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Common Purpose Liability Versus Joint Perpetration: A Practical View on the ICC's Hierarchy of Liability Theories

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Abstract

On 7 March 2014, Trial Chamber II of the International Criminal Court (ICC) convicted Germain Katanga for war crimes and crimes against humanity. Katanga's conviction is based on the concept of common purpose liability as regulated in Article 25(3)(d) of the Rome Statute. This liability theory establishes criminal responsibility for wilfully or knowingly contributing to the crimes of a group of persons who act together pursuant to a common purpose. The ICC regards common purpose liability as a residual liability theory, which provides for a lower level of blameworthiness than principal forms of criminal responsibility, such as joint perpetration. This article appraises the residual and inferior status of common purpose liability by comparing the ICC's application of common purpose liability and joint perpetration. The comparison makes clear that common purpose liability in theory stipulates lower *actus reus* and *mens rea* standards than joint perpetration. However, in practice the ICC applies the requirements of both these liability theories in a context-dependent way in interplay with the particular facts of individual cases. It can therefore not be concluded in general terms that common purpose liability *by definition* constitutes a less serious type of criminal responsibility than joint perpetration. Instead, it is preferable to adopt a flexible approach, which recognizes that common purpose liability covers a variety of conduct entailing different levels of blameworthiness.

Keywords

common purpose liability; hierarchy of liability theories; International Criminal Court; joint perpetration; law in practice

1. Introduction

On 7 March 2014, Trial Chamber II of the International Criminal Court (ICC) convicted Germain Katanga for war crimes and crimes against humanity, sentencing him to 12 years of imprisonment.[1] A few months later, both Katanga and the Prosecutor dropped their appeals against the verdict and the Trial Chamber judg-

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1 *Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07, T.Ch. II, 7 March 2014 (hereinafter Katanga Trial Chamber judgment); *Prosecutor v. Germain Katanga*, Sentencing judgment (article 76 of the Statute), ICC-01/04-01/07, T.Ch. II, 23 May 2014.

ment became final.[2] Katanga's conviction is based on common purpose liability as stipulated in Article 25(3)(d) of the Rome Statute. Broadly speaking, common purpose liability establishes responsibility for wilfully or knowingly contributing to the crimes of a group of persons acting with a common purpose.[3]

According to the ICC, common purpose liability establishes 'the lowest objective threshold for participation according to article 25'.[4] Furthermore, it is not required that 'the accused shared the group's intentions to commit the crime'.[5] Considering these lenient objective and subjective standards, the Court regards common purpose liability as a residual mode of liability that constitutes a lower level of blameworthiness than other liability theories, such as joint perpetration.[6] Indeed, the requirements of common purpose liability *in theory* set a relatively low threshold of criminal responsibility. However, when we analyze how the ICC has applied common purpose liability *in practice*, it appears that the Court takes a flexible, context-dependent approach, which takes account of the specific facts of individual cases. This raises the question of whether common purpose liability *by definition* creates a residual type of criminal responsibility and whether the persons contributing to a common purpose are *necessarily* less blameworthy than other participants.

In this article, I examine the meaning and status of common purpose liability by comparing this liability theory to joint perpetration. The comparison between common purpose liability and joint perpetration is particularly useful, since joint perpetration constitutes the counterpart of common purpose liability – it is viewed as a principal liability theory that captures the responsibility of senior political and military figures who mastermind international crimes.[7] Rather than characterizing common purpose liability and joint perpetration exclusively in terms of abstract legal standards, I assess how the ICC has applied these standards to the facts of individual cases. This allows me to ascertain whether the *actus reus* and *mens rea* requirements of common purpose liability are employed in such a lenient way that common purpose liability can be deemed to establish a lower degree of criminal responsibility than joint perpetration.

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2 'Defence and Prosecution discontinue respective appeals against judgment in Katanga case', 25 June 2014, available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx (accessed 2 October 2015).

3 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 (hereinafter Rome Statute), Art. 25(3)(d).

4 *Prosecutor v. William Ruto and Joshua Sang*, Decision on the confirmation of charges, ICC-01-09-01/11, P.T.Ch. II, 23 January 2012 (hereinafter *Ruto and Sang* confirmation of charges decision), para. 354.

5 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1638. In addition, see *Prosecutor v. Thomas Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06, P.T.Ch. I, 29 January 2007 (hereinafter *Lubanga* confirmation of charges decision), para. 337.

6 *Lubanga* confirmation of charges decision, *supra* note 5, para. 337; *Ruto and Sang* confirmation of charges decision, *supra* note 4, para. 354; *Katanga* Trial Chamber judgment, *supra* note 1, para. 1618. Eser even argues that common purpose liability is 'superfluous, since the thresholds of aiding and abetting (. . .) are already so low that it is difficult to imagine many cases needing a special provisions such as subparagraph (d)'. A. Eser, 'Individual Criminal Responsibility', in Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 767, at 803.

7 The article does not address the concept of superior responsibility stipulated in Art. 28 of the Rome Statute. Whilst this liability theory addresses the liability of senior leaders, it establishes liability for omissions (failure to prevent or punish) and can therefore not be seen as a principal form of criminal responsibility.

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The article is structured as follows. In Section 2, I set out the debate on the ICC's hierarchical construction of liability theories based on the notion of 'control over the crime'. In Section 3, I analyze the law in theory, in particular the ICC's interpretation of the *actus reus* and *mens rea* requirements of common purpose liability and joint perpetration. Section 4 reflects upon this analysis by assessing the law in practice, i.e., the way in which the ICC has applied the requirements of common purpose liability and joint perpetration in individual cases. In Section 5, I conclude that the ICC has applied common purpose liability and joint perpetration in a context-dependent way in interplay with case-specific facts. Accordingly, it cannot be maintained that common purpose liability *by definition* establishes a lower degree of blameworthiness than joint perpetration. Moreover, the Court's practice does not support the conclusion that the liability theories in Article 25(3) are structured in a hierarchical way according to their level of responsibility.

2. Hierarchy of liability theories

Article 25(3) of the Rome Statute lists a number of liability theories, which stipulate different ways of committing and participating in the commission of international crimes.[8] The provision specifies that individuals can be held responsible for perpetrating a crime, either directly, indirectly, or jointly with another (subparagraph a); ordering, soliciting, or inducing the commission of a crime (subparagraph b); aiding, abetting, or otherwise assisting the commission of a crime (subparagraph c); and – finally – for contributing to a group acting with a common purpose (subparagraph d).

The ICC divides these liability theories into principal forms of perpetration (subparagraph a) and accessorial forms of participation (subparagraph (b)-(d)). According to the Court, the distinction between principal and accessorial liability is not merely terminological,[9] but also entails 'a value-oriented hierarchy'.[10] This means that 'the forms of perpetration in subparagraph (a) prevail over the other forms of (secondary) participation (subparagraphs (b)-(d)) in terms of the level of responsibility of the perpetrators and the blame to be imposed on them'.[11] The *Lubanga* Appeals Chamber has accordingly held that:

8 Article 25(3) Rome Statute.

9 *Prosecutor v. Thomas Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06, A.Ch., 1 December 2014 (hereinafter *Lubanga* Appeals Chamber judgment), para. 462.

