ANNEX 3: Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's appeal

SEPARATE OPINION OF

JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

Table of Contents

PROLEGOMENA

I issue this Separate Opinion with the hope that it will contribute to a better understanding of some very fundamental concepts that are at the core of international criminal law and that are thus crucial for understanding how criminal law operates in contexts of mass criminality such as in the case against Mr Bosco Ntaganda. I wish to highlight in this regard the importance of this case given the complexity and number of charges brought as well as the mode of liability charged: indirect co-perpetration. This is also the first case in which a conviction for sexual crimes is upheld on appeal before this Court. Justice has been brought to the thousands of victims in this case.

I concur with the findings and outcome in the Common Judgment. It is indeed correct to uphold Mr Ntaganda's conviction as an indirect co-perpetrator of war crimes and crimes against humanity that constitute grave violations of internationally recognised human rights. However, in both the conviction and sentencing appeal proceedings it became clear that certain arguments of Mr Ntaganda seem to be premised on incorrect interpretations of the law applicable to the contextual elements of crimes against humanity and to indirect co-perpetration as a mode of liability set out in the Rome Statute. These misinterpretations are in turn based on the existing confusion surrounding these legal concepts and the lack of comprehensive guidance from the Court thereon. While upholding Mr Ntaganda's conviction, the Appeals Chamber's Common Judgment does not fully clarify the law in a comprehensive and systematic manner.

Given the fundamental importance of a proper understanding of the scope and nature of the contextual elements of crimes against humanity, in particular the requirement that the widespread or systematic attack be committed pursuant to or in furtherance of a State organisational policy, as well as the meaning and scope of indirect co-perpetration, including through an organised power apparatus, as a mode of liability provided for in the Statute, I feel compelled to write this Opinion. It is my hope to clarify the law and provide guidance to the parties and participants, the international community and all relevant stakeholders. I also feel motivated to issue this Opinion in order to provide some predictability in the jurisprudence of the Court, thereby

enhancing the fairness of proceedings.

International criminal law is a realm of international law that draws on both international public law (including in particular international humanitarian and international human rights law) and criminal law. Although the Court is sometimes called upon to rule on issues governed by international public law, the essence of its work is based on criminal law. It is my hope that this Opinion will assist in a better understanding of the criminal law applied at the Court for this and future cases before both this Court and other national and international jurisdictions.

I. KEY FINDINGS

1. In the context of crimes against humanity, the policy element and the systematic nature of the attack are different – while the former is the cause, the latter is the result of its implementation.

2. When interpreted in light of the object and purpose of the Rome Statute, the policy element must be understood as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity.

3. A widespread or systematic attack directed against any civilian population is the hallmark element of crimes against humanity and is the cross-cutting element against which all individual criminal acts charged in a given case must be assessed.

4. A widespread and systematic attack in article 7 of the Statute amounts to a campaign of serious human rights violations that materialises in the multiple commission of acts referred to in article 7(1) of the Statute.

5. All of the modalities of the well-established category of perpetration are enshrined in article 25(3)(a) of the Statute. Thus, indirect co-perpetration is an integrated modality that combines the constitutive elements of indirect perpetration and co-perpetration and is, as such, compatible with the principle of legality and the rights of the accused. Indirect co-perpetration through an organised power apparatus is one variant of perpetration through another person.

6. Due to the nature of the crimes under the jurisdiction of the Court -crimes that generally involve large-scale and mass criminality-, indirect co-perpetration constitutes an appropriate tool to deal with this type of criminality and to investigate, prosecute and convict those bearing the highest degree of responsibility.

II. INTRODUCTION

7. On 30 March 2021, the Appeals Chamber delivered its judgment concerning the conviction of Mr Bosco Ntaganda ('Common Judgment'). While some aspects of the Conviction Decision of Trial Chamber VI (the 'Trial Chamber') were unanimously confirmed, others were upheld by a majority of the Judges. Although this Opinion agrees with the findings and outcome in the Common Judgment, it deems it imperative to address some misinterpretations that crystallised in both the conviction and sentencing appeal proceedings. It is necessary to expand and further clarify two fundamental legal concepts: (i) the contextual elements of crimes against humanity, in particular the requirement that the widespread or systematic attack directed against any civilian population be carried out pursuant to or in furtherance of an organisational policy, and (ii) the meaning and scope of indirect co-perpetration, including through an organised power apparatus, as a mode of liability provided for in the Rome Statute (the 'Statute').

8. In relation to the contextual elements of crimes against humanity, this Opinion supports the notion that the organisation implementing the policy pursuant to which an attack directed against the civilian population is committed can be a state or a non-state organisation. Furthermore, the organisation can be formally or informally established as a criminal or a non-criminal organisation. It generally consists of a group of at least three persons who pursue a particular aim and who are hierarchically organised and structured. The defining criterion is that the organisation must be a structured entity capable of conceiving and implementing a policy to carry out a widespread or systematic attack directed against any civilian population. The assessment of whether an organisation meets this requirement is always fact-sensitive.

9. As to the policy element, it is important that it be distinguished from the systematic nature of the attack in the sense that the policy is the cause and the attack is the result of its implementation. Moreover, there is no need for the organisation to formalise or explicitly define the policy since it may be possible to infer it from the existence of a planned, directed or organised attack that would suffice to exclude random or spontaneous violence. It is not required for the policy to be defined ahead of the attack and is not uncommon for it to crystallise once the attack has commenced; it may only be possible to define the policy in the light of the overall course of conduct.

Furthermore, the policy can be inferred from various elements, *inter alia*, the level of planning, patterns of violence, the involvement of the State or the relevant organisation in the commission of crimes, *modus operandi*, statements condoning or encouraging the commission of crimes, underlying motivations, deliberate omissions by the organisational hierarchy, etc.

10. The widespread or systematic attack must be carried out pursuant to or in furtherance of the policy, and the individual underlying criminal acts must be committed as part of the attack. It is important to note that while the organisation may be acting pursuant to a legitimate aim, it is possible that the means through which it seeks to achieve its goal, in other words the policy, are criminal. A legitimate end cannot justify illegal means that lead to crimes against humanity which always amount to grave human rights violations. In light of the object and purpose of the Statute, the policy requirement must be understood as imposing a minimum threshold that seeks to exclude ordinary crimes from the purview of international jurisdiction.

11. With respect to the meaning and nature of the widespread or systematic attack directed against any civilian population, this Opinion considers that this requirement, as a contextual element of crimes against humanity, cuts across all forms for this type of crime and therefore all acts charged in a given case. Attack within the meaning of article 7 of the Statute must be distinguished from attacks in the sense of international humanitarian law. While the latter are linked to armed hostilities, involve acts of physical violence and pursue military objectives, a widespread or systematic attack against a civilian population need not have those features. Such attack constitutes a course of conduct of the perpetrators reflected in a campaign of human rights violations against civilians that could be systematic or widespread. When committed in the context of a broader campaign against the civilian population, a single act may amount to a crime against humanity. A widespread attack is characterised by the geographical scope of the attack and/or the number of victims. A systematic attack occurs as a result of the organised nature of the acts of violence and the lack of probability of random occurrence.

12. With regard to the meaning and scope of indirect co-perpetration as a mode of liability under the Statute, this Opinion finds that article 25(3)(a) of the Statute enshrines all modalities of the well-established category of perpetration: direct

perpetration, co-perpetration, indirect perpetration and indirect co-perpetration as an integrated form of perpetration that combines the constitutive elements of indirect perpetration and co-perpetration. Furthermore, it is the control over the crime (hegemony over the act or *Tatherrschaft* in German and *dominio del hecho* in Spanish) that constitutes the objective distinguishing criterion to differentiate perpetration from other modes of liability. One particular modality of indirect perpetration occurs when the crimes are committed through an organised power apparatus (*Organisationsherrschaft* in German or *autoría mediata a través de aparatos organizados de poder* in Spanish). As a result of his or her hierarchical position within the structure of the organisation and the automatic functioning thereof, the indirect perpetrator exercises functional control over the crimes and retains the power to frustrate their commission. This mode of individual criminal responsibility has two main features: the existence of an organised power apparatus duly structured composed of replaceable direct perpetrators facilitating compliance with the plans, directives, objectives and, ultimately, orders of the organisation; and the functional control exerted by the indirect perpetrator over the functioning of the organisation.

13. This Opinion emphasises that in light of the nature of the crimes under the jurisdiction of the Court -crimes that generally involve large-scale and mass criminality-, neither indirect perpetration nor co-perpetration alone would properly capture this specific type of criminality. Therefore, indirect co-perpetration as an integrated mode of liability is an appropriate tool to address the large-scale and mass criminality that characterise international crimes and to investigate, prosecute and convict those bearing the highest degree of responsibility. This approach is consistent with the principle of legality and the rights of the accused given that both indirect perpetration and co-perpetration are specifically provided for in the Statute. The constitutive elements of indirect co-perpetration are: the existence of an agreement or a common plan and its implementation; the coordinated realisation of the objective elements of the crime by the co-perpetrators; and the existence of an organised power apparatus hierarchically controlled by the co-perpetrators that functions automatically and is composed of replaceable elements willing to implement the common plan which involves the commission of crimes.

14. In relation to the mental element requirement in article 30 of the Statute in cases

of indirect co-perpetration through an organised power apparatus, the co-perpetrators must be aware of, and have intent with regard to: (i) the existence of a common plan that involves the commission of crimes; (ii) their coordinated realisation of the objective elements of the crime; (iii) the fact that implementing their common plan will result in the realisation of the objective elements of the crime or the fact that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events; and (iv) the existence of an organised power structure hierarchically controlled by them that functions automatically and is composed of replaceable elements willing to implement the common plan and commit crimes as a result. Finally, in cases of indirect co-perpetration, as in cases of indirect perpetration through an organised power apparatus, it is not required that the accused person be aware of the occurrence of each criminal incident or its specificities. This is because their mode of liability is different from that of direct perpetrators.

15. It is on the basis of the above that in the following chapters this Opinion first sets out the relevant background and the issues at stake. It then examines the following issues: (A) The contextual elements of crimes against humanity, including (1) the meaning and nature of an organisation; (2) the meaning and nature of an organisational policy within the meaning of article 7 of the Statute; and (3) the meaning and nature of an attack directed against the civilian population in article 7 of the Statute; (B) The meaning and scope of indirect co-perpetration, including (1) indirect co-perpetration as a mode of liability provided in the Statute; and (2) the kind of knowledge and intent required within the meaning of Article 30 of the Statute in indirect co-perpetration. Each of the issues includes the relevant legal and juridical considerations and their application to the case at hand. In the last chapter, this Opinion recapitulates the main points reached under each issue and sets out a number of final conclusions.

16. It is the aim of this Opinion to assist in the interpretation and application of fundamental legal concepts in the realm of international criminal law in this case and future cases to come before this Court and other (inter)national jurisdictions.

17. For outreach purposes, summaries of this Opinion in English, French and Spanish are annexed at the end of this Opinion.

III. RELEVANT BACKGROUND AND ISSUES AT STAKE

A. Conviction Decision

18. The Trial Chamber found Mr Ntaganda guilty of eighteen counts of war crimes and crimes against humanity: five counts of crimes against humanity and thirteen counts of war crimes.[1] Mr Ntaganda was convicted on all charges brought against him, namely: murder and attempted murder as a crime against humanity and as a war crime under article 7(1)(a) and article 8(2)(c)(i) of the Statute, respectively ('Counts 1 and 2'); intentionally directing attacks against civilians as a war crime under article 8(2)(i) of the Statute ('Count 3'); rape of civilians as a crime against humanity and as a war crime under article 7(1)(g) and article 8(2)(e)(vi) of the Statute, respectively ('Counts 4 and 5'); rape of children under the age of 15 incorporated into the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* ('UPC/FPLC') as a war crime under article 8(2)(e)(vi) of the Statute ('Count 6'); sexual slavery of civilians as a crime against humanity and as a war crime under article 7(1)(g) and article 8(2)(e)(vi) of the Statute, respectively ('Counts 7 and 8'); sexual slavery of children under the age of 15 incorporated into the UPC/FPLC as a war crime under article 8(2)(e)(vi) of the Statute ('Count 9'); persecution as a crime against humanity under article 7(1)(h) of the Statute ('Count 10'); pillage as a war crime under article 8(2)(e)(v) of the Statute ('Count 11'); forcible transfer of the civilian population as a crime against humanity under article 7(1)(d) of the Statute ('Count 12'); ordering the displacement of the civilian population as a war crime under article 8(2)(e)(viii) of the Statute ('Count 13'); conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute ('Counts 14, 15 and 16'); intentionally directing attacks against protected objects as a war crime under article 8(2)(e)(iv) of the Statute ('Count 17'); and destroying the adversary's property as a war crime under article 8(2)(xiii) of the Statute ('Count 18').[2]

19. Mr Ntaganda was convicted as direct perpetrator pursuant to article 25(3)(a) of the Statute for some of the criminal acts under counts 1, 2, 10 and 11. He was also convicted as an indirect co-perpetrator under article 25(3)(a) of the Statute for criminal

[1] Judgment, 8 July 2019, ICC-01/04-02/06-2359 (the 'Conviction Decision').
[2] Conviction Decision, pp. 535-539.

acts under all counts.

B. Determination in the Common Judgment of the relevant grounds of appeal

20. In the Common Judgment,[3] some aspects of the Trial Chamber's judgment (the 'Conviction Decision') were unanimously confirmed and others were upheld by a majority of the Judges. As a result, the conviction of Mr Ntaganda for war crimes and crimes against humanity in its entirety was upheld. For the present purposes, this Opinion sets out the determination in the Common Judgment in relation to the fourth, fifth, eleventh, twelfth, thirteenth, fourteenth and fifteenth grounds of appeal. It is in these grounds of appeal that Mr Ntaganda raises arguments that call for a thorough analysis of the contextual elements of crimes against humanity and indirect co-perpetration as a mode of liability provided for in article 25(3)(a) of the Statute.

21. Under the fourth ground of appeal, Mr Ntaganda disputes the finding about the existence of an organisational policy within the meaning of article 7(2) of the Statute. He raises two main arguments, namely that: (i) the Trial Chamber erred in finding that the UPC/FPLC was an organisation prior to 9 August 2002,[4] and (ii) the Trial Chamber erred in its assessment of the evidence in order to establish a policy to commit an attack directed against the civilian population.[5] The Common Judgment rejected both challenges. In relation to the first argument concerning the organisation, it considered that Mr Ntaganda had failed to identify the material impact of the alleged error.[6] Regarding the second argument concerning evidence relevant to establishing the existence of a policy to commit an attack against the civilian population, the Common Judgment reviewed the Trial Chamber's evidentiary assessment and concluded that the overall conclusion concerning the existence of an organisational policy was not unreasonable.[7]

22. Under the fifth ground of appeal, Mr Ntaganda challenged the Trial Chamber's

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[3] Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red (the 'Common Judgment').
[4] Defence Appeal Brief - Part II, 30 June 2020, ICC-01/04-02/06-2465-Red-Corr ('Mr Ntaganda's Appeal Brief – Part II'), para. 107.
[5] Mr Ntaganda's Appeal Brief – Part II, paras 108-127.
[6] Common Judgment, IV.D.1.(b).
[7] Common Judgment, IV.D.2.(b).

finding that the alleged attack was directed against a civilian population. In particular, he alleges that the Trial Chamber: (i) failed to find that a civilian population was the primary object of the attack; (ii) erred by limiting its analysis of the evidence to six military operations; (iii) failed to accord sufficient weight to the legitimate purpose of the six military operations it considered; (iv) failed to consider relevant evidence regarding other UPC/FPLC operations; and (v) erred in finding that orders to attack civilians were issued.[8] The Common Judgment rejected the totality of Mr Ntaganda's argument and determined that the Trial Chamber's conclusion that the attack was directed against a civilian population was not unreasonable.[9]

23. In the relevant part of his eleventh ground of appeal, Mr Ntaganda argued that the Trial Chamber failed to make a finding on his knowledge of the rape of Mave and that there is no evidence supporting a finding that he knew about rape and sexual slavery committed by the UPC/FPLC in this period of time or that 'he would have foreseen that the rape of "Mave" would occur "in the ordinary course of events"'.[10] The Common Judgment rejected Mr Ntaganda's arguments given that the Trial Chamber's findings regarding the sexual crimes against child soldiers by UPC/FPLC forces, in addition to the underlying evidence, showed 'Mr Ntaganda's personal involvement in the rapes, that rapes were "common knowledge" and Mr Ntaganda knew of the sexual violence inflicted on individuals under the age of 15 that were part of the UPC/FPLC.'[11]

24. Under the twelfth ground of appeal, Mr Ntaganda challenged the Trial Chamber's finding that he knew and intended that individuals under the age of fifteen would be, or were being recruited or conscripted into the UPC/FPLC and used to participate actively in hostilities.[12] The Common Judgment carefully reviewed the Trial Chamber's findings supporting its inference on Mr Ntaganda's knowledge and intent and concluded that the Trial Chamber's conclusion was reasonable.[13]

25. In the relevant part of the thirteenth ground of appeal, Mr Ntaganda challenged

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[8] Mr Ntaganda's Appeal Brief – Part II, paras 58-103.
[9] Common Judgment, IV.E.
[10] Mr Ntaganda's Appeal Brief – Part II, para. 270.
[11] Common Judgment, para. 855.
[12] Mr Ntaganda's Appeal Brief – Part II, paras 272, 277.
[13] Common Judgment, IV.L.3.

the Trial Chamber's approach to the common plan and the crimes committed in the implementation thereof, and to his alleged control over the crimes committed by Hema civilians.[14] He challenged, *inter alia*, the finding that the co-perpetrators agreed to the commission of specific crimes and foresaw the commission of crimes against children.[15] After a careful review of the Trial Chamber's findings and the evidence underpinning them, the Common Judgment rejected, in their entirety, the arguments raised by Mr Ntaganda in relation to the existence and contours of the common plan.[16] Furthermore, the Common Judgment found that it was reasonable for the Trial Chamber to conclude on the basis of the evidence of orders to the Hema civilians and their joint operation with the UPC/FPLC soldiers that the Hema civilians 'functioned as a tool in the hands of the co-perpetrators' and that their 'will had become irrelevant'.[17]

26. Under the fourteenth and fifteenth grounds of appeal, Mr Ntaganda argued that the Trial Chamber erred in finding that he possessed the required *mens rea* as an indirect co-perpetrator for the crimes of UPC/FPLC soldiers committed during the First and Second Operations.[18] In addition, under the fifteenth ground of appeal, Mr Ntaganda submitted that the Trial Chamber erred in determining that he had control over the crimes committed during the Second Operation.[19] The Common Judgment carefully reviewed the Trial Chamber's findings and underlying evidence and concluded that the determination of the Trial Chamber in relation to Mr Ntaganda's knowledge and intent was reasonable.[20]

C. Issues arising and discussed in this Opinion

27. The appeals lodged by Mr Ntaganda and the Prosecutor raise several legal, factual and procedural issues of utmost importance to this and future cases. However, this Opinion focuses on two legal matters that have triggered confusion and inconsistent interpretations in this and other cases: namely the nature and scope of an organisational policy to commit an attack against the civilian population within the meaning of article 7 of the Statute, and indirect co-perpetration as a mode of liability explicitly provided

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[14] Mr Ntaganda's Appeal Brief – Part II, paras 283-316.
[15] Mr Ntaganda's Appeal Brief – Part II, paras 301-309.
[16] Common Judgment, IV.M.2.
[17] Common Judgment, IV.M.3.
[18] Mr Ntaganda's Appeal Brief – Part II, paras 317 – 411.
[19] Mr Ntaganda's Appeal Brief – Part II, paras 372 – 398.
[20] Common Judgment, IV.N and IV.O.

for in article 25(3)(a) of the Statute. These substantive issues are fundamental in the realm of international criminal law and therefore this Opinion aims at exploring and clarifying certain aspects thereof with a view to advancing a better interpretation of the law and thereby improving the work of the Court.

1. Contextual Elements of Crimes Against Humanity

28. The main issues concerning contextual elements of crimes against humanity that arise in this appeal and require further clarification are the nature and scope of an organisational policy to commit an attack against the civilian population within the meaning of article 7 of the Statute.

29. This issue arises in the context of the fourth ground of appeal where Mr Ntaganda challenges the factual assessment carried out by the Trial Chamber to find that the widespread and systematic attack carried out by the UPC/FPLC was pursuant to an organisational policy to commit such attack. While Mr Ntaganda's arguments question the factual assessment of the Trial Chamber, it is clear that to evaluate the correctness of such determination, it is necessary to first have a proper understanding of the nature and scope of the organisational policy requirement. Furthermore, under the fifth ground of appeal, Mr Ntaganda directly challenges the legal interpretation by the Trial Chamber of the requirement in article 7(1) of the Statute that the widespread or systematic attack be 'directed against any civilian population'. Although the Common Judgment addresses in part this specific question, there is a need to further clarify the meaning and nature of an attack within the meaning of crimes against humanity. The questions thus arising are:

a. What is the meaning and nature of an organisation in the context of crimes against humanity?

b. What is the meaning and nature of an organisational policy to commit an attack against the civilian population?

c. What is the meaning and nature of an attack directed against the civilian population in article 7 of the Statute?

2. Indirect co-perpetration as a mode of liability under the Rome Statute

30. The main issues arising in this appeal concerning indirect co-perpetration (in particular through an organised power apparatus) as a mode of liability provided for in the legal framework of the Statute, are the scope and constitutive elements of indirect co-perpetration, namely its ambit of application and its elements, both objective and subjective.

31. This issue arises in the context of the eleventh, twelfth, thirteenth, fourteenth and fifteenth grounds of appeal, where Mr Ntaganda premises his factual submissions on an incorrect legal interpretation of the elements of indirect co-perpetration through an organised power apparatus. The Common Judgment partially addresses this question, thus there is a need for further clarification of this mode of liability. The questions thus arising are:

> **a.** Whether indirect co-perpetration, including through an organised power apparatus, is a mode of liability encompassed in the Statute?
> **b.** How does a co-perpetrator control the crimes when they are committed through an organised power apparatus?
> **c.** What kind of knowledge and intent within the meaning of article 30 of the Statute is required in indirect co-perpetration?

32. Questions (a) and (b) are intrinsically linked and are therefore addressed together in section IV.A of this Opinion.

IV. CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY

33. In this section, the Opinion discusses in detail some of the contextual elements required for the configuration of crimes against humanity: the existence of an organisation; the existence of an organisational policy and the existence of a widespread or systematic attack directed against any civilian population. As is clear from the submissions advanced by Mr Ntaganda in the fourth and fifth grounds of appeal, there seems to be a certain level of confusion on the contours of the specific elements set out in the Statute and in the Elements of Crimes.

34. Article 7(1) of the Statute states that *'[f]or the purpose of this Statute, "crimes*

against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

35. Article 7(2) of the Statute clarifies that '*[f]or the purpose of paragraph 1: "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*'.

36. According to article 9 of the Statute, the Elements of Crimes may assist in the interpretation and application of articles 6, 7, 8, and 8 *bis* of the Statute. The second paragraph of the Introduction to Crimes Against Humanity in the Elements of Crimes clarifies that the legal framework of the Court does not require 'proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization'. Furthermore, paragraph 3 specifies that '*[i]t is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population*'. The footnote to this section reads as follows:

> [a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

37. More generally, at paragraph 1 it is stated that '*[s]ince article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world*'.

38. The aim of this Opinion is to clarify the interpretation of the law on the fundamental requirement that there must be an organisational policy to commit an attack directed against any civilian population. Such requirement involves three main elements: the existence of an organisation; the existence of a policy and the existence

of an attack. Each of these is discussed below.

A. The meaning and nature of an organisation in the context of crimes against humanity

1. Mr Ntaganda's challenge and determination in the Common Judgment

39. In relevant part under the fourth ground of appeal, Mr Ntaganda averred that the Trial Chamber erred by concluding that (i) the UPC/FPLC was an organisation pursuant to article 7 of the Statute before it was officially constituted, and (ii) it was not an organisation until 9 August 2002 when it began exercising control over a territory.[21]

40. The Common Judgment considered that Mr Ntaganda failed to identify the material effect of the alleged error.[22] It further noted that Mr Ntaganda did not challenge the findings of the Trial Chamber related to the UPC/FPLC being an organisation,[23] and he did not seem to argue that the UPC/FPLC was not officially constituted or that it did not exercise control over a territory during the period relevant to the charges.[24]

41. While this Opinion agrees with the determination in the Common Judgment, it considers it appropriate in addressing Mr Ntaganda's argument to elaborate on the meaning and nature of an organisation in the context of crimes against humanity. The ultimate aim is to strengthen the Common Judgment.

2. Legal framework and relevant juridical considerations

42. The legal framework of the Statute refers to a *State or organisational* policy. At the outset, it is observed that neither the Statute nor the Elements of Crimes defines or sets out the nature of an organisation carrying out a policy to commit a widespread or systematic attack against any civilian population. While the legal texts do not define or delineate the scope of a State either, the term is 'self-explanatory'[25] and may be satisfied

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[21] Mr Ntaganda's Appeal Brief – Part II, para. 107
[22] Common Judgment, IV.D.1.(b).
[23] Common Judgment, IV.D.1.(b).
[24] Common Judgment, IV.D.1.(b).
[25] Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March

even when the 'policy' is adopted by regional or even local organs of the State.[26] This is because, as it was rightly put by the International Criminal Tribunal for the former Yugoslavia (the 'ICTY'):

> Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a 'widespread' scale, or upon a 'systematic' basis.[27]

43. From the wording of the relevant provisions, it is possible to conclude that when referring to an organisation, such reference is not limited to the State as an organisation. Indeed, article 7(2) of the Statute refers to '*a State or organizational policy*' and the Introduction to Crimes against Humanity in the Elements of Crimes speaks at paragraph 3 of a policy requiring '*that the State or organization'* actively promote or encourage the attack and the absence of '*governmental or organizational action*'.[28] The text of the core legal documents governing the Court thus codifies a possibility that had been previously noted in the realm of international justice.[29] While the State generally

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2010, ICC-01/09-19-Corr (the '*Kenya* Authorisation Decision'), para. 89, stating that the term is 'self-explanatory'. *See also* G. Mettraux, *International Crimes: Law and Practice: Volume II: Crimes Against Humanity* (2020), p. 313.

[26] *Kenya* Authorisation Decision, para. 89.

[27] ICTY, Trial Chamber II, *Prosecutor v Fatmir Limaj et al.*, Judgement, 30 November 2005, IT-03-66-T, (the '*Limaj et al.* Trial Judgment'), para. 191.

[28] Emphasis added.

[29] ICTY, Trial Chamber, *The Prosecutor v. Duško Tadić*, Opinion and Judgement, 7 May 1997, IT-94-1-T, paras 654-655 (the '*Tadić* Trial Judgment'). The Trial Chamber noted '[t]he traditional conception was […] that the policy must be that of a State […] because [the commission of crimes against humanity] requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of crimes against humanity'. It subsequently observed that '[w]hile this may have been the case during the Second World War […] this is no longer the case'. The Trial Chamber noted the development of the law in relation to crimes against humanity 'to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory'. Similarly, the International Law Commission ('ILC') Draft Code contains the requirement that in order to constitute a crime against humanity the enumerated acts must be 'instigated or directed by a Government or by any organization or group' (ILC, Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, Part II, 26 July 1996, A/CN.4/Ser.A/1996/Add.1 (Part 2), p. 47). The commentary to the draft articles of the Draft Code prepared by the International Law Commission in 1991 states that the draft article 'does not confine possible perpetrators of the crimes [crimes against humanity] to public officials or representatives alone . . . the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article' (ILC, Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, 19 July 1991, UN Doc. A/46/10, p. 103).

represents the most complete form of organisation, other entities may also qualify as an 'organisation' for the purpose of article 7(2) of the Statute.

