

How Bosco Ntaganda was convicted as an “indirect co-perpetrator” in eighteen crimes

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By: James Hendry

Bosco Ntaganda was found guilty of 18 crimes against humanity and war crimes by a Trial Chamber of the International Court of Justice (ICC) on July 8, 2019 (here). He was convicted as a direct perpetrator in three crimes as well as an indirect co-perpetrator in those three and the 15 other crimes. This article will explore how the Trial Chamber applied the nascent law of ‘indirect co-perpetration’.

The development of the concept of ‘indirect co-perpetration’

Professor Schabas writes that “by combining ‘co-perpetration’ using the ‘control over the crime’ thesis and indirect perpetration, judges at the Court have created a hybrid form of liability known as ‘indirect co-perpetration’” (W. Schabas, *An Introduction to the International Criminal Court*, (5th, 2017), 214-5). Both committing a crime ‘jointly with another’ or ‘through another person’ are forms of perpetration under article 25(3)(a) of the Rome Statute.

The Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Confirmation decision

considered charges against two accused of crimes against humanity and war crimes and ‘introduced’ a form of liability under article 25(3)(a) of the Rome Statute where: ‘An individual who has no control over the person through whom the crime would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual — one who controls the person used as an instrument — these crimes can be attributed to him on the basis of mutual attribution’ (para. 493). The trials of the two accused were later severed. The majority of the Trial Chamber in Ngudjolo Chui acquitted him. In dealing with the issue of indirect liability in that case, it held that the Prosecutor had not proved he was the leader with authority and control over the combatants who directly perpetrated the attack in question and so the evidence could not allow it ‘to accept or even contemplate’ the concept of ‘indirect perpetration’ and so did not advance a definition of the concept (paras. 110-11). However, Judge Van den Wyngaert concurred in the acquittal and described this form of liability in para. 59 at Ngudjolo Chui as ‘a new axis for the attribution of criminal responsibility: in addition to the horizontal axis (joint perpetration) and the vertical axis (perpetration through another person), a new diagonal axis (“indirect co-perpetration”) was created’. Though she disagreed with the concept herself, para. 64, her description of this form of liability has become a term of art in ICC jurisprudence (See Einarsen and Rikhof, A Theory of Punishable Participation at 387). The Prosecutor’s appeal of the acquittal was dismissed.

The Trial Chamber in Katanga was the first Trial Chamber to elaborate the concept of ‘indirect co-perpetration’ as some of the charges were initially laid against him and Ngudjolo on this basis. The elaboration was based on (a) the control of the accused over the crime committed by another, usually where the accused are leaders of an organization whose hierarchical structure secured the ‘functional automatism’ of the direct perpetrators of the material elements of the crime (paras. 1396, 1406-12); (b) the accused must possess the mental elements of the crime and (c) awareness of the factual circumstances that give him control over the crime, such as their leadership role and the rules that create the functional automatism of the perpetrators (para. 1416). The Trial Chamber held that it was not established that the militia led by Katanga was an organized apparatus of power nor that he wielded sufficient control over the militia and the crimes to engage this form of liability.

However, Katanga was found guilty as an accessory under article 25(3)(d) of the crime against humanity and war crime of murder, and the crimes of directing an attack against civilians, destroying enemy property and pillaging as war crimes. Article 25(3)(d) attaches responsibility to an accused who contributes to the commission of a crime within the jurisdiction of the ICC by a group of persons acting with a common purpose. The Chamber found that Katanga had contributed to the Ngiti militia, which it found to be a group of persons whose common purpose was to commit the war crimes of murder, pillage and destroying property and the crime against humanity of murder by wiping out the Hema, their homes and means of livelihood and to destroy the village of Bogoro as demonstrated by the attack itself (paras. 1657-62). The Chamber held Katanga had a “truly significant” part in the commission of the crimes though his logistic, diplomatic and weaponry assistance (paras. 1679-81). The Chamber found that as president of the Ngiti militia, Katanga knew the attack on the village would

proceed with his help and that the militia would commit the crimes it did as part of its common purpose (paras. 1689-91) and was found liable as an accessory under article 25(3)(d).

Notably, the Chamber distinguished this form of liability from the Joint Common Enterprise theory of the ad hoc tribunals, by saying that under the Rome Statute, an individual was liable only for the crimes to which they contributed, rather than for all of the crimes encompassed by the common purpose (para. 1619).