10 *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10, P.T.Ch. I, 16 December 2011 (hereinafter *Mbarushimana* confirmation of charges decision), para. 279. Similarly, *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, T.Ch. I, 14 March 2012 (hereinafter *Lubanga* Trial Chamber judgment), para. 999.

11 K. Ambos, *Treatise on International Criminal Law* (2013), Vol. I, 147. On this issue also see, G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', (2007) 5 JICJ 953, at 956–7; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 79–80; G. Werle and B. Burghardt, 'Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?', (2011) 9 JICJ 85, at 88; A. Gil Gil and E. Maculan, 'Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* case to the *Katanga* judgment', (2015) 28 LJIL 349, at 363; H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?', (2014) 12 JICJ 295, at 296–7; K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', (2012) 12 *International Criminal Law Review* 115, at 141.

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> [g]enerally speaking and all other things being equal, a person who is found to commit a crime him- or herself [under subparagraph (a)] bears more blameworthiness than a person who contributes to the crime of another person or persons [under subparagraph (b)-(d)].[12]

Moreover, the ICC maintains that the different forms of accessorial liability are hierarchically structured *inter se*.[13] This means that common purpose liability will only be used when the accused cannot be held responsible for ordering, soliciting, or aiding and abetting crimes.[14] Hence, common purpose liability 'is triggered only when subparagraphs (a)-(c) are not satisfied'.[15]

The hierarchical ordering of liability theories requires the formulation of a guiding principle that differentiates perpetrators from accessories. According to the ICC, this principle must entail a normative assessment of the accused's role.[16] On this account, the Court has found that only persons who have control over crimes by exercising the power to decide whether and how a crime is committed, can be qualified as principal perpetrators – all others are 'mere' accessories.[17] Thus, the level of control (implicitly) becomes the decisive factor for determining the accused's degree of responsibility:

> [c]harging defendants ... under 25(3)(a) means that they played a central role, that they had "control of the crime". This is contrasted to liability under subparagraphs 25(3)(b–d) where control plays no role and accessories are regarded as less responsible and less blameworthy.[18]

The ICC's linkage between the accused's level of control and his degree of blameworthiness has generated extensive legal debate. In this respect, practitioners and commentators generally concede the conceptual distinction between principals

12 *Lubanga* Appeals Chamber judgment, *supra* note 9, para. 462. This view is not uncontested. See, e.g., *Katanga* Trial Chamber judgment, *supra* note 1, paras. 1084–6; *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute – Concurring opinion of Judge Christine van den Wyngaert, ICC-01/04-02/12, 18 December 2012 (hereinafter Concurring opinion Judge Van den Wyngaert), paras. 22–30; *Prosecutor v. Thomas Lubanga*, Separate opinion of Judge Adrian Fulford, ICC-01/04-01/06, 14 March 2012 (hereinafter Separate opinion Judge Fulford), paras. 8–9.

13 Admittedly, case law on this point is less extensive and explicit as in relation to the hierarchical ordering of principals and accessories. Yet, as Vest notes, it seems fair to conclude that the ICC's approach goes beyond the distinction between perpetration and secondary participation by putting the forms of secondary participation in hierarchical order. Vest, *supra* note 11, at 305.

14 E.g., *Lubanga* confirmation of charges decision, *supra* note 5, para. 337; *Ruto and Sang* confirmation of charges decision, *supra* note 4, para. 354; *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 278.

15 *Ruto and Sang* confirmation of charges decision, *supra* note 4, para. 354.

16 *Lubanga* Appeals Chamber judgment, *supra* note 9, paras. 466, 473. For a scholarly analysis, see, e.g., Vest, *supra* note 11, at 296–8; Van Sliedregt, *supra* note 11, at 79–81; Ambos 2012, *supra* note 11, at 146; J.D. Ohlin et al., 'Assessing the Control-Theory', (2013) 26 LJIL 725, at 742–3; E. van Sliedregt, 'Perpetration and Participation in Article 25(3) of the Statute of the International Criminal Court', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 499 at 508.

17 *Lubanga* Appeals Chamber judgment, *supra* note 9, para. 473; *Lubanga* confirmation of charges decision, *supra* note 5, paras. 330, 338; *Katanga* Trial Chamber judgment, *supra* note 1, para. 1396; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07, P.T.Ch. I, 30 September 2008 (hereinafter *Katanga and Chui* confirmation of charges decision), para. 484. For a scholarly analysis of this issue, see, e.g., T. Weigend, 'Perpetration trough an Organization: The Unexpected Career of a German Legal Concept', (2011) 9 JICJ 91, at 92–3; K. Ambos, 'A Workshop, a Symposium and the Katanga Trial Judgment of 7 March 2014', (2014) 12 JICJ 219, at 227–8; Van Sliedregt, *supra* note 16, at 508–9; Werle, *supra* note 11, at 962–3; Van Sliedregt, *supra* note 11, at 83–5.

18 Ohlin et al., *supra* note 16, at 742. See also Van Sliedregt, *supra* note 11, at 79.

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who *commit* a crime and accessories who *contribute* to the crimes of others:[19] whilst principals are responsible in their own right, the responsibility of accessories is derivative of – i.e., dependent on – the commission of a crime by a principal. The majority of the *Katanga* Trial Chamber has accordingly clarified that the principals' conduct *constitutes* the commission of crimes, whereas the contribution of accessories is only *connected* to the commission of crimes by others.[20]

Having said that, it is not self-evident that the distinction between the commission of crimes and the contribution to crimes of others carries normative weight in the sense that the former connotes a more serious degree of liability than the latter. Various commentators have raised critique against equating accessorial liability to lesser liability.[21] For example, Ohlin, Van Sliedregt and Weigend have argued that there is no rule or theory stipulating that accessorial liability automatically constitutes a mitigated form of criminal responsibility.[22] Likewise, the majority of the *Katanga* Trial Chamber has dismissed prior ICC case law in which Article 25(3) was interpreted in a hierarchical way. According to the majority,

> the distinction between perpetrator of and accessory to a crime inheres in the Statute but does not, nonetheless, entail a hierarchy, whether in respect of guilt or penalty. Each mode of liability has different characteristics and legal ramifications which reflect various forms of involvement in criminality. However, this does not necessarily signify that accused persons will be found less culpable or will incur a lesser penalty.[23]

By reasoning in this way, the majority in *Katanga* has endorsed the minority views that were previously expressed by Judges Fulford and Van den Wyngaert in the *Lubanga* and *Ngudjolo* cases, respectively. In her concurring opinion to the *Ngudjolo* Trial Chamber judgment, Judge Van den Wyngaert has stressed that the conceptual difference between principal and accessorial responsibility does not necessarily entail a different level of blameworthiness: '[t]he fact that principals are connected more directly to the bringing about of the material elements of the crime than accessories does not imply that the role of the former should be regarded as inherently more blameworthy'.[24]