44. In light of article 31 of the Vienna Convention on the Law of Treaties, in interpreting a treaty, the starting point is the ordinary meaning of the text. The ordinary meaning of the word 'organisation' provides limited assistance in interpreting this term in the context of article 7(2) of the Statute. According to the Oxford Dictionary, an organisation is 'a group of people who form a business, club, etc. together in order to achieve a particular aim'.[30] Similarly, Black's Law Dictionary defines 'organization' as 'a body of persons (such as a union or corporation) formed for a common purpose'.[31] From its ordinary definition, two characteristics are clear: an organisation is formed by more than two people and it seeks to achieve a particular aim. Furthermore, it is possible to infer from the definition and the wording of the Rome Statute and Elements of Crimes that an organisation need not be criminal in nature.

45. Werle and Burghardt correctly observe that the association of persons 'must be of a certain size, since an organized association of persons that at no time comprises more than a handful of participants might be described as a group or a band, but not as an organization'.[32] They also note that 'the term implies the existence of structures that make it possible to coordinate action in purposeful ways and attribute that action to the organization'.[33] The scholars highlight that '[a]ssociations of persons that exist only for the duration of a concrete situation are thus no more "organizations" in the usual sense of the term than are simple groups of people'.[34]

46. Although relevant, the ordinary meaning only provides a basis for discerning the nature and characteristics of an organisation within the meaning of article 7(2) of the

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[30] Oxford Advanced Learner's Dictionary, available at: https://www.oxfordlearnersdictionaries.com/definition/english/organization?q=organisation.
[31] B. A. Garner (ed.), *Black's Law Dictionary* (2004).
[32] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1155.
[33] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1155.
[34] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1155.

Statute.

47. Considering that the Court is a criminal court and given the international crimes under its jurisdiction, which generally involve organised criminality, guidance can be sought from other international treaties addressing similar types of criminality. In this regard, the United Nations Convention against Transnational Organised Crime defines an 'organised criminal group' in article 2(a) as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences […]'.[35] Similarly, article 2(c) defines a structured group as 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'.[36] The interpretative note to this provision indicates that 'the term "structured group" is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined'.[37]

48. When interpreting the nature of an organisation as referred to in the core legal texts, chambers of this Court have arrived at different conclusions. While some have considered that only State-like organisations may qualify under article 7(2) of the Statute, others maintain that the focus should be placed on determining whether the group has the capability to perform acts which infringe on basic human values.[38] This dichotomy was made crystal clear in the decision issued by Pre-Trial Chamber II on the authorisation to open an investigation into the Kenyan situation.

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[35] United Nations General Assembly, article 2(a) of the United Nations Convention against Transnational Organized Crime, 8 January 2001, A/RES/55/25.
[36] United Nations General Assembly, article 2(c) of the United Nations Convention against Transnational Organized Crime, Resolution 55/25, A/RES/55/25.
[37] United Nations General Assembly,Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols, 3 November 2000, A/55/383/Add.1, para. 4.
[38] *Kenya* Authorisation Decision, para. 90. *See also* Pre-Trial Chamber II, *The Prosecutor v Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (the '*Kenyatta and Hussein Ali* Decision on the Confirmation of Charges'), paras 112-114, in which Pre-Trial Chamber II rejects the interpretation argued by the Defence, namely a narrower interpretation of the term 'organization' to the extent the drafters of the Statute 'clearly intended the formal nature of the group and the level of its organization to be a defining criterion'.

49. According to the dissenting Judge in that decision, an 'organisation' should have 'quasi-State' characteristics. He affirmed:

> 51. I read the provision such that the juxtaposition of the notions "State" and "organization" in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those "organizations" should partake of some characteristics of a State. Those characteristics eventually turn the private "organization" into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.[39]

This Opinion notes that the above is but one possible approach that would significantly restrict the ambit of application of crimes against humanity, excluding structured organisations capable of perpetrating atrocious crimes directed against civilian populations.

50. The majority of Pre-Trial Chamber II adopted the view that a case-by-case assessment is required to determine whether an organisation has the capability to perform acts which infringe on basic human values. According to the Pre-Trial Chamber, such assessment may include, *inter alia*, the following factors:

> whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[40]

This Opinion observes that this is yet another approach and wishes to emphasise that, as noted in the Common Judgment, the qualifier attributed to criminal activities against the civilian population as the 'primary purpose' is misplaced.[41] An attack directed against a civilian population may indeed serve other objectives or motives. In addition,

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[39] *Kenya* Authorisation Decision, Dissenting Opinion of Judge Hans-Peter Kaul, para. 51.
[40] *Kenya* Authorisation Decision, para. 93.
[41] Common Judgment, paras 419-424.

the organisation need not be under a responsible command in a military sense. Rather, for a group to qualify as an organisation, it must possess a structure and a hierarchy that enables it to implement a policy to carry out a widespread or systematic attack directed against any civilian population. Furthermore, this Opinion considers that exercising territorial control over part of the territory of a State is not a necessary requirement for qualifying as an organisation for the purpose of article 7(2) of the Statute.

51. In relation to the above, Kress suggests that only organisations that may be party to non-international armed conflicts under article 1(1) of Additional Protocol II to the Geneva Conventions of 12 August 1949 ('Additional Protocol II')[42] should fall under article 7(2)(a) of the Statute.[43] This would mean an organisation 'under responsible command' and exercising 'control over a part of its territory'.[44] Indeed, this type of structure only refers to armed groups in non-international armed conflicts. This is a more appropriate approach for the interpretation and application of war crimes since AP II is a tool of international humanitarian law dealing with armed conflicts. However, such an overly restrictive interpretation does not find support in the wording of the Statute and would be contrary to its object and purpose insofar as it would create an impunity gap for atrocities that shock the conscience of the international community committed by organisations that do not meet the strict requirements of article 1(1) of Additional Protocol II.

52. In rejecting the approach followed by the majority in the decision issued by Pre-Trial Chamber II on the authorisation to open an investigation into the Kenyan situation, the dissenting Judge stated that

> 53. In this respect, the general argument that any kind of non-state actors may be qualified as an "organization" within the meaning of article 7(2)(a) of the Statute on the grounds that it "has the capability to perform acts which infringe on basic human values" without any further specification seems unconvincing to me. In fact this approach may expand the concept of crimes against humanity to any infringement of human rights. I am convinced that a distinction must be upheld

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[42] *See* ICRC, article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 7 December 1978, 1125 United Nations Treaty Series 17513 (the 'Additional Protocol II').
[43] C. Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' in *15 Journal of Conflict & Security Law* (2010), pp. 271-272.
[44] *See* article 1(1) of the Additional Protocol II.

> between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community as a whole.[45]

While this Opinion agrees with the dissenting Judge insofar as he contends that not every infringement of human rights is a crime against humanity, it is worth recalling that the atrocious crimes under the jurisdiction of the Court always entail grave violations of human rights.[46] Furthermore, only those gross human rights violations that are committed in a widespread or systematic manner will be prosecutable as crimes against humanity before the Court.

53. In the case of *The Prosecutor v. Germain Katanga*, the Trial Chamber rightly pointed out that the organisation within the meaning of article 7(2) of the Statute is linked to the existence of an attack within the meaning of article 7(2)(a) of the Statute. It considered in this regard that this connection 'presupposes that the organisation has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7(2)(a) of the Statute'.[47]

54. The Trial Chamber in the same case correctly concluded that it 'suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population'.[48] In view of 'modern asymmetric warfare', Trial Chamber II considered that it could not be ruled out 'that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-

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[45] *Kenya* Authorisation Decision, Dissenting Opinion of Judge Hans-Peter Kaul, paras 51-53.
[46] *See* Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Joint Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa, 6 May 2019, ICC-02/05-01/09-397-Anx2, paras 12, 31, 170, 174.
[47] Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG (the '*Katanga* Conviction Decision'), para. 1119. *See also* Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, ICC-01/12-01/18-35-Red2-tENG, para. 47.
[48] *Katanga* Conviction Decision, para. 1119.

State'.[49]

55. The interpretation of the majority in the *Katanga* case is in line with the object and purpose of the Statute. Indeed, adopting an interpretation whereby an organisation must hold quasi-State characteristics would risk undermining the Statute's goal of prosecuting the most serious crimes. This is because under such an interpretation entities that may have carried out a widespread or systematic attack directed against any civilian population under article 7(1) of the Statute pursuant to or in furtherance of their policy would be excluded on account of their being insufficiently hierarchical to be considered, in theory, as capable of pursuing or enforcing a policy whose aim is such an attack. As noted by several scholars, such a restrictive interpretation might lead to impunity for gross violations of human rights and create loopholes.[50]

56. Subsequently, Judge Ozaki stated in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* that 'the commonly stated test of whether an organization has sufficient capabilities to carry out an attack against a civilian population does nothing to guard against the risk of simply reasoning backwards, using the fact that such an attack occurred to infer the existence of an organization'.[51] In her view, such interpretation 'has tended to be circular and lacking in certainty'.[52]

57. Judge Ozaki considered that an organisation within the meaning of article 7(2)(a) of the Statute requires at a minimum '(i) a collectivity of three or more persons; (ii) existing for a certain period of time, which, at least, transcends the period during which the policy was formed and implemented; (iii) with a particular aim or purpose, whether

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[49] *Katanga* Conviction Decision, para. 1119.
[50] M. Di Filippo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' in *The European Journal of International Law* (2008), p. 567; M. Halling, 'Push the Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' in *Leiden Journal of International Law* (2010), p. 833; L. N. Sadat, 'Emerging from the Shadow of Nuremberg: Crimes Against Humanity in the Modern Age', *Washington University in St. Louis Legal Studies Research Paper* (2012), pp. 84-92; G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1167.
[51] Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Separate Opinion of Judge Kuniko Ozaki, 21 March 2016, ICC-01/05-01/08-3343-AnxII (the 'Separate Opinion of Judge Kuniko Ozaki in the *Bemba* case'), para. 25.
[52] Separate Opinion of Judge Kuniko Ozaki in the *Bemba* case, para. 25.

it is criminal or not, and (iv) with a certain structure'.[53] She noted that additional potentially relevant factors could include: 'whether the group has an established internal hierarchy; whether the group exercises control over part of the territory of a state; the group's infrastructure and resources; and whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria'.[54] Although Judge Ozaki provides an alternative interpretation to the 'organisation' element, as explained above, territorial control cannot be considered a requirement because otherwise an organisation for the purposes of article 7(2) of the Statute would bear the same meaning as an organised armed group in non-international armed conflicts as per article 1(1) of Additional Protocol II. This Opinion is in agreement with this reasoning.

58. Some jurisprudence of the *ad hoc* tribunals seems to suggest that territorial control on the part of the organisation is required in order to qualify as an organisation that implements a policy to commit an attack directed against any civilian population.[55] However, as more appropriately put by the Court of Bosnia and Herzegovina, 'the relevant consideration should focus on the organization's capacity as a group to conceive and adopt the policy to attack a civilian population in a widespread or systematic manner, rather than on the organization's formal characteristics and taxonomy'.[56] Indeed, while the question of whether an organisation exercises territorial control may be relevant to determining the organisation's capability to conceive, adopt and implement a policy to attack a civilian population, it is not, as explained above, a requirement *per se* to qualify as an organisation in the context of crimes against humanity.

59. Robinson, who was a participant in the negotiations at Rome that led to the adoption of the Statute, recalls that

> [t]he solution reached in Rome was to refer only to a state or organization, as it

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[53] Separate Opinion of Judge Kuniko Ozaki in the *Bemba* case, para. 29.
[54] Separate Opinion of Judge Kuniko Ozaki in the *Bemba* case, para. 29.
[55] *Tadić* Trial Judgment, paras 654-655. *See also* ICTY, Trial Chamber, *The Prosecutor v Vlatko Kupreškić et al.*, Judgement, 14 January 2000, IT-95-16-T, (the '*Kupreškić et al.* Trial Judgment'), para. 552; *Limaj et al.* Trial Judgment, para. 213.
[56] Bosnia and Herzegovina, Court of Bosnia and Herzegovina, *Prosecutor's Office of Bosnia and Herzegovina v. Mitar Rašević and Savo Todović*, Trial Panel Verdict, 28 February 2008, X-KR/06/275, p. 40.

> was agreed that using the term 'organization' is fairly flexible, and to the extent that there might be a gap between the concept of 'group' and 'organization', it was considered that the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept.[57]

60. This Opinion notes with approval Di Filippo's argument that although in the past crimes against humanity were 'linked to a form of state policy',

> the crucial point becomes whether we have to consider as a necessary element of crimes against humanity the very presence of states or state-like authorities behind the violent acts, or, instead, the fact that the authors are organised – no matter whether in the context of a state structure or of a private group or network – and able to put into practice "a course of conduct involving the multiple commission' of serious violent acts undermining the protection of basic human values".[58]

61. Werle and Burghardt also highlight that '[l]arge-scale violence today is no longer perpetrated only by states or other territorially organized entities', referring, *inter alia*, to '[m]ilitias and paramilitary units, terrorist groups and criminal networks'.[59]

62. Di Filippo considers that his view is compatible with the principle of strict construction of penal statutes. He recalls in this regard 'the general purpose of protecting basic human values' underpinning article 7 and the Rome Statute as a whole; 'the deliberate choice to use the term "organizational" […] which has a wider meaning of state or other territorial entity'; and 'the capacity gained by private criminal groups to commit the serious crimes enumerated in Art. 7 […] with an efficiency and danger comparable to those of state structures'.[60]

63. Similarly, Werle and Burghardt maintain that the principle of strict construction provided in article 22(2) of the Statute 'does not require that the term "organization" be

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[57] D. Robinson, 'Defining 'Crimes Against Humanity' at the Rome Conference' in *93 American Journal of International Law* (1999), p. 50, fn 44.
[58] M. Di Filippo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' in *19 The European Journal of International Law* (2008), p. 567.
[59] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1167.
[60] M. Di Filippo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' in *19 The European Journal of International Law* (2008), p. 568, fn 143.

narrowly interpreted *in some way'*.[61] In their view, this principle 'only takes effect where, after an interpretation "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", two equally plausible interpretations remain'.[62] Given that a restrictive interpretation would not be aligned with the object and purpose of the Statute insofar as it would leave unpunished some of the most serious crimes committed pursuant to the policy of organisations that are not State-like, the principle of strict construction does not take effect.

64. By reference to the wording of article 7(2)(a) of the Statute, Werle and Burghardt maintain that '[i]t contradicts linguistic and grammatical rules to assume from the use of the conjunction "or" that the second of the juxtaposed terms (here "organization") must share definitional characteristics with the first (here "state")'.[63] They further maintain that it is unclear 'why, in determining whether intentional individual rights violations of significant magnitude are disruptions of world peace, it should make a difference whether these violations were committed by an organization that is non-governmental'.[64] The scholars correctly emphasise that '[t]he crucial issue is the individual's need for protection, not the question of which entities commit violations of human rights'.[65]

Conclusion on the legal framework and relevant juridical considerations

65. From the above, it is possible to draw a number of conclusions. First, for the purposes of article 7(2), while the State will generally represent the most complete form of organisation, other entities may also qualify as an 'organisation'. From its ordinary meaning it is possible to conclude that an organisation consists of at least three people

[61] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1159 (emphasis in original).
[62] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1159.
[63] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1156.
[64] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), pp. 1160-1161.
[65] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1153.

who pursue a particular aim and that it is more organised and structured than a mere group of people. Second, its establishment may be formal or informal and it can be a criminal or a non-criminal organisation. Third, the focus of the enquiry to determine whether an organisation qualifies as such within the meaning of crimes against humanity should be on those features of the organisation such as its hierarchy and ways of functioning that would allow it to conceive, adopt and implement a policy to carry out a widespread or systematic attack directed against any civilian population. Given that article 7(2)(a) links an attack against any civilian population to an organisational policy, such connection presupposes that the organisation has the resources, means and capacity to carry out a widespread or systematic attack directed against any civilian population. Fourth, while considerations such as whether the organisation has quasi-State features and/or exercises some kind of territorial control may be relevant in assessing its capability to carry out an attack within the meaning of article 7(1) of the Statute, such features are not necessary requirements to qualify as an organisation. A different interpretation would improperly equate an organisation within the meaning of article 7(2) of the Statute with an organised armed group in the context of non-international armed conflicts as per article 1(1) of Additional Protocol II.

66. In a different chapter, this Opinion describes the features of an organised power apparatus through which a person may indirectly commit a crime. In cases of crimes against humanity where the perpetrator commits crimes through an organised power apparatus, the organisation for the purpose of article 7(2)(a) and the organised power apparatus through which the perpetrator commits the crime often coincide. Indeed, as further explained below, in the case at hand the UPC/FPLC was the organisation that implemented a policy to drive the Lendu out from Ituri which resulted in a widespread and systematic attack against them; and it was the same organised power apparatus (the UPC/FPLC) through which Mr Ntaganda indirectly co-perpetrated several of the crimes charged.

3. Application to the case

67. While this Opinion agrees with the Common Judgment insofar as it rejects Mr Ntaganda's argument challenging the finding that the UPC/FPLC was an organisation before it was officially constituted and before it exercised some kind of territorial control, it considers it necessary to further elaborate on the reasons for which the

UPC/FPLC qualifies as an organisation for the purposes of article 7 of the Statute.

68. As noted in the Conviction Decision, the UPC was already in existence as a political entity before September 2000.[66] Its constituent act and statute dated 15 September 2000 refer to 'the need for democratic institutions, mention human rights, and outline that UPC members have equal rights and can be any Congolese without distinction of gender, race, ethnicity, religion or opinion'.[67] Similarly, the UPC programme 'states that the UPC stands for respect of fundamental rights and liberties, against any partition of the country'.[68] Originally named FRP and with Thomas Lubanga as one of its most prominent leaders, the organisation increased its political activity and was formally created in September 2002.[69]

69. In declarations and statements subsequent to the formal creation of the UPC, it was stated that the UPC 'was a political movement gathering all Congolese living in the north-east of the DRC […] and committed to working in favour of the well-being of the population'[70] and that 'its main concern in the short term was pacification and reconciliation in Ituri "whatever the cost"'.[71] As to its reasons for military action, the programme issued on 26 September 2002 mentioned 'a "terrorist and genocidal" coalition of APC [*Armée du Peuple Congolais*] elements from Mbusa Nywamisi's RCD-K/ML [*Rassemblement Congolais pour la Démocratie-Kisangani/Mouvement de Libération*], ADF, Nalu, Maymay and Interahamwe as an external cause of the Hema-Lendu conflict'.[72]

70. As to the military wing of the UPC, the FPLC, the Trial Chamber found that '[a]round May 2002, the emerging military wing of the UPC/FPLC began training military recruits at Mandro'.[73] It also noted that 'at the end of July 2002 it obtained weapons by air, enough to arm all of the 1800 to 2000 recruits present at that time at

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[66] Conviction Decision, para. 285.
[67] Conviction Decision, para. 285, fn. 722.
[68] Conviction Decision, para. 285, fn. 722.
[69] Conviction Decision, para. 286.
[70] Conviction Decision, para. 296.
[71] Conviction Decision, para. 299.
[72] Conviction Decision, para. 303.
[73] Conviction Decision, para. 314.

Mandro and to keep some in reserve'[74]. It was determined that '[f]rom August 2002, the emerging UPC/FPLC controlled Bunia'[75] and '[i]n early September 2002, this military group was formally established as the FPLC by UPC President Thomas Lubanga, to act as the armed wing of the UPC'.[76]

71. The Trial Chamber described in detail the characteristics of the UPC/FPLC as the organisation that implemented the policy to carry out an attack against the civilian population.[77] The UPC/FPLC was a non-State organisation that 'had a well-organised structure'.[78] This organisation was led by Thomas Lubanga and its members 'all had the same claims and motivations'.[79] It is therefore clear that the UPC/FPLC consisted of a group of people who shared common interests and motivations.

72. Furthermore, during the period relevant to the charges, the UPC/FPLC 'was a well-organised military armed group, consisted of a significant number of trained soldiers and possessed a significant arsenal of weapons, and resembled a conventional army'.[80] This organisation had both 'a formal political and military structure' and 'had divided its operation units over three geographical sectors'.[81]

73. Another factor relevant to assessing whether the UPC/FPLC had the capability of conceiving, adopting and implementing a policy to carry out a widespread or systematic attack against the civilian population relates to its activities aimed at developing its military capacity. The Trial Chamber referred in this regard to the procurement of weapons, engagement in the recruitment of a large number of new members, and the setting up of military training centres where recruits were trained in a structured manner.[82]

74. As concluded by the Trial Chamber, the above characteristics enabled the

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[74] Conviction Decision, para. 314.
[75] Conviction Decision, para. 314.
[76] Conviction Decision, para. 315.
[77] Conviction Decision, paras 675-681.
[78] Conviction Decision, para. 675.
[79] Conviction Decision, para. 676.
[80] Conviction Decision, para. 678.
[81] Conviction Decision, para. 679.
[82] Conviction Decision, para. 680.

UPC/FPLC to 'carry out large-scale military operations, lasting several weeks and including different fronts at the same time'.[83] Indeed, the UPC/FPLC was a well-structured organisation. It was precisely its hierarchical structure that made the UPC/FPLC an organisation capable of implementing a policy to carry out a widespread and systematic attack against any civilian population – in other words, an organisation within the meaning of article 7(2) of the Statute.

75. Mr Ntaganda presents arguments relating to the timing of which, in his view, the UPC/FPLC became an organisation for the purposes of article 7 of the Statute. However, the exact moment in time when the UPC/FPLC became a well-organised apparatus of power is irrelevant given that the facts of this case demonstrate that at the time relevant to the charges, it was indeed an organisation capable of carrying out a widespread or systematic attack directed against a civilian population.

76. Finally, Mr Ntaganda's attempt to suggest that there is a requirement of territorial control in order for a group to be considered an organisation is inapposite. As explained above, while the question of whether the UPC/FPLC exercised territorial control may be relevant in determining its capability to carry out a widespread or systematic attack against a civilian population, it is not a requirement *per se*. In light of the factual findings entered by the Trial Chamber, it is clear that at the time relevant to the charges, the UPC/FPLC was a well-organised structure that indeed had the ability to conceive and implement a policy to carry out a widespread or systematic attack against the civilian population. The Trial Chamber's conclusion that the UPC/FPLC was an organisation for the purpose of article 7(2) of the Statute was thus correct.

B. The meaning and nature of an organisational policy to commit an attack against the civilian population

1. Mr Ntaganda's challenge and determination in the Common Judgment

77. Mr Ntaganda argued that the Trial Chamber erred in its assessment of the evidence underpinning its finding on the existence of an organisational policy to

[83] Conviction Decision, para. 680.

commit an attack directed against a civilian population and that no reasonable trier of fact would have concluded that there was an organisational policy to commit an attack against the civilian population.[84] In particular, he: challenged the Trial Chamber's reliance on the testimony of P-0014 concerning the meeting in Kampala in June 2002, and;[85] referred to the Trial Chamber's alleged failure to consider evidence regarding the multi-ethnic composition of the UPC/FPLC,[86] evidence concerning punishment of UPC/FPLC members who committed violations,[87] and exculpatory evidence regarding the training of troops.[88]

78. In turn, the Common Judgment carefully reviewed the findings and evidence and determined that none of Mr Ntaganda's arguments had merit. In the Appeals Chamber's view, the Trial Chamber's conclusions regarding the existence of an organisational policy were reasonable.[89] In particular, the Common Judgment noted that 'the Trial Chamber's factual finding on the existence of an "organizational policy" was principally supported by its analysis of the political context of ethnic conflict in which the UPC/FPLC emerged, its objectives and organisation along ethnic lines, and the planning and execution of the military operations during which crimes were committed'.[90]

79. The Common Judgment also found that, contrary to Mr Ntaganda's contention,

> [t]he Trial Chamber was not required to establish that all the activities of the UPC/FPLC could be explained by reference to a policy to attack the civilian population or to exhaustively define the objectives, aims or policies of the UPC/FPLC as an organisation. Indeed, a single incident or operation in which multiple crimes are committed could amount to a crime against humanity provided that the relevant contextual elements are met, irrespective of the wider activities of the state or organisation concerned.[91]

80. While this Opinion agrees with the determinations of the Common Judgment, it

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[84] Mr Ntaganda's Appeal Brief – Part II, paras 108-127.
[85] Mr Ntaganda's Appeal Brief – Part II, para. 111.
[86] Mr Ntaganda's Appeal Brief – Part II, paras 112-118.
[87] Mr Ntaganda's Appeal Brief – Part II, para. 126.
[88] Corrigendum to the "Public Redacted Version of 'Defence response to CLR1 and CLR2 Observations on Defence Appeal Brief – Part II', 22 May 2020, ICC-01/04-02/06-2537Conf", 22 June 2020, ICC-01/04-02/06-2537-Red, 30 June 2020, ICC-01/04-02/06-2537-Red-Corr, para. 35.
[89] Common Judgment, paras 10 – 50.
[90] Common Judgment, para. 33.
[91] Common Judgment, para. 37.

considers it necessary, in order to evaluate the correctness of the Trial Chamber's factual assessment, to set out the proper understanding of the nature and scope of the organisational policy requirement. The ultimate aim is to strengthen the Common Judgment.

2. Legal framework and relevant juridical considerations

a. Wording of the relevant provisions

81. According to article 7(2) of the Statute, a widespread or systematic attack within the meaning of article 7(1) of the Statute 'means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, *pursuant to or in furtherance of a State or organizational policy to commit such attack*'.

82. In addition, the Introduction to Crimes against Humanity in the Elements of Crimes specifies at paragraph 3 that '[i]t is understood that "policy to commit such attack" requires that the State or organization *actively promote or encourage* such an attack against a civilian population'. The footnote to this section states that 'in exceptional circumstances [the policy may] be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack'. It then clarifies that '[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organisational action'. Given their placement in a footnote, the binding effect of these statements is, at a minimum, unclear.

83. Furthermore, the second paragraph of the Introduction to Crimes Against Humanity in the Elements of Crimes clarifies that the legal framework of the Court does not require 'proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization'.

84. According to its ordinary meaning, policy is 'a plan of action agreed or chosen by a political party, a business, etc'.[92] In French, the meaning of *politique* is '[r]easoned course of conduct, in particular of a firm or institution […]; […] [c]oncerted manner of

[92] Oxford Advanced Learner's Dictionary, available at: https://www.oxfordlearnersdictionaries.com/definition/english/policy?q=policy.

conducting a matter'.[93] In Spanish, the term *política* is defined as 'orientations or guidelines that govern the actions of a person or entity in a specific matter or field'.[94] Werle and Burghardt refer to policy as 'the guiding ideas, demands, goals and programmes of an organization'.[95]

85. Furthermore, from the wording of article 7 of the Statute, it must be concluded that the term State or organisational policy means something different than the systematic nature of the attack as otherwise it would never be possible to give effective meaning to the disjunctive formulation in article 7(1) of the Statute: widespread *or* systematic attack. Moreover, from the definitions of the term policy in English, French, and Spanish, it is possible to infer that the policy seems to refer to the manner in which a specific matter is conducted, in other words the way in which the plan of a person or group of persons is carried out.

b. Current understanding in the jurisprudence of the Court

86. Several chambers of the Court have made relevant pronouncements in relation to the nature and scope of the policy requirement. However, the jurisprudence in this regard is not uniform and has as a result often led to misunderstandings in the interpretation and application of the Rome Statute.

