'BEYOND REASONABLE DOUBT' AND 'SPECIFIC DIRECTION' THROUGH THE INTERSTICES OF THE KATANGA CASE AT THE INTERNATIONAL CRIMINAL COURT

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Abstract: This short piece argues that the *Katanga* case at the International Criminal Court might constitute another instance of a new 'trend' criminalizing persons participating in war while 'contemplating' crimes might be committed throughout the course of hostilities.

Keywords: Katanga; ICC; Specific Direction; Beyond Reasonable Doubt.

Introduction

The case against Germain Katanga saw the second guilty verdict at the International Criminal Court (hereinafter, ICC)[1], following Thomas Lubanga's conviction and sentence to 14 years of imprisonment for the war crimes of enlisting and conscripting children and using them to participate actively in hostilities[2]. At

1 Judgment rendu en application de l' article 74 du Statut, Katanga (ICC-01/04-01/07), Trial Chamber II, 7 March 2014 (hereinafter, TC Judgment). An extensive commentary to this decision can be soon found in Miguel Manero de Lemos, "Commentary to Katanga through the evolution of International Criminal Law and Procedure and the prospect that judges at the ICC move (even further) away from the Rome Statute", Annotated Leading Cases of International Criminal Tribunals, André Klip and Stephen Freeland (eds.), Intersentia, Antwerp, Oxford, Portland, Vol. 62 (forthcoming).

2 Judgment pursuant to Art. 74 of the Statute, Lubanga Dyilo (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012. Verdict and sentence confirmed by Appeals Chamber on 1 December 2014.

the time of the writing, Katanga's 2014 judgment still stood as one of the only two final convictions stemming from the two decades in existence ICC[3]. Placed within the context of extreme violence flaring in the Democratic Republic of the Congo (DRC) in the beginning of the century,

> *"[t]he case was complex in relation to facts, but comparatively narrow in scope, since it focused on one criminal incident carried out in the course of a single day. In a split 2-1 decision, Trial Chamber II found Katanga [the former leader of the Force de resistance patriotique en Ituri (FRPI)] guilty of contributing to crimes against humanity and war crimes committed by the Ngiti militia of Walendu-Bindi and Lendu fighters of Bedu-Ezekere during the attack on 24 February 2003 against the predominantly Hema-populated village of Bogoro, which occupied a strategic position for the Union des patriotes congolais (UPC) in the Uturi Province"[4].*

The judgment of the two judges in the majority – finding Katanga guilty under a mode of liability enshrined in Article 25 (3) (d) of the Rome Statute – elicited a long and strongly worded rebuke from Judge Van den Wyngaert[5], blustering the majority, amongst other things, on account that the evidence presented at trial did not warrant a conviction[6]. No one better than Judge Van den Wyngaert characterized her overall stance:

> *"I do concur with the Majority's conclusion [that] the charges under article 25(3)(a) of the Statute have not been proved beyond reasonable doubt. However, this is as far as our unanimity goes. As concerns the rest of the Majority's Opinion, I find myself in disagreement with almost every aspect of it"[7].*

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3 Very recently, on 8 July 2019, ICC Trial Chamber VI found Bosco Ntaganda guilty of 18 counts of war crimes and crimes against humanity. Prosecutor v. Bosco Ntaganda, Judgment, ICC-01/04-02/06, 8 July 2019. Sentencing and appeals proceedings will follow.

4 Carsten Stahn, "Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment", Journal of International Criminal Justice 12, no. 4 (September 2014), p. 810.

5 Minority Opinion of Judge Christine van den Wyngaert (ICC-01/04-01/07-3436-Anx), 7 March 2014 (hereinafter, Minority Opinion Van den Wyngaert).

6 Minority Opinion Van den Wyngaert, Part III, ("Germain Katanga's guilt has not been established beyond reasonable doubt").

7 Minority Opinion Van den Wyngaert, par. 1 (emphasis added).

Of course, the very disparate approaches of the majority and Judge Van den Wyngaert raise legitimate doubts about the fairness of Katanga's conviction[8].

'Beyond Reasonable Doubt'

Under the peculiar and apparently 'wide' type of 'aiding and abetting a group' mode of liability of Article 25 (3) d)[9], the contribution to "a crime by a group of persons acting with a common purpose" requires that the contribution is intentional and be made either (two alternative sub-modes of liability):

> *"(i) with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court [mode of liability 4.1]; or (ii) in the knowledge of the intention of the group to commit the crime [mode of liability 4.2]"*[10].