Similarly, Judge Fulford has asserted in his separate opinion to the *Lubanga* Trial Chamber judgment that it is impossible and unhelpful 'to establish a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability within Article 25(3)'.[25] He has therefore argued that persons who contribute to the common purpose of a group are not necessarily less responsible than aiders and abettors, especially 'since many of history's most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a

19 E.g., Ohlin et al., *supra* note 16, at 742; Gil Gil and Maculan, *supra* note 11, at 363, 365–6; Van Sliedregt, *supra* note 11, at 66–8.
20 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1384.
21 E.g., Ohlin et al., *supra* note 16, at 743; Gil Gil and Maculan, *supra* note 11, at 359; Van Sliedregt, *supra* note 11, at 86; Van Sliedregt, *supra* note 16, at 511–13.
22 Ohlin et al., *supra* note 16, at 744.
23 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1387.
24 Concurring opinion Judge Van den Wyngaert, *supra* note 12, para. 22.
25 Separate opinion Judge Fulford, *supra* note 12, para. 9.

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common goal'.[26] However, as of yet, this remains the minority view. The majority of ICC judges continues to embrace the hierarchical construction of liability theories.[27]

3. Common purpose liability and joint perpetration in theory

Common purpose liability and joint perpetration entail three analogous requirements. Both liability theories stipulate that the accused: (i) made a contribution; (ii) to a common plan; (iii) with a criminal state of mind. In interpreting these requirements, the ICC has made an effort to clearly distinguish joint perpetration from common purpose liability by emphasizing that the former sets significantly higher thresholds than the latter.

3.1. Contribution to Crimes

Taking as a starting point that the joint perpetrator is a *principal* who *controls* the commission of crimes, ICC case law requires that joint perpetrators made an 'essential contribution' to the commission of crimes, which resulted in the realization of the objective elements of the crimes charged. The essential contribution standard is met when the accused had the power to frustrate the commission of crimes by withholding his assigned tasks.[28] As Weigend explains, the negative formulation of this criterion entails a 'hypothetical judgment about how things would have turned out without the actor's contribution, and in that respect necessarily contains a speculative element'.[29]

The accused's essential contribution does not have to be committed at the execution stage, nor must there be a direct physical link between the accused's contribution and the commission of crimes.[30] Instead, a joint perpetrator may 'compensate' for his absence at the crime scene by contributing to the planning of crimes, by supplying weapons or ammunition, or by directing and coordinating troops from a distance.[31] The contributions of joint perpetrators can thus be quite remote in time

26 Separate opinion Judge Fulford, *supra* note 12, para. 8. Similarly, Vest, *supra* note 11, at 305; K. Ambos, 'The International Criminal Court and Common Purpose: What Contribution is Required Under Article 25(3)(d)?', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 592 at 607.

27 On this issue, see also Ambos 2013, *supra* note 11, at 147.

28 *Lubanga* Appeals Chamber judgment, *supra* note 9, para. 469; *Lubanga* confirmation of charges decision, *supra* note 5, para. 346; *Lubanga* Trial Chamber judgment, *supra* note 10, paras. 999–1000. Similarly, *Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11, P.T.Ch. I, 11 December 2014 (hereinafter *Blé Goudé* confirmation of charges decision), para. 135. For a critical view, see Separate opinion Judge Fulford, *supra* note 12, paras. 15–17; Concurring opinion Judge Van den Wyngaert, *supra* note 12, paras. 40–8. For a scholarly reflection upon this issue, see, e.g., T. Weigend, 'Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges', (2008) 6 JICJ 471, at 478–80; Ambos 2012, *supra* note 11, at 140–1.

29 Weigend, *supra* note 28, at 480. Similarly, Gil Gil and Maculan, *supra* note 11, at 357–9.

30 E.g., *Lubanga* Trial Chamber judgment, *supra* note 10, paras. 1003–5; *Lubanga* confirmation of charges decision, *supra* note 5, para. 330; *Katanga and Chui* confirmation of charges decision, *supra* note 17, para. 526; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, P.T.Ch. II, 23 January 2012 (hereinafter *Kenyatta* confirmation of charges decision), para. 402.

31 *Lubanga* Trial Chamber judgment, *supra* note 10, paras. 469, 1004; *Katanga and Chui* confirmation of charges decision, *supra* note 17, para. 526; Ohlin et al., *supra* note 16, at 732.

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and place from the actual physical perpetration of crimes. By interpreting the *actus reus* element of joint perpetration in such a broad way, the ICC allows for qualifying senior political and military figures who operate from a distant position as *principal* perpetrators.[32] Whilst this practice gives apt expression to the central role of those in leadership positions, it raises questions as to what room remains for other forms of criminal responsibility, such as common purpose liability.[33]

In relation to common purpose liability, Article 25(3)(d) of the Rome Statute stipulates that the accused contributed to the commission of crimes by a group of persons 'in any other way'.[34] At first sight, this use of terms reflects a low standard, which is even met by small, immaterial and indirect contributions. Ohlin has therefore warned that whilst many persons may contribute to group crimes – for example, by selling food, water and clothing to criminals – qualifying all these contributions as a basis for criminal responsibility constitutes 'a significant example of legislative over-reaching'.[35]

Arguing along similar lines, the *Mbarushimana* Pre-Trial Chamber (PTC) has conceded that common purpose liability will be overextended if *any* infinitesimal contribution of a grocer, utility provider, or janitor satisfies the contribution requirement of Article 25(3)(d).[36] The PTC has therefore required that the accused makes a *significant* contribution to crimes.[37] The significant contribution standard allegedly sets as a lower threshold of participation than the essential contribution standard of joint perpetration.[38] It entails that the accused was able to *influence* the occurrence of crimes, without demanding that the commission of crimes *depended* on the accused's contribution. [39]

The question of whether an accused influenced the commission of crimes must be answered on a case-by-case basis in light of the specific

32 *Lubanga* Trial Chamber judgment, *supra* note 10, para. 1003. Similarly, Weigend, *supra* note 28, at 478–9; Van Sliedregt, *supra* note 11, at 99; Ohlin et al., *supra* note 16, at 728. This is specifically so when joint perpetration is combined with indirect perpetration. In that case, the 'essential contribution may consist of activating the mechanisms which lead to the automatic compliance with (. . .) orders and, thus, the commission of crimes'. E.g., *Kenyatta* confirmation of charges decision, *supra* note 30, para. 402.

33 Similarly, Ohlin et al., *supra* note 16, at 732.

34 Article 25(3)(d) Rome Statute.

35 J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', (2007) 5 JICJ 69, at 79.

36 *Mbarushimana* confirmation of charges decision, *supra* note 10, paras. 276–7.