87. As to the question of whether the State or organisational policy need be explicitly defined, Pre-Trial Chamber I, Pre-Trial Chamber II and Pre-Trial Chamber III have noted on several occasions that this is not the case stating that 'an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion'.[96]

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[93] *See* Centre national de ressources textuelles and lexicales, "Politique", available at https://www.cnrtl.fr/definition/politicarde : '*Ligne de conduite raisonnée, en particulier d'une entreprise, d'une institution'* ("Reasoned course of conduct, in particular of a firm or institution"); *Le Grand Robert de la langue française*, "Politique", available at https://dictionnaire.lerobert.com/definition/politique : "*Manière concertée de conduire une affaire*" ("Concerted manner of conducting a matter").
[94] *See* Real Academia Española, available at: https://dle.rae.es/político#Ta2HMYR: '*Orientaciones o directrices que rigen la actuación de una persona o entidad en un asunto o campo determinado*'.
[95] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p.1155.
[96] Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on confirmation of charges, 30 September 2008, ICC-01/04-01/07-717 (the '*Katanga and Ngudjolo*

88. Furthermore, in the case of *The Prosecutor v. Germain Katanga*, the Trial Chamber found that the existence of a State or organisational policy can mostly 'be inferred by discernment of, *inter alia*, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation'.[97] It noted the unlikelihood of the adoption and dissemination of a pre-established design or plan to carry out a widespread or systematic attack against a civilian population.[98]

89. Similarly, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Trial Chamber confirmed that the 'policy' requirement does not need to be express or formalised, and held that it can be inferred from different factors.[99] It referred in this regard to the following non-exhaustive list of factors:

> (i) that the attack was planned, directed or organized; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organizational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the State or the organization condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation.[100]

90. The Trial Chamber in the case of *The Prosecutor v. Germain Katanga* went on to say that the 'policy may be part of an ongoing process whose every aspect is not always predetermined before the operation or course of conduct pursued against the targeted civilian population has commenced or even once it has started'.[101] The Trial Chamber in the same case correctly emphasised that often in those cases reaching the Court 'some aspects of the policy pursued against a civilian population will only crystallise and

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Decision on the Confirmation of Charges'), para. 396, *referring* to G. Werle (ed.), *Principles of International Criminal Law* (2005), p. 227. *See also* Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(a) and (b) of the Rome Statute on the charges of the prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424 (the '*Bemba* Decision on the Confirmation of Charges'), para. 81; *Kenyatta and Hussein Ali* Decision on the Confirmation of Charges, para. 111; *Kenya Authorisation* Decision, paras 84-88; and Pre-Trial Chamber II, *Situation in the Republic of Côte d'Ivoire*, Corrigendum to 'Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the Situation of the Republic of Côte d'Ivoire', 15 November 2011, ICC-02/11-14-Corr (the '*Côte d'Ivoire* Authorisation Decision'), para. 43.

[97] *Katanga* Conviction Decision, para. 1109.

[98] *Katanga* Conviction Decision, para. 1109.

[99] Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343 (the 'Bemba Conviction Decision'), para. 160.

[100] *Bemba* Conviction Decision, para. 160.

[101] *Katanga* Conviction Decision, para. 1110.

develop as actions are set in train and undertaken by the perpetrators'.[102] For this reason, the Trial Chamber considered that the State or organisational policy may 'become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only *in retrospect*, once the acts have been committed and in the light of the overall operation or course of conduct pursued'.[103]

91. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judges Monageng and Hofmański have correctly noted in the context of their dissent to the judgment rendered by the majority of the Appeals Chamber that the policy requirement 'may be established not only by reference to the criminal acts that make up the attack'.[104] When dealing with Mr Bemba's argument that the Trial Chamber erred in law in relying on pillage, a war crime, to prove a policy to commit an attack, the two Judges appropriately considered that in establishing the existence of a State or organisational policy to commit a widespread or systematic attack '[r]egard may also be had to broader considerations, including factors that are not criminal acts at all, for example, the organisational context in which the crimes occurred'.[105]

92. In terms of the *raison d'être* of the policy requirement, Pre-Trial Chamber I has suggested that the inclusion of the 'policy' requirement was to ensure that 'the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern'.[106] Pre-Trial chambers have also linked the policy to a regular pattern in the following terms: '[t]he requirement of 'a State or organizational policy' implies that the attack follows a regular pattern'.[107]

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[102] *Katanga* Conviction Decision, para. 1110.
[103] *Katanga* Conviction Decision, para. 1110 (emphasis in original).
[104] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, 8 June 2018, ICC-01/05-01/08-3636-Anx1-Red (A) (confidential version notified on the same day) (the '*Bemba* Dissenting Opinion to Appeal Judgment'), para. 532.
[105] *Bemba* Dissenting Opinion to Appeal Judgment, para. 532.
[106] *Katanga* and *Ngudjolo* Decision on the Confirmation of Charges, para. 396.
[107] *Bemba* Decision on the Confirmation of Charges, para. 81; *Côte d'Ivoire* Authorisation Decision, para. 43.

93. In terms of the policy requirement *vis á vis* the systematic character of the attack, Pre-Trial Chamber I indicated that

> [t]he term "systematic" has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis".[108]

94. However, this interpretation has been criticised because it is maintained that it equates the policy element with the systematic nature of the attack.[109]

95. In comparing the two distinct elements of 'systematic' and 'State or organisational policy', Pre-Trial Chamber I held that they 'both refer to a certain level of planning of the attack', noting that 'evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack'.[110] At the same time, the Pre-Trial Chamber cautioned against conflating these two terms, indicating without further elaboration that 'they serve different purposes and imply different thresholds under article 7(1) and (2)(a) of the Statute'.[111]

96. Also in relation to the systematic nature of the attack *vis á vis* the State or organisational policy pursuant to which such attack is carried out, the Trial Chamber in the case of *The Prosecutor v. Germain Katanga* stressed that the terms 'policy' and 'systematic' should not be used as synonyms, as this would ultimately mean that a widespread attack would be cast as systematic, thus contradicting article 7(1) of the Statute's disjunctive wording of a 'widespread or systematic attack'. When discussing the relation between the term 'policy' and the term 'systematic', the Trial Chamber found that '[t]o establish a "policy", it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the

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[108] *Katanga* and *Ngudjolo* Decision on the Confirmation of Charges, para. 397.
[109] R. Cryer, D. Robinson, S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (2019), p. 237.
[110] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red (the '*Gbagbo* Decision on the Confirmation of Charges'), para. 216.
[111] *Gbagbo* Decision on the Confirmation of Charges, para. 216.

systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community'.[112]

97. Pre-Trial Chamber II seems to have made a distinction between the State or organisational policy and the objective/aim of the State or organisation. The distinction was made on the basis of the wording of article 7(2)(a) of the Statute requiring that the policy be 'to commit such attack'. In the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber II held that 'the policy must be directed to commit the attack' and that, therefore, the second limb of the policy alleged by the Prosecutor in that case ('to gain power and create a uniform ODM voting block') would not be considered.[113] Interestingly, the Pre-Trial Chamber found that the second limb was 'merely political in nature and [might] not aim at committing an attack against the civilian population'.[114] It held that 'the Statute does not envisage any requirement of motive or purpose to prove that a policy to commit an attack against the civilian population exists'.[115] In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Trial Chamber confirmed that '[w]hile it may be of evidential value, the Statute does not envisage any requirement of demonstrating a "motive" or "purpose" underlying the policy to attack the civilian population'.[116]

98. Although there seem to be some divergence in the jurisprudence, the following general conclusions can be drawn: (i) a State or organisational policy to commit a widespread oy systematic attack need not be explicitly set out – it can be inferred from various factors, including the level of planning of the attack, recurrent patterns of violence, the involvement of the State or organisational forces in the commission of crimes, statements attributable to the State or organisation condoning or encouraging the commission of crimes, an underlying motivation, etc; (ii) often aspects of the policy may crystallise as the attack against the civilian population is underway - the definition of the overall policy may only be possible*in retrospect*, once the acts have been

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[112] *Katanga* Conviction Decision, paras 1111-1113.
[113] Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 (the '*Ruto et al.* Decision on the Confirmation of Charges'), paras 212-213.
[114] *Ruto et al.* Decision on the Confirmation of Charges, para. 213.
[115] *Ruto et al.* Decision on the Confirmation of Charges, para. 213.
[116] *Bemba* Conviction Decision, para. 159.

committed and in the light of the overall operation or course of conduct pursued; (iii) the policy requirement must be assessed in relation to the attack as a whole as a opposed to considering it with respect to separate acts, or 'incidents'; (iv) the policy requirement ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised; (v) while evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, these two terms should not be conflated as they serve different purposes and imply different thresholds under article 7(1) and (2)(a) of the Statute; and (vi) a distinction must be made between the policy and the aim/objective/purpose of the State or organisation - while it may be of evidential value, the Statute does not envisage any requirement of demonstrating a purpose underlying the policy to attack the civilian population.

c. Customary Law

99. This Opinion notes that the customary law status of the policy element is hotly debated. On the first occasion that crimes against humanity were formally laid out, that is in the Nuremberg Charter of 1945, they were enumerated as acts: 'committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.[117] Although the Charter did not explicitly refer to a policy requirement for the configuration of the crime, the Nuremberg Tribunal referred to a 'policy of terror' in its description of the crimes that had been committed in the cases before it:

> With regard to Crimes Against Humanity, there is no doubt whatever that political

[117] United Nations, article 6(c) of the Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 United Nations Treaty Series 279. A similar definition was adopted in United Nations, article 6(c) of the Charter of the International Military Tribunal for the Far East, 19 January 1946 (amended 26 April 1946), TIAS No. 1589: 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated' and Control Council for Germany, article 2(1)(c) of Allied Control Council Law No. 10, Official Gazette, 31 January 1946: 'Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'

> opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale and in many cases was organized and systematic.[118]

100. In 1950, in its adoption of the Nuremberg Principles, the International Law Commission (the 'ILC') attempted to adopt an internationalizing factor in its definition of crimes against humanity by requiring a link between such acts and war crimes or crimes against peace.[119] Similarly, the first version of the ILC's Draft Code of Offences against the Peace and Security of Mankind required that such acts be committed 'in execution of or in connexion with other offences defined in this article'.[120] The requirement of a link between crimes against humanity and other crimes under international law did not ultimately appear in the first Draft Code of Offences against the Peace and Security of Mankind of 1954.[121] However, article 2(11) did require that the acts committed against any civilian population be 'at the instigation or with the toleration of [the authorities of a State or private individuals]'.[122]

101. The draft presented by the Special-Rapporteur on the Draft Code in 1989 contained a number of factors or criteria which distinguished crimes against humanity from ordinary crimes, including their 'mass or systematic nature'.[123] The Commentary on the draft emphasised that an individual act committed against a single person may constitute a crime against humanity where it constitutes a link in a chain and is part of a system or plan: '[t]he notion of system, plan and repetitiveness is necessary in order to categorize an act committed against an individual victim as a crime against

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[118] International Military Tribunal, *International Military Tribunal v. Martin Borman et al.*, Judgment, 1 October 1946, pp. 80, 468.
[119] ILC, principle VI(c) of the International Law Commission Report on Principles of the Nuremberg Tribunal, Report of the International Law Commission covering its second session, 5 June-29 July 1950, 29 July 1950, A/CN.4/34, p. 377: acts constituted crimes against humanity 'when such acts are done or such persecutions are carried out in execution of or in connexion with any crime against peace or any war crime'.
[120] ILC, article 2(10) of the Draft Code of Offences against the Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, 27 July 1951, A/CN.4/SER.A/1951/Add.l, p. 136.
[121] ILC, Draft Code of Offences against the Peace and Security of Mankind, 28 July 1954.
[122] ILC, article 2(11) of the Draft Code of Offences against the Peace and Security of Mankind, 28 July 1954.
[123] ILC, article 14 of the Draft Code of Crimes against the Peace and Security of Mankind,Yearbook of the International Law Commission Volume II, Part I, 21 July 1989, A/CN.4/SER.A/1989/Add.I (Part 1), p. 88.

humanity'.[124] Following this example, the 1991 Draft Code of Crimes against the Peace and Security of Mankind introduced the requirement that the violations be committed on a systematic or mass scale in relation to some of the criminalised acts.[125] The commentary indicated that '[t]he systematic element relates to a constant practice or to a methodical plan to carry out such violations'.[126]

102. The 1996 ILC Draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be 'instigated or directed by a Government or by any organization or group'.[127] The commission explained that this requirement was

> intended to exclude the situation in which an individual commits an inhumane act whilst acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or an organisation […] The instigation or direction of a Government or any group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of the State.[128]

103. Some have argued that the policy requirement does not form part of customary international law as (i) no international instrument before or after the Rome Statute has adopted such a requirement; (ii) national judgments that seem to offer support for the existence of such a requirement are either based on interpretations of national legislation and/or simply incorrect statements of international law; and (iii) that the jurisprudence of the ICTY and ICTR, which mistakenly read a policy requirement into the definition of crimes against humanity based on examples of conduct prosecuted, has

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[124] ILC, article 14 of the Draft Code of Crimes against the Peace and Security of Mankind,Yearbook of the International Law Commission Volume II, Part I, 21 July 1989, A/CN.4/SER.A/1989/Add.I (Part 1), p. 89, paras 60-67.
[125] ILC, article 21 of the Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, Part II, 19 July 1991, A/CN.4/SER.A/1991/Add.l (Part 2), p. 103.
[126] ILC, article 21 of the Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, Part II, 19 July 1991, A/CN.4/SER.A/1991/Add.l (Part 2), p. 103.
[127] ILC, article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, Part II, 26 July 1996, A/CN.4/Ser.A/1996/Add.1 (Part 2), p. 47.
[128] ILC, article 18 of the Draft Code of Crimes against Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, Part II, 26 July 1996, A/CN.4/Ser.A/1996/Add.1 (Part 2), p. 47.

since been firmly rejected.[129]

104. Some scholars regarded the State or organisational policy as a required element prior to the 1990s. This was then recognized in the *Tadić* Trial Judgment, as explained below, and in the Rome Statute as well as the 1991 and 1996 ILC Draft Codes of Crimes against the Peace and Security of Mankind. However, the customary law status of the policy element remains controversial. Its controversial character warrants a cautious interpretation of this element, as imposing a minimum threshold that aims at excluding ordinary crimes from the international realm.

d. Definitions and scope in other international tribunals

105. This Opinion notes that, with the exception of the Rome Statute, the Statutes of other international tribunals do not explicitly refer to the State or organisational policy requirement. Article 5 of the Statute of the ICTY covers crimes against humanity 'committed in armed conflict, whether international or internal in character, and directed against any civilian population'.[130] It is noteworthy that the 1993 Report of the UN Secretary-General concerning the establishment of the ICTY stated that '[c]rimes against humanity refer to inhumane acts of a very serious nature […] committed as part of a widespread or systematic attack against any civilian population'.[131]

106. While article 3 of the Statute of the ICTR does not refer to a State or organisational policy, it does introduce for the first time the requirement of a widespread or systematic attack specifying that crimes against humanity must be 'committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'.[132]

107. Similarly, both the Extraordinary Chambers in the Court of Cambodia ('ECCC') and the Special Court for Sierra Leone ('SCSL') refer to crimes against humanity as acts or crimes committed as part of a widespread or systematic attack against any

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[129] R. Dixon, 'Article 7 Crimes against Humanity, para 1 'Chapeau'' (revised by C. Hall) in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2008), pp. 235-236.
[130] Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.
[131] United Nations Security Council, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993, U.N. Doc. S/25704/Add.1, paras 47-48.
[132] Article 3 of the Statute of the International Criminal Tribunal for Rwanda.

civilian population.[133]

108. In its early jurisprudence, the *ad hoc* tribunals considered that the policy element was a constitutive element of crimes against humanity.[134] This requirement was abandoned by the ICTY Appeals Chamber in *The Prosecutor v. Kunarac et al.*, which held that neither the attack nor the acts of the accused need to be supported by any form of 'policy' or 'plan'.[135] Nevertheless, early ICTY decisions offer helpful guidance on the interpretation of the policy requirement.

109. In its judgment in *The Prosecutor v. Dusko Tadić*, the ICTY Trial Chamber employed the term 'policy' to explain the idea that an attack is not composed of 'isolated, random acts of individuals',[136] and 'cannot be the work of isolated individuals alone'.[137] The *Tadić* judgment equated the policy element with the above-mentioned requirement recognized by the ILC in the 1996 Draft Code of Crimes, that an attack does not consist of individuals acting on their own initiatives.[138] In its reasoning, the ICTY Trial Chamber held that

> the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not

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[133] Cambodia, National Assembly, article 5 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, 27 October 2004: 'Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds'; United Nations, article 2 of the Statute of the Special Court for Sierra Leone, 14 August 2000: 'The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population'.

[134] *See e.g.* *Tadić* Trial Judgment, para. 653; ICTR, Trial Chamber I, *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, ICTR-96-4-T (the '*Akayesu* Trial Judgement'), para. 580; ICTR, Trial Chamber I, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgement and Sentence, 6 December 1999, ICTR-96-3-T (the '*Rutaganda* Trial Judgment'), para. 69; ICTR, Trial Chamber I, *The Prosecutor v. Alfred Musema*, Judgement and Sentence, 27 January 2000, ICTR-96-13-A (the '*Musema* Trial Judgment'), para. 204; ICTR, Trial Chamber II, *The* Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement, 21 May 1999, ICTR-95-1-T (the ''), paras 123-125, 581.

[135] ICTY, Appeals Chamber, *The Prosecutor v. Dragoljub Kunarac et al.*, Judgement, 12 June 2002, IT-96-23 & IT-96-23/1-A (the '*Kunarac et al.* Appeal Judgment'), para. 98. This conclusion was then endorsed, *inter alia*, in ICTY, Trial Chamber II, *The Prosecutor v. Mitar Vasiljević*, Judgement, 29 November 2002, IT-98-32-T, para. 36; ICTY, Trial Chamber, *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, 31 March 2003, IT-98-34-T, para. 234; ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, Judgement and Sentence, 15 May 2003, ICTR-97-20-T (the '*Semanza* Trial Judgement'), para. 329.

[136] *Tadić* Trial Judgment, para. 653.

[137] *Tadić* Trial Judgment, para. 655.

[138] *Tadić* Trial Judgment, para. 655.

> isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population.[139]

110. In the same decision, the ICTY Trial Chamber noted that the policy need not be formalised and 'can be deduced from the way in which the acts occur'.[140] Other cases subsequently affirmed that the policy does not need to be explicitly formulated[141] and that it does not need to be conceived at the highest levels.[142] In its decision in *The Prosecutor v. Tihomir Blaškić*, the ICTY Trial Chamber affirmed that '[t]his plan, however, need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events'.[143] It further listed factors from which one could deduce a policy, including *inter alia* repetition of the acts, the scale of the acts, and overall political background.[144]

111. Similarly, the ICTR adopted the policy requirement. In the case of *The Prosecutor v. Clément Kayishema et al.*, the ICTR Trial Chamber held that 'the policy element demands a showing that the crimes were instigated by a government or by an organisation or group'.[145] ICTR cases have consistently affirmed that the policy need not be adopted formally and that all that is required is some 'preconceived' plan or policy.[146]

112. Furthermore, the SCSL has inferred the policy from the manner in which acts took place. By way of example, in the case of *The Prosecutor v. Moinina Fofana et al.*, it held that '[i]n view of these findings of fact, taken as a whole, the Appeals Chamber is of the view that the criminal conduct against those civilians was neither random nor isolated acts but was rather perpetrated pursuant to a common pattern of targeting the

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[139] *Tadić* Trial Judgment, para. 653.
[140] *Tadić* Trial Judgment, para. 653.
[141] *See e.g. Kupreškić et al.* Trial Judgment, para. 551; ICTY, Trial Chamber, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, 26 February 2001, IT-95-14/2-T, para. 181.
[142] ICTY, Trial Chamber, *The Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, IT-95-14-T (the '*Blaškić* Trial Judgment'), para. 205.
[143] *Blaškić* Trial Judgment, para. 204.
[144] *Blaškić* Trial Judgment, para 204.
[145] *Kayishema et al.* Trial Judgment, para. 581.
[146] *See e.g. Akayesu* Trial Judgment, para. 508; *Rutaganda* Trial Judgment, para. 68; *Musema* Trial Judgment, para. 204.

civilian population'.[147]

113. As noted above, this jurisprudence changed with a judgment rendered by the ICTY Appeals Chamber in the case of *The Prosecutor v. Dragoljub Kunarac*. In this regard, the ICTY Appeals Chamber found that there is nothing in the ICTY Statute or customary international law that requires proof of a plan or policy to commit a crime against humanity.[148] The relevant footnote reads as follows:

> There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. […] Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied […]. Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element [Footnotes omitted].[149]

114. This position was then followed by the ICTR and the SCSL, despite these courts having ruled differently before.[150] Schabas disagrees with the position taken in the ICTY Appeals Chamber in the *Kunarac* case that there is no requirement of a policy with respect to crimes against humanity under customary international law. He argues that the references cited by the ICTY Appeals Chamber in support of its position do not actually bolster its conclusions and that relevant authorities suggesting the contrary, notably article 7(2)(a) of the Rome Statute, are ignored completely. He highlights the strong policy concerns about an open-ended definition of crimes against humanity that can extend to virtually everything except isolated crimes committed by individuals, which, in his view, would deter States from accepting the jurisdiction of the Court.[151]

115. From the above, it is possible to conclude that despite the controversy

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[147] SCSL, Appeals Chamber, *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgement, 28 May 2008, SCSL-04-14-A (the '*Fofana and Kondewa* Appeal Judgment'), para. 307.
[148] *Kunarac et al.* Appeal Judgment, para. 98.
[149] *Kunarac et al.* Appeal Judgment, fn 114.
[150] *See e.g.* *Semanza* Trial Judgment, para. 329 (following *Kunarac et al.* Appeal Judgment); *Fofana and Kondewa* Appeal Judgment (following *Kunarac et al.* Appeal Judgement); Extraordinary Chambers in the Courts of Cambodia, Appeals Chamber, *The Prosecutor v. Nuon Chea and Khieu Samphan*, Appeal Judgement, 23 November 2016, 002/19-09-2007-ECCC/SC, paras 722 et seq.
[151] W. Schabas (ed.), *The International Criminal Court*: *A Commentary on the Rome Statute* (2010), pp. 151-152.

surrounding the position adopted by the ICTY Appeals Chamber rejecting the proposition that a State or organisational policy is a constitutive element of crimes against humanity, early jurisprudence of the *ad hoc* and other international tribunals provides useful guidance and is aligned with the interpretation generally made in cases before the Court. In essence, the interpretation made in other international tribunals confirms that: (i) the policy requirement aims at excluding isolated, random acts of individuals from the realm of crimes against humanity; (ii) the policy need not be formalised and can be inferred from the way in which the acts occur; (iii) it does not need to be conceived at the highest levels; and (iv) factors to be considered in determining whether acts were carried further to a State or organisational policy may include the repetition of the acts, the scale of the acts, and overall political background.

e. Evolution and drafting history of article 7 of the Statute

116. The major stumbling block during the drafting of the crimes against humanity section was the 'threshold' for crimes against humanity, meaning the conditions, which distinguish crimes against humanity from ordinary domestic crimes.[152]

117. The 1994 Report of the ILC adopted the same contextual elements for crimes against humanity as the ICTY Statute, covering crimes 'committed in armed conflict, whether international or internal in character, and directed against any civilian population'.[153] This formulation was compared to article 21 of the Draft Code of Crimes against the Peace and Security of Mankind, entitled 'Systematic or mass violations of human rights', where a requirement was explicitly set out that the violations occur in a systematic manner or on a mass scale.[154]

118. The ILC emphasised its understanding that the definition of crimes against humanity encompasses 'inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part'. It was specified that the term 'directed against any civilian population' should be taken

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[152] D. Robinson, 'The context of crimes against humanity' in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 60.
[153] ILC, Report of the International Law Commission on the work of its forty-sixth session, 22 July 1994, A/49/10.
[154] ILC, Report of the International Law Commission on the work of its forty-sixth session, 22 July 1994, A/49/10, p. 76.

to refer to 'acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds'.[155]

119. The 1995 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court suggested that crimes against humanity should be subject to further qualification. It was observed that the crimes usually involved a widespread or systematic attack against the civilian population rather than isolated offences.[156] Support for the view could be found in the ILC 1996 Draft Code of Crimes, which also included the alternative requirements of widespread or systematic attack in its definition of 'Systematic or mass violations of human rights'. The ILC explained that 'systematic manner' means 'pursuant to a preconceived plan or policy'.[157] The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy'.[158]

120. The Preparatory Committee on the Establishment of an International Criminal Court ('Preparatory Committee') again emphasised the importance of establishing general criteria to distinguish crimes against humanity from ordinary crimes under national law. In this regard, there was broad support for the inclusion of the widespread or systematic criteria to underline the scale and magnitude of the offences, although there was some divergence as to whether they should be cumulative ('widespread and systematic') or alternative ('widespread or systematic').[159]

121. The following alternatives were suggested:

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[155] ILC, Report of the International Law Commission on the work of its forty-sixth session, 22 July 1994, A/49/10, p. 76.
[156] UN General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 1995, A/50/22, pp. 16-17.
[157] Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session, Yearbook of the International Law Commission, 1996, vol. II (Part Two), p. 47.
[158] ILC, article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission Volume II, Part II, 26 July 1996, A/CN.4/Ser.A/1996/Add.1 (Part 2), p. 47.
[159] United Nations General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court , Volume II (Compilation of Proposals), 14 September 1996, A/51/22[VOL-II](SUPP).