After carefully considering the majority and minority opinions on the whole, the author of this commentary is not convinced that the 'majority's case' against Katanga – under Article 25 (3) (d) ii (the 'narrower' mode of liability 4.2 under which Katanga was ultimately found guilty) – was proven beyond reasonable doubt. That is particularly true, in view of the fact that, as pointed out by Judge

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8 Carsten Stahn, "Justice Delivered or Justice Denied?", p. 829 ("[t]he strong dissent on facts and their interpretation calls into question the very premise whether the conviction meets the 'beyond reasonable doubt' standard"); Sophie Rigney, "The Words Don't Fit You: Recharacterisation of the Charges, Trial Fairness, and Katanga", 15(2) Melbourne Journal of International Law, Vol 15, 2014, p. 19 ("[t]his case is indicative of a conception of trial where fairness and the rights of the accused are cleaved apart, and conviction is prioritised. Judges adduce evidence, and only subsequently tell the accused how he is charged, reorienting a prosecution case to ensure a finding of guilt. Words are fashioned to fit the accused. If this were Wonderland, Alice would be likely to object loudly. Yet in a system such as international criminal law, which has based itself on the centrepiece of a trial – and a trial which must be fair, lest it be 'more show than trial' – these questions must not remain unresolved too much longer").

9 The modes of liability enshrined in Article 25 (3) of the Rome Statute are: "(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible [mode of liability 1]; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted [mode of liability 2]; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission [mode of liability 3]; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose [mode of liability 4]".

10 Article 25 (3) d) Rome Statute (emphasis added).

Van den Wyngaert, "so much evidence was missing, and that there were so many serious credibility problems with crucial prosecution witnesses"[11].

For example, it is difficult to understand how *exactly* the majority reached a "beyond reasonable doubt" conclusion that the Ngiti fighters of Walendu-Bindi *adopted a common purpose* to attack Bogoro *in order to eliminate the Hema civilian population there*[12]. As highlighted by Judge Van den Wyngaert,

> *"it is not an easy task to discern the exact evidentiary basis of the Majority's findings in this regard, because they are scattered over several different places throughout the Majority Opinion"[13].*

It is similarly hard to understand what *exactly* led the majority to conclude beyond reasonable doubt that, before the attack had occurred, Katanga made a contribution to the crimes in Bogoro in the *knowledge* of the *intention of the group* to commit *the crimes*. As again highlighted by Judge Van den Wyngaert,

> *"[while it is] possible to infer the existence of a group acting with a common purpose from the fact that a number of people simultaneously committed crimes at a certain time and location […], [i]t is not possible to infer from the mere fact that physical perpetrators acted with mens rea on the day the crimes were committed that they shared a common purpose to commit these crimes beforehand"[14].*

The difficulties are especially acute if one seriously respects the principle of legality, as enshrined in a curious article of the Rome Statute. Although Article 22 (*nullum crimen sine lege*) provides in its third paragraph that "[t]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute", it unapologetically demands in its first two that:

> *"[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court" and that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in*

11 Minority Opinion Van den Wyngaert, par. 143.

12 Minority Opinion Van den Wyngaert, par. 226.

13 Minority Opinion Van den Wyngaert, par. 226.

14 Minority Opinion Van den Wyngaert, par. 23 (emphasis in the original).

favour of the person being investigated, prosecuted or convicted".

One has to assume that the drafters did not intend the illogical result of not applying these two paragraphs to modes of liability, which some could argue are not per force to be considered part of the 'definition' of a crime. Thus, if one is not allowed to extend Article 25 (3) (d) by analogy and its ambiguities cannot be resolved against the defendant, even a supposedly beyond reasonable doubt conclusion that Katanga had *knowledge* that his contribution would *inevitably* lead to the commission of 'crimes under the jurisdiction of the court' would not *per se* warrant a conviction under mode of liability 4.

Under a strict and non-analogical interpretation of mode of liability 4.2, which speaks of 'knowledge of the intention of the group to commit *the crime*', the *beforehand knowledge* of the (future) 'crimes' in Bogoro would have to be proved. Moreover, the 'in any other way' contribution mentioned at the start of paragraph d) would have to be strictly interpreted as a contribution towards the specific 'crime' mentioned at the end of sub-paragraph d) ii. However, there was not sufficient evidence on record to prove beyond reasonable doubt such *closely knitted links* between the specific group intention, the beforehand knowledge of such intention and the actual contributions, on the one hand, and the specific crimes that were committed in Bogoro, on the other hand.