37 Ibid., paras. 282–3. See also *Katanga* Trial Chamber judgment, *supra* note 1, para. 1632. The significant contribution test is not uncontested. In her separate opinion to the *Mbarushimana* Appeals Chamber decision on the confirmation of charges, Judge Fernández de Gurmendi argued that a quantitative standard like the significant contribution test is inappropriate for excluding normal economic and social activities from the scope of common purpose liability. She considered it more useful to adopt a qualitative criterion, which restricts criminal responsibility to contributions that increase the risk of criminal conduct. *Prosecutor v. Callixte Mbarushimana*, Judgment 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" – Separate opinion of Judge Silvia Fernández de Gurmendi, ICC-01/04-01/10, A.Ch., 30 May 2012. For a scholarly evaluation of this issue, see R.C. DeFalco, 'Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute', (2013) 11 JICJ 715; Ambos, *supra* note 26, at 605.

38 Although the reasoning of the PTC is somewhat ambiguous, the PTC places so much emphasis on the residual character of common purpose liability that it seems fair to conclude that the PTC interpreted the significant contribution standard as a particularly low *actus reus* standard. For a more elaborate – and critical – discussion of this issue, see Ambos, *supra* note 26, at 599–604.

39 *Katanga* Trial Chamber judgment, *supra* note 1, paras. 1632–3.

circumstances of the case under consideration.[40] According to the majority in *Katanga*, this assessment should focus on the *effect* of the accused's conduct, rather than on the *direct nexus* between the accused and the crimes committed.[41] Furthermore, the majority has stressed that the accused's contribution needs to relate to the commission of crimes specifically and that the accused can only be held responsible for crimes to which he contributed.[42] In her separate opinion to the *Katanga* judgment, Judge Van den Wyngaert has added to this finding that:

> when assessing the significance of someone's contribution, there are good reasons for analyzing whether someone's assistance is specifically directed to the criminal or noncriminal part of a group's activities. Indeed, this may be particularly useful to determine whether particular generic contributions – i.e. contributions that, by their nature, could equally have contributed to a legitimate purpose – are criminal or not.[43]

3.2. Criminal Intent

ICC case law defines the mental elements of joint perpetration in a rather complex way. Basically, proof is required that the accused carried out the subjective elements of the crimes with which he is charged and that he knew that the implementation of his plans would result in the commission of the indicted crimes.[44] Furthermore, the accused must have been aware that he made an essential contribution to the crimes for which he stands trial.[45] The threshold for these subjective elements is specified in Article 30 of the Rome Statute, which stipulates that – unless otherwise provided – the accused must either mean to commit the crimes or be at least aware that his actions will lead to the commission of crimes in the ordinary course of events.[46]

The *Lubanga* PTC has initially considered that Article 30 does not only encompass situations in which the accused meant to bring about the objective elements of the crimes charged (*dolus directus* of the first degree) or knew that the commission of these crimes would be the necessary outcome of his acts (*dolus directus* of the second degree).[47] Rather, the PTC decided that Article 30 also includes situations in which the accused was aware of the risk that his actions *may* or *could* lead to the commission of crimes (*dolus eventualis*).[48] This broad interpretation has been

40 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1634; *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 284.
41 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1635.
42 Ibid., paras. 1619, 1632.
43 *Prosecutor v. Germain Katanga*, Minority opinion of Judge Christine van den Wyngaert, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07, 7 March 2014 (hereinafter Minority opinion Judge Van den Wyngaert), para. 287.
44 *Lubanga* confirmation of charges decision, *supra* note 5, para. 349; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, ICC-01/05-01/08, P.T.Ch. II, 15 June 2009 (hereinafter *Bemba* confirmation of charges decision), para. 351. These requirements are often indistinguishable in practice. See, e.g., *Kenyatta* confirmation of charges decision, *supra* note 30, para. 418; *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06, P.T.Ch. II, 9 June 2014 (hereinafter *Ntaganda* confirmation of charges decision), para. 135.
45 *Lubanga* Trial Chamber judgment, *supra* note 10, para. 1013.
46 Article 30 Rome Statute.
47 *Lubanga* confirmation of charges decision, *supra* note 5, para. 352.
48 Ibid.

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rejected in later judgments and decisions.[49] It is now generally accepted that joint perpetrators must have known that crimes *would* occur in the ordinary course of events as a result of their actions.[50] This requires that the commission of crimes was a virtual certainty or an 'almost inevitable outcome'.[51]

In contrast to joint perpetration, common purpose liability does not require that the accused intended to commit crimes or fulfilled the mental elements of the crimes charged. Instead, it suffices to establish that: (i) the accused made an intentional contribution to a group crime; (ii) whilst knowing of the group's criminal intentions or seeking to contribute to the group's criminal purpose.[52] According to the majority in *Katanga*, the first *mens rea* prong only relates to the accused's contribution, not to the plan or criminal intent of the group.[53] It suffices to establish that the accused made a deliberate and conscious contribution and was aware that his actions contributed to the group's activities.[54]

The second prong includes two alternative *mens rea* standards: the accused should either (i) have known of the group's criminal intentions; or (ii) seek to contribute to the group's criminal purpose.[55] So far, case law has been limited to the first alternative. The majority in *Katanga* has emphasized that knowledge should be demonstrated in relation to each of the specific crimes that the group intended to commit.[56] This means that there must be a direct subjective link between the accused and the crimes for which he stands trial.

3.3. Common Purpose/Plan

Joint perpetration and common purpose liability establish liability for group crimes in which multiple persons worked together towards a joint criminal endeavour. Both liability theories accordingly entail a 'collective element' – the common plan or common purpose element – which ties the participants together and justifies the mutual attribution of contributing acts.[57] ICC case law clarifies that the common plan and common purpose element are 'functionally identical' and can be construed

49 *Lubanga* Trial Chamber judgment, *supra* note 10, para. 1011; *Ruto and Sang* confirmation of charges decision, *supra* note 4, paras. 335–6; *Bemba* confirmation of charges decision, *supra* note 44, paras. 360–9.

50 *Lubanga* Trial Chamber judgment, *supra* note 10, para. 1012. However, Judge Van den Wyngaert argued in her concurring opinion to the *Ngudjolo* Trial Chamber judgment that the majority's reasoning in terms of 'risk' and 'probability' is 'tantamount to accepting *dolus eventualis* dressed up as *dolus directus* second degree'. Concurring opinion Judge Van den Wyngaert, *supra* note 12, para. 38.

51 *Lubanga* Appeals Chamber judgment, *supra* note 9, para. 447; *Kenyatta* confirmation of charges decision, *supra* note 30, para. 411.

52 For a critical assessment of these *mens rea* requirements in light of Art. 30 of the Rome Statute, see J.D. Ohlin, 'Joint Criminal Confusion', (2009) 12 *New Criminal Law Review* 406, at 417–18; Ohlin, *supra* note 35, at 78–81.

53 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1638.

54 Ibid., para. 1639; *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 288.

55 For a critical evaluation of the equation between knowledgeable and purposeful actions, see, e.g., Ohlin, *supra* note 35, at 78–81; Gil Gil and Maculan, *supra* note 11, at 360–1.

56 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1642.