> an element of planning, policy, conspiracy or organization; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts committed as part of a policy, plan or conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes.[160]

122. Proposals to further qualify the 'widespread or systematic' criteria included reference to:

> widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law; acts committed systematically or as part of a public policy against a segment of the civilian population; acts committed in application of a concerted plan to indicate the necessary degree of intent, concert or planning; acts committed with the consent of a Government or of a party in control of territory; and exceptionally serious crimes of international concern to exclude minor offences.[161]

123. Among the proposed elements of the definition of crimes against humanity, some delegations included a nexus to an armed conflict and discriminatory motive. In its 1997 proceedings, the Preparatory Committee's Working Group on the Definition of Crimes retained both the war nexus and the discriminatory motive as optional elements of the offense:

> For the purpose of the present Statute, any of the following acts constitutes a crime against humanity when committed
>
> [as part of a widespread [and] [or] systematic commission of such acts against any population];
>
> [as part of a widespread [and] [or] systematic attack against any [civilian population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds:] (a) murder ....].[162]

124. At the third and fourth meetings of the Committee of the Whole, on 17 June 1998,

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[160] United Nations General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), 14 September 1996, A/51/22[VOL-I](SUPP), para. 85.
[161] United Nations General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), 14 September 1996, A/51/22[VOL-I](SUPP), para. 85.
[162] United Nations General Assembly, United Nations Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from February 11 to 21, 1997, 12 March 1997, A/AC.249/1997/L.5, p. 4.

it was clear that deep division remained about the use of 'widespread and systematic' or 'widespread or systematic'.[163] Although the majority of delegations were in favour of the 'widespread or systematic' option, notable opponents were the five permanent members of the Security Council. The U.K. delegation insisted that '[t]he reference in the chapeau to widespread and systematic commission of the acts concerned was extremely important' in order to 'distinguish individual acts of murder from the kinds of acts referred to'.[164]

125. On 1 July 1998, the Canadian delegation made the following informal proposal, based explicitly on the *Tadić* precedent referred to above, as a concession to obtain the agreement of Britain, France and the United States to the 'widespread or systematic' formulation: '[f]or the purpose of the present statute, a crime against humanity means any of the following acts when knowingly committed as a part of a widespread or systematic attack directed against any civilian population'.[165] It explained that an 'attack directed against any civilian population' means 'a course of conduct involving the commission of multiple acts […] directed against any civilian population *pursuant to or in furtherance of a governmental or organizational policy to commit those acts*'.[166]

126. A proposal submitted by Canada and Germany contained the following qualification of article 7(2)(a) of the Statute: '[t]he existence of a policy may be inferred on the basis of the available evidence as to the facts and circumstances. It is not necessary to prove that a policy has been formally adopted'.[167] The express clarification that 'it is not necessary to prove that a policy has been formally adopted' was eliminated

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[163] United Nations General Assembly, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court – Official Records, Volume II, 17 June 1998, A/CONF.183/13 (Vol. II).
[164] United Nations General Assembly, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court – Official Records, Volume II, 17 June 1998, A/CONF.183/13 (Vol. II), p. 150.
[165] H. von Hebel and D. Robinson, 'Crimes within the jurisdiction of the Court' in R.S. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 98.
[166] H. von Hebel and D. Robinson, 'Crimes within the jurisdiction of the Court' in R. S. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 95 (emphasis added).
[167] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal submitted by Canada and Germany on article 7, 23 November 1999, PCNICC/1999/WGEC/DP.36, p. 2.

from the draft text as it was felt that this point was sufficiently well-established.[168] Similarly, the affirmation that 'the existence of a policy may be inferred on the basis of the available evidence as to the facts and circumstances' was omitted as it was deemed unnecessary and potentially unwise to instruct the judges as to when they could make evidentiary inferences.[169]

127. A further compromise was reached to insert a requirement that some form of action on the part of the state or organisation to promote or encourage the criminal conduct was necessary to satisfy the policy element, a solution which was also appealing to states with concerns about the threshold requirements of crimes against humanity.[170] Switzerland made the following proposal: '[i]n general, a policy would be implemented by State or organizational action. A policy may, however, in some circumstances be implemented by inaction which is deliberately aimed at encouraging such attack'. Faced with continued opposition to the draft text, the sub-coordinator suggested including the action requirement but adding a footnote formulated along the lines of the Swiss proposal. Ultimately, additional qualifiers were insisted upon so that the footnote reads: '[…]Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack'. Turkey and other states sought the insertion of the final sentence, '[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational action', which emphasises that a policy cannot be inferred from inaction alone; the circumstances must also indicate that the inaction is intended to encourage the crimes.[171]

128. Considering the drafting history of the Statute, it is clear that the drafters intended to make the 'State or organisational policy' a separate element of crimes against humanity. In fact, this was a compromise reached in order for the contextual elements

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[168] D. Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 77.
[169] D. Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 77.
[170] D. Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 66-67.
[171] D. Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 76.

'widespread' and 'systematic' to be disjunctive rather than conjunctive.[172] Yet, it is clear that the rationale underlying its inclusion was to 'exclude from the realm of crimes against humanity spontaneous criminal occurrences' and 'help distinguish between what is of concern to the international community on the one hand and, on the other, the sort of crimes that should remain the exclusive concern of domestic jurisdictions'.[173] Furthermore, from the drafting history, it is possible to conclude that the drafters felt that it was unnecessary to specify that the policy need not be formalised and/or that it could be inferred from relevant circumstances.

f. Academic debate

129. The notion of State or organisational policy to commit a widespread or systematic attack directed against a civilian population has been discussed at length by experts and academics.

130. In terms of distinguishing the policy element from the systematic nature of the attack, Mettraux has observed that '[t]o keep these two notions normatively distinct, it is […] important to treat one (the policy) as the cause of the other (a systematic attack against a civilian population) and to treat the former as an overarching element of the criminality of concern and the latter as reflecting the result of the implementation of that policy'.[174] The ILC has differentiated these concepts as follows: 'while "systematic" refers to a repetitive scheme of acts with similar features, the "policy" requirement points more toward such acts being intended as a collective attack on the civilian population'.[175]

131. Robinson has equally attempted to distinguish the concepts of policy and systematic by noting that they are not equivalent. In his view, '"[p]olicy" does not

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[172] D. Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' in *93 The American Journal of International Law* (1999), p. 47; R. Cryer, D. Robinson, and S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (2019), p. 234. *See also* ILC, Report of the International Law Commission on the work of its seventy-first session, 29 April–7 June and 8 July–9 August 2019, 9 August 2019, UN Doc. A/74/10, pp. 31-32.
[173] G. Mettraux, *International Crimes: Law and Practice: Volume II: Crimes Against Humanity* (2020), p. 292.
[174] G. Mettraux, *International Crimes: Law and Practice: Volume II: Crimes Against Humanity* (2020), p. 304.
[175] ILC, First Report on Crimes Against Humanity by Sean D. Murphy, Special Rapporteur, 17 February 2015, UN Doc. A/CN.4/680, para. 143.

necessarily require deliberate planning, direction or orchestration; it requires only that some state or organization must have at least encouraged the attack, either actively or passively'.[176] In this regard, he has argued that the term 'systematic' requires 'a very high degree of organization or orchestration, and has been interpreted by the ICTR as meaning "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources"'.[177] In contrast, the policy requirement is much more flexible.

132. In a similar vein, DeGuzman states that '[s]ince the ICC Statute requires *either* widespread *or* systematic action for crimes against humanity, the policy element cannot be interpreted as the equivalent of systematicity' as such interpretation 'would violate the presumption that no statutory provision is superfluous'.[178] In her view, this warrants an interpretation of policy whereby it 'need not involve systematic planning or action, nor must it involve articulated premeditation. Instead, the policy element should be defined as requiring merely a "course of action, guiding principle, or procedure" associated with some entity beyond the individual perpetrator'.[179]

133. The same goes for Cryer and others, who observe that '[f]or those jurisdictions that apply a policy element, this harmonization would require that the policy element be appropriately interpreted as a minimalist threshold excluding random action, in accordance with the previous jurisprudence'.[180] A similar view is expressed by Hwang who, on the basis of the drafting history of article 7(2) of the Statute argues that

> In construing the "policy" requirement, the future ICC should keep in mind that the importance of this element, as understood by the ILC and the ICTY, is not to demonstrate systematicity, but to establish some degree of State or organizational involvement in acts of crimes against humanity. Accordingly, the ICC should

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[176] D. Robinson, 'The Draft Convention on Crimes Against Humanity: what to do with the definition?' in M. Bergsmo and Song T. (eds.), *On the Proposed Crimes against Humanity Convention* (2014), p. 107.
[177] D. Robinson, 'The Draft Convention on Crimes Against Humanity: what to do with the definition?' in M. Bergsmo and Song T. (eds.), *On the Proposed Crimes against Humanity Convention* (2014), p. 50, *citing* *Akayesu* Trial Judgment.
[178] M. M. deGuzman, 'The road from Rome: the developing law of crimes against humanity' in *22 Human Rights Quarterly* (2000), p. 374 (emphasis in original).
[179] M. M. deGuzman, 'The road from Rome: the developing law of crimes against humanity' in *22 Human Rights Quarterly* (2000), p. 374.
[180] R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Procedure* (2007), p. 198.

> follow the interpretation of the ICTY and be willing to infer policy from the way acts are committed, rather than insist upon proof of a formalized policy. This approach would be consistent not only with contemporary international law, but also with the intent of the delegates at the Rome Conference who clearly sought to incorporate the widespread and systematic criteria as alternative components. […]
>
> Article 7 defines the requisite policy as the "policy to commit such an attack." This general formulation is an improvement on the policies previously articulated by national courts or the ICTY. Requiring the establishment of a specific, narrowly defined policy, such as a policy to impose political hegemony, to discriminate, or to commit particular acts would have unduly constrained the future ICC prosecutor in seeking justice for crimes against humanity.[181]

134. Jalloh also shares the view that the 'policy' threshold should be rather low, stating that greater interpretative flexibility should be afforded to ICC judges 'by lowering the threshold of what constitutes an *organization* as far down as possible, in the same way that we would lower the threshold required to find that a *policy* is in place'.[182]

135. As to the purpose of the policy element, there seems to be agreement among the academics that it seeks to screen out acts of individuals on their own carrying out unconnected criminal activities.[183] Robinson states in this regard that

> [t]he policy element of crimes against humanity—the underlying direction, instigation or encouragement by a State or organization—is what unites otherwise unrelated inhumane acts, so that they may be accurately described as an 'attack,' considered collectively, rather than a mere crime wave or other domestic criminal behavior. This is what elevates crimes of individuals to the international sphere of concern.[184]

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[181] P. Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court' in *22 Fordham International Law Journal* (1998), pp. 503-504.
[182] C. C. Jalloh, 'What makes a crime against humanity a crime against humanity?' in *28 American University International Law Review* (2013), p. 432 (emphasis in original).
[183] *See* D. Robinson, 'The Draft Convention on Crimes Against Humanity: what to do with the definition?' in M. Bergsmo, T. Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014), p. 107; Sadat mentions that the 'policy' element was added last minute to article 7 of the Statute to reassure states that random or isolated acts would not be prosecuted as crimes against humanity by the Court (L.N. Sadat, 'Crimes against humanity in the modern age' in *107 American Journal of International Law* (2013), pp. 371, 377); Chesterman also seems to be of this view, stating that the policy requirement basically reiterates the position that isolated and random acts cannot amount to crimes against humanity (S. Chesterman, 'An altogether different order: defining the elements of crimes against humanity' in *10 Duke Journal of Comparative and International Law* (2000), p. 316).
[184] D. Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee (ed.), *The International Criminal Court: elements of crimes and rules of procedure and evidence* (2001), p. 64.

136. There also seems to be broad agreement that the State or organisational policy to commit an attack against any civilian population need not be expressly stated or formalised, need not involve the highest levels of a state or organisation and may be inferred from the manner in which the acts occur and from the implausibility of coincidental occurrence.[185] Cryer, Friman, Robinson and Wilmshurst add that not only does the policy need not be formally adopted, it is also unnecessary to state it clearly and precisely.[186]

137. It is also maintained by scholars that there may be occasions when a policy may be manifested by a deliberate failure to act which is consciously aimed at encouraging an attack.[187] It has been stated in this regard that it is not required to show action by a State or organisation – explicit or implicit approval or endorsement as well as inaction designed to encourage the crimes would also suffice.[188]

138. On the basis of the debate between active conduct and mere inaction or toleration of atrocities, Ambos seems to opt for a rather broad interpretation of 'policy' as well, stating that this old debate

> reflected in the contradictory wording of the Elements of Crimes and a corresponding footnote, discussed elsewhere, must be decided in favour of a broad interpretation of the policy concept. Given its contested status in customary international law and the general meaning of 'policy' inaction, toleration or acquiescence of the face of CAH must be considered sufficient.[189]

139. Ambos makes an interesting distinction between the action or inaction by linking them to the nature of the attack (widespread or systematic). He maintains that while in

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[185] *See* D. Robinson, 'The Draft Convention on Crimes Against Humanity: what to do with the definition?' in M. Bergsmo and Song T. (eds.), *On the Proposed Crimes against Humanity Convention* (2014), p. 107; R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Procedure*, 1st Ed. (Cambridge: CUP, 2007), p. 198; G. Werle and F. Jeβberger, *Principles of International Criminal Law* (2014), p. 342.

[186] R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Procedure* (2007), p. 198; K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity' in *13 Criminal Law Forum* (2002), pp. 27-28.

[187] D. Robinson, 'The Draft Convention on Crimes Against Humanity: what to do with the definition?' in M. Bergsmo and Song T. (eds.), *On the Proposed Crimes against Humanity Convention* (2014), p. 107.

[188] R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Procedure* (2007), p. 198.

[189] K. Ambos, 'Crimes against humanity and the International Criminal Court' in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2011), p. 286.

the case of a systematic attack 'a certain guidance of the individual perpetrators with regard to the prospective victims may be typical, a widespread attack that is not at the same time systematic will very often be accompanied by a policy only consisting of deliberate inaction, toleration, or acquiescence'.[190]

140. Ambos and Wirth explain how an attack could be widespread, but not organised or planned and still be found to be the object of a policy in the following terms:

> The only solution to this problem is to accept that a policy can also consist in the deliberate denial of protection for the victims of widespread but unsystematic crimes, i.e., in the tolerance of these crimes. This can be the case, for example, if a government consciously refrains from putting a stop to the activity of criminals who, on a very large scale, kill the inhabitants in a certain area to gain easier access to its natural resources. The government's motive for inaction could be that these persons, at the same time, oppose the government's politics. In such a case the government would be content that someone else is doing the "dirty work". Another example – more relevant for East Timor – would be that small groups of unorganised militia carry out small uncoordinated missions which, however, viewed in their totality, involve sufficient victims to qualify as widespread. If this conduct were in line with the intentions of the government or the *de facto* power in the territory and would, therefore, remain unopposed (i.e., tolerated), the policy not to oppose the attacks would meet the requirements of the policy element. According to the view of the authors, it would therefore not be necessary to prove that such militia were actively supported or instructed by a state or organisation (as may be the case in East Timor). However, if it could be proven, the active support would render the attack a systematic one.[191]

This Opinion agrees with the above-mentioned scholars that there may indeed be situations in which widespread attacks are not carried out in a systematic way and yet are committed pursuant to, or in furtherance of, a State or organisational policy to carry them out.

141. The authors acknowledge that there may be some inconsistency between their view and the requirement in the Elements of Crimes that the State or organisation 'actively promote or encourage' the attack. However, they consider that the requirement of 'active promotion or encouragement' is either vitiated by the contradictory footnote,

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[190] K. Ambos, 'Crimes against humanity and the International Criminal Court' in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2011), p. 286.
[191] K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity' in *13 Criminal Law Forum* (2002), pp. 31-32.

or has no legal effect 'because it is inconsistent with the Statute and therefore legally void'.[192] Regarding the latter proposition, they consider that to require an 'active policy' for crimes against humanity would duplicate the requirement under the Statute that the attack be systematic and disregard the Statute's disjunctive possibility that an attack be widespread or systematic.[193]

142. Werle agrees that the Elements of Crimes 'are too narrow in requiring that the state or organization "actively" promote or encourage the attack on the civilian population' and that the 'text of the Statute gives no cause for such a limitation'.[194] In his view, the 'policy of a state or organization can consist of taking a leading role in commission of the crime, but also in actively promoting the crime or in merely tolerating it'.[195]

143. A proponent of the inclusion of the policy requirement, William Schabas expresses the view that:

> Concerns that requiring a State policy will leave a so-called impunity gap are misplaced. Most so-called non-State actors find themselves more than adequately challenged by various national justice systems. The needs in prosecution are not a broadening of the definitions of international crimes, but rather a strengthening of international judicial cooperation mechanisms so as to facilitate bringing offenders to book for "ordinary" crimes. Mainly, it is when perpetrators commit heinous acts precisely because they are acting on behalf of a State, and in pursuit of its policies that we require international justice to step in. Insisting that the policy be an element of the crime clarifies the reality of this special form of criminality and facilitates its distinction.[196]

144. Interestingly, Cryer, Friman, Robinson and Wilmshurst referred to the dispute between the proponents and opponents of the policy requirement to note that the result is the same for both:

> The controversy over whether the policy element is required may in fact be a

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[192] K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity' in *13 Criminal Law Forum* (2002), p. 33.
[193] K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity' in *13 Criminal Law Forum* (2002), p. 33.
[194] G. Werle and F. Jeβberger, *Principles of International Criminal Law* (2014), p. 345.
[195] G. Werle and F. Jeβberger, *Principles of International Criminal Law* (2014), p. 345.
[196] W. A. Schabas, 'State Policy as an Element of International Crimes' in *98 Journal of Criminal Law and Criminology* (2008), p. 982.

> product of disagreement about what the element *means*. If that is the case, then the split authorities seem to reflect two routes (in form) to the same destination (in substance). On one route, the term 'policy' is rejected, but it is implicit that random criminality of individuals does not amount to an 'attack'. On the other route, the policy element *is* a requirement, but as noted by various commentators, it stands for the very same proposition: indeed, the necessary logical corollary of excluding isolated individual acts is to require some instigation or encouragement by something *other than* individuals, namely a State or organization.[197]

145. From the above academic debate, it is possible to draw the following conclusions: (i) the policy element must be appropriately interpreted as a minimum threshold aimed at excluding random action; (ii) a higher threshold would risk equating this element with the systematic nature of the attack; (iii) a State or organisational policy need not be expressly stated or formalised, need not involve the highest levels of a State or organisation and may be inferred from the manner in which the acts occur and from the implausibility of coincidental occurrence; and (iv) while in the case of a systematic attack the action of the perpetrators in the form of certain guidance with regard to the prospective victims may be typical, a widespread attack that is not at the same time systematic will very often be accompanied by a policy only consisting of deliberate inaction, toleration, or acquiescence – for the purposes of establishing the policy requirement this would suffice.

g. Interpretation in the light of object and purpose

146. The provisions contained in the Rome Statute must, as the provisions of any other treaty, be interpreted in the light of its object and purpose. The object and purpose of the Rome Statute is set out in crystal clear terms in the preamble: 'the most serious crimes of concern to the international community as a whole must not go unpunished and […] their effective prosecution must be ensured'; the preamble further emphasises the determination 'to put an end to impunity for the perpetrators of these crimes and thus […] contribute to the prevention of such crimes'.

147. When interpreted in light of the object and purpose of the Statute, the State or organisational policy requirement set out in article 7(2) constitutes a minimum threshold aimed at excluding criminality that does not qualify as 'the most serious crimes of concern to the international community'. Indeed, a different interpretation

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[197] R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Procedure* (2007), pp. 197-198.

would in effect risk defeating the object and purpose of the Statute by creating an impunity gap for cases where crimes that shock the conscience of humanity are committed in furtherance of a policy that has not been formalised or that has crystallised only in the course of a widespread or systematic attack.

148. In this understanding, the policy constitutes the means by which the aim/goal of the State/organisation is achieved. Such goal may be entirely legitimate and need not be criminal. However, the means by which such aim is sought is criminal – indeed the means is the policy to commit a widespread or systematic attack. By introducing the policy element, the drafters sought to punish deliberate widespread or systematic attacks directed against any civilian population. Indeed, the policy is reflected in the widespread or systematic attack. The foregoing interpretation fits the object and purpose of the Rome Statute of ending impunity for the most serious crimes of concern to the international community.

149. The *Tadić* judgment expressed the above in the most clear terms: *'the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population*'.[198] Indeed, part of what transforms an individual's act into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct.

h. Conclusion on the legal framework and relevant juridical considerations

150. From the above legal framework and relevant juridical considerations the following conclusions may be drawn. First, the State or organisational policy to commit a widespread or systematic attack against any civilian population is legally distinct from the 'systematic' nature of the attack – it is appropriate to treat one (the policy) as the cause of the other (a systematic attack against a civilian population).

151. Second, the State or organisational policy to commit a widespread or systematic attack against any civilian population need not have been formalised or explicitly defined ahead of the attack; an attack that is shown to have been planned, directed, or

[198] *Tadić* Trial Judgment, para. 653 (emphasis added).

organised—as opposed to spontaneous or isolated acts of violence—will generally be considered to amount to a policy.

152. Third, often the policy crystallises as the attack against the civilian population is underway – it may only be possible to define the policy once the acts have been committed and in the light of the overall operation or course of conduct pursued.

153. Fourth, the State or organisational policy can be inferred from various factors, including the level of planning of the attack, recurrent patterns of violence, the involvement of the State or organisational forces in the commission of crimes, statements attributable to the State or organisation condoning or encouraging the commission of crimes, an underlying motivation, deliberate omissions by the organisational hierarchy, the *modus operandi*, etc.

154. Fifth, it is the attack rather than the underlying acts attributable to the accused that must be shown to have been carried out in pursuance or furtherance of the policy - the course of conduct that makes up the attack must reflect a link to the State or organisational policy.

155. Sixth, it need not be proven that the policy in question is underpinned by any sort of ideology or special motivation – the State or organisation may be motivated by a legitimate objective/aim and yet the means by which it seeks to achieve it may be criminal – the policy is the means and the widespread or systematic attack is the result of its implementation.

156. Seventh, an interpretation in light of the object and purpose of the Rome Statute warrants an understanding of the policy requirement as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity; the policy requirement was conceived to exclude spontaneous criminal occurrences and distinguish between what is of concern to the international community on the one hand and, on the other, the sort of crimes that should remain the exclusive concern of domestic jurisdictions. An interpretation requiring a higher threshold would risk equating the policy requirement with the systematic nature of the attack and may create an impunity gap for cases where crimes that shock the conscience of humanity are committed in furtherance of a policy that has not been formalised or that has crystallised only in the course of the widespread or systematic attack.

3. Application to the case

157. While this Opinion agrees with the reasoning and outcome of the Common Judgment insofar as it rejected Mr Ntaganda's challenge to the Trial Chamber's finding that the 'stated aim [to defend the population as a whole] was directly contradicted by the planning and unfolding of the group's military operations',[199] it deems it necessary to first determine whether the Trial Chamber assessed the existence of an organisational policy within the meaning of article 7 of the Statute in light of the appropriate considerations as set out above.

158. In this case, the Trial Chamber's finding on the existence of a UPC/FPLC organisational policy to carry out a widespread and systematic attack against a civilian population, namely to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians, was largely based on the planning and unfolding of the military operations during which crimes were committed.[200] It found that: (i) recruits were taught that the Lendu as such were the enemy; (ii) orders were given to attack the Lendu, civilian or combatant, including by Mr Ntaganda as Deputy Chief of Staff; and (iii) during the operations considered by the Trial Chamber, civilians were attacked, including after the initial assault when the area was under the control of the UPC/FPLC.[201] In relation to the latter consideration, the Trial Chamber noted that the 'UPC/FPLC troops generally acted following a certain *modus operandi*, characterised by an initial assault and the taking of control over the town or village, followed by a *ratissage* operation, extending up to several days after the initial assault, aimed at eliminating any survivors, including civilians, as well as looting'.[202]

159. On the basis of the above considerations, the Trial Chamber found that '[t]he crimes committed against the civilians were not the result of an uncoordinated and spontaneous decision of individual perpetrators acting in isolation, but were the intended outcome of the implementation of a policy which was actively promoted'.[203]

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[199] Common Judgment, para. 1025 referring to Conviction Decision, para. 687.
[200] Conviction Decision, paras 687-689.
[201] Conviction Decision, paras 687-688.
[202] Conviction Decision, para. 688.
[203] Conviction Decision, para. 689.

It therefore concluded that 'the course of conduct took place pursuant to a policy of the UPC/FPLC to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians'.[204]

160. Mr Ntaganda's arguments on appeal seem to misinterpret the applicable law. In arguing that the purpose and conduct of all military operations of the UPC/FPLC over the time-frame of the charges, as well as its peace-building initiatives, should have been considered in determining whether the attack was carried out pursuant to or in furtherance of an organisational policy, he confuses the policy requirement with the objectives/aim/purpose or motivation of the organisation. As explained above, it need not be proven that the policy in question is underpinned by any sort of ideology or special motivation. While the State or organisation may be motivated by a legitimate objective/aim, it may still implement a policy to carry out an attack against the civilian population in order to achieve its purpose.

161. In this case, while the aim of the UPC/FPLC as an organisation to put an end to the power exercised by the RCD-K/ML in the territory of Ituri[205] may have been legitimate, the means by which this objective was sought to be achieved translated into a policy to chase away the Lendu civilians and those perceived as non-Iturians. As a result of the implementation of this policy, during the First and the Second Operation, a widespread and systematic attack against the civilian population took place.

162. Furthermore, since the relevant consideration is whether the organisational policy relates to the widespread or systematic attack and not whether it relates to the overall activities of the State or organisation in question, the policy to carry out an attack against the civilian population did not need to be linked to, or explained by, other activities or objectives carried out/pursued by the UPC/FPLC.

163. Since a State or organisational policy to commit a widespread or systematic attack may be inferred from all relevant circumstances and often crystallises as the attack against the civilian population is underway, it was correct for the Trial Chamber to infer the UPC/FPLC policy to chase away the Lendu and those perceived as non-Iturians from the circumstances relevant to the planning and unfolding of the military operations

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[204] Conviction Decision, para. 689.
[205] Conviction Decision, para. 682.

during which crimes were committed. In particular, it was correct to rely on the fact that: (i) recruits were taught that the Lendu as such were the enemy; (ii) orders were given to attack the Lendu, civilian or combatant, including by Mr Ntaganda as Deputy Chief of Staff; (iii) during the operations considered by the Trial Chamber, civilians were attacked, including after the initial assault when the area was under the control of the UPC/FPLC; and (iv) UPC/FPLC troops generally acted following a certain *modus operandi*.[206] Indeed, in the case at hand, it was only once the widespread and systematic attack against the civilian population was set in motion that the UPC/FPLC policy to chase away the Lendu and those perceived as non-Iturians crystallised.

164. Bearing in mind that the object and purpose of the Rome Statute is to put an end to the most serious crimes of concern to the international community and the resultant understanding of the policy requirement as a minimum threshold that only aims at excluding isolated and spontaneous criminal occurrences, the Trial Chamber's assessment and conclusion on the existence of a UPC/FPLC organisational policy to commit a widespread and systematic attack against the civilian population is clear and unassailable.

C. The meaning and nature of an attack directed against the civilian population in article 7 of the Statute

1. Mr Ntaganda's challenge and determination in the Common Judgment

165. In relevant part under the fifth ground of appeal, Mr Ntaganda challenged the Trial Chamber's finding on the existence of an attack by the UPC/FPLC directed against a civilian population. He alleged that the Trial Chamber failed to find that the civilian population was the primary object of the attack as opposed to the incidental object of the attack.[207] Mr Ntaganda further submitted that the Trial Chamber was 'required to direct its inquiry to all UPC/FPLC military operations during the relevant period' and to not limit it to six military operations.[208] He also averred that the Trial

[206] Conviction Decision, paras 687-688.
[207] Mr Ntaganda's Appeal Brief – Part II, para. 59.
[208] Mr Ntaganda's Appeal Brief – Part II, para. 60.

Chamber failed to afford sufficient weight to the legitimate purpose of the six military operations considered for the purpose of establishing the existence of an attack within the meaning of article 7 of the Statute.[209] Finally, Mr Ntaganda raised factual errors in the Trial Chamber's finding that orders to attack civilians were issued.[210]

166. The Common Judgment found that article 7 of the Statute does not establish an additional legal requirement of finding that the civilian population was the primary object of the attack.[211] It held in this regard that the requirement that an attack be directed against the civilian population

> mean[s] no more than that the attack targeted the civilian population. Although the phrase [the civilian population is the 'primary object' of the attack] suggests otherwise, it does not establish a legal requirement that the *main* aim or object of the relevant acts was to attack civilians. An attack directed against a civilian population may also serve other objectives or motives. The question of whether an attack was directed against a civilian population is essentially a factual issue that may be assessed by considering, *inter alia*, the criteria set out by the ICTY Appeals Chamber in the *Kunarac et al* case.[212]

167. Taking these into account, the Common Judgment found that 'the Trial Chamber properly directed itself as to the relevant considerations,' and 'reasonably concluded that the attack was directed against a civilian population.'[213]

168. It also concurred with the Trial Chamber's view that 'the requirement that the acts form part of a "course of conduct" indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts.'[214] The Common Judgment considered that this does not require an analysis of the totality of the activities and military operations of a state or organisation to establish that there was a course of conduct involving the multiple commission of acts referred to in article 7(1) or that the attack targeted a civilian population.[215] After a careful review of the Trial Chamber's findings and the evidence underpinning them, the Common Judgment

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[209] Mr Ntaganda's Appeal Brief – Part II, paras 61-67.
[210] Mr Ntaganda's Appeal Brief – Part II, paras 75-102.
[211] Common Judgment, para. 418.
[212] Common Judgment, para. 422 (footnotes omitted).
[213] Common Judgment, para. 425.
[214] Common Judgment, para. 430.
[215] Common Judgment, para. 431.

concluded that the Trial Chamber's conclusions that orders to attack civilians had been issued and that an attack against the civilian population took place were not unreasonable.[216]

169. This Opinion considers that the Common Judgment has properly addressed Mr Ntaganda's challenge with respect to whether the attack was directed against any civilian population and will therefore not delve into this issue further. However, some of Mr Ntaganda's submissions seem to misinterpret the meaning of an 'attack' in the context of crimes against humanity. This Opinion will therefore focus on how this element should be understood. The ultimate aim is to strengthen the Common Judgment.