Ntaganda's case

The Chamber's analysis of the requirements of indirect co-perpetration

Ntaganda was charged under article 25(3)(a) of the Rome Statute for conduct between August 2002 and December 2003 as a direct perpetrator on counts of the war crime of murder and the crimes against humanity of murder and persecution, but was significantly also charged on all 18 counts as an 'indirect co-perpetrator,' alleging responsibility 'jointly with another person' as well as 'through another person'.
The Chamber described the concept of 'indirect perpetration' in his case as not a stand-alone mode of liability, but a particular form of co-perpetration where a common plan is executed through other persons as 'tools' of all of the co-perpetrators (para. 772). In its analysis of the concept, the Chamber referred to paragraphs 38-41 of the Ongwen confirmation decision where the Court had rejected the Defence argument that this mode of liability was not specified in the Rome Statute and could not be applied without offending the principle of legality because "…consistent with the uniform jurisprudence of the Court…the [Rome] Statute criminalises as forms of "commission" not only situations in which the co-perpetrators put in place their respective contributions by directly and personally executing the objective elements of the crime, but also when they do so 'through another person' by jointly controlling the action of another person to such a degree that the will of that person becomes irrelevant, and that his or her action must be attributed to the co-perpetrators as if it were their own. This form of responsibility (which has been defined as "indirect co-perpetration" or "joint indirect perpetration") still rests on the notion of reciprocal imputation of co-ordinated actions performed by each co-perpetrator". (para. 772, fn. 2342, quotation from Ongwen at para. 39).

The Chamber applied the analysis of indirect co-perpetration applied by the Appeals Chamber in Lubanga that individual criminal responsibility for the commission of crimes 'jointly with another person' and 'through another person' has two objective elements: (a) the joint element of an express or implicit agreement or common plan between the accused and others to commit the crimes or to act in a way that would ordinarily result in their commission so as to prove the accused worked together for the commission of the crimes, and (b) the indirect element of commission through another person that is proved by showing that the parties to the agreement or common plan exert control that 'subjugates the will' of the direct perpetrators of the crimes. The accused must have had control over

the crimes through ‘his or her essential contribution’ to them and ‘the resulting power to frustrate’ their commission. The accused must also have the required intent and knowledge required by article 30 of the Rome Statute and any *lex specialis* (paras. 774-5). The Chamber went on to spell out that the agreement or common plan need not specifically aim at the commission of the crimes but must contain ‘a specific element of criminality’ and the crimes must have been a ‘virtual certainty’ as a result of implementing the agreement or common plan (para. 776). The element of control establishes the indirect nature of the liability of the accused for the commission of crimes ‘through another person’ by rendering the will of the direct perpetrators ‘irrelevant’ so that their actions ‘must’ be attributed to the accused as if they were their own (para. 777). The direct perpetrators of the crimes will often belong to an organization, such as a military, whose apparatus of power deprives any member within the apparatus of their liberty to decide whether to commit the crime (para. 778). The Chamber added that the requirement to establish an accused’s control over the crime by proof of his essential contribution to it pursuant to the agreement or common plan and his power to frustrate its commission was important to ‘imputing the totality of the crime’ to him rather to distinguish guilt by way of other modes of liability such as aiding or abetting (para. 779-80).

The Chamber’s findings on ‘indirect co-perpetration’

The Joint Plan

The Chamber found that Ntaganda worked together with other military leaders of the predominantly ethnic Hema and Gegere Union of Congolese Patriots and its military wing the Patriotic Force for the Liberation of the Congo (UPC/FPLC), including Thomas Lubanga and Floribert Kisembo, and that they agreed on a common plan to drive out all the Lendu people from various villages in the Ituri region in North-East Congo. This had started during their military campaign against a rival group, the Congolese Rally for Democracy (RCD) that had fractured into the RCD-K/ML, with their military wing called the Congolese Popular Army (APC).

Their plan was to destroy the Lendu by attacking and killing Lendu civilians and destroying and appropriating their property commonly called ‘*[ku]piga na kuchaji*’, raping and forcing civilians into sexual slavery, forcibly displacing them and not allowing them to return and by attacking protected property (para. 809). The Chamber also found that from August 2002 the co-perpetrators were virtually certain that implementing their common plan would lead to recruiting and using children under 15 in combat and suffer rape and slavery (para. 811).

Indirect commission through other persons

Having found that Ntaganda and the other leaders of the UPC/FPLC were jointly implementing an agreed common plan against the Lendu, the Chamber went on to find that the UPC/FPLC’s numbers, organization, weapons, resembled a conventional army with a formal military structure with effective

communication systems (paras. 814-5). The evidence demonstrated that the organization reliably carried out the orders of Ntaganda and other co-perpetrators to implement the common plan (para. 816). This led the Chamber to conclude 'the will of the individual soldiers was irrelevant for the execution of a given order' and that the 'UPC/FLPC as a whole functioned as a tool in the hands of the co-perpetrators' to realize the crimes against the Lendu and that the crimes could be attributed to the co-perpetrators as their own (para. 819). The Chamber also found that Hema civilians who carried out killings and lootings beside members of the ethnically Hema UPC/FPLC were similarly a 'tool in the hands of the co-perpetrators' (para. 824).