57 *Lubanga* Appeals Chamber judgment, *supra* note 9, para. 445; *Lubanga* Trial Chamber judgment, *supra* note 10, para. 981; *Blé Goudé* confirmation of charges decision, *supra* note 28, para. 134. See also Van Sliedregt, *supra* note 11, at 100. On the meaning of the common plan element in relation to joint perpetration, see, e.g., M. Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration', in E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (2014), 128, at 133–4.

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in an analogous way.[58] The Court interprets the common plan/purpose as an 'agreement or common plan between two or more persons'.[59] The common plan/purpose does not have to be embedded in a military, political, or administrative organization, nor should it be previously arranged or formulated. Rather, the agreement may materialize extemporaneously and can be inferred from circumstantial evidence, which demonstrates a group's concerted action.[60]

ICC case law is still divided as to the scope of the common plan. In some cases, the ICC has held that the common purpose 'does not need to be specifically directed at the commission of a crime'.[61] Rather, it suffices that the common plan includes 'an element of criminality',[62] which means that the implementation of the common plan entailed the risk that 'if events follow the ordinary course, a crime will be committed'.[63] However, in other cases, the Court seems to have formulated a stricter standard by requiring that the common purpose was to commit a crime, or at least involved the commission of crimes.[64] This restrictive interpretation precludes the possibility that the accused is held responsible for crimes committed in excess of the common plan.[65] It ascertains that criminal conduct following from opportunistic actions of individuals cannot be attributed to other group members.[66]

Because the common purpose element under Article 25(3)(d) and the common plan element under Article 25(3)(a) have a similar meaning, the finding of a group acting with a common purpose is linked to the notion of joint perpetration. According to the majority in *Katanga*, the finding that joint perpetrators acted pursuant to a common plan *may* help to establish the existence of a group acting with common purpose, although it is not *required* that this group consisted exclusively of joint perpetrators.[67] In her minority opinion, Judge Van den Wyngaert has presented a

58 See explicitly *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 271. The common plan and common purpose are also substantiated on the basis of similar factual circumstances. See, e.g., *Blé Goudé* confirmation of charges decision, *supra* note 28, paras. 137, 175; *Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, ICC-01/11-01/11, P.T.Ch. I, 12 June 2014 (hereinafter *Gbagbo* confirmation of charges decision), paras. 231, 254.

59 *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 271. Similarly, *Katanga* Trial Chamber judgment, *supra* note 1, para. 1625.

60 *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 271; *Katanga* Trial Chamber judgment, *supra* note 1, para. 1626; *Lubanga* Trial Chamber judgment, *supra* note 10, para. 988; *Lubanga* confirmation of charges decision, *supra* note 5, para. 345.

61 *Lubanga* confirmation of charges decision, *supra* note 5, para. 344. Similarly, *Lubanga* Trial Chamber judgment, *supra* note 10, para. 985; *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 271.

62 *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 271; *Lubanga* confirmation of charges decision, *supra* note 5, paras. 343–5; *Lubanga* Trial Chamber judgment, *supra* note 10, para. 984. This view is critically assessed by Judge Van den Wyngaert in her minority opinion to the *Katanga* Trial Chamber judgment. Minority opinion Judge Van den Wyngaert, *supra* note 43, para. 286.

63 *Lubanga* Trial Chamber judgment, *supra* note 10, para. 984.

64 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1627; *Ruto and Sang* confirmation of charges decision, *supra* note 4, para. 301. Interestingly, the *Kenyatta* Pre-Trial Chamber has unified the two distinct interpretation of the common plan by holding that the 'the common plan must encompass an element of criminality, meaning that it must involve the commission of a crime with which the suspect is charged'. *Kenyatta* confirmation of charges decision, *supra* note 30, para. 399.

65 On this issue, Ambos 2012, *supra* note 11, at 140; Gil Gil and Maculan, *supra* note 11, at 360–1.

66 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1630. See also Minority opinion Judge Van den Wyngaert, *supra* note 43, para. 191.

67 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1629.

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more restrictive view by arguing that the group acting with a common purpose is *by definition* a group of joint perpetrators.[68] At first sight, Judge Van den Wyngaert's equation is logically convincing,[69] since the commission of crimes by a group acting with a shared intent is tantamount to joint perpetration. Having said that, we should bear in mind that joint perpetration and common purpose liability differ on the *actus reus* level. Joint perpetration – at least in theory – sets a higher contribution threshold ('essential contribution') than common purpose liability ('significant contribution'). Therefore, whilst joint perpetrators automatically form a group of persons acting with a common purpose, the group of persons acting with a common purpose does not necessarily consist of joint perpetrators exclusively.

Moreover, we should be mindful that common purpose liability applies irrespective of whether the accused was a member of the group acting with a common purpose or not.[70] Also persons who contributed to a group's common purpose from an outside position – i.e., without sharing the group's criminal intent – can be held responsible under Article 25(3)(d).[71] This does not apply to joint perpetration, which requires that the perpetrators acted with a common intention to commit crimes.[72]

4. Common purpose liability and joint perpetration in practice

After having clarified the differences and similarities in the ICC's interpretation of joint perpetration and common purpose, this section continues to discuss how the Court has applied these liability theories in practice. Here, the focus is on the ICC's application of the contribution requirement and the *mens rea* elements, since this is where joint perpetration and common purpose liability differ in theory and where joint perpetration *in abstracto* sets a higher standard than common purpose liability.

4.1. Contribution to Crimes

4.1.1. Significant Contribution Test

In theory, common purpose liability requires that the accused: (i) made a *significant* contribution; (ii) to the *specific crimes* for which he stands trial. In the *Sang* and *Mbarushimana* cases, the ICC has applied this standard in a restrictive way.

In the case against Joshua Sang – a radio broadcaster before and during the 2007/2008 post-election violence in Kenya – the PTC construed a relatively close normative-causal relation between the acts of the accused and the criminal conduct for which he stood trial. In particular, the PTC held there were substantial grounds to believe that the accused: (i) fanned the commission of crimes by spreading hate messages; (ii) broadcasted false news messages that inflamed the violent atmosphere;

68 Minority opinion Judge Van den Wyngaert, *supra* note 43, para. 284. For a different view, see Ohlin, *supra* note 52, at 416.
69 Differently, Ohlin, *supra* note 52, at 416.
70 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1631. For a scholarly analysis of this issue, see, e.g., Ohlin, *supra* note 52, at 410–16; A. Cassese, *International Criminal Law* (2008) 213.
71 *Katanga* Trial Chamber judgment, *supra* note 1, para. 1627.
72 See Section 3.2.