2. Legal framework and relevant juridical considerations

170. Article 7(1) of the Rome Statute lists criminal acts that, 'when committed as part of a widespread or systematic attack directed against any civilian population' amount to crimes against humanity. Article 7(2)(a) of the Statute defines an attack against any civilian population as '*a course of conduct involving the multiple commission of acts referred to in paragraph 1* against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.[217]

171. From the wording of the above provisions, it is clear that the widespread or systematic attack directed against any civilian population is the contextual and cross-cutting element against which the specific criminal acts or incidents charged in a given case must be assessed.

172. As is clear from the drafting history, it is important not to equate an attack directed against a civilian population in the context of crimes against humanity with a military attack in the sense of war crimes. An early proposal submitted by Canada and Germany contained the following qualification of article 7(2)(a) of the Statute: '[t]he term "attack" in this context therefore includes not only a military attack but also more

[216] Common Judgment, IV.E.
[217] Emphasis added.

generally a campaign or operation against a civilian population'.[218]

173. Ultimately, paragraph 3 of the introduction to the elements of article 7 in the Elements of Crimes clarifies that '[t]he acts need not constitute a military attack'. The clarification that an 'attack' in the context of crimes against humanity need not be a military attack was intended to eliminate the potential for confusion with the term as used in article 8 of the Statute and to underline that, in the context of crimes against humanity, 'attack' is a legal term of art having a different meaning.[219]

174. It is thus clear that from early on, there has been an intention to differentiate between an 'attack' in the sense of article 7(2) of the Statute and a military attack in the context of war crimes. Indeed, different from a military attack, an attack within the meaning of crimes against humanity may consist of acts that constitute a campaign of serious human rights violations that may not necessarily involve physical violence but rather other types of violence as well, such as psychological, emotional or verbal violence. Moreover, such an attack does not necessarily consist of any kind of violence.

175. On the other hand, and in contrast with the understanding of attack in the context of crimes against humanity, article 49, paragraph 1 of Additional Protocol I defines 'attacks' within the military context as 'acts of violence against the adversary, whether in offence or in defence'.[220] Meanwhile, as noted by Dixon, 'it is clear that an "attack" within the meaning of article 7 need not involve any acts of violence'.[221] He refers in this regard to legislation such as the Nuremberg Laws which constituted acts of persecution and to many acts constituting the crime of apartheid and imprisonment that

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[218] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal submitted by Canada and Germany on article 7, 23 November 1999, PCNICC/1999/WGEC/DP.36, p. 2.
[219] D. Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 74.
[220] ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 United Nations Treaty Series 17512.
[221] R. Dixon, 'Article 7 Crimes against Humanity, para 1 'Chapeau'' (revised by C. Hall) in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2008), p. 175.

'do not necessarily involve acts of violence'.[222]

176. This view has been confirmed in the jurisprudence of the *ad hoc* tribunals. In the case of *The Prosecutor v. Jean Paul Akayesu*, the ICTR Trial Chamber held that '[a]n attack may also be non-violent in nature, like imposing a system of apartheid […] or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner'.[223]

177. It is also important to note that a widespread or systematic attack within the meaning of article 7 of the Statute need not be linked to armed hostilities or an armed conflict. As is clear from the wording of the legal texts governing the Court, this requirement which was incorporated in the Nuremberg and Tokyo Charters as well as in the ICTY Statute, was not included in article 7 of the Rome Statute.[224] In this regard, it is important to draw a distinction between an attack within the meaning of article 7(2) of the Statute and the war crime of intentionally directing attacks against the civilian population in international and non-international armed conflicts, as stipulated in articles 8(2)(b)(i)[225] and 8(2)(e)(i)[226] of the Statute, respectively. This specific war crime has features that distinguish it from a widespread or systematic attack: the attack must be linked to an armed conflict (whether international or non-international), it

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[222] R. Dixon, 'Article 7 Crimes against Humanity, para 1 'Chapeau'' (revised by C. Hall) in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2008), p. 175.

[223] *Akayesu* Trial Judgment, para. 581. *See also* ICTY, Trial Chamber, *The Prosecutor v. Dragoljub Kunarac et al.*, Judgement, 22 February 2001, IT-96-23-T & IT-96-23/1-T, para. 416; *Rutaganda* Trial Judgment, para. 70; *Musema* Trial Judgment, para. 205.

[224] Article 6(c) of the Charter of the International Military Tribunal (Nuremberg Charter) and article 5(c) of the Charter of the International Military Tribunal for the Far East (Tokyo Charter) stated that the acts must be carried out 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' which were crimes against peace and war crimes, both of which are premised on the existence of an armed conflict. Similarly, article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia afforded within the jurisdiction of the tribunal 'to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population'.

[225] 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.

[226] 'Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.

involves physical violence, and it is used as a method of warfare and thus has a military objective.

178. Dixon correctly points out that '[i]t is not required that each act listed in paragraph 1 [of article 7 of the Statute] occurring within the attack be widespread or systematic, providing that the acts form part of an attack with these characteristics'.[227] It is precisely for this reason that the commission of a single criminal act can constitute a crime against humanity in the context of a broader campaign against the civilian population.[228]

179. The acts constituting the attack have been described by the ILC as 'widespread or systematic violations aimed at the civilian population in whole or part'.[229] Since each of the acts listed in article 7(1) of the Statute entail human rights violations, a widespread or systematic attack within the meaning of this provision must be understood as a widespread or systematic campaign of grave human rights violations. Respected scholars have noted in this regard that all crimes under article 7(1) of the Statute involve 'intentional violations of fundamental human rights'.[230]

180. The attack described in article 7(1) of the Statute is qualified by the requirement that it be either widespread or systematic. The widespread or systematic requirement is the legal element that distinguishes crimes against humanity from common crimes. The requirement of 'widespread or systematic' is disjunctive. As discussed above, the issue of whether this should be a disjunctive or a conjunctive test was extensively debated by

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[227] R. Dixon, 'Article 7 Crimes against Humanity, para 1 'Chapeau'' (revised by C. Hall) in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2008), p. 176.
[228] *Tadić* Trial Judgment, para. 649: 'Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.'
[229] ILC, Report of the International Law Commission on the work of its forty-sixth session, 2 September 1994, A/49/10, p. 76.
[230] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1160, *referring to* K. Ambos in *Internationales Strafrecht* (2011), 7 marginal no. 173; C. Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' in *23 Leiden Journal of International Law* (2010), p. 859; G.Werle,'Die Zukunft des Völkerstrafrechts' in S. Grundmann et al. (eds), *Festschrift 200 Jahre Juristische Fakultat der Humboldt-Universitat zu Berlin, Geschichte, Gegenwart und Zukunft* (2010), p. 1227.

the drafters of the Rome Statute.[231] As put by the ICTY Trial Chamber in the *Tadić* judgment, '[e]ither one of these [widespread or systematic] is sufficient to exclude isolated or random acts'.[232]

181. Several chambers of the Court have interpreted the definition of an attack within the meaning of article 7 of the Statute. In the case of *TheProsecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II considered that the term referred to 'a campaign or operation'.[233] The *Katanga* Trial Chamber noted that 'a single event may well constitute an attack'.[234] Pre-Trial Chamber II set out in *Bemba* that it is the commission of the acts referred to in article 7(1) of the Statute that constitutes the 'attack' and 'beside the commission of the acts, no additional requirement for the existence of an "attack" should be proven'.[235]

182. With regard to the qualifier 'widespread', there seems to be consensus that it connotes 'the large-scale nature of the attack and the number of targeted persons'.[236] In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II and Trial Chamber III restricted it further by stating that it 'connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[237]

183. It has been affirmed that a widespread attack entails 'an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians'.[238] Therefore, it appears that the main considerations are the

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[231] *See inter alia*, H. von Hebel and D. Robinson, 'Crimes within the jurisdiction of the Court' in R. S. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (1999); D. Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' in *93 The American Journal of International Law* (1999), p. 47. *See also supra*, IV.B.2.(e): Evolution and Drafting History of article 7 of the Statute.
[232] *Tadić* Trial Judgment, para. 646.
[233] *Bemba* Decision on the Confirmation of Charges, para. 75.
[234] *Katanga* Conviction Decision, para. 1101.
[235] *Bemba* Decision on the Confirmation of Charges, para. 75.
[236] *Katanga* Conviction Decision, para. 1123. *See also Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 394; *Gbagbo* Decision on the Confirmation of Charges, para. 222.
[237] *Bemba* Decision on the Confirmation of Charges, para. 83, *citing Akayesu* Trial Judgment, para. 580; *Bemba* Conviction Decision, para. 163.
[238] *Bemba* Decision on the Confirmation of Charges, para. 83; *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 395.

geographical scope of the attack and/or the number of victims.

184. The qualifier 'systematic' has been briefly discussed above when distinguishing it from the State or organisational requirement. Some chambers have stated that this element refers to 'the organised nature of the acts of violence and the improbability of their random occurrence'.[239] Ambos and Wirth argue that the terms 'thoroughly organised and following a regular pattern' and 'substantial public or private resources' of the *Akayesu* definition of 'systematic'[240] should not be regarded so much as strict requirements of a systematic attack but rather as an illustration referring to typical situations in which an attack exists. In their view, an attack on innocent civilians cannot be excluded for the sole reason that it was committed with very limited resources, or that it was sloppily organised.[241]

185. Schabas has identified a number of factors that may be considered in determining the existence of a widespread or systematic attack directed against a civilian population. Drawing on the jurisprudence of the ICTY, he identified the following factors which may be taken into account: the number of victims and nature of the acts; the existence of a political objective and an acknowledged policy or plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that contemplates the destruction, persecution, or weakening of a community; the preparation and use of significant public or private resources; and the participation of high-level political or military authorities.[242]

186. Werle and Burghardt correctly note in this regard that

> The contextual elements 'attack', 'systematic' and 'widespread', which overlap in meaning, essentially imply three things: (1) A wide variety of intentional

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[239] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 394, *citing* ICTY, Appeals Chamber, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, 17 December 2004, IT-95-14/2, para. 94, *referencing* *Kunarac et al.* Appeal Judgment, para. 94; *Gbagbo* Decision on the Confirmation of Charges, para. 223; *Katanga* Conviction Decision, para. 1123; Conviction Decision, para. 692.

[240] *Akayesu* Trial Judgment, para. 580: A systematic attack was defined as 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.'

[241] K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity' in *13 Criminal Law Forum* (2002), pp. 1–90.

[242] W. Schabas, *The International Criminal Court*: *A Commentary on the Rome Statute* (2010) , p. 149.

> violations of the most fundamental human rights occurs. (2) There is a systematic link between these violations that justifies combining them into one overall crime. (3) The overall crime is large in scale.[243]

Indeed, a widespread or systematic attack essentially consists of a widespread or systematic commission of intentional violations of the most fundamental human rights and in this sense it can be described as a human rights violations campaign. The victim of such campaign is the civilian population. As noted above, this Opinion agrees with the Common Judgment that targeting the civilian population need not be the 'primary purpose' of the attack.[244] While an organisation may have legitimate purposes and objectives, when those are pursued through the commission of an attack directed against the civilian population, those purposes or motives are irrelevant to establishing the existence of an attack within the meaning of article 7 of the Statute.

Conclusion on the legal framework and relevant juridical considerations

187. From the above considerations, it is possible to draw the following conclusions. First, a widespread or systematic attack directed against any civilian population is the hallmark legal element of crimes against humanity; it is the cross-cutting element against which all criminal acts charged in a given case must be assessed. Second, an attack within the meaning of article 7(1) of the Statute must not be confused with a military attack in the sense of war crimes – while the latter is linked to armed hostilities and involves acts of violence, the former need not be violent in nature. For similar reasons an attack in the context of crimes against humanity must be distinguished from the war crime of intentionally directing attacks against the civilian population stipulated in articles 8(2)(b)(i) and 8(2)(e)(i) of the Rome Statute. The latter, different from an attack under article 7, must be linked to an armed conflict (whether international or non-international), it involves physical violence, it is used as a method of warfare and it therefore has a military objective. Third, an attack in the context of crimes against humanity means a campaign of serious human rights violations which materialises in the multiple commission of acts referred to in article 7(1) of the Statute. Fourth, it is the attack and not each individual act that must be widespread or systematic – for this reason a single criminal act may constitute a crime against humanity if committed in

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[243] G. Werle, B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' in *10 Journal of International Criminal Justice* (2012), p. 1160.
[244] Common Judgment, paras 419-424.

the context of a broader campaign against the civilian population. Fifth, the attack within the meaning of crimes against humanity must be either widespread or systematic – while the first qualifier refers to the extent of the geographical scope of the attack and/or the number of victims, the systematicity relates to the organised nature of the acts of violence and the improbability of their random occurrence.

3. Application to the case

188. In the case at hand, the Trial Chamber determined the existence of a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute by reference to its findings concerning the commission of 'several acts constituting murder, rape, sexual slavery, persecution, and forcible transfer of civilians during the First and Second Operation'.[245] It further referred to crimes committed during the assaults on Songolo (killing of civilians and looting of houses and shops), Zumbe (killing of civilians and burning of houses), Komanda (killing of civilians, looting of goods and rape), and Bunia (killing of civilians, burning of houses and looting of goods).[246]

189. The Trial Chamber considered that

> the fact that the UPC/FPLC may have also conducted operations that were solely serving a military purpose and during which civilians were not attacked has no bearing on the validity of the factual findings of the Chamber that during several specific assaults, on which evidence has been presented to the Chamber, civilians were deliberately attacked.[247]

190. On the basis of its findings, the Trial Chamber was 'satisfied beyond reasonable doubt of the existence of a course of conduct which involved the multiple commission of acts referred to in Article 7(1)'.[248]

191. From the above, it is clear that in the present case, the course of conduct carried out by the UPC/FPLC involved the widespread and systematic multiple commission of criminal acts that entail at the same time grave human rights violations against the Lendu and those perceived as non-Iturians. The attack in this case constituted a

[245] Conviction Decision, para. 664.
[246] Conviction Decision, para. 665.
[247] Conviction Decision, para. 665.
[248] Conviction Decision, para. 666.

campaign of human rights violations against a civilian population.

192. In arguing that the Trial Chamber erred by failing to direct its inquiry to all UPC/FPLC military operations during the relevant period and that this error affected its conclusion that the acts charged formed part of a course of conduct,[249] Mr Ntaganda seems to confuse the term attack in the context of crimes against humanity and in the context of war crimes. As explained above, an attack within the meaning of article 7 of the Statute is not synonymous with a military attack.

193. In this case, the Prosecutor alleged that

> 39. Examples of the UPC/FPLC acts that together constitute an attack against a civilian population include an attack on Bunia on or about 6-9 August 2002, on Songolo on or about 31 August 2002, on Zumbe on or about 15-16 October 2002, a series of attacks on Mambasa, Eringeti and Komanda between October and December 2002, on Mongbwalu (and the Banyali-Kilo collectivité) on or about 15 November toon or about 15 December 2002, on the Walendu-Djatsi collectivité in January 2003 and again on or about 16 February to on or about 3 March 2003, and further attacks on Bunia on or about 6 March 2003 and between 6 and 27 May 2003. [Footnotes omitted.][250]
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> […]
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> 41. As a result of the UPC/FPLC attack on the non-Hema civilian population in Banyali-Kilo collectivité from November to December 2002 [First Operation] and in Walendu-Ndjatsi collectivité from February to March 2003 [Second Operation], at least 240 Lendu and other non-Hema civilians were killed; civilians were raped and abducted and kept as sex slaves; hundreds of civilian structures were damaged or destroyed (including private homes, and protected civilian objects such as hospitals, health centres, churches and schools) and/or pillaged. In addition, civilians, mostly Lendu, were injured. The attacks by the UPC/FPLC were so frequent during these periods that the non-Hema civilian population was forced to leave their homes and to live in the bush on a semi-permanent basis. Thousands of people were displaced by the series of attacks.
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> 42. These two charged attacks themselves constitute attacks against the civilian population under article 7. [Footnotes omitted.][251]

194. In the Decision on the Confirmation of Charges, the Pre-Trial Chamber found

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[249] Mr Ntaganda's Appeal Brief – Part II, para. 60.
[250] Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Updated Document Containing the Charges, 16 February 2015, ICC-01/04-02/06 (the '*Ntaganda* Updated Document Containing the Charges'), para. 39.
[251] *Ntaganda* Updated Document Containing the Charges, paras 41-42.

that

> From on or about 6 August 2002 to on or about 27 May 2003, an attack against the non-Hema civilian population pursuant to the organisational policy depicted above took place in several locations in Ituri. This attack is more specifically demonstrated by a series of assaults discussed in the paragraphs below. These assaults, viewed as a whole, form a course of conduct involving the multiple commissions of acts referred to in article 7(1) of the Statute and, consequently, constitute an attack within the meaning of that provision.[252]

195. In subsequent paragraphs, the Pre-Trial Chamber specifically referred to the eight operations during which the Prosecutor alleged that acts referred to in article 7(1) of the Statute had been committed.[253]

196. As is clear from the above, and as pointed out by the Prosecutor,[254] the course of conduct involving the multiple commission of crimes referred to in article 7(1) of the Statute was comprised of crimes committed during eight military operations carried out by the UPC/FPLC.[255]

197. In assessing whether a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute had been established beyond reasonable doubt by the Prosecutor, the Trial Chamber correctly limited its analysis to the allegations brought by the Prosecutor.[256] It carried out its assessment in relation to the eight operations alleged by the Prosecutor to form part of the attack[257] and in relation to two of them, it could not establish that acts referred to in article 7(1) of the Statute

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[252] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 22.
[253] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, paras 25-30.
[254] Prosecution response to "Defence Appeal Brief - Part II", 14 April 2000, ICC-01/04-02/06-2500-Red (original confidential version filed 3 April 2020), para. 79.
[255] *See* Prosecution's Pre-Trial Brief, 1 September 2015, ICC-01/04-02/06-503-AnxA-Red2 (original confidential version filed 9 March 2015), paras 37, 40-72.
[256] Conviction Decision, paras 664-665. *See* in this regard Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of the Prosecutor against the Decision of the Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute', 16 December 2013, ICC-02/11-01/11-572, para. 47: 'The Appeals Chamber considers that it is for the Prosecutor to plead the facts relevant to establishing the legal elements and for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack. The question of how many of the incidents pleaded by the Prosecutor would suffice to prove an "attack" in the present case is a matter for the Pre-Trial Chamber to determine. It is not a question that can be determined in the abstract'.
[257] *See* Conviction Decision, sections IV.B.3; IV.B.4; IV.B.5; IV.B.6; IV.B.7; IV.B.8; IV.B.9; IV.B.10.

were committed.[258] As per the terms of article 7(1) and the allegations presented by the Prosecutor, this is indeed what the Trial Chamber was required to do.

198. Given that the Prosecutor did not allege that acts referred to in article 7(1) of the Statute were committed in military operations other than in the course of the ones identified in the charging documents, neither she nor the Pre-Trial Chamber were required to determine whether criminal acts had been committed in other military operations. The fact that some other military operations may have been conducted in relation to which no evidence on the commission of crimes against civilians was presented has no bearing on the Trial Chamber's findings that the attack comprised of multiple acts referred to in article 7(1) of the Statute was directed against Lendu civilians. This was indeed irrelevant to determine the existence of a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against a civilian population. This is because an attack within the meaning of article 7(1) of the Statute need not be a military attack and is not synonymous with an attack as understood in international humanitarian law.

199. As to whether the attack carried out by the UPC/FPLC was widespread, systematic or both, the Trial Chamber found that the attack against the civilian population was both widespread and systematic. In relation to the widespread qualifier, it noted that during the course of conduct described above, 'the UPC/FPLC committed a series of acts constituting murder, persecution, forcible transfer of civilians, rape and sexual slavery against civilians in a large number of different locations, situated primarily in the area between Bunia and Mongbwalu, and extending to Songolo, Zumbe and Komanda'.[259] Indeed, the attack against the civilian population was large both in geographical terms and in the number of victims.

200. In terms of the systematic character of the attack, the Trial Chamber noted that 'the UPC/FPLC soldiers consistently engaged in similar conduct, producing the same effects on the targeted civilian population, namely the killings, rapes and displacement

[258] Conviction Decision, paras 443-449 (Bunia on or about 6 to 9 August 2002) and paras 647-653 (Bunia on 6 March 2003).
[259] Conviction Decision, para. 694.

of Lendu, as well as the looting and destruction of houses'.[260] The Trial Chamber further referred to 'a repeated *modus operandi*, characterised by an initial assault and the taking of control over the town or village, followed by a *ratissage* operation, extending up to several days after the initial assault, aimed at eliminating any survivors, including civilians, and at looting'.[261] In light of its factual findings, it was correct for the Trial Chamber to conclude that acts of violence committed against the Lendu and those perceived as non-Iturians was organised in nature, and that their random occurrence was improbable.

201. In light of the above, the Trial Chamber's conclusion that the UPC/FPLC carried out a widespread and systematic attack directed against a civilian population was correct.

D. Conclusion on contextual elements

202. The analysis above allows us to draw a number of conclusions and to arrive at a proper understanding of the nature and meaning of a State or organisational policy to commit a widespread or systematic attack against a civilian population.

203. In terms of an organisation that can plan, conceive and implement a policy, it is important to recall that:

a. While the State generally represents the most complete form of organisation, other entities may also qualify as an 'organisation' for the purpose of article 7(2) of the Statute.

b. An organisation in the context of crimes against humanity consists of a group of at least three persons who are hierarchically organised and structured and pursue a particular objective.

c. The conformation of the organisation may be formal or informal and it could be a criminal or non-criminal organisation.

d. The focus of the determination of whether an organisation qualifies

[260] Conviction Decision, para. 695.
[261] Conviction Decision, para. 695.

as such within the meaning of article 7 of the Statute ought to be on those features that would allow it to carry out a widespread or systematic attack directed against any civilian population.

e. The determination of whether an organisation has the ability to implement a policy to execute an attack against a civilian population is fact-sensitive.[262]

f. In the case at hand, the UPC/FPLC was indeed a well-organised structure that consisted of a political structure (UPC) that had an armed wing (FPLC). It had a formal political and military structure, resembled a conventional army, had weapons and carried out recruitment and training activities of soldiers in military training centres. All these features enabled the UPC/FPLC to plan, conceive and implement an organisational policy to carry out a widespread or systematic attack against the civilian population.

g. The Trial Chamber was thus correct in determining that the UPC/FPLC was an organisation within the meaning of article 7(2) of the Statute.

204. As to the organisational policy to commit an attack within the meaning of article 7 of the Statute, the conclusions are as follows:

a. It is important to avoid confusion between the policy element and the systematic nature of the attack – the policy is properly interpreted as the cause of the widespread or systematic attack against the civilian population.

b. It is unnecessary for the policy to have been formalised or explicitly defined ahead of the attack –the policy element may be inferred from the existence of a planned, directed or organised attack that

[262] In a different chapter, this Opinion describes the features of an organised power apparatus through which a person may indirectly commit a crime as a co-perpetrator. In cases of crimes against humanity where the perpetrator commits crimes through an organised power apparatus, the organisation for the purpose of article 7(2)(a) and the organised power apparatus through which the perpetrator commits the crime often coincide.

would exclude spontaneous or isolated acts of violence.

c. Frequently the policy only crystallises once the attack against the civilian population is already underway, and consequently, often the policy can only be defined once the acts have been committed and in light of the overall course of conduct.

d. An organisational policy to commit a widespread or systematic attack against a civilian population may be inferred from a variety of factors including for example the level of planning of the attack, recurrent patterns of violence, the involvement of the State or organisational forces in the commission of crimes, statements attributable to the State or organisation condoning or encouraging the commission of crimes, an underlying motivation, deliberate omissions by the organisational hierarchy, the *modus operandi*, etc.

e. It is the widespread or systematic attack against the civilian population rather than the underlying criminal acts attributable to the accused that must be shown to have been carried out in pursuance or furtherance of the policy.

f. To establish the existence of a policy to commit an attack within the meaning of article 7 of the Statute, it is unnecessary to prove that such policy was underpinned by any sort of ideology or motivation. It is possible that the State or organisation is motivated by a legitimate aim but the means through which it seeks to achieve it are criminal (the policy) resulting in a widespread or systematic attack directed against the civilian population.

g. When interpreted in light of the object and purpose of the Rome Statute, the policy requirement ought to be understood as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity. Requiring a higher threshold would risk equating the policy requirement with the systematic nature of the attack and may create an impunity gap for cases where crimes that shock the conscience of humanity are committed in

furtherance of a policy that has not been formalised or that has crystallised only in the course of the widespread or systematic attack.

h. In the case at hand, the Trial Chamber determined that the organisational policy of the UPC/FPLC was to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians. The policy was to a large extent inferred from the planning and unfolding of the military operations during which crimes were committed. Relevant considerations in this regard were, *inter alia*: the fact that recruits were taught that the Lendu as such were the enemy; orders were given to attack the Lendu, civilian or combatant; and during the operations considered by the Trial Chamber, civilians were attacked.

i. It was only once the widespread and systematic attack against the civilian population was set in motion that the UPC/FPLC policy to chase away the Lendu and those perceived as non-Iturians crystallised.

j. It was correct to conclude that the crimes committed were not the result of an uncoordinated and spontaneous decision of individual perpetrators acting in isolation, but were the intended outcome of the implementation of a policy which was actively promoted.

k. While the aim of the UPC/FPLC to put an end to the power exercised by the RCD-K/ML in the territory of Ituri may have been legitimate, the means by which this objective was sought to be achieved crystallised into a policy to chase away the Lendu civilians and those perceived as non-Iturians. A widespread and systematic attack against the civilian population took place during the First and the Second Operation as a result of the implementation of this policy.

l. The Trial Chamber was thus correct in determining that the UPC/FPLC conceived and implemented a policy to carry out a

widespread and systematic attack against a civilian population.

205. With respect to the meaning and nature of an attack within the meaning of article 7 of the Statute, this Opinion arrives at the following conclusions:

a. A widespread or systematic attack directed against any civilian population is the hallmark element of crimes against humanity and is the cross-cutting element against which all individual criminal acts charged in a given case must be assessed.

b. It is important to distinguish between an attack within the meaning of article 7(1) of the Statute and a military attack in the sense of war crimes. While attacks in the sense of international humanitarian law are linked to armed hostilities, involve acts of physical violence and sometimes target the civilian populations as a means of war and thus with a military objective, a widespread or systematic attack against the civilian population for purposes of establishing crimes against humanity need not be physically violent in nature nor linked to an armed conflict, and the purpose for triggering the attack against the civilian population is irrelevant.

c. A widespread or systematic attack within the meaning of crimes against humanity amounts to a campaign of serious human rights violations that materialises in the multiple commission of acts referred to in article 7(1) of the Statute.

d. Given that it is the attack and not each individual act that must be widespread or systematic, a single criminal act may constitute a crime against humanity when committed in the context of a broader campaign against the civilian population.

e. An attack within the meaning of article 7 of the Statute may be widespread or systematic. The widespread qualifier refers to the extent of the geographical scope of the attack and/or the number of victims. The systematic character relates to the organised nature of the acts of violence and the improbability of their random

occurrence.

f. In the case at hand, the Trial Chamber determined the existence of a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute given that several crimes (murder, rape, sexual slavery, persecution, and forcible transfer of civilians, looting of goods and shops, looting and burning of houses) occurred during the First and Second Operations, the assaults on Songolo, Zumbe, Komanda, and Bunia.

g. Because it is necessary to distinguish between an attack within the meaning of article 7 of the Statute and an attack in a military sense, the fact that the UPC/FPLC may have conducted other military operations in relation to which no evidence on the commission of crimes against civilians was presented is irrelevant to the Trial Chamber's findings that the attack comprised of multiple acts referred to in article 7(1) of the Statute was directed against Lendu civilians. This is because an attack within the meaning of article 7(1) of the Statute need not be a military attack and is not synonymous with an attack as understood in international humanitarian law.

h. The attack against the Lendu and those perceived as non-Iturians was both widespread and systematic. It was large in geographical terms and in the number of victims, it was organised in nature and its random occurrence was improbable.

i. The Trial Chamber was therefore correct in finding that the UPC/FPLC carried out a widespread and systematic attack directed against a civilian population.