Under a strict and non-analogical interpretation of mode of liability 4.1, which speaks more generally of '*a crime* within the jurisdiction of the Court', it would be necessary to prove that Katanga had the 'aim of furthering the criminal activity or criminal purpose of the group'. Similarly, there was not sufficient evidence *of such aim* on record.

Actually, for identical reasons, evidence produced at trial would also not suffice for a 'normal aid and abet' conviction because – under the apparently 'narrow' mode of liability 3 enshrined in Article 25 (3) (c) – this would require evidence beyond reasonable doubt that Katanga's assistance had "the purpose of facilitating the commission of such a crime"[15]. A 'strict and in favour of the defendant' interpretation does not allow for a (non-purposeful) knowledge-based construction of the *mens rea* enshrined in this provision.

'Specific Direction'

But perhaps the most important beyond reasonable doubt issue relates with a statement of the majority about the anti-Hema ideology of the Ngiti militia. The majority alleged that:

15 In fact, strictly interpreted, this requirement seemingly even demands more than the customary law requirement that some sort of 'specific direction' must have taken place (on specific direction see infra).

> *Katanga's own "testimony show[ed] in no uncertain terms that he wholeheartedly espoused that ideology"*[16].

Differently, Judge Van den Wyngaert seems not to have witnessed such a type of testimony:

> *"I fully reject the suggestion that Germain Katanga's knowledge about concerns over the UPC's alleged secessionist tendencies somehow shows that he was filled with a hatred towards the Hema civilian population in general that was so strong that he wanted to eradicate them all. I stress, in this regard, that there is not a single reliable item of evidence in this case which refers to a single utterance by Germain Katanga that could be interpreted as anti-Hema"*[17].

For Judge Van den Wyngaert, the majority's reliance on the "anti-hema ideology" seems to be a stalking horse for an argument that is based on *dolus eventualis*, As she exemplary put it,

> *"[i]n the end, one wonders whether the Majority Opinion's elaborate developments about an alleged ethnically-based ideology and the way in which 'tribal warfare' was conducted in Ituri are not in fact a stalking horse for an argument that is based on dolus eventualis. Indeed, when reading the Majority Opinion as a whole, one cannot escape the impression that what Germain Katanga really stands [convicted] of is that he made a contribution to an operation which he knew involved a risk that certain individuals, who lacked the necessary training and discipline and who held grudges against the Hema, might harm Hema civilians if they had the opportunity"*[18].

Such is also the *impression* of the author of this article. However, according to current prevalent doctrinal and jurisprudential opinion, the Rome Statute was devised in order to exclude *dolus eventualis* from its scope[19].

Contrastingly, the stance of Judge Van den Wyngaert seems to be a stalking

16 TC Judgment, par. 1684-1691) (emphasis added).

17 Minority Opinion Van den Wyngaert, par. 291.

18 Minority Opinion Van den Wyngaert, par. 292 (emphasis added).

19 Minority Opinion Van den Wyngaert, par. 292 ("as the Majority rightly concludes, the Statute, for better or for worse, does not include dolus eventualis. It is therefore inappropriate to rely on such arguments, even if they are dressed up under a different guise").

horse for an argument that is based on a contributory to crimes *dolus directus*. Indeed, in the 169th of her 170 page dissent, she held that:

> *"I cannot say in good conscience that I understand exactly what really took place or that I have strong reasons to believe that Germain Katanga intentionally contributed to the commission of crimes by the Ngiti fighters of Walendu-Bindi"*.

However, such intentionality is not required under the Rome Statute mode of liability 4.2 used as the grounds for Katanga's individual criminal responsibility.

Without bluntly acknowledging what the whole 'ethnicity discussion' was really about, both the majority and Judge Van den Wyngaert were in reality debating the famous requirement of specific direction 'invented' in 1999 by *Tadić* in the first war crimes' case to go to trial in the International Criminal Tribunal for the Former Yugoslavia (hereinafter, ICTY)[20]. While setting out the law on aid and abet, the appeals chamber of the ICTY in *Tadić* considered that:

> *"[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime […] and this support has a substantial effect upon the perpetration of the crime. […]. In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal"*[21].