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and (iii) broadcasted instructions in which he directed the physical perpetrators to specific areas of attack.[73] In addition, there was evidence that Sang made violent statements in which he encouraged the criminal actions of the physical perpetrators. Most significantly, Sang allegedly urged people to 'get their weapons from where they were kept and, if necessary, to use any arm at their disposal to evict the Kikuyus'.[74] In this way, he directly influenced the eruption of post-election violence. As one witness pointed out, 'after listening to Mr. Sang's words, he had no choice' but to join the fighters.[75]

Similarly, in the *Mbarushimana* case, the PTC required a direct influence of the accused's actions on the commission of crimes. Callixte Mbarushimana was the Executive Secretary of the Democratic Forces for the Liberation of Rwanda (FDLR) in the Democratic Republic of Congo (DRC). In this capacity, Mbarushimana formed part of the FDLR's senior leadership and represented the FDLR in the media and during peace negotiations.[76] Whilst the PTC held that Mbarushimana thus contributed to the FDLR's general policy,[77] it was unable to establish that the accused's actions had an impact on the commission of crimes by FDLR forces.[78] Furthermore, there was insufficient evidence that Mbarushimana exercised any authority over the commanders and soldiers committing crimes on the ground. In fact, most of them had never heard of Mbarushimana – who resided in Paris, far removed from the scene of the crimes – and were unaware of his position within the FDLR.[79] The PTC therefore concluded that Mbarushimana's conduct did not meet the significant contribution threshold.

The ICC's observations in the *Sang* and *Mbarushimana* cases signify a strict interpretation of common purpose liability, which is based on a clear causal connection between the acts of the accused and the crimes charged. The Court essentially required that the accused's conduct had a direct effect on the commission of crimes specifically rather than on the common purpose in general. In other cases, however, the Court has adopted a much more lenient approach. For example, in the case against Ahmed Harun – the former Minister of State for the Interior of the Government of Sudan[80] – the PTC determined that Harun managed the Darfur Security Desk and oversaw the activities of the government bodies that coordinated the counter-insurgency in Darfur.[81] Harun also personally participated in key activities of the counter-insurgency campaign, such as the recruitment, armament, and funding of Janjaweed militia.[82] According to the PTC, Harun thus made a significant contribution to the commission of war crimes and crimes against humanity against

73 *Ruto and Sang* confirmation of charges decision, *supra* note 4, para. 355.
74 Ibid., para. 359.
75 Ibid., para. 360.
76 *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 5.
77 Ibid., para. 317–19.
78 Ibid., paras. 297, 299, 319–20.
79 Ibid., para. 336.
80 *Prosecutor v. Ahmed Harun and Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, P.T.Ch. I, 27 April 2007 (*Harun and Kushayb* warrant of arrest decision).
81 Ibid., para. 81.
82 -Ibid., paras. 83–6.

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the 'African tribes' in Darfur.[83] This finding is based on a broad inference. The accused's involvement in specific crimes is deduced from actions that relate to his authoritative position and general role within the Sudanese government.

A comparably broad approach was adopted by the majority of the *Katanga* Trial Chamber. In assessing Katanga's contribution to the attack against the civilian population of Bogoro, the majority paid particular heed to Katanga's distribution of arms and ammunition to local combatants.[84] According to the majority, the weapons and ammunition delivered by Katanga ascertained the military superiority of the combatants, enabled them to continue their purpose of eliminating the Hema population of Bogoro, and thus secured the success of the attack.[85] By reasoning in this way, the majority in *Katanga* linked the accused's contribution first and foremost to the attack on Bogoro in general, whilst his involvement in the commission of specific (categories of) crimes remained indirect. Hence, the accused could be held responsible for contributing to a (legitimate) military operation, which he knew entailed a risk of crimes.[86]

The previous analysis demonstrates that the ICC makes different factual appraisals of the significant contribution standard. Yet, this does not necessarily mean that the Court applies the contribution standard in an inconsistent way. Possibly, the variations in ICC case law can be explained by the different (organizational) positions of the accused. As the *Mbarushimana* PTC made clear, each contribution must be appraised in light of the accused's (perceived) role within a group/organization.[87] This means that the significance of a contribution is influenced by the accused's (organizational) function, which colours his conduct and determines the importance of his actions. Considering this context-dependent evaluation, it may be easier to establish the significant contribution threshold in cases against senior military figures, such as Germain Katanga, than in relation to persons who played a more marginal, political role, like Callixte Mbarushimana.

4.1.2. Essential Contribution Test

In relation to the ICC's use of the essential contribution standard for joint perpetration, we also witness a varied and context-dependent practice in which some cases display a stricter approach than others. For example, the *Lubanga* Trial and Appeals Chamber applied the essential contribution standard in a rather lenient way. The Chambers inferred the essentiality of Thomas Lubanga's contribution to the recruitment of child soldiers from *inter alia*: (i) his function as commander-in-chief and political leader of the UPC/FPLC; (ii) his overall coordinating role; (iii) the fact that he was informed on UPC/FPLC operations; (iv) the fact that he was involved in the

83 Ibid., para. 88.
84 *Katanga* Trial Chamber judgment, *supra* note 1, paras. 1671, 1674–80. In addition, the Trial Chamber holds that Katanga acted as a key protagonist in the alliances which the militia had forged and was the intermediary between the suppliers of weapons and ammunition and the physical perpetrators of the crimes. *Katanga* Trial Chamber judgment, *supra* note 1, para. 1680.
85 *Katanga* Trial Chamber judgment, *supra* note 1, paras. 1674, 1676, 1678–9.
86 Similarly, Minority opinion Judge Van den Wyngaert, *supra* note 43, paras. 301–8.
87 *Mbarushimana* confirmation of charges decision, *supra* note 10, para. 292.

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planning of military operations and provided logistical support; and (v) Lubanga's close involvement in the UPC/FPLC's recruitment policy and his active support for recruitment initiatives.[88] Notably, these circumstances primarily concern the accused's senior role within a military and political organization and his involvement in the organization's activities, rather than his contribution to the recruitment of child soldiers specifically. This suggests that the accused's position of authority and his support for a (hazardous) organizational policy serve as a proxy for assessing the essential character of his contribution.[89]

Like the *Lubanga* Trial and Appeals Chamber judgments, the ICC's findings in the case against Laurent Gbagbo can also generate a broad application of the essential contribution standard. The PTC in this case concluded that the accused contributed to the commission of crimes by *inter alia*: (i) designing and implementing a common plan to retain power by all means; (ii) creating a structure for the implementation of the common plan; (iii) arming the forces loyal to him; and (iv) co-ordinating the implementation of the common plan.[90] By reasoning in this way, the PTC seems to evaluate the essentiality of the accused's contribution primarily in relation to the common plan, instead of the commission of crimes. The link between the accused and the crimes for which he stands trial consequently depends on the nature and scope of the joint endeavour to which the accused contributed. This approach can yield a broad application of the essential contribution standard, in particular when the common plan is not criminal in itself, but refers to a lawful organizational policy.[91] To prevent that the causal link between the accused's conduct and the crimes for which he stands trial becomes too diluted, it is important that the ICC pays careful attention to the relation between the general common plan and the commission of specific crimes.