V. MEANING AND SCOPE OF INDIRECT CO-PERPETRATION AS A MODE OF LIABILITY UNDER THE ROME STATUTE

206. In this Chapter, this Opinion aims at elucidating a very much discussed mode of liability in relation to which there is still much misunderstanding and misinterpretation as is clear from the submissions made in this case in both the conviction and sentencing appeals. While this Opinion agrees with the determinations made by the majority of the Appeals Chamber in the eleventh, twelfth, thirteenth, fourteenth and fifteenth grounds of appeal, it deems it necessary to further elaborate on the applicable law in relation to indirect co-perpetration as a mode of liability provided in article 25(3)(a) of the Statute. The ultimate aim is to strengthen the Common Judgment and provide legal clarity for future cases.

207. To that end, this Chapter is divided in two sections. The first section discusses indirect co-perpetration as an integrated mode of liability that combines the constitutive elements of joint perpetration and indirect perpetration provided in article 25(3)(a) of the Statute, and indirect co-perpetration though an organised power apparatus as one of its most common forms. The second section addresses the mental element required in article 30 of the Statute in cases of indirect co-perpetration. The conclusions reached in each section are then applied to the present case.

A. Indirect co-perpetration as a mode of liability provided in the Statute

1. Mr Ntaganda's challenge and determination in the Common Judgment

208. In the relevant part of the thirteenth ground of appeal, Mr Ntaganda challenged some of the Trial Chamber's findings relevant to establish his individual criminal responsibility as indirect co-perpetrator pursuant to article 25(3)(a) of the Statute. In particular, he argued that the Trial Chamber erred in finding the existence of a common plan given the alleged absence of direct evidence and having purportedly failed to exclude other reasonable inferences.[263] Mr Ntaganda further submitted that the Trial Chamber erred in convicting him for the actions of Hema civilians in Mongbwalu, as the evidence and the reasoning were insufficient to demonstrate '"sufficiently tight

[263] Mr Ntaganda's Appeal Brief – Part II, paras 283-300.

control" by the accused' to the extent that the Hema civilians did not have any other choice but to commit the crimes.[264]

209. The Common Judgment rejected Mr Ntaganda's challenges to the evidentiary assessment of the Trial Chamber concerning a meeting in Kampala in June 2002 and its reliance on this and other meetings as evidence of a common plan.[265] In particular, the Common Judgment determined that 'there is no legal impediment to inferring the common plan from the wider circumstances, including the events on the ground,'[266] and in the case at hand, the Trial Chamber 'relied on evidence of meetings, specific orders and instructions to the troops, that are indicative of the subsequent action of the co-perpetrators,' in order to find whether there was a common plan to drive out the Lendu from the targeted localities.[267] The Common Judgment found that 'it was reasonable for the Trial Chamber to conclude that the UPC/FPLC military leaders acted with a common plan to drive out the Lendu from the targeted localities'.[268] After a thorough review of the Trial Chamber's findings and evidence relied upon, the Common Judgment found that in light of the evidence of orders issued to the Hema civilians and their joint operation with the UPC/FPLC soldiers, it was not unreasonable to conclude that they functioned as a tool in the hands of the co-perpetrators and their will had become irrelevant.[269]

210. In the relevant part of the fifteenth ground of appeal, Mr Ntaganda challenged the Trial Chamber's finding that he had control over the crimes committed by virtue of his essential contribution to the implementation of the common plan and argued that the Trial Chamber was 'bound to analyse his responsibility in respect of both operations separately'.[270] In this regard, the Common Judgment rejected Mr Ntaganda's arguments and clarified that '[c]onsistent with the principle of causation […], an accused's essential contribution must be to the crime for which he or she is responsible. However,

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[264] Mr Ntaganda's Appeal Brief – Part II, paras 310-316.
[265] Common Judgment, IV.M.2.(a) and (b).
[266] Common Judgment, para. 918 (footnotes omitted).
[267] Common Judgment, para. 919.
[268] Common Judgment, para. 930.
[269] Common Judgment, IV.M.3.(c).
[270] Defence reply to 'Prosecution's response 'Defence appeal brief - Part III ', 3 April 2020, ICC-01/04-02/06-2500', , 22 June 2020, ICC-01/04-02/06-2534-Red (original confidential version filed 19 May 2020) ('Mr Ntaganda's Reply to Prosecutor's Response to appeal'), para. 54.

the contribution of a co-perpetrator which, on its face, is not directly to a specific crime, but to the implementation of the common plan more generally may still suffice.'[271] The Common Judgment further recalled that 'the decisive consideration for co-perpetration, is whether Mr Ntaganda's contributions as a whole amounted to an essential contribution to the crimes within the framework of the common plan',[272] and determined that the Trial Chamber was not required to analyse 'Mr Ntaganda's essential contribution with respect to the specific crimes charged in each operation'.[273] The Common Judgment emphasised that '[a] co-perpetrator can make an essential contribution to the common plan at any stage, including the execution stage, the planning and preparation stage, and the stage when the common plan is conceived'.[274]

211. In relation to Mr Ntaganda's challenges to the Trial Chamber's factual assessment of his essential contribution to the implementation of the common plan, the Common Judgment first recalled that 'a determination of whether an alleged co-perpetrator exercised control over the crimes […] necessarily depends on a holistic assessment of all the relevant facts and evidence'[275] and concluded that on the basis of the Trial Chamber's findings and evidence relied upon, the Trial Chamber's conclusion in this regard was reasonable.[276]

212. While this Opinion agrees with the determinations of the Common Judgment, it deems it necessary to elaborate on certain aspects of indirect co-perpetration as a combined mode of liability under the Rome Statute, and on indirect co-perpetration through an organised power apparatus as one of its variants. The ultimate aim is to strengthen the Common Judgment.

2. Legal framework and relevant juridical considerations

213. In the instant case, the Trial Chamber seems to have found that indirect co-perpetration is a form of co-perpetration provided in article 25(3)(a) of the Statute. In

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[271] Common Judgment, para. 1041.
[272] Common Judgment, para. 1064.
[273] Common Judgment, para. 1064.
[274] Common Judgment, para1066.
[275] Common Judgment, para. 1074.
[276] Common Judgment, IV.O.2.(c) and IV.O.3.(c).

this regard, the Conviction Decision held that '"indirect co-perpetration" in this case should not be seen as a stand-alone mode of liability, but as a particular form of co-perpetration, which is compatible with the wording of the Statute',[277] and that '[t]he requirement of the existence of an organisation used to subjugate the will of the direct perpetrators refers to one of the forms in which commission through another person, within the meaning of Article 25(3)(a) of the Statute may take place'. [278]

214. For the reasons developed in this section, this Opinion considers that the Trial Chamber was correct in interpreting article 25(3)(a) of the Statute as encompassing indirect co-perpetration and in considering that indirect commission through an organised power apparatus is a variant thereof. Indeed, as noted below, there is ample doctrine and jurisprudence favouring an interpretation of the Statute that makes possible the prosecution of indirect co-perpetration through an organised power apparatus as an integrated form of liability that combines the constitutive elements of indirect perpetration and co-perpetration.[279]

a. Wording of article 25(3)(a) of the Statute

215. Article 25(3)(a) of the Statute reads as follows:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
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> 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.

216. From the wording of article 25(3)(a) of the Statute, it is clear that within the legal framework of the Rome Statute, a person is considered a perpetrator when he or she (a) directly commits a crime as an individual (direct perpetration); (b) commits a crime

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[277] Conviction Decision, para. 778.
[278] Conviction Decision, para. 778, *referring to* *Katanga* Conviction Decision, paras 1408, 1411 (footnotes omitted).
[279] The original concept in German is '*mittelbare Täterschaft*' (*See* C. Roxin, 'Straftaten im Rahmen Organisatorischer Machtapparate' in *Goltdammers Archiv für Strafrecht* (1963), pp. 193-207). In Spanish, it has been translated as '*autoría mediata*' (*See, e.g.* C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 240. *See also* A. Kiss, 'Autoría mediata*:* hacia otra expansión en la jurisprudencia de la Corte Penal Internacional' in E. Hilgendorf, M. D. Lerman, F. J. Cordoba, *Brücken bauen* (2020), pp. 1054-1044). In English, the concept has been translated as 'indirect perpetrator' and 'perpetrator-by-means' (*See* V. Nerlich, 'Superior Responsibility under Article 28 ICC Statute. For What Exactly is the Superior Held Responsible?' in *5 Journal of International Criminal Justice* (2007), footnote 20. This opinion refers to the concept interchangeably as indirect perpetrator.

jointly with another person (co-perpetration); and/or (c) indirectly commits a crime (indirect perpetration). In relation to the latter scenario, the provision clarifies that it is irrelevant whether the direct perpetrator is criminally responsible him or herself. As is clear from the drafting history, the possibility of holding responsible an indirect perpetrator, even when the direct perpetrator is criminally responsible him or herself was not originally envisaged by the drafters.

217. In 1996, the Preparatory Committee submitted a proposal that included the traditional forms of innocent agency, where the indirect perpetrator forces an agent to commit the crime or deceives him or her to do so:

> A person shall be deemed a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without *mens rea*.[280]

218. However, a year later, the Preparatory Committee changed the formulation to read almost exactly as the present article 25(3)(a) reads today:

> A person is criminally responsible and liable for punishment for a crime […] if that person […]
>
> commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible.[281]

219. The wording and drafting history of article 25(3)(a) of the Statute confirm the view that perpetrators are not only those that either individually or jointly with another person directly commit the crimes but also those that use other persons to execute the crimes, regardless of whether those persons are criminally responsible themselves. In this regard, the jurisprudence of the Court has also noted that 'the most typical manifestation of the concept of control over the crime, which is the commission of a crime through another person, is expressly provided for in article 25(3)(a) of the

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[280] *See* Preparatory Committee on the Establishment of an International Criminal Court, Informal Group on General Principles of Criminal Law, Proposed new Part (III bis) for the Statute of an International Criminal Court, 26 August 1996, A/AC.249/CRP.13, p. 5. *See also* T. Weigend, 'Indirect Perpetration' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 54, *referring to* C. Bassiouni, *The Legislative History of the International Criminal Court* (2005), p. 200.
[281] T. Weigend, 'Indirect Perpetration' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 542-543.

Statute'.[282] It was further held that

> the use of the phrase "regardless of whether that other person is criminally responsible" in article 25(3)(a) of the Statute militates in favour of the conclusion that this provision extends to the commission of a crime not only through an innocent agent (that is, through another person who is not criminally responsible), but also through another person who is fully criminally responsible.[283]

220. This Opinion notes that article 25(3)(a) of the Statute reflects the well-established criminal category of perpetration which includes different modalities: direct perpetration, co-perpetration and indirect perpetration. In relation to the first modality, Van Sliedregt notes that direct commission refers to those individuals that have fulfilled the elements of the crime in person.[284] As to the second modality, Werle correctly points out that '[w]hat is crucial for co-perpetration is criminal cooperation within the framework of a common plan or design'.[285]

221. With respect to the third category, Werle observes that indirect perpetration refers to situations when 'the perpetrator uses another person as a tool to commit a crime'.[286] He notes in this regard that '[t]he idea of a perpetrator-by-means is recognized by the world's major legal systems'.[287] In Werle's correct interpretation, this third alternative of perpetration includes both situations where the direct perpetrator is not liable (because he or she for example is not yet of legal age or because of the configuration of a ground for exclusion of responsibility) and situations where the direct perpetrator bears criminal responsibility but 'can be manipulated' by the indirect perpetrator.[288] In his view, 'perpetration-by-means requires a situation of tight control by the person

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[282] Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN (the '*Lubanga* Decision on the Confirmation of Charges'), para. 339.
[283] *Lubanga* Decision on the Confirmation of Charges, para. 339.
[284] E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), p. 89.
[285] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 958.
[286] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in 5 *Journal of International Criminal Justice* (2007), p. 963.
[287] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in 5 *Journal of International Criminal Justice* (2007), p. 963 *referring to* K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002), p. 568; G. Fletcher, *Rethinking Criminal Law*, New York: *Oxford University Press*, (2000), p. 639.
[288] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 964.

behind the direct perpetrator'.[289]

222. From the terminology used in article 25(3)(a) of the Statute, it is clear that all variants of the well-established category of perpetration are codified in the Rome Statute. Furthermore, for reasons explained below, it is clear that indirect co-perpetration is an integrated mode of liability encompassed in article 25(3)(a) of the Statute insofar as it combines the constitutive elements of joint perpetration and indirect perpetration and is, in this regard, compatible with the principle of legality and the rights of the accused.

b. Control over the crime as the distinguishing criterion

223. Article 25(3)(a) of the Statute, similar to several other criminal codes of the world, distinguishes between perpetrators, instigators,[290] accomplices[291] and those that '[i]n any other way contributesto the commission or attempted commission of […] a crime by a group of persons acting with a common purpose'.[292] Article 28 further codifies the responsibility of superiors when they fail to act in order to prevent, punish or submit the commission of crimes to the competent authorities. There is thus a need to establish a distinguishing criterion to identify which persons are responsible as perpetrators and which persons may be criminally responsible as instigators, accomplices or responsible superiors.

224. It is important to clarify that perpetration and other modes of liability should be distinguished in order to ensure a proper legal characterisation of the facts in a given case, or as put by some scholars 'fair labelling'.[293] This is particularly the case considering that the Rome Statute makes a distinction to this effect in article 25(3).[294]

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[289] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 964.
[290] Article 25(3)(b) of the Statute.
[291] Article 25(3)(c) of the Statute.
[292] Article 25(3)(d) of the Statute.
[293] J. D. Ohlin, E. van Sliedregt and T. Weigend, 'Assessing the Control-Theory' in 26 *Leiden Journal of International Law* (2013), p. 726; D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law' in *64 Current Legal Problems 1* (2011), p. 6.
[294] Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*,J Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red (the '*Lubanga* Appeal Judgment'), para. 462.

However, this is not to say that in all cases the perpetrators will deserve a higher sentence than persons bearing criminal responsibility under article 25(3)(b) to (d) or pursuant to article 28 of the Statute. As already noted by the Appeals Chamber, this assessment will always depend on the specific facts of a given case.[295]

225. It bears noting that throughout the history of criminal law, several theories have been considered to distinguish perpetration from other modes of liability. One of them is the approach well known in common law jurisdictions where the perpetrator is defined as the individual who performs the *actus reus* of the crime.[296] It has been noted that this theoretical approach could lead to paradoxical results. As noted by Ohlin, if a mob boss 'orders a subordinate to kill a rival criminal', he or she 'will only be convicted as an accomplice since he did not perform the physical act of shooting the victim'.[297] Another theory that gained adherence in German criminal law is the approach that considers as perpetrators those who display the relevant *mens rea* for the crime in question.[298] Concerns have also been voiced in relation to this approach, particularly regarding 'the uncertain causal connection between the defendant and the resulting crime'.[299]

226. A third way in between these two approaches, the objective 'control of the crime' criterion, was espoused by important scholars of criminal law.[300] As noted by Jakobs, the control over the crime criterion, also referred to as 'hegemony over the act' by

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[295] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Red, paras 59-60.
[296] J. D. Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 519.
[297] J. D. Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 519.
[298] J. D. Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 520.
[299] J. D. Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 520.
[300] G. Jakobs, 'El ocaso del dominio del hecho' in M. Cancio Meliá and G. Jakobs (eds.), *Conferencias sobre temas penales* (Rubinzal Culzoni: Buenos Aires, 2004), *referring to* H. Welzel, *Das Deutsche Strafrecht: Eine Systematische Darstellung* (1969); Gallas, *Materialien zur Strafrechtsreform I*, pp. 121 and seq., 128, 133, 137; and Maurach-Gössel, *Strafrecht AT part 2* (1989).

Fletcher,[301] was developed by, among others, Welzel, Gallas and Maurach.[302] Others, including Roxin, maintain that this approach dates back to scholars like Hegler (1915) , Frank (1931), Lobe (1933) and Goldschmidt.[303]

227. On the basis of the work of the foregoing scholars, Roxin proposes that a perpetrator is a person who "dominates" (*beherrscht*) the commission of the criminal offence, in that he has the power to determine whether or not the relevant acts are done. Control of the crime (*Tatherrschaft* in German and *dominio del hecho* in Spanish) can occur when a person does the relevant act himself, does it jointly with others, or uses another person as his tool'.[304]

228. According to Roxin, 'control over the act [*Tatherrschaft*] has established itself as the decisive criterion'.[305] In his view, '[a] person is a perpetrator if he *controls the course of events*; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution to the attributable act of the other person, is an instigator or abettor.'[306]

229. The Court has early on adopted in its jurisprudence the objective criterion of 'control over the crime' to distinguish between perpetration (article 25(3)(a) of the Statute) and other modes of liability. In *Lubanga*, Pre-Trial Chamber I noted that

> only those who have control over the commission of the offence – and are aware of having such control – may be principals because:
>
> (i) they physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration);
>
> (ii) they control the will of those who carry out the objective elements of the

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[301] G. Fletcher, Rethinking Criminal Law, New York: *Oxford University Press*, 2000.
[302] G. Jakobs, 'El ocaso del dominio del hecho' in M. Cancio Meliá and G. Jakobs (eds), *Conferencias sobre temas penales* (Rubinzal Culzoni: Buenos Aires, 2004), *referring to* H. Welzel, *Das Deutsche Strafrecht: Eine Systematische Darstellung* (1969); Gallas, *Materialien zur Strafrechtsreform I*, pp. 121 and seq., 128, 133, 137; and Maurach-Gössel, *Strafrecht AT part 2* (1989).
[303] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), pp. 74, 77.
[304] T. Weigend, 'Perpetration through an Organization' in *9 Journal of International Criminal Justice* (2011), at p. 95.
[305] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 196.
[306] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 196 (emphasis added).

> offence (commission of the crime through another person, or indirect perpetration); or
>
> (iii) they have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration).[307]

230. The above approach has been subsequently confirmed in the jurisprudence of the Court.[308] On one of these occasions, Pre-Trial Chamber I described the control over the crime criterion as the 'leading principle for distinguishing between principals and accessories to a crime' and as 'one that synthesises both objective and subjective components'.[309] The Appeals Chamber confirmed the control of the crime as the objective criterion to distinguish between perpetration and other modes of liability in its first final appeal (*Lubanga* case) and subsequent jurisprudence.[310]

231. In the present case, the Trial Chamber referred to the control over the crime criterion as follows:

> Further, in relation to the requirement of control over the crime, it facilitates a normative assessment of the role of the accused person in the specific circumstances of the case. Indeed, the most appropriate tool for conducting such an assessment is an evaluation of whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if his essential contribution was not made at the

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[307] *Lubanga* Decision on the Confirmation of Charges, para. 332.

[308] *See e.g. Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 488; *Lubanga* Decision on the Confirmation of Charges, paras 326-341; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2002, ICC-01/04-01/06-2842, para. 994; *Bemba* Decision on the Confirmation of Charges, para. 347; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243, para. 152; Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of 'Decision on the confirmation of charges', 7 March 2011, ICC-02/05-03/09-121, para. 126; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 279; *Ruto et al.* Decision on the Confirmation of Charges, paras 291-292; *Kenyatta and Hussein Ali* Decision on the Confirmation of Charges, para. 296; Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Warrant of arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/-05-01/09-01, para. 210; *Katanga* Conviction Decision, para. 1393; *Lubanga* Appeal Judgment, para. 469; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5) (the '*Bemba et al.* Appeal Judgment'), para. 810.

[309] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 484.

[310] *Lubanga* Appeal Judgment, para. 469; *Bemba et al.* Appeal Judgment, para. 820.

execution stage of the crime.

> Accordingly, the purpose of the requirement of control over the crime is to distinguish between commission and other modes of liability, such as under Article 25(3)(c) of the Statute. If it is found that the accused provided an essential contribution to the crime pursuant to an agreement or common plan, this justifies the normative imputation to each co-perpetrator of the totality of the crime committed jointly by the co-perpetrators.[311]

232. It is thus clear that the distinguishing criterion between perpetration (in all its modalities) and other modes of liability is that of who controls the crime and thereby retains the power to frustrate its commission.

c. Indirect Perpetration through an organised power apparatus as a form of indirect perpetration reflected in art. 25(3)(a)

233. In the instant case, the Conviction Decision referred to the 'existence of an organisation used to subjugate the will of the direct perpetrators' stating that

> [i]n such case, while the potential physical perpetrators are interchangeable within the organisation, the criterion of control means that the indirect perpetrator used "at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed".[312]

234. The above finding of the Trial Chamber reflects one form of indirect perpetration, namely the modality whereby the indirect perpetrator controls the crime by virtue of his hierarchical position within an organised power structure and by virtue of its automatic functioning ensured by the replaceable nature of the direct perpetrators who are willing to implement the instructions, directives and orders of the organisation. The foregoing gives the indirect perpetrator functional control over the functioning of the organisation and thus, over the crimes. As noted by Werle, 'perpetration-by-means requires a situation of tight control by the person behind the direct perpetrator' and '[s]uch control will usually be present in the context of an organised criminal hierarchy'.[313] A proper understanding of this specific variant of indirect perpetration requires an in-depth

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[311] Conviction Decision, paras 779-780, *referring to* *Lubanga* Appeal Judgment, para. 473 and *Bemba et al.* Appeal Judgment, para. 821 (footnotes omitted).
[312] Conviction Decision, para. 778, *referring* to *Katanga* Conviction Decision, para. 1411 (footnotes omitted).
[313] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 964.

analysis of its origins, nature and scope.

235. Guided by the need to distinguish principals from accessories,[314] and building upon the concept of control of the crime originally discussed by scholars such as Hegler, Welzel and others,[315] Roxin introduced a novel approach to indirect perpetration by observing the Nazi apparatus of power. He considered it evident that the superior authority that organised the extermination of the Jewish population controlled the outcome in a different way than an instigator would. He thus wondered what the reason for this was.[316]

236. Roxin has explained that the issue of indirect perpetration is particularly pressing in international criminal law where crimes often tend to be perpetrated by groups rather than individuals.[317] In this regard, this Opinion agrees with Ohlin that we face a challenge in international criminal law 'to develop a sophisticated doctrine that navigates between the collective nature of international criminality and the individualized determinations of criminal law'.[318]

237. Roxin proposed that in cases of collective criminality such as that of the Nazi power apparatus, the organisation that is hierarchically structured with high, mid-level and low level members who are interchangeable, is at the disposal of those at the top who retain functional control of crimes committed and are called the perpetrator behind the perpetrator (*autor detrás del autor* in Spanish), the perpetrator-by-means or perpetrator behind the desk (in Spanish *autor de escritorio*).[319]

238. The two key elements that must be present for a person to be considered an indirect perpetrator through an organised power apparatus are: (i) the existence of an organised hierarchical power apparatus that functions automatically as a result of the replaceable nature of the direct perpetrators which, in turn, leads to compliance with

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[314] M. Granik, 'Indirect Perpetration Theory: A Defence' in *28 Leiden Journal of International Law* (2015), p. 981.
[315] *See supra* V(A)(2)(b): Control of the Crime as the Distinguishing Criterion.
[316] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 240.
[317] M. Granik, 'Indirect Perpetration Theory: A Defence' in *28 Leiden Journal of International Law* (2015), p. 981.
[318] J. D. Ohlin, 'Joint Intentions to Commit International Crimes' in *11 Chicago Journal of International Law* (2011), p. 720.
[319] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p 238.

the instructions, directives and orders of the organisation; and (ii) control of the indirect perpetrator over the functioning of the organisation that enables him or her to control the crimes and retain the power to frustrate them. These two concepts are explored in depth below.

239. It is worth noting that the approach proposed by Roxin has been applied by this Court and several domestic jurisdictions. In Germany, after the end of the German Democratic Republic (GDR), German courts were faced with a host of novel legal questions. One of them concerned the responsibility for the death of hundreds of GDR citizens who were shot or lost their lives in the mine fields as they attempted to cross the border to the West through the Berlin war. These cases squarely confronted the Federal Court of Appeals with the question of whether the leaders of the relevant GDR institutions could be punished as principal perpetrators even though the wall guards had already been convicted as perpetrators of the border killings. The Federal Court of Appeals, relying on Roxin's theory, held in 1994 that the leaders of the GDR regime were not mere instigators but perpetrators of homicide.[320]

240. In Argentina, on 9 December 1985, the Buenos Aires Federal Court of Appeals issued its judgment in the so-called *Juntas* case. The military commanders of the three consecutive Argentinean Military Juntas that had run the authoritarian military regime governing Argentina from 1976 to 1983 were convicted. Although they had not physically abducted, tortured or murdered, the Buenos Aires Federal Court of Appeals found them liable as indirect perpetrators for the crimes committed by the members of the military service they commanded, by applying Roxin's theory.[321] After the *Juntas* Trial, Argentinean courts have progressively abandoned the formally objective approach to the notion of principal liability, and have instead embraced the approach based on the notion of control of the crime.[322] More recently, in the context of the prosecution of grave human rights violations committed during the last dictatorship,

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[320] T. Weigend, 'Perpetration through an Organization' in *9 Journal of International Criminal Justice* (2011), p. 98.
[321] *See* Argentina, National Criminal and Correctional Appeals Court, *Trial of the Military Juntas*, Judgment, 9 December 1985, Case No. 13/84.
[322] *See* E. Malarino, 'El Caso Argentino' in K. Ambos (ed.), *Imputación de Crímenes de los Subordinados al Dirigente*: *Un Estudio Comparado* (2008), p. 59.

some Argentinean courts have again applied the notion of indirect perpetration through organised structures of power to convict senior military commanders who were part of the higher echelons of the Argentinean military between 1976 and 1983.[323]

241. In Peru, the notion of indirect perpetration through organised structures of power was applied for the first time by the Peruvian National Penal Chamber in its 13 October 2006 trial judgment,[324] which was subsequently confirmed by the Peruvian Supreme Court.[325] These judgments were issued in the case of Abimael Guzmán, the founder and leader of the terrorist organisation *Sendero Luminoso* or the Shining Path, and all its leadership, including his wife Elena Iparraguirre, Laura Zambrano, Maria Pantoja and many others for the Lucanamarca massacre of 3 April 1983 and thousands of serious terrorist attacks that resulted in hundreds of victims, and the criminal activity of the members of the organisation committed between 1980 and 1992.[326] The accused were convicted as indirect co-perpetrators through an organised power apparatus (*coautores mediatos por dominio de organización*) with some of them being sentenced to life imprisonment and others to high imprisonment penalties.