At the level of the *actus reus*, *Tadić* came up, not only with a "substantial effect upon the perpetration" requirement, but also with an incisive and 'inventively' placed in the *actus reus*, "specifically directed to assist a certain specific crime" requirement, which some might say it was in fact its most inventive act, as there was no clear authority to support it. At the level of *mens rea*, *Tadić* spoke of a "knowledge that the acts assist" that has to be linked to the *specific crime*, thereby apparently rejecting of a *dolus eventualis* type of foreseeability. If one thinks on how to compound the whole picture, namely on how to conciliate this "knowledge of a specific crime" *mens rea* with the "specifically directed to assist a certain specific crime" *actus reus*, it is even possible to argue that mere knowledge is not sufficient,

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20 ICTY, Judgement, Prosecutor v. Tadić, Case No. IT 94 1 A, A. Ch., 15 July 1999, in Klip/ Sluiter, ALC-III-761 (hereinafter, Tadić AC Judgment). Tadić's 'inventiveness' is famous in the realm of International Criminal Law.

21 Tadić AC Judgment, par. 229 (emphasis added).

and in fact a purposive *mens rea* was upheld by the appeals chamber[22].

In *Katanga*, the majority apparently dismissed *en passant* the necessity for any type of 'specific direction' debate while affirming that:

> *"[a]s regards the Defence argument concerning remoteness of the Accused to the crimes committed, proximity to the crime is not, in the Chamber's opinion, a relevant criterion. Indeed, in international criminal law the prime focus of investigations and prosecutions is those who, whilst physically, structurally or causally remote from the physical perpetrators of the crimes, indirectly committed them or facilitated their commission by virtue of the position they held, however remote"*[23].

Contrastingly, Judge Van den Wyngaert – in tune with her strict adherence to the words of the Rome Statute stance – informed she that was not taking any position on "whether customary international law has anything to say on aiding and abetting and, if so, whether or not it supports a requirement for 'specific direction' ", but immediately also put forward that:

> *"when assessing the significance of someone's contribution, there are good reasons for analysing 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 [*[24]*…] are criminal or not. The need for such a distinguishing element is especially acute in the context of article 25(3)(d), where both the mens rea and the actus reus thresholds are extremely low. That said, I see no need for incorporating a separate specific direction requirement for 25(3)(d) liability but I believe the relevance of specific direction for the determination of the significance of any contribution in the sense of article 25(3)(d)(ii) should not be ignored. This is because there may otherwise be almost no criminal culpability to speak of in cases when someone makes a generic contribution with simple knowledge of the existence of a group acting with a common purpose […]"*[25].

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22 On specific direction as purpose to assist, see Alexander Greenawalt, Foreign Assistance Complicity, 54 Columbia Journal of transnational Law, 531 (2016), p. 579, 580.

23 TC Judgment, par. 1636.

24 "[C]ontributions that, by their nature, could equally have contributed to a legitimate purpose".

25 Minority Opinion Van den Wyngaert, par. 287 (emphasis corresponding to 'I see no need',

In short, while the majority dismissed the necessity to verify in *casu* whether 'specific direction' existed, Judge Van den Wyngaert contritely 'kind of' upheld such necessity.

In order to understand the split between the majority and Judge Van den Wyngaert in this regard, one has to speak of another case decided at the ICTY at about the same time the *Katanga* case was being adjudicated in the ICC. In *Perišić*, the ICTY had to face case-facts that clearly 'yelled out', and what about specific direction? Here is a summary of the Prosecution's case:

> *"the ICTY Office of the Prosecutor (OTP) charged the accused Momčilo Perišić on 13 counts of war crimes and crimes against humanity under two principal modes of liability: superior responsibility and aiding and abetting. The Prosecution's case (at least with respect to aiding and abetting), was that Perišić, as Chief of the General Staff of the Yugoslav Army (VJ) — its most senior military officer — aided and abetted the crimes of the Bosnian Serb Army (VRS) in the newly independent Bosnia and Herzegovina, by providing them with substantial military assistance. In short, it was alleged that Perišić was the military lifeline that permitted the VRS to function as an effective fighting force. The Prosecution's theory was that Perišić provided such assistance in full knowledge that it would be used to commit crimes, and that it did in fact enable, and had a substantial effect on, the commission of crimes by VRS members, particularly at Srebrenica and during the siege of Sarajevo"*[26].

