathieu Ngudjolo) ¶¶ 22–24, No. ICC-01/04-02/12 (Intl. Crim. Ct., Tr. Chamber II, Dec. 12, 2012) (concurring opinion of Judge Christine Van den Wyngaert).

Situation in the Democratic Republic of the Congo (The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui) ¶¶ 12, 28, 30–33, No. ICC-01/04-01/07 (Intl. Crim. Ct., Tr. Chamber II, Nov. 21, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1529337.pdf> (accessed Mar. 12, 2015).

Situation in the Republic of Kenya (The Prosecutor v. William Samoei Ruto et al.) ¶¶ 283–284, 287, 291–292, 301, 306, 313, 333, 351, 354, No. ICC-01/09-01/11 (Intl. Crim. Ct., Pre-Tr. Chamber II, Jan. 23, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> (accessed Mar. 12, 2015).

Statute of the International Tribunal for Rwanda, Art. 6, U.N. Security Council Res. 955 (1994), U.N.Doc. S/RES/955 (November 8, 1994), <http://www1.umn.edu/humanrts/peace/docs/scres955.html> (accessed Mar. 12, 2015).

Statute of the International Tribunal for the Former Yugoslavia, Art. 7 (adopted by U.N. Security Council Res. 808 (1993), U.N. Doc. S/RES/808 (February 22, 1993)), at <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (accessed Mar. 12, 2015).

Summary of Trial Chamber II's Judgment of 7 March 2014, Pursuant to Article 74 of the Statute in the Case of *The Prosecutor v. Germain Katanga* ¶¶ 55, 73, 77, 82, 84, <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf> (accessed Mar. 12, 2015).

System Criminality in International Law 15 (Harmen van der Wilt & André Nollkaemper, eds.) (Cambridge University Press 2009).

The Prosecutor v. Du[ko Tadi] a/k/a/ 'Dule,' Opinion and Judgment ¶¶ 191–192, No. IT-94-1-T (Intl. Crim. Trib. for the Former Yugo., Tr. Chamber, May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> (accessed Mar. 12, 2015).

The Prosecutor v. Ferdinand Nahimana et al., Judgment ¶ 483, No. ICTR-99-52-A (Intl. Crim. Trib. for the Former Yugo., App. Chamber, Nov. 28, 2007), available at <http://www.refworld.org/docid/48b5271d2.html> (accessed Mar. 12, 2015).

The Prosecutor v. Milomir Stakić, Judgment ¶ 62, No. IT-97-24-A (Intl. Crim. Trib. for the Former Yugo., App. Chamber, Mar. 22, 2006), available at <http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf> (accessed Mar. 12, 2015).

Information about the authors

Olena Kucher (Kyiv, Ukraine) – PhD Student, Institute of International Relations, Taras Shevchenko National University of Kyiv (36/1 Melnikova str., Kyiv, 04119, Ukraine; e-mail: olena.kucher@gmail.com).

Aleksey Petrenko (Göttingen, Germany) – LLM Student, University of Göttingen, Graduate of the Immanuel Kant Baltic Federal University (Kaliningrad, Russia) (Annastraße, Göttingen, 37075, Germany; e-mail: alex.petrenko39@gmail.com).