242. The Peruvian Supreme Court also applied the mode of liability of indirect perpetration through an organised power apparatus in the case brought against former president Alberto Fujimori and he was sentenced to 25 years of imprisonment for crimes of murder, torture, forced disappearances and other grave human rights violations committed the organised power apparatus named Colina Group (*Grupo Colina*).[327] In the case known as *Los Cabitos*, the members of the Political Military

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[323] *See inter alia*, Argentina, La Plata Federal Criminal Oral Tribunal, *Christian F. von Wernich v. Argentina*, Judgment, 1 November 2007, Case No. 2506/07; Argentina, Cordoba Federal Oral Criminal Tribunal, *Luciano B. Menéndez et al. v. Argentina*, Judgment, 24 July 2008, Case No. 22/08; and Argentina, Tucumán Federal Oral Criminal Tribunal, Antonio Domingo et al. *v. Argentina*, Judgment, 4 September 2008, Expte. V - 03/08.
[324] Peru, Permanent Criminal Court, *P v. Abimael Guzmán Reinoso et al.*, Judgment, 13 October 2006, Case No. 560-03.
[325] Peru, Supreme Court of Justice, *P v. Abimael Guzmán Reinoso et al.,* Judgment, 14 December 2007, Case No. 5385-2006.
[326] F. Muñoz Conde, H. Olásolo, 'The Application of the Notion of Indirect Perpetration Through Organized Structures of Power in Latin America and Spain' in *9 Journal of International Law Criminal Justice* (2011), p. 127.
[327] Peru, Supreme Court of Justice Special Criminal Chamber, *Barrios Altos, La Cantuta and SIE Basement* cases, Judgment, 7 April 2009, Decision No. AV 19-2001 (the '*Barrios Altos* Judgment'), para. 720.

Command (*Comando Político Militar*) of the Ayacucho city (a town located in the Peruvian *andes*) as well as other national political leaders were charged and convicted as indirect co-perpetrators through a State organised power apparatus whose members committed on a massive scale torture, murder, enforced disappearances and other grave human rights violations in 1984 in the context of the State fight against terrorism.[328]

243. In Colombia, the Colombian Supreme Court made, for the first time, reference to the mode of liability of indirect perpetration through organised structures of power in its judgment dated 7 March 2007 in the *Machuca* case[329] and in subsequent cases.[330] In Chile, in the 21 September 2007 Chilean Supreme Court decision granting the Peruvian extradition request in relation to former Peruvian president Fujimori, the Chilean Supreme Court referred expressly to the possible application of the mode of liability of indirect perpetration through organised structures of power.[331]

244. At this Court, the Pre-Trial Chamber in the case of *Katanga and Ngudjolo* correctly explained the need to adopt the approach proposed by Roxin,:

> The most important reason for this Chamber's deciding for this mode of liability is that it has been incorporated into the framework of the Statute. The crimes falling within the jurisdiction of this Court — those of 'the most serious [...] concern to the international community as a whole', and which 'threaten the peace, security, and well-being of the world' — will almost inevitably concern collective or mass criminality. The Chamber finds that by specifically regulating the commission of a crime through another responsible person, the Statute targets the category of cases which involves a perpetrator's control over the organisation.[332]

245. Similarly, the Peruvian Supreme Court in the case instituted against *Abimael Guzmán* explained in clear terms the compatibility of indirect perpetration with criminal

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[328] L. Ibáñez Carranza, 'Los retos del Caso Cabitos' in *Cuartel Los Cabitos: Lugar de Horror y Muerte* (APRODEH, 2014), pp. 103-105.
[329] Colombia, Supreme Court of Justice Criminal Chamber, *Machuca* case, Judgment, 7 March 2007, Case No. 23825.
[330] Colombia, Supreme Court of Justice Criminal Chamber, *Yamid Amat* case, Judgment, 8 August 2007, Case No. 25974; Colombia, Supreme Court of Justice Criminal Chamber, *Gabarra* case, Judgment, 12 September 2007, Case No. 24448.
[331] For a commentary on this judgment, *see* R. Lledo Vasquez, 'Comentarios sobre la Sentencia de Extradición de Alberto Fujimori Fujimori' in *4 Anuario de Derechos Humanos* (2008), p. 114.
[332] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 501.

law and the suitability of its application:

> Indirect perpetration is a dogmatic category, linked to the control of the crime theory. […] As such, it is a mode of liability that need not be described in a legal text for its compatibility with the principle of legality to be understood. In short, it is a theoretical means from which meaning is given to the objective elements of the criminal offence involved, because it relates an individual to the elements that configure it by the control of the will of the material executor.[333]

246. Since most of the cases that come before the Court involve organisations that amount to organised power apparatuses, it is through the lens of the approach proposed by Roxin that the criminal responsibility of those controlling the crimes (by virtue of their hierarchical position in the organisation and the automaticity of its functioning) could be assessed given the functional control they exercise over the crimes directly perpetrated by the replaceable agents.

247. The two key elements of this approach, namely the existence of an organised power apparatus and the functional control by the indirect perpetrator, are discussed in detail immediately below.

i. *The organised power apparatus*

248. In the words of Roxin, the organised power apparatus at the disposal of the indirect perpetrator comes to have a life of its own in that it functions as per the willingness of the perpetrator-by-means, regardless of the changing nature of its members.[334] The person behind the organisation can trust that his or her plan will be executed without the need to force or deceive the executors, considering that if any of them does not comply, there will be another who will immediately do so.[335]

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[333] Peru, Supreme Court of Justice, *P. v. Abimael Guzmán Reinoso et al.*, Judgment, 26 November 2007, R.N. 5385-2006 (the '*Abimael Guzmán* Judgment 26 November 2007'), pp. 25-26: ('*La autoría mediata es una categoría dogmática, vinculada a la teoría del dominio del hecho […] Como tal, es un título de imputación que no necesariamente debe estar descrito en un texto legal para que se entienda su compatibilidad con la exigencia de determinación del tipo legal (ampliado). Se trata en suma de un aparato teórico desde el que se da sentido a los elementos objetivos del tipo penal involucrado, porque pone en relación a un individuo con los elementos que lo configuran por el dominio de la voluntad del ejecutor material*').
[334] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 240.
[335] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 240.

249. These organised power structures tend to be complex in that they are hierarchically organised with members and sympathisers operating on the ground and several hierarchical layers between those on the ground executing crimes and the persons at the top of the organisation's hierarchy. This structure effectively results in situations such as that of Eichmann, that is, a person holding a middle rank in the organisation who could be at the same time a replaceable element at the disposal of the person holding the highest position within the organisation, and also an indirect perpetrator in relation to the crimes executed by the replaceable agents operating on the ground.[336]

250. Roxin identifies two typical manifestations of control through an organised power apparatus. One manifestation emerges when those who embody the power of a State use organisations under their control to commit crimes. In Roxin's view, this might be the most frequent manifestation because only the State can be above the law of that State. Being the State itself in charge of enforcing its laws, whenever those at the top use its organisations to commit crimes and nobody resists, the law will not be sufficient to prevent or punish crimes committed through those organisations, and could further be used to ensure the functioning of the organisation and its members as per the criminal plan.[337]

251. The second manifestation, according to Roxin, emerges in clandestine, secret, criminal organisations, or the like, with a clear criminal orientation, in violation of positive criminal laws, and with rigid structures that are independent to the changing nature of their members. Criminal organisations composed of a number of members who know each other and accordingly elect a leader would not fall within this category because such specific organisations depend on the specific identity of their members, as opposed to the requisite replaceable nature that is characteristic of the members of the abovementioned apparatuses of power.[338]

252. In relation to the type of organised power apparatus and whether this need be

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[336] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), pp. 240-243.
[337] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 244.
[338] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 245.

State-sponsored, in the mega-trial that occurred in the context of the case brought against the terrorist leader Abimael Guzmán in Peru, Guzmán's defence claimed that the notion of indirect perpetration through organised structures of power could not be applied because the Shining Path was not a State-sponsored organisation. However, the National Penal Chamber and the Peruvian Supreme Court pointed out that the application of the notion of indirect perpetration through organised structures of power was never limited to State-sponsored organisations because, according to Roxin, it is mainly suitable for situations in which the relevant organisation acts outside the legal order.[339] The Peruvian Supreme Court highlighted that indirect perpetration through an organised power apparatus encompasses both the abuse of a State power structure, as well as, above all, a non-governmental structure as in the cases of macro-criminality or organised crime.[340]

253. Before this Court, in the case of *Katanga and Ngudjolo*, the Pre-Trial Chamber helpfully set out the characteristics of an organised power apparatus:

> 512. The Chamber finds that the organisation must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.
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> 513. In the view of the Chamber, it is critical that the chief, or the leader, exercises authority and control over the apparatus and that his authority and control are manifest in subordinates' compliance with his orders. His means for exercising control may include his capacity to hire, train, impose discipline, and provide resources to his subordinates.[341]

254. The Pre-Trial Chamber in this case further referred to the 'mechanisation' of the organisation ensured by the replaceable nature of the subordinates:

> 515. In addition, particular characteristics of the organised and hierarchical apparatus enable the leader to actually secure the commission of crimes. *In essence, the leader's control over the apparatus allows him to utilise his*

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[339] Peru, Permanent Criminal Court, *P v. Abimael Guzmán Reinoso et al.*, Judgment, 13 October 2006, Case No. 560-03; *Abimael Guzmán* Judgment 26 November 2007.
[340] *Abimael Guzmán* Judgment 26 November 2007, pp. 25-26: ('*La autoría mediata a través de aparatos de poder abarca tanto al abuso de una estructura de poder estatal, como y sobre todo a una estructura no gubernamental como en los supuestos de la macrocriminalidad o criminalidad organizada como la presente*').
[341] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 512-513.

> *subordinates as "a mere gear in a giant machine" in order to produce the criminal result "automatically" […].*
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> 516. Above all, this "mechanisation" seeks to ensure that the successful execution of the plan will not be compromised by any particular subordinate's failure to comply with an order. Any one subordinate who does not comply may simply be replaced by another who will; the actual executor of the order is merely a fungible individual. As such, the organisation also must be large enough to provide a sufficient supply of subordinates.
>
> 517. *The main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders.* […][342]

255. The Trial Chamber in the same case highlighted that '[t]he key to the superior's securing control over the crime is the functional automatism which propels the apparatus of power'.[343] It noted that '[i]t is the interchangeability of potential executors which makes it possible to establish that the organisation consists of several persons who may replace one another and who are all in a position to bring about the material elements of the crimes'.[344] It also referred to this functional automatism as follows:

> Control over the crime ensues, therefore, from the nature of the organisation and its structural dynamics − any personal ties between the perpetrator-by-means and the executor are ultimately inconsequential, even where they may be taken into account. The apparatus somehow operates autonomously and both its existence and survival must not depend on any personal relationships between its members.[345]

256. The Trial Chamber in *Katanga and Ngudjolo* pointed out that '[i]t is the existence of an organised and hierarchical apparatus of power, characterised by near-automatic obedience to the orders it hands down, which will allow a court to find certain members of the structure responsible as perpetrators of crimes whose material elements were committed by their subordinates'.[346]

257. In a similar line of reasoning, the Peruvian Supreme Court in the case of *Abimael Guzmán* underscored the key aspects of the organised power apparatus: a hierarchical structure and the replaceable nature of its members. The Peruvian Supreme Court considered the replaceable nature of the members of the organisation a key requirement

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[342] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 515-517 (emphasis added).
[343] *Katanga* Conviction Decision, para. 1408.
[344] *Katanga* Conviction Decision, para. 1408.
[345] *Katanga* Conviction Decision, para. 1409.
[346] *Katanga* Conviction Decision, para. 1410.

of the notion of indirect perpetration. When analysing the replaceable nature of the members of the Shining Path, the Peruvian Supreme Court focused on the successive interchangeability of its members. It emphasized that, if a member of the Shining Path did not comply with an order of the Permanent Direction Committee, another member would replace him.[347]

258. The Peruvian Supreme Court in the same case highlighted that what is relevant in terms of indirect perpetration through an organised power apparatus is the existence of a hierarchical structure with replaceable executors. In this structure the indirect perpetrator controls the crime and his or her decision is transmitted through the chain of command in which each agent transmitting the order is equally an indirect perpetrator.[348]

259. Subsequently, in the case against former Peruvian president Fujimori, the Peruvian Supreme Court considered that indirect perpetration through an organised power apparatus requires the previous existence of an organised structure possessing a solid hierarchy line making the superior strategic level responsible for the criminal decisions adopted within said structure.[349] It found that the organisation must have two characteristics: (1) role assignment, implying a division between the strategic and executory level and not a mere labour division; and, (2) a functioning life independent to that of its members (*'una vida funcional independiente a la de sus integrantes*'), leading to automatism or automatic apparatus functioning.[350]

260. Interestingly, the Peruvian Supreme Court considered that a characteristic of the organised power apparatus is that the direct executors have a psychological predisposition to fulfil the order that implies the commission of a crime. This is because the executor no longer acts as an individual but as part of the strategic, operational and

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[347] Peru, Supreme Court of Justice, *P v. Abimael Guzmán Reinoso et al.*, Judgment, 14 December 2007, Case No. 5385-2006.
[348] *Abimael Guzmán* Judgment 26 November 2007, pp. 25-26: ('*Lo relevante desde la perspectiva de la autoría mediata con uso de aparatos de poder es el hecho que exista un estructura jerárquica, con ejecutores fungibles y en el que el hombre de atrás ejerza un dominio del hecho, cuya decisión se trasmita a través de una cadena de mando, en la que cada agente trasmisor sea igualmente un autor mediato*').
[349] *Barrios Altos* Judgment, para. 726.
[350] *Barrios Altos* Judgment, para. 726.

ideological whole that integrates and leads the existence of the organisation.[351] In his or her behaviour, the executor will reflect the objectives of this collective entity and of superiors who he obeys and to whom he is subordinate.[352]

261. It follows from the above that the organised power apparatus may be a State or non-State organisation. Similarly, it could be a formal or informal organised power apparatus. The decisive features of the organised power apparatus are: (1) it must be hierarchically organised; (2) it enjoys automatic functioning; (3) the replaceable nature of its members; and (4) the fact that the criminal acts of the direct executor are always to the benefit of the organisation.

ii. Functional control by the perpetrator

262. As explained above, originally control over a crime through another person was considered to materialise through either mistake or coercion.[353] In Roxin's view, these two alternatives were inadequate for comprehending specific types of criminality where control is based on organised power structures:

> [A]side from control based on error and control based on coercion, there is also, in an objective delineation of modes of participation, a third, quite independent form of indirect perpetration that I will call 'control based on organized power structures' and that, in contrast to the two first named types of indirect perpetration, permits control of events despite the complete responsibility of the direct perpetrator.[354]

263. He nonetheless considers that in this third form, regardless of the indirect perpetrator's control, the direct perpetrator's freedom is not limited, nor is he or she spared from liability.[355] Yet, in Roxin's view, this is irrelevant in terms of the control exerted by the person behind the apparatus, because, to him, the direct perpetrator is not a specific individual who is free and responsible for his acts, but rather an

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[351] *Barrios Altos* Judgment, paras 740-741.
[352] *Barrios Altos* Judgment, paras 740-741.
[353] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 197.
[354] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 198.
[355] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 240.

anonymous and substitutable agent.[356]

264. While the direct perpetrator intends and is criminally responsible for the individual crimes he or she commits, the indirect perpetrator is held responsible for the entire spectrum of criminality committed through the organised power apparatus. The direct perpetrator is in this sense replaceable, yet criminally responsible for the crimes he personally commits. It is worth highlighting in this regard that indirect perpetration through an organised power apparatus is the only mode of liability that permits holding accountable two criminally responsible perpetrators who are not committing a crime jointly: the direct perpetrator or executor and the indirect perpetrator who controls the functioning of the organisation.

265. Here the concept of control is key. Control over the crime is achieved through an organisation, which 'develops a life independent of its changing membership. Its functioning does not depend on the individual personality of the executors; it is, so to speak, "automatic".'[357] Hence,

> the behind-the-scenes actor at the nerve centre of the organizational structure presses a button and issues an order to kill, he can expect to be obeyed, without needing to know those who carry it out. Nor is it necessary that he have recourse to the tools of coercion or deception. After all, he knows that if one of the numerous organs participating in the commission of the offence shirks its task, another will immediately take its place without affecting the accomplishment of the overall plan.[358]

266. According to Eichmann's counsel, 'a refusal of obedience on his part would have had no effect on the implementation of the extermination of the Jews'; '[t]he command apparatus would have continued to operate, as it did after Heydrich was killed', and '[i]n face of orders from an all-powerful collective, the sacrifice would be senseless'.[359] Roxin considers this to be characteristic in organised power apparatuses such as the Nazi State, where Eichmann was executing his superior's plans but anyone else could

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[356] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), p. 240.
[357] G. Werle, B. Burghardt, 'Introductory Note' in *9 Journal of International Criminal Justice* (2011), p. 198.
[358] G. Werle, B. Burghardt, 'Introductory Note' in *9 Journal of International Criminal Justice* (2011), p. 198.
[359] R. Servatius, *Verteidigung Adolf Eichmann: Plädoyer* (1961), pp. 77-78.

have equally done so. However, Roxin notes that, besides being a replaceable executor in the apparatus, Eichmann was, at the same time, embedded in the middle level of the power apparatus which enabled him to control the crimes executed by those on the ground and retain the power to frustrate them.[360] In this regard, the bench found Eichmann to be 'no mere "cog", small or large, in a machine propelled by others; he was, himself, one of those who propelled the machine'.[361]

267. Therefore, a fundamental element that allows for this third form of indirect perpetration is the replaceable nature of those carrying out the criminal acts. In Roxin words: 'the individual is an anonymous, interchangeable figure, a cog in the machine of the power structure that can be replaced at any time.'[362] It is the replaceable nature of the persons carrying out the crimes that allows the automatic functioning of the organisation and thus the control of the crimes by the indirect perpetrator.

268. As to the proximity or remoteness of the indirect perpetrator to the criminal acts, Roxin affirms that

> [W]hereas normally, the farther removed a participant is from the victim and the direct criminal act, the more he is pushed to the margins of events and excluded from control over the acts, in this case the reverse is true. Loss of proximity to the act is compensated by an increasing degree of organizational control by the leadership positions in the apparatus.[363]

269. Similarly, the District Court of Jerusalem in the case of Eichmann found that 'the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned'.[364] In its view, 'the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the

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[360] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), pp. 242-243.
[361] E. Lauterpacht, 'Attorney-General of the Government of Israel v. Adolf Eichmann' in *36 International Law Reports* (1968), p. 331.
[362] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 199.
[363] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 200.
[364] Israel, District Court of Jerusalem, *Attorney General v. Adolf Eichmann*, Judgment, 11 December 1961, Case No. 40/61 (the '*Eichmann* Judgment'), p. 193.

higher ranks of command'.[365]

270. The Peruvian Supreme Court has also determined that there are several degrees of responsibility and that the degree of responsibility will vary for the higher stratum of power, and will be greater than that corresponding to the intermediary level.[366] It determined that, as Roxin put forth, the loss of proximity of the highest stratum to the acts is compensated by its control over the organisation.[367]

271. The finding concerning the irrelevance of the proximity of the indirect perpetrator to the person who actually committed a crime is remarkable. Indeed, in contexts of mass criminality where the indirect perpetrators generally make use of structured apparatuses of power to carry out their criminal plan, those carrying the highest responsibility are generally not those physically closer to the criminal acts considered. It is thus clear that control of the crime does not correlate to physical proximity to the criminal acts.

272. The approach proposed by Roxin has already been applied by the Court. Notably, in the case of *Katanga and Ngudjolo*, the Pre-Trial Chamber noted that

> 496. A concept has developed in legal doctrine that acknowledges the possibility that a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible. This doctrine is based on the early works of Claus Roxin and is identified by the term: "perpetrator behind the perpetrator" (*Täter hinter dem Täter*).
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> 497. *The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator.* As such, in some scenarios it is possible for both perpetrators to be criminally liable as principals: the direct perpetrator for his fulfilment of the subjective and objective elements of the crime, and the perpetrator behind the perpetrator for his control over the crime via his control over the will of the direct perpetrator.
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> 498. Several groups of cases have been presented as examples for the perpetrator behind the perpetrator's being assigned principal responsibility despite the existence of a responsible, direct perpetrator (i.e., one whose actions are not exculpated by mistake, duress, or the lack of capacity for blame-worthiness). This notwithstanding, the cases most relevant to international criminal law are those

[365] *Eichmann* Judgment, p. 193.
[366] *Barrios Altos* Judgment, para. 731.
[367] *Barrios Altos* Judgment, para. 731.

> in which the perpetrator behind the perpetrator commits the crime through another by means of "control over an organisation" (*Organisationsherrschaft*).[368]

273. Trial Chamber II in the same case endorsed the approach followed by the Pre-Trial Chamber stating that '[o]ther forms of control may include the existence of an organised apparatus of power whose leadership may be assured that its members will effect the material elements of the crime'.[369] The Trial Chamber correctly noted that the approach of control over the organisation need not be 'the one and only legal solution that allows the provisions of article 25(3)(a) concerning commission by an intermediary to be construed'.[370] In its understanding, 'the sole indispensable criterion […] is the indirect perpetrator's exertion, in or other [*sic*] some fashion, including from within an organisation, of control over the crime committed through another person'.[371]

274. When the control of the crime through another person occurs as a result of the functional control of the organised power apparatus,

> the criterion of control must be construed as requiring that the indirect perpetrator use at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of a crime, without leaving of the subordinates at liberty to decide whether the crime is to be executed.[372]

275. In the context of the case brought against former Peruvian president Fujimori, the Peruvian Supreme Court described in detail the characteristics of the commanding power of the indirect perpetrator that enables him or her to control the functioning of the organised power apparatus and thus the commission of crimes by the replaceable direct perpetrators. It held that command power is the ability of the higher strategic level ('the man behind the scenes' or '*el hombre de atrás*' in Spanish) to issue orders or assign roles to the part of the organisation that is subordinate to it. It further clarified that this ability is acquired, or can be conferred, in response to a position of authority or leadership derived from political, ideological, social, religious, cultural, economic or similar factors.[373]

276. In terms of how the command power is manifested, the Peruvian Supreme Court

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[368] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, pp. 496-498 (emphasis added).
[369] *Katanga* Conviction Decision, para. 1403.
[370] *Katanga* Conviction Decision, para. 1406.
[371] *Katanga* Conviction Decision, para. 1406.
[372] *Katanga* Conviction Decision, para. 1411.
[373] *Barrios Altos* Judgment, para. 729.

held that it occurs when the person behind the scenes exercises orders, expressly or implicitly, which will be fulfilled due to the automaticity granted by the organisation's own functional constitution. In the view of the Peruvian Supreme Court, it is therefore unnecessary that the ordering party also, or alternatively, resort to coercion or deception of the potential executors. This is because the material perpetrators share the criminal objectives pursued by the organisation and have a predisposition to comply with the order that expresses the realisation of an illegal act. Therefore, according to the Peruvian Supreme Court, the person behind the scenes exercises control over the will of a direct executor given the integration of the direct executor within the organised power apparatus itself.[374]

277. It follows that within an organised power apparatus, the indirect perpetrator controls the crimes by virtue of his or her hierarchical position in the organisation as well as its automatic functioning ensured by the replaceable nature of its members. This enables the indirect perpetrator to control the functioning of the organisation and thus the commission of crimes by the direct perpetrators, while retaining the power to frustrate the commission of said crimes. While indirect perpetrators are often physically distant from the criminal incidents, this does not preclude them from bearing a high degree of responsibility for criminal acts.

iii. Differences from instigation (article 25(3)(b) of the Statute)

278. Indirect perpetration is often confused with the concept of instigation. However, these must be distinguished. According to article 25(3)(b) of the Statute, a person who solicits or induces someone else to commit a crime is criminally liable, as long as the crime is in fact attempted or committed. Commentators have noted that, in common legal language, *soliciting* means urging, advising, commanding or otherwise inciting another to commit a crime, whilst *inducing* means the enticement or urging of another person to commit a crime.[375] Both soliciting and inducing contain elements of persuasion and force, and refer to cases in which a person influences someone else to

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[374] *Barrios Altos* Judgment, para. 729.
[375] A. Coco,'Instigation' in J. De Hemptinne, R. Roth, E. Van Sliedregt, M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), pp. 257-283.

commit a crime.[376]

279. In an analysis of *Attorney-General of the Government of Israel v. Adolf Eichmann*, Roxin notes that the bench discarded solicitation as a mode of liability adequate for mass crimes such as the Jewish extermination. Roxin points to the bench's remark that the common nomenclatures of 'counselling and soliciting' would not sufficiently encompass the mass crimes at stake.[377] The bench notably observed that '[i]n such an enormous and complicated crime as the one we are now considering, wherein many people participated at various levels and in various modes of activity […] there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime'.[378]

280. It has been correctly pointed out that the main distinction between an instigator and the 'perpetrator behind the desk' is that the latter 'need not look out for a principal offender but already has at hand people willing to commit the offence'.[379] Similarly, Schünemann noted that the indirect perpetrator does not 'submit' to the decision of the immediate actor, and therefore, cannot be treated as a mere instigator.[380] In terms of the level of blameworthiness, Roxin has pointed out that the leader of an organisation bears greater responsibility than a mere instigator because the replaceable members within an organisation cannot substantially deviate from the orders given by the leader.[381]

281. In the case of *Katanga and Ngudjolo*, Trial Chamber II has correctly observed that 'whereas participation as an instigator under article 25(3)(b) may entail a position of authority, it requires a contribution consisting solely of prompting or encouraging a decision to act − the power to decide on the execution of the crime remains the preserve

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[376] A. Coco,'Instigation' in J. De Hemptinne, R. Roth, E. Van Sliedregt, M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), pp. 257-283.
[377] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), pp. 241-242.
[378] *Eichmann* Judgment, para. 197.
[379] T. Weigend, 'Perpetration through an Organization' in *9 Journal of International Criminal Justice* (2011), p. 97.
[380] B. Schünemann, 'Die Rechtsfigur des "Täters hinter dem Täter" und das Prinzip der Tatherrschaftsstufen' in A. Hoyer, H. E. Muller, M. Pawlik, J. Wolter (eds.), *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (2006), p. 410.
[381] C. Roxin, 'Organisationsherrschaft und Tatentschlossenheit' in *Zeitschrift fur internationale Strafrechtsdogmatik* (2006), p. 295.

of another person'.[382]

282. In the same case, the Pre-Trial Chamber has noted that it is the control over the organisation that justifies holding the perpetrator behind the desk as a perpetrator rather than as an accessory to the crime:

> The leader's ability to secure this automatic compliance with his orders is the basis for his principal — rather than accessorial — liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed.[383]

283. While in the case of the instigator, the instigator encourages the commission of crimes by the perpetrator and does not have control thereof, in the case of indirect perpetration, the perpetrator behind the perpetrator retains control over the crime by virtue of his hierarchical position within the organised power apparatus and its automatic functioning that enables compliance with its criminal plan. Furthermore, whilst in the case of instigation, the will of the direct perpetrator is relevant to the mass criminality taking place, in the case of an indirect perpetrator the will of the direct perpetrator is only relevant to the individual crime(s) he commits but it is irrelevant to the mass criminality orchestrated by the indirect perpetrator. The direct perpetrator is in this sense replaceable.

iv. Differences from complicity (article 25(3)(c) of the Statute)

284. Some may confuse indirect perpetration through an organised power apparatus with the responsibility of accomplices. Article 25(3)(c) of the Statute attaches criminal liability to any person who '[f]or 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'. Werle notes that the assistance of the accomplice to the criminal act of the perpetrator may occur before, during or after the commission of the crime.[384]

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[382] *Katanga* Conviction Decision, para. 1396.
[383] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 500-501, 511-513, 515-518.
[384] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 969.