Ntaganda's essential contribution to the execution of the joint plan

The Chamber then assessed whether Ntaganda was individually criminally responsible for the crimes as indirect co-perpetrator based on his control over the crimes committed by the UPC/FPLC pursuant to the common plan because of his essential contribution to them and the resulting power to frustrate their commission (para. 826). The Chamber made its assessment in light of his high position in the UPC/FPLC (para. 829). His contribution included recruitment and training (including child soldiers) of an 'efficient military group', his planning and command abilities as senior officer that enabled the UPC/FLPC to continue committing the crimes pursuant to the common plan (paras. 838, 846, 854), ensuring his orders were obeyed, including those to kill Lendu civilians and to loot their property and to commit specific killings, ordering the use of heavy weapons and endorsing the criminal conduct of his soldiers (para. 851). The Chamber held that he had the power to frustrate the commission of the crimes and therefore cumulatively constituted an essential contribution (para. 856) to the commission of the crimes pursuant to the common plan, including the children who were enrolled, raped, subjected to sexual slavery and used to fight (para. 857).

The Chamber's findings re the underlying crimes

Having found that Ntaganda met the criteria for responsibility as an indirect co-conspirator, the Chamber went on to examine the evidence supporting the underlying crimes. The Chamber carefully developed the record to decide whether the crimes alleged had been proven beyond a reasonable doubt. For each charge, it identified the incidents within the scope of the confirmation decision that were not proved and then those that proved the underlying crimes beyond a reasonable doubt. First, the Chamber found Ntaganda murdered a priest in Mongbwalu and so was guilty as a direct perpetrator of the war crime of murder and the crimes against humanity of murder and persecution.

He was also found liable as indirect co-perpetrator of all the crimes he was charged with as well.

In the matters of the war crime of murder and the crimes against humanity of murder and attempted murder, the Chamber found that the UPC/FLPC killed many individuals in the villages that it attacked in its various operations, particularly those of Lendu ethnicity, both during the attacks and *ratissage* or clean-up operations. Some were killed at Ntaganda's order, other by Hema fighters working with the

UPC/FLPC, and many after sexual violence. The Chamber also found UPC/FLPC soldiers had committed attempted murder in many instances (paras. 873-4). The Chamber next found that the UPC/FLPC had committed the war crime of intentionally attacking civilians, particularly Lendu, by direct or indiscriminate attacks on them and by the indiscriminate use of heavy weapons during their military operations. Some attacks were under the direct orders of Ntaganda (para. 922).

The Chamber then found that UPC/FLPC soldiers committed the war crime of rape as a war crime and crime against humanity by the numerous violent rapes of women and men (para. 940) in the course of their military operations. The Chamber had earlier found that sexual violence was a tool used by the UPC/FLPC to achieve their goal to destroy the Lendu (para. 805). Its soldiers perpetrated violence in a systematic way against the predominantly Lendu population, being ordered by the leaders to kill and rape (as a means of waging war) civilians of any age or sex, to loot their property and drive them off (paras. 797-807).

The Chamber went on to find that UPC/FLPC committed acts sexual slavery as a war crime and crime against humanity where the evidence showed that young women were raped and forced to perform menial tasks for soldiers and commanders, exercising ‘some of the powers of ownership’ (paras. 960-1).

The Chamber also found that the UPC/FLPC committed the war crime of sexual slavery against female child soldiers of the UPC/FLPC in three specific incidents (para. 975), though noting that the practice was widespread (paras. 406-13) including sexual violence used against young female members of the personal guard of the leaders of the organization (paras. 407-8). Those leaders did not intervene (paras. 412,980). The Chamber found that the UPC/FLPC committed the crime of persecution as a crime against humanity because the murders, rapes and sexual slavery and intentional attacks against civilians were all severe deprivations of the fundamental human rights to life, liberty and bodily security under international law without justification against the Lendu ethnic group, compounded by pillage, destruction and resulting forced displacement (paras. 1008, 1022).

The Chamber also found that the UPC/FLPC committed the war crime of pillage based on many specific incidents that deprived the victims of items necessary for their everyday lives (para. 1044); in some cases, the stolen property was given to Ntaganda and other senior leaders (para. 1032). The Chamber also found that the UPC/FLPC committed the crime against humanity of forcible transfer of population forcing the Lendu from their homes and property consistent with its objectives and refusing to allow them to return, often by burning their homes (para. 1067). The Chamber also found the UPC/FLPC committed the war crime of ordering the displacement of the civilian population, such as Ntaganda’s order to attack the Lendu in Mongbwalu ‘kupiga na kuchaji’ without discriminating between combatants and civilians (para. 1084-5, 1096).