In contrast to the previous examples – which display a broad use of the essential contribution test – there are also cases in which the ICC has reinforced the objective connection between the accused and the crimes charged. The Court's findings in the case against Charles Blé Goudé are illustrative in this respect. The PTC in this case determined that the accused was a prominent supporter of Laurent Gbagbo. He particularly tried to keep Gbagbo in power by contributing to the 'recruitment, training and financing of militias and mercenaries, the distribution of weapons, and, in particular, by way of the mobilisation of the youth for violence against [the opponents of Gbagbo]'.[92] According to the PTC, these contributions 'had the effect of strengthening the general capability of the pro-Gbagbo forces to commit all the

88 *Lubanga* Appeals Chamber judgment, *supra* note 9, para. 436.

89 In the *Ntaganda* and *Harun and Kushayb* cases as well, the Pre-Trial Chamber referred to the accused's prominent position within the organization in evaluating their contribution. *Ntaganda* confirmation of charges decision, *supra* note 44, para. 108; *Harun and Kushayb* warrant of arrest decision, *supra* note 80, para. 103. This practice has been criticized, since it creates 'the risk of holding the defendant accountable solely on the basis of his/her position in the hierarchy and on the dereliction of duties inherent in this status'. Gil Gil and Maculan, *supra* note 11, at 357.

90 *Gbagbo* confirmation of charges decision, *supra* note 58, para. 276.

91 This practice has been criticized. See, e.g., Gil Gil and Maculan, *supra* note 11, at 356–62; Concurring opinion Judge Van den Wyngaert, *supra* note 12, para. 34.

92 *Blé Goudé* confirmation of charges decision, *supra* note 28, para. 142.

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crimes'.[93] However, the PTC refused to establish that Blé Goudé in this way made an essential contribution to each of the crimes committed in pursuance of the common plan,[94] in particular considering that the plan to keep Gbagbo in power was broad in nature and was not implemented in 'the form of a single, unified and coordinated operation but rather [in] the form of separate, multiple violent operations'.[95] Thus, the PTC seems to set a high standard, which requires that the accused controlled the occurrence of specific criminal incidents, rather than the common plan more generally.[96]

4.1.3. Interim Conclusion

The previous analysis reveals that the ICC has applied the essential and significant contribution standards in diverse and context-dependent ways. It is therefore difficult to distinguish these standards in terms of a uniform test that clearly demarcates both concepts from each other. Rather than claiming that the essential contribution standard of joint perpetration *necessarily* constitutes a higher threshold than the significant contribution requirement of common purpose liability, it is more appropriate to adopt a flexible approach that takes account of the different ways in which the ICC has applied these tests to the facts of individual cases. This observation raises the question of whether joint perpetrators are *by definition* more blameworthy than persons contributing to a common purpose and whether there is sufficient factual ground for *categorically* classifying common purpose liability as a residual form of criminal responsibility.[97] More generally, the ICC's context-dependent use of the *actus reus* elements of joint perpetration and common purpose liability also calls the ICC's hierarchical interpretation of Article 25(3) into question.

4.2. Criminal Intent

4.2.1. Knowledge of Crimes by Others

The assessment of the accused's *mens rea* was one of the crucial issues in the *Katanga* case. To hold Katanga responsible under common purpose liability, the Court had to determine whether he knew that the weapons he delivered to the Ngiti militia would be used to attack civilians (as a war crime and crime against humanity), rather than to fight enemy combatants (as a legitimate military purpose). Based on the evidence, the majority concluded that Katanga was indeed aware of the criminal purpose for

93 Ibid., para. 145.
94 Ibid., paras. 144–6.
95 Ibid., para. 146.
96 It is interesting to see that whilst the PTC rejected to confirm the charges of specific crimes on the basis of joint perpetration, the PTC confirmed these charges on the basis of ordering, considering that the accused gave specific instructions to carry out actions that resulted in crimes and had a direct effect on the commission of crimes. This raises the question of why the PTC considered that the accused did not control these crimes. *Blé Goudé* confirmation of charges decision, *supra* note 28, para. 161. In the case against Ngudjolo Chui, the Trial Chamber also seems to have used the essential contribution standard in a restrictive way. In particular, the Trial Chamber held that the accused's high social status, extensive military experience, regular contacts with various regional officials and his position as colonel during various meetings cannot prove that he commanded the physical perpetrators during their commission of crimes, nor that the accused had issued military orders to that account. *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant article 74 of the Statute, ICC-01/04-02/12, 18 December 2012, para. 501.
97 Similarly, Ohlin et al., *supra* note 16, at 732.

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which his weapons would be used. The majority in this respect specifically referred to Katanga's knowledge of: (i) the preparations of Ngiti militia to attack Bogoro; (ii) the fact that the weapons and ammunition he distributed would be used by combatants during the attack; (iii) the ways in which the war in Ituri was waged, causing suffering to the civilian population; and (iv) previous ethnic-driven violence against the Hema population by Ngiti combatants.[98] Notably, these facts only link the accused indirectly to the crimes charged. In particular, the Chamber's reference to Katanga's general knowledge of the raging war evidences a broad application of the *mens rea* elements of common purpose liability.[99]

The findings of the majority in *Katanga* raise the question of whether current judicial practice complies with the ICC's abstract interpretation of the subjective elements of common purpose liability. At first sight, it seems that whilst the Court *in theory* emphasizes that common purpose liability requires that the accused was aware of each of the crimes that a group intended to commit, *in practice* it is willing to infer the accused's knowledge from facts that are not directly linked to specific criminal conduct. Having said that, it is still too early to conclude that the ICC systematically disregards the *mens rea* standard of common purpose liability. In particular considering that other case law presents a more precise assessment of the accused's knowledge of crimes,[100] it seems that the findings of the *Katanga* majority must be appraised in light of the specific facts of the case under consideration. In this respect, it is noteworthy that the majority integrated the commission of crimes within the more general policy of ethnically driven violence in the Ituri region.[101] It can therefore not be established yet that the ICC will apply the *mens rea* elements of common purpose liability in a similarly lenient way in future cases.

4.2.2. Intent to Commit Crimes

Looking at the loose application of the *mens rea* elements of common purpose liability by the *Katanga* majority, there seems to be a sound basis for distinguishing common purpose liability from joint perpetration. The low mental standard set by the majority in *Katanga* is clearly unacceptable in relation to joint perpetration, which requires that the accused intended to commit the crimes charged.[102] This

98 *Katanga* Trial Chamber judgment, *supra* note 1, paras. 1684–9. This reasoning has been criticized by Judge Van den Wyngaert in her minority opinion. Minority opinion Judge van den Wyngaert, *supra* note 43, para. 290. Similarly, in relation to Bemba's intent to commit crimes as a joint perpetrator, the Pre-Trial Chamber has refused to accept that an accused's '*mens rea* under article 30 of the Statute could be generally inferred from alleged past behavior . . . . The fact that certain crimes were committed in prior events does not necessarily mean that they would certainly take place subsequently'. *Bemba* confirmation of charges decision, *supra* note 44, para. 377.