A surprise to many, the appeals chamber of the ICTY decided to take the law on aiding and abetting set out in *Tadić* seriously and upheld its requirements, most infamously its specific direction requirement. According to the widely criticized view of the appeals chamber[27], such requirement "establishes a *culpable link* between assistance provided by an accused individual and the crimes of principal perpetrators"[28]. As the appeals chamber observed,

> *"Perišić's assistance to the VRS was remote from the relevant*

'should not be ignored' and 'almost no criminal culpability' were added).

26 Manuel Ventura, "Farewell 'specific direction'", p. 3.

27 Many scholars were unforgiving. Paradigmatically, see Manuel Ventura, "Farewell 'specific direction'", p. 30, 36.

28 Prosecutor v. Perišić, Judgment, Appeals Chamber, Case No. IT-04-81-A, 28 February 2013 (hereinafter, Perišić Appeal Judgment), para 77.

> *crimes of principal perpetrators [at Srebrenica and Sarajevo]. […] The VRS was independent from the VJ and […] the two armies were based in separate geographic regions […]. Perišić was [not] physically present when relevant criminal acts were planned or committed. [Thus], [i]n these circumstances, […] an explicit analysis of specific direction [is] required in order to establish the necessary link between the aid Perišić provided and the crimes committed by principal perpetrators"*[29].

As the appeals chamber was unable to find such link, Perišić was acquitted[30]. Outrage followed. The outrage led to a reversal of *Perišić* by a differently composed appeals chamber in *Šainović*[31] and *at present* it seems settled that no 'specific direction' requirement is necessary under customary law.

Following this 'new' position – trending at the ICTY and other international tribunals – and subtly holding that, under Article 25 (3) (d), the Rome Statute also does not require specific direction, the stance of the majority in *Katanga* seems to amount to little else than a de facto creation of a new *sui generis* criminal contribution to a 'joint' enterprise encompassing any insider or outsider to the enterprise who, while *contemplating* that an international crime might be committed, *in any other way* contributes to a crime within the jurisdiction of the court committed by a loosely defined group pursuing a loosely defined common plan[32]. The problem is, as Lachezar notes, that:

> *"when two or more persons agree on a plan to wage a war, there is always an inherent risk that this course of action, legitimate as it may be, may possibly lead to the commission of crimes. If the scope of JCE's 'common plan' element is defined to comprise 'contemplated' crimes, then it can be that the only way in which a person in such a context can avoid […] liability for resulting crime(s) is by not entering common plans to wage wars: a conclusion that hardly fits*

29 Perišić Appeal Judgment, par. 42.

30 Perišić Appeal Judgment, par. 73, 74.

31 Prosecutor v. Šainović et al., Judgment (Appeals Chamber) (Case No. IT-05-87-A), 23 January 2014.

32 On how the position of the majority "brings an almost indefinite range of organizations and non-state actors within the scope of application of crimes against humanity […] [and] calls into question the very necessity of the 'capacity'-based model […] stand[ing] in contrast to the wording of the Statute and the intended will of the drafters", see Carsten Stahn, "Justice Delivered or Justice Denied?", p. 817, 818.

in the established legal framework of jus ad bellum"[33].

Indeed, the 'no specific direction' legacy of *Katanga* might as well be that of a 24 years old young person who, on the basis of the most plausible account of the beyond reasonable doubt evidence on record, was only engaged in what, at the time of the facts, could be categorised as a type of participation in warfare to which criminal responsibility was not attached. Or, perhaps more simply, just a participant in a joint plan (certainly agreed with many others) to wage a war while 'contemplating' that international crimes will occur.

33 On 'contemplation' as a (in)sufficient basis for criminal liability to arise, see Lachezar Yanev, "On Common Plans and Excess Crimes: Fragmenting the Notion of Co-Perpetration in International Criminal Law", Leiden Journal of International Law (2018), 31, p. 704-708 (alluding to decisions of other international tribunals, namely the SCLS and ECCC). See also The Prosecutor v. Simatović and Stanišić, Judgement, Dissenting Opinion of Judge Koffi Kumelio A. Afande, IT-03-69-A, Appeals Chamber, 9 December 2015 (stressing the need of clearly distinguishing "JCE liability from another enterprise such as 'Joint Warfare Enterprise' (JWE). In a JWE, there is a plurality of persons making contributions, whether significant or not, to a common plan, who have the intent to further not a criminal purpose, but rather a legal 'warfare purpose' which is common to them").