The Chamber also found that the UPC/FPLC committed the war crime of conscripting and enlisting

children under 15 into armed forces or using them in hostilities. From the outset, the UPC/FLPC and Ntaganda in particular (para. 356), called on their communities to recruit children to protect the communities against the Lendu (para. 1117). They were trained as soldiers along with the other recruits and subjected to iron discipline (para. 1120). Then they were used as leaders' bodyguards and in reconnaissance and hostilities (paras. 1128-30).

The Chamber also found that the UPC/FLPC committed the war crime of attacking protected objects such as the medical centre in Sayo (paras. 1138, 1144).

Finally, the Chamber found that the UPC/FPLC committed the war crime of destroying the adversary's property by shelling Lendu villages and burning down houses throughout the military operations against them, without military necessity (para. 1156, 1161, 1167).

The Chamber's findings on the overarching elements of the crimes

For the purposes of the crimes against humanity charged against Ntaganda, the Chamber held that the attacks on civilians were 'widespread' because there were numerous series acts of murder, persecution, forcible transfer of civilians, rape and sexual slavery against civilians at the large number of locations at which hostilities took place (para. 694). It held the attacks on civilians were 'systematic' because UPC/FPLC soldiers consistently engaged in a modus operandi, an initial attack followed a '*ratissage*' operation involving the elimination of survivors, including civilians, and looting on a house to house basis, at the numerous sites at which it attacked civilians (para. 695). The crimes were committed by the UPC/FPLC, a militia 'organization' (para. 681) based on a 'policy' of getting rid of the Lendu people (para. 689). The Chamber decided that the impugned conduct was 'part of' that attack as it reviewed each crime.

For the purposes of the war crimes charged against Ntaganda, the Chamber reviewed the complex situation of conflicts going on at the relevant time in the UPC/FPLC area of operations. The Chamber found that it was an 'organised armed group' during the relevant period (para. 710). The Chamber found that the UPC/FLPC was an organised military force and constantly fought other similar forces over the relevant period indicating the requisite level of intensity was met as indicated by the international community's belief that it should intervene to bring about peace (para. 723). It held that during the relevant period the UPC/FLPC was involved in at least one non-international armed conflict (para. 725). The Chamber rejected the argument that this was an international armed conflict based on the assistance provided to the UPC/FLPC by Rwanda because its involvement did not amount to overall control (para. 730). But see a discussion of this issue (here).

The Chamber's findings on mens rea

The Chambers finally determined whether the mental elements of the crimes were met to establish

indirect co-perpetration. First, Ntaganda position with the UPC/FPLC, his presence in the battle zone and personal conduct in the orders he gave to his soldiers proved that he intended the acts of killings, rapes, sexual slavery, forcible transfer and persecution perpetrated by UPC/FLPC soldiers as part of a widespread and systematic attack against the civilian population (para. 1171). Second, Ntaganda must have been aware of the fact of the existence of the armed conflict because of his role in the UPC/FLPC that the Chamber had found to be an organized armed group (para. 1172-3). Third, Ntaganda's role as planner and commander and his activities in those roles showed that he meant to engage in the conduct subject to the charges. Fourth, Ntaganda intended the UPC/FLPC soldiers to kill individuals protected under IHL (civilians and persons hors de combat), to appropriate goods for personal use without consent of the owners, to order the displacement of lawfully present civilians not for their security or military necessity, to rape civilians, to indiscriminately attack structures and protected objects knowing that civilian houses and hospitals are protected under IHL and to target the Lendu ethnic group (para. 1188). Further, Ntaganda's recruitment, training and using persons under 15 as personal bodyguards and soldiers established that he meant to conscript and enlist children for hostilities and failed to provide them with protection, especially young female soldiers who suffered extreme sexual violence from other UPC/FLPC soldiers who were not punished.

Conclusion

The Chambers engaged in a thorough application of the 'indirect co-perpetrators' theory of liability to a very close examination of each incident alleged to constitute the underlying crimes. The application of this theory of the liability of the leaders of one of the many predatory armed organizations constantly in conflict at this time shows this theory to effective at holding the leaders liable for acts committed by many, including their own child soldiers and personal guards, for many atrocities committed over a large area by many perpetrators.

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Image: Bosco Ntaganda during the delivering of the judgment of ICC Trial Chamber VI at the seat of the Court in The Hague (The Netherlands) on 8 July 2019 ©ICC-CPI.