99 Similarly, Minority opinion Judge van den Wyngaert, *supra* note 43, para. 291.

100 In various cases, the ICC has established the accused's intent and knowledge under Art. 25(3)(d) on the basis of facts that are largely analogous to the facts that are used in relation to the *mens rea* elements of joint perpetration. See, e.g., *Blé Goudé* confirmation of charges decision, *supra* note 28, paras. 155, 180; *Gbagbo* confirmation of charges decision, *supra* note 58, paras. 237–8, 257–8, *Ntaganda* confirmation of charges decision, *supra* note 44, paras. 122-135, 162. However, it is difficult to draw conclusions from this practice, considering that the accused in these cases are charged alternatively under different modes of liability.

101 *Katanga* Trial Chamber judgment, *supra* note 1, paras. 1142–51. This approach has been criticized by Judge van den Wyngaert in her minority opinion. Minority opinion Judge van den Wyngaert, *supra* note 43, paras. 208–21.

102 See Section 3.2.

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point is supported by the findings of the *Lubanga* Trial Chamber majority. The majority inferred Lubanga's intent to recruit, conscript and use child soldiers from specific circumstances concerning *inter alia*: (i) his use of child soldiers as bodyguards; (ii) his participation in rallies where child soldiers were present; and (iii) his visits to training camps where he gave morale-boosting speeches to recruits, including child soldiers.[103] By reasoning in this way, the majority in *Lubanga* construed a stronger – more direct – subjective link between the accused and the crimes committed than the *Katanga* majority.

Still, we should be mindful that – when substantiating Lubanga's intent as joint perpetrator – the Trial Chamber majority also referred to a number of general circumstances, such as the fact that Lubanga was in close contact with other senior figures and that all armed groups in Ituri used child soldiers.[104] It is not yet clear whether these facts could by themselves have provided a sufficient basis for establishing Lubanga's intent, or whether more precise evidence of his personal use and inspection of child soldiers was essential for meeting the *mens rea* threshold of joint perpetration. Possibly, the majority's reference to such specific facts can be explained by the unequivocal circumstances of the *Lubanga* case, which allowed for a confined application of the *mens rea* requirements. Future Chambers may be willing to adopt a more lenient approach in marginal cases in which the evidence of the accused's intent is less strong.

Consider, for example, the findings of the *Kenyatta* PTC in relation to the charges of rape against Francis Muthaura and Uhuru Kenyatta. The PTC on this point established that the accused 'directed a group of armed Mungiki members to revenge against civilian residents of Nakuru and Naivasha, in the knowledge of and exploiting the ethnic hatred of the attackers towards their victims'.[105] According to the PTC, these circumstances provide sufficient evidence 'that Mr. Muthaura and Mr. Kenyatta knew that rape was a virtually certain consequence of the implementation of the common plan'.[106] By reasoning in this way, the PTC draws a broad inference. It is not directly clear why the commission of rape constitutes a virtually certain consequence of a reprisal operation, even when this operation was driven by ethnic hatred.

4.2.3. Interim Conclusion

The findings above suggest that the ICC's application of the *mens rea* requirements of common purpose liability and joint perpetration is shaped by the facts of individual cases.[107] The subjective elements acquire a different colour, depending on the specific circumstances to which they are applied. Of course, this does not alter the fact that the *mens rea* requirements of joint perpetration and common purpose liability have

103 *Lubanga* Trial Chamber judgment, *supra* note 10, paras. 1277–8.
104 Ibid
105 *Kenyatta* confirmation of charges decision, *supra* note 30, para. 415.
106 Ibid., para. 415.
107 The context-dependent character of the ICC's assessment of the *mens rea* elements is also illustrated by the findings of the *Bemba* PTC. By using terms such as 'generally' and 'necessarily', the PTC clarifies that its findings should be seen in light of the specific facts of the *Bemba* case. *Bemba* confirmation of charges decision, *supra* note 44, paras. 377, 389, 400.

a different basis and set a different standard in *abstracto*. However, we should bear in mind that practice is often more flexible than theoretical standards suggest. The facts of individual cases cannot always be fully captured in abstract legal standards. This calls for a nuanced understanding of the differences between the subjective elements of joint perpetration and common purpose liability. It also brings back the question of whether the liability theories stipulated in Article 25(3) of the Rome Statute can be structured in a hierarchical way on the basis of abstract categories and general criteria.

5. Concluding observations

The majority of ICC judges reads the liability theories stipulated in Article 25(3) of the Rome Statute in a hierarchical way. Within the hierarchy of liability theories, common purpose liability is regarded as a residual liability theory with low *mens rea* and *actus reus* standards, in particular compared to joint perpetration. According to the ICC, this entails that persons contributing to a common purpose are less blameworthy than joint perpetrators.

This article has appraised the distinction between common purpose liability and joint perpetration by assessing how the ICC has applied these liability theories to the facts of individual cases. The article has clarified the differences between common purpose liability and joint perpetration, both in relation to the accused's contribution and criminal intent. At the same time, it has shown that the ICC applies common purpose liability and joint perpetration in interplay with the facts of individual cases, leading to a varied and context-dependent practice. On this account, it is inappropriate to maintain that common purpose liability *by definition* constitutes a residual type of liability that establishes a low level of blameworthiness compared to joint perpetration. Instead, it is preferable to adopt a nuanced and flexible approach, which recognizes that Article 25(3)(a) and (d) cover a variety of conduct and different levels of responsibility.

By rejecting the ICC's qualification of common purpose liability as a residual and inferior, I do not mean to disqualify the reasons for distinguishing between different liability theories.[108] Indeed, the formulation of distinctive modes of liability promotes the principle of individual criminal responsibility and has great narrative and expressive value.[109] Having said that, the foregoing case law analysis shows the weaknesses of the ICC's hierarchical construction of Article 25(3). The Court's varied and context-dependent use of joint perpetration and common purpose liability makes it difficult to conclude in general terms that one liability theory conveys a more serious type of criminal responsibility than the other. Whilst such a

108 For a critical view on the need for distinguishing between different liability theories, see J. Stewart, 'The End of Modes of Liability for International Crimes', (2012) 25 LJIL 165.

109 Ohlin et al., *supra* note 16, at 745. Similarly, Ambos 2012, *supra* note 11, at 144–5; Werle, *supra* note 11, at 956–7; Gil Gil and Maculan, *supra* note 11, at 363; Vest *supra* note 11, at 302; Van Sliedregt, *supra* note 16, at 511; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Dissenting opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07, 21 November 2012, para. 20.

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hierarchical categorization can be advantageous from a doctrinal point of view – since it creates a clear and well-ordered concept of criminal responsibility – we may need to accept that legal practice is too complex and resilient to be captured in terms of a universal hierarchy. Of course, this does not mean that theoretical distinctions between different modes of liability can be disregarded at will, or that courts are free to establish criminal responsibility according to their personal preferences. Yet, we should acknowledge that we can only understand the meaning and scope of the criminal responsibility and appraise (the relevance of) the differences between liability theories in light of legal practice. Therefore, it is important that future research pays close attention to the ICC's practical use of liability theories in individual cases.