285. Roxin helpfully distinguishes between those controlling the crime within the organisation and those whose acts do not independently move the organisation forward. In this view, the latter commit acts that only amount to participation. Accordingly, consultative functions, drafting plans without power of command or providing the means only imply accessory to a crime as those actions do not move the machinery.[385]

286. Werle also correctly notes that '[w]hile the assistant's contribution facilitates the commission of the crime, the assistant wields no control over the commission of the crime as such'.[386] He notes in this regard that '[b]y the very nature of assistance – contribution to the crime of another – it is not the person assisting who defines the crime committed; it is the perpetrator'.[387] Therefore, 'assistance pursuant to Article 25(3)(c) of the ICC Statute captures contributions to the commission of a crime that are not covered as joint commission'.[388]

287. Van Sliedregt and Yanev further note that while co-perpetration 'assigns *principal* liability for the charged offence, […] aiding and abetting is a form of *accessorial* responsibility for contributing to the crime of another person'.[389] They also point to the 'critical distinction' that while co-perpetration 'requires the existence of a "common plan or agreement", between the accused and the other participants in the group crime', there is no such requirement for complicity.[390]

288. While the accomplice does not control the crime and without his or her contribution, the crime would still have been possible given that its ownership belongs to the (direct or indirect) perpetrator(s), in cases of indirect perpetration through organised power structures, it is the indirect perpetrator who controls the commission

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[385] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011), p. 202.
[386] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 969.
[387] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), pp. 969-970.
[388] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 969.
[389] E. van Sliedregt, L. Yanev, 'Co-Perpetration Based on Joint Control over the Crime' in J. De Hemptinne, R. Roth, E. van Sliedregt M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), p. 91 (emphasis in original).
[390] E. van Sliedregt, L. Yanev 'Co-Perpetration Based on Joint Control over the Crime' in J. De Hemptinne, R. Roth, E. van Sliedregt, M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), pp. 91-92.

of crimes and retains the power to frustrate them.

v. Differences from contribution to a group crime (article 25(3)(d) of the Statute)

289. It is also important to make a distinction between indirect perpetration through an organised power apparatus and criminal liability for contribution to a group crime under article 25(3)(d) of the Statute. This provision states that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person […] [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose […]'.

290. Werle describes this norm as a 'catch-all provision' applicable to 'indirect forms of assistance – such as financing the group – that do not warrant liability for either co-perpetration or aiding and abetting'.[391] In his view, this is because those forms of assistance 'have no substantial effect on the commission of the crime'.[392] He correctly refers to contribution to a group crime 'as a subsidiary mode of participation yielding the weakest form of liability'.[393] In a similar line of reasoning, Schabas contends that 'Article 25(3)(d) has been described as a "residual form of accessory liability which makes it possible to criminalize those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting"'.[394] He observes that this residual mode of liability is '"triggered only when subparagraphs (a)–(c) are not satisfied"'.[395]

291. Van Sliedregt and Yanev also highlight the differences, noting in particular that '"common purpose" responsibility in Article 25(3)(d) is a form of accessorial liability, while co-perpetration based on joint control ascribes to the accused principal liability

[391] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 970.
[392] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), pp. 970-971.
[393] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in *5 Journal of International Criminal Justice* (2007), p. 971.
[394] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), p. 579.
[395] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), p. 579.

for the group commission of the crime'.[396] They also note that, unlike co-perpetration, '"common purpose" responsibility in Article 25(3)(d) of the ICC Statute does not require the accused to be a member of the group of persons acting with a common purpose'.[397]

292. Two important distinctions between this mode of liability and indirect perpetration through an organised power apparatus must be pointed out. First, as with the case of instigation and accomplice liability, persons contributing to a group crime do not have control over the crimes committed by the group and therefore do not retain the power to frustrate their commission. Second, a group of persons acting with a common purpose is not tantamount to an organised power apparatus. As explained in detail above, an organised power apparatus is hierarchically organised, functions automatically, its members are replaceable and the criminal acts of the direct executor are always to the benefit of the organisation. Therefore, it would be erroneous to equate an organised power apparatus with a mere group of persons who share a common purpose.

vi. Differences from superior responsibility

293. Indirect perpetration through an organised power apparatus is also distinct from the residual superior responsibility mode of liability. The doctrine of superior responsibility holds superiors criminally responsible in relation to crimes committed by their subordinates on the basis of their failure to prevent or punish them.[398] Superior responsibility requires: (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that crimes were about to be or had been committed by the subordinates; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.[399]

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[396] E. van Sliedregt, L. Yanev 'Co-Perpetration Based on Joint Control over the Crime' in J. De Hemptinne, R. Roth, E. van Sliedregt, M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), p. 93.
[397] E. van Sliedregt, L. Yanev 'Co-Perpetration Based on Joint Control over the Crime' in J. De Hemptinne, R. Roth, E. van Sliedregt, M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), p. 93.
[398] M. Jackson, 'Command Responsibility' in J. De Hemptinne, R. Roth, E. van Sliedregt, M. Cupido, M. Ventura, and L. Yanev (eds.), *Modes of Liability in International Criminal Law* (2019), p. 409.
[399] M. Jackson, 'Command Responsibility'in J. De Hemptinne, R. Roth, E. van Sliedregt, M. Cupido, M. Ventura, and L. Yanev(eds.), *Modes of Liability in International Criminal Law* (2019), p. 409.

294. To begin with, while liability under article 25(3) of the Statute, in general, refers to actions taken by the perpetrators, accomplices and instigators,[400] the *actus reus* required for liability under article 28 of the Statute explicitly refers to an omission on the part of the superior:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, *as a result of his or her failure to exercise control properly over such forces*, […]
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, *as a result of his or her failure to exercise control properly over such subordinates* […].[401]

295. Another relevant distinction between the role played by an indirect perpetrator and that of a superior is that the perpetrator by means or indirect perpetrator controls the overall commission of the crime and the direct perpetrator is merely an executor.[402]

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[400] During the drafting history, some proposals included mentions or optional provisions where the *actus reus* under the Statute could be acts or omissions (*see* Preparatory Committee on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court. Volume II (Compilation of proposals), 13 September 1996, A/51/22, pp. 90-91. *See also* United Nations General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 1995, A/50/22, p. 58; United Nations General Assembly, United Nations Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from February 11 to 21, 1997, 12 March 1997, A/AC.249/1997/L.5, p. 18; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Working Group on General Principles of Criminal Law, Report of the Working Group on General Principles of Criminal Law, 29 June 1998, A/CONF.183/C.1/WGGP/L.4/Add.1, p. 4). Although such mentions or provisions do not appear in the current version of the Statute, the drafters, in Cryer's view, did not categorically exclude responsibility by omission (R. Cryer, *An Introduction to International Criminal Law and Procedure* (2010), p. 363. *See also* E. van Sliedregt, *Individual Criminal Responsibility* (2012), p. 54). Moreover, van Sliedregt notes that in some Germanic and common law jurisdictions, the provisions that criminalise an act that requires the perpetrator's positive action can be interpreted as implicitly saying that they also criminalise negative acts (inaction or omissions) that lead to the same result (Van Sliedregt notes that this is known as '*unechte Unterlassungsdelikete*' under German law and 'indirect omissions', as opposed to 'direct' or 'genuine omissions' under common law. E. van Sliedregt, *Individual Criminal Responsibility* (2012), p. 56. In Spanish, this has been translated as '*omisión impropia*', as opposed to '*omisión propia*'. *See* H. Heinrich Jescheck, *Tratado de Derecho Penal* (1981), p. 848). Even if implicit omission were to be considered under article 25(3)(a) of the Statute, this would always be implicit while under article 28 the provision requires an explicit or genuine omission.

[401] Emphasis added.

[402] *See e.g.* V. Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' in *5 Journal of International Criminal Justice* (2007), p. 671, *referring to* K. Ambos, *Internationales Strafrecht* (2006), section 7, margin number 27; A. Eser, 'Individual Criminal

Criminal liability as a responsible superior does not require the exercise of such control over the subordinates.

296. Although it may be possible that a person incur criminal responsibility as both an indirect perpetrator through an organised power apparatus and as a responsible commander, liability under article 28 of the Statute 'is subsidiary to liability under article 25'.[403] Indeed, superior responsibility is a residual mode of liability that, in contexts of mass criminality where crimes are often perpetrated through organised power apparatuses, can only be resorted to when other more appropriate modes of liability cannot be established.

d. Specific requirements for indirect co-perpetration through an organised power apparatus

297. While some have questioned the existence of indirect co-perpetration as a mode of liability under the Rome Statute,[404] this Opinion agrees with the finding of Pre-Trial Chamber I in the case of *Katanga and Ngudjolo* that 'through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of "senior leaders" adequately'.[405]

298. In the same case, the Pre-Trial Chamber dismissed the argument raised by the Defence that the wording of article 25(3)(a) of the Statute, particularly the use of the word 'or', incorporates either co-perpetration or indirect perpetration, but not indirect co-perpetration. In this regard the chamber noted that:

Responsibility' in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*: *A Commentary*, *Vol. I* (2002), p. 793; C. Roxin, *Täterschaft und Tatherrschaft* (2000), p. 142.

[403] V. Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' in *5 Journal of International Criminal Justice* (2007), p. 671, fn 20 *referring to* G. Werle, *Principles of International Criminal Law* (2005), margin number 540.

[404] L. Sadat, J. Jolly, 'Seven Canons of ICC Treaty Interpretations: Making Sense of Article 25's Rorschach Blot' in 27 *Leiden Journal of International Law* (2014) pp. 781-782; J. D. Ohlin, E. van Sliedregt, T. Weigend, 'Assessing the Control-Theory' in 26 *Leiden Journal of International Law* (2013), p. 731-732; J. D. Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), pp. 527-531.

[405] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 492.

> article 25(3)(a) uses the connective "or", a disjunction (or alternation). Two meanings can be attributed to the word "or" – one known as weak or *inclusive* and the other strong or *exclusive*. An inclusive disjunction has the sense of "either one or the other, and possibly both" whereas an exclusive disjunction has the sense of "either one or the other, but not both". Therefore, to interpret the disjunction in article 25(3)(a) of the Statute as either "inclusive" or "exclusive" is possible from a strict textualist interpretation. In the view of the Chamber, basing a person's criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability "in accordance with the Statute".[406]

This Opinion agrees with the above interpretation and recalls that in this case counsel for Mr Ntaganda conceded during the appeals oral hearing that '[i]ndirect co-perpetration is a part of the Statute'.[407] Indeed, indirect co-perpetration occurs when the execution of the material elements of the crime by the co-perpetrators takes place through yet another person or persons, including through the use of an organised power apparatus that enables the control over the commission of crimes by the replaceable direct perpetrators.[408]

299. This Opinion notes that there have been different opinions as to whether indirect co-perpetration is a fourth mode of liability or rather a form of indirect perpetration or co-perpetration.[409] Regardless of the name one may wish to give to this mode of liability, the fundamental aspect is that it is encompassed in article 25(3)(a) of the Statute when it accounts for the possibility of holding someone accountable both as a co-perpetrator and as an indirect perpetrator. Indeed, indirect co-perpetration constitutes an integrated mode of liability encompassed in the Statute that combines the constitutive elements of indirect perpetration and co-perpetration and is therefore compatible with the principle of legality and the rights of the accused.

300. Roxin asserts that a co-perpetrator is an individual who shares with at least one

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[406] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 491.
[407] Transcipt of hearing of 14 October 2020, ICC-01/04-02/06-T-272-Red-ENG, p. 71, lines 23-24.
[408] Similarly, Weigend explained that 'in German understanding, indirect co-perpetration is not a novel ,creation but simply a sub-category of joint perpetration'. *See* T. Weigend, 'Problems of Attribution in International Criminal Law: A German Perspective' in *12 Journal of International Criminal Justice* (2014) p. 260.
[409] *See e.g. Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 491-492). *See also Ruto et al.* Decision on the Confirmation of Charges, paras 287-288; E. van Sliedregt, L. Yanev, 'Co-Perpetration Based on Joint Control over the Crime' in J. De Hemptinne, R. Roth, E. van Sliedregt, *Modes of Liability in International Criminal Law* (2019), p. 110; Conviction Decision, para. 772.

other person joint functional control over the commission of a crime: '[t]his type of "key position" of each co-perpetrator describes precisely the structure of joint control over the act'.[410] It has been correctly observed that in the specific context of crimes committed through an organisation whereby senior leaders jointly control the commission of crimes executed by the replaceable direct perpetrators, neither the doctrine of joint control nor the doctrine of indirect perpetration correctly captures the combined vertical and horizontal elements of these factual circumstances.[411] Given the nature of the crimes under the jurisdiction of this Court, which generally involve cases of large-scale and mass criminality, indirect co-perpetration through an organised power apparatus constitutes an appropriate tool to investigate, prosecute and punish those bearing the highest degree of criminal responsibility.

301. In cases of indirect perpetration through an organised power apparatus, the co-perpetrators are those at the top of the organisation's hierarchy who share the control of the crime by virtue of their functional control over the organisation and the automatism of its functioning. Therefore, the perpetrator behind the desk and the direct perpetrator are not co-perpetrators. Scholars have given the name 'junta model' to those situations where the co-perpetrators exercise joint and vertical control over the same organisation.[412] Weigend has noted that the junta model involves 'one group of subordinates subject to control by a group of leaders working together'.[413]

302. For instance, in the *Omar Al Bashir* case, Pre-Trial Chamber I held that 'there are reasonable grounds to believe that Omar Al Bashir and the other high-ranking Sudanese political and military leaders directed the branches of the "apparatus" of the

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[410] C. Roxin, *Täterschaft und Tatherrschaft* (Perpetration and control over the act) (1994), p. 278.
[411] H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2009), p. 329; J. D. Ohlin, *Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability* (2012) p. 577; H. G. van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility' in *Journal of International Criminal Justice* (2009), p. 312.
[412] H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*. (2009), p. 330.
[413] T. Weigend, 'Perpetration through an Organization' in *9 Journal of International Criminal Justice* (2011), p. 91.

State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan'.[414]

303. The elements that must be established for indirect co-perpetration, including when the co-perpetrators use an organised power apparatus to commit the crimes through other persons, have been set out in the jurisprudence of the Court.

304. Specifically, in the case of *Katanga and Ngudjolo*, the Pre-Trial Chamber found that the two main elements of indirect co-perpetration are 'the existence of an agreement or common plan between […] those who carry out the elements of the crime through another individual'[415] and 'the division of essential tasks between two or more persons'.[416] The Pre-Trial Chamber in the same case clarified that when the co-perpetrators commit the crimes through others 'their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes'.[417]

305. In the case of *Ruto and Sang*, the Pre-Trial Chamber set out in detail its understanding of the objective elements of indirect co-perpetration:

> (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.[418]

306. In relation to the existence of a common agreement or plan among the co-perpetrators, the jurisprudence of the Court has established that 'the agreement or plan must include an element of criminality […] it must involve the commission of a crime'

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[414] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (the '*Al Bashir* Warrant of Arrest Decision'), para. 216.
[415] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 522.
[416] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 521.
[417] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 525. *See also* *Ruto and Sang* Decision on the Confirmation of Charges, para. 306.
[418] Ruto and Sang Decision on the Confirmation of Charges , para. 292 *referring to* *Bemba* Decision on the Confirmation of Charges, paras 350-351; *Katanga and Ngudjolo* Decision on the Confirmation of Ccharges, paras 500-514, 527-539; *Al Bashir* Warrant of Arrest Decision*Al Bashir* Warrant of Arrest Decision, paras 209-213.

and 'does not necessarily need to be explicit', meaning that 'its existence may be inferred from the "concerted action" of the indirect co-perpetrators'.[419]

307. The elements of this mode of criminal responsibility can be summarised as: the existence of an agreement or a common plan between two or more persons; the coordinated 'essential contribution' by each co-perpetrator to the common plan resulting in the realisation of the objective elements of the crime; and the existence of an organised power apparatus hierarchically controlled by the co-perpetrators that functions automatically and is composed of replaceable elements at the base willing to implement the common plan that involves the commission of crimes.

308. It is thus clear that when more than one person exercise functional control over an organised power apparatus in furtherance of an agreed common plan that involves an element of criminality, they are indirect co-perpetrators. All of them retain the power to frustrate the commission of crimes by the replaceable direct perpetrators who are at the base of the organisation. This integrated mode of liability encompassed in the Rome Statute combines the constitutive elements of joint perpetration and indirect perpetration expressly set out in article 25(3)(a) of the Rome Statute and is thus compatible with the principle of legality and the rights of the accused.

e. Conclusion on the legal framework and relevant juridical considerations

309. From the above analysis, a number of conclusions may be drawn. First, article 25(3)(a) of the Statute enshrines all modalities of the well-established category of perpetration: direct perpetration, co-perpetration and indirect perpetration. Indirect co-perpetration is an integrated mode of liability encompassed in the Rome Statute that combines the elements of co-perpetration and indirect perpetration. It is compatible therefore compatible with the principle of legality and the rights of the accused.

310. Second, the control of the crime is the objective distinguishing criterion that differentiates perpetration in all its modalities (article 25(3)(a) of the Statute) from other modes of liability (article 25(3)(b)-(d) and article 28 of the Statute). While in the case

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[419] *Ruto et al.* Decision on the Confirmation of Charges, para. 301; *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 523. *See also* *Lubanga* Appeal Judgment, paras 445-446; *Bemba et al.* Appeal Judgment, paras 133, 764.

of perpetration the accused person controls the crime thereby retaining the power to frustrate its commission, in the other modes of liability this ability is absent.

311. Third, indirect perpetration through an organised power apparatus is a form of commission through another person as provided in article 25(3)(a) of the Statute whereby crimes are committed through an organised power apparatus (*Organisationsherrschaft* in German *or autoría mediate a través de aparatos organizados de poder* in Spanish). As a result of his or her hierarchical position within the structure and the automatic functioning thereof, the indirect perpetrator exercises functional control over the crimes and retains the power to frustrate their commission. The two main characteristics of indirect perpetration through an organised power apparatus are the existence of an organised power apparatus duly structured composed of replaceable direct perpetrators leading to compliance with the plans, directives, objectives and, ultimately, orders of the organisation and the functional control exerted by the indirect perpetrator over the functioning of the organisation.

312. Fourth, an organised power apparatus may be State or non-State. It may be a formal or informal organisation. The key features of an organised power apparatus is that (i) it is hierarchically structured; (ii) it functions automatically; (iii) its members are replaceable; and (iv) the criminal acts of the direct perpetrators are always to the benefit of the organisation.

313. Fifth, in the context of organised power apparatus, the indirect perpetrator controls the crimes by virtue of his or her hierarchical position and the automatic functioning of the organisation. It is the functioning of the organised power apparatus whereby the members at the base are replaceable by nature that enables compliance with directives, instructions and, eventually, orders of the organisation. Indirect perpetrators are often physically distant from the commission of crimes but this does not prevent them from bearing a high degree of responsibility.

314. Sixth, indirect co-perpetration through an organised power apparatus is an appropriate approach to deal with the crimes within the jurisdiction of the Court which involve large-scale and mass criminality and where the Court aims at prosecuting those most responsible.

315. Seventh, the elements of indirect co-perpetration through organised power

apparatus are: the existence of an agreement or a common plan between two or more persons; the realisation of the objective elements of the crime by the co-perpetrators in a coordinated manner; and the existence of an organised power apparatus hierarchically controlled by the co-perpetrators that functions automatically and is composed of replaceable elements at the base willing to implement the common plan which involves the commission of crimes.

3. Application to the case

316. In its determination of Mr Ntaganda's criminal responsibility as an indirect co-perpetrator pursuant to article 25(3)(a) of the Statute, the Trial Chamber divided the analysis in three parts. It first addressed the common plan agreed upon by the co-perpetrators;[420] then the execution of the elements of the crimes through other persons (the UPC/FPLC organisation and Hema civilians supporters);[421] and thirdly Mr Ntaganda's contribution.[422]

317. Given that the second and third elements are the most important for establishing Mr Ntaganda's criminal liability as an indirect co-perpetrator through an organised power apparatus, this Opinion will first set out the characteristics of the UPC/FPLC that makes it an organised power apparatus; it will then refer to the role played by Mr Ntaganda therein to illustrate how he exercised functional control throughout the period relevant to the charges. Finally, this Opinion will refer to the common plan agreed upon by the co-perpetrators.

318. When assessing the execution of the crimes through the UPC/FPLC, the Trial Chamber noted that it 'was a well-organised armed group, consisted of a high number of trained soldiers and possessed a significant arsenal of weapons, and resembled a conventional army'.[423] It further noted that '[t]he UPC/FPLC had a formal military structure' and that three of the co-perpetrators, including Mr Ntaganda, 'held the position of highest authority within the UPC/FPLC'.[424] The Trial Chamber further

[420] Conviction Decision, paras 781-811.
[421] Conviction Decision, paras 812-825.
[422] Conviction Decision, paras 826-857.
[423] Conviction Decision, para. 814.
[424] Conviction Decision, para. 814.

observed that the 'recruits were trained in military skills, including discipline' and that the orders of those in holding positions of authority 'were respected and executed'.[425]

319. In determining that the common plan was executed and crimes were committed as a result of its implementation through the UPC/FPLC, the Trial Chamber referred to the conditions of living and training to which recruits and soldiers were subjected. It referred in this regard to violent beatings, imprisonment, submersion in water, food deprivation, rapes and in some instances death.[426] The training and living conditions undoubtedly increased the already existing vulnerability of recruits and soldiers and, as noted by the Trial Chamber, made 'them even more docile and submissive to their commanders'.[427]

320. On the basis of the above findings of the Trial Chamber, it is clear that the UPC/FPLC was an organised apparatus of power. Indeed, during the period of time relevant to the charges, it was a hierarchically organised structure. By virtue of the training and living conditions to which they were subjected, the members of this organisation were replaceable and willing to execute the instructions, directions and orders of the organisation, even if those implied the commission of grave crimes. As correctly found by the Trial Chamber, the UPC/FPLC in effect 'functioned as a tool in the hands of the co-perpetrators' and it was through this organisation that they committed 'without any structural constraints',[428] war crimes and crimes against humanity.

321. When discussing the responsibility of Mr Ntaganda as indirect co-perpetrator through the use of Hema civilians, the Trial Chamber found that they 'functioned as a tool in the hands of the co-perpetrators'.[429] These conclusions were in turn based on the Trial Chamber's finding that 'the Hema civilians engaged in the relevant acts in the context of the general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers, who were themselves committing crimes in Mongbwalu at the

[425] Conviction Decision, paras 815-816.
[426] Conviction Decision, para. 817.
[427] Conviction Decision, para. 818.
[428] Conviction Decision, para. 819.
[429] Conviction Decision, para. 824.

same time', as well as on the finding that 'the conduct of these civilians followed orders of the UPC/FPLC leadership'.[430]

322. From the Trial Chamber's findings, it is clear that the Hema civilians, although not formally members of the UPC/FPLC as an organisation, served as a tool for the commission of crimes by the co-perpetrators. As noted in the Common Judgment, there is evidence in the record of orders issued to the civilians by either Mr Ntaganda or his subordinates.[431] Since they were 'controlled through soldiers of the UPC/FPLC'[432] who were themselves a tool at the co-perpetrators' disposal, the Hema civilians became themselves replaceable direct executors leading to compliance with the criminal plan of the co-perpetrators, including in particular Mr Ntaganda.

323. The Trial Chamber then assessed whether Mr Ntaganda had control over the crimes by virtue of his essential contribution thereto and the resulting power to frustrate their commission. In its determination, the Trial Chamber considered: (i) the position occupied by Mr Ntaganda during the relevant period;[433] (ii) Mr Ntaganda's determinative role in setting up a strong military group capable of driving out from certain areas all Lendu civilians;[434] (iii) the fact that Mr Ntaganda devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second Operations;[435] and (iv) the fact that Mr Ntaganda gave orders to commit crimes and personally engaged in violent conduct towards the enemies.[436]

324. Mr Ntaganda's high position within the hierarchy of the UPC/FPLC as Deputy Chief of Staff in charge of Operations and Organisation allowed him to deploy troops and monitor the operations.[437] It was established that the orders issued by Mr Ntaganda were obeyed and that he 'inspired fear over the troops as well as the population'.[438] The actions he took prior, during and after the First and Second Operations further confirm

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[430] Conviction Decision, para. 822.
[431] Common Judgment, IV.M.3.(c).
[432] Conviction Decision, para. 824.
[433] Conviction Decision, paras 827-829.
[434] Conviction Decision, paras 830-833.
[435] Conviction Decision, paras 834-846.
[436] Conviction Decision, paras 847-851.
[437] Conviction Decision, para. 828.
[438] Conviction Decision, para. 828.

that Mr Ntaganda exercised functional control over the UPC/FPLC and was therefore in a position to control the criminal acts committed by the replaceable direct perpetrators operating on the ground. His contributions as a whole clearly amounted to an essential contribution to the crimes within the framework of the common plan. His control over the crimes and power to frustrate them was established on the basis of his position within the hierarchically organised power structure, the automatic functioning of this structure, the replaceable nature of the members of the UPC/FPLC operating on the ground and their general predisposition to implement the criminal plan of those controlling the organised power structure. These circumstances made him an indirect co-perpetrator through the organised apparatus of power embodied in the UPC/FPLC.

325. In relation to the existence of a common plan, the Trial Chamber found that 'Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo, worked together and agreed in the common plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML'.[439] It further found that '[b]y way of this agreement' the co-perpetrators meant the destruction of the Lendu community, which involved the targeting of civilians through killing, rape and other crimes.[440] It found that 'these acts were performed targeting the Lendu communities specifically in order [*sic*] prevent their return to the assaulted localities'.[441]

326. The Trial Chamber's finding on the existence of a common plan was based on a number of considerations: the gathering of future members of the UPC/FPLC in 2000 based on ethnicity;[442] the setting up of 'a well-functioning armed force' with a disciplinary system ensuring the execution of orders within its ranks;[443] the commission of crimes 'in a systematic way' against the civilian population, predominantly the Lendu;[444] the fact that '[t]he killing of a Lendu, and the looting of Lendu property, were not considered punishable offences by UPC/FPLC soldiers, and rapes went

[439] Conviction Decision, para. 808.
[440] Conviction Decision, para. 809.
[441] Conviction Decision, para. 809.
[442] Conviction Decision, para. 782, *referring to* para. 310.
[443] Conviction Decision, para. 785, *referring to* paras 705-709, 332.
[444] Conviction Decision, para. 797.

unpunished';[445] the meeting of June 2002 in Kampala, at which the objective to drive out the Lendu was stated;[446] teaching recruits that the Lendu and the Ngiti were the enemy;[447] the objective of the UPC/FPLC to chase away the RCD-K/ML, but also the Lendu civilians and those perceived to be non-Iturians;[448] and orders to kill the Lendu.[449]

327. This Opinion concurs with the Common Judgment insofar as it rejects Mr Ntaganda's challenges to the Trial Chamber's findings on the existence of a common plan on the part of the co-perpetrators to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML. As a result of the implementation of the common plan agreed upon by the co-perpetrators, including Mr Ntaganda, several crimes were committed against the Lendu during the First and Second Operations. The Common Judgment appropriately highlights Mr Ntaganda's futile attempt to artificially separate his contributions to the First and Second Operations thereby ignoring that in both instances his contributions were an integral component of the common plan.[450]

328. The above considerations show that throughout the period relevant to the charges the UPC/FPLC was a hierarchically organised power apparatus composed of replaceable members. Within the organisation, Mr Ntaganda, by virtue of his position within the hierarchy and his responsibilities and actions, coupled with the automatic functioning of the organisation, exercised functional control over the UPC/FPLC and therefore over the criminal acts carried out by the replaceable direct perpetrators on the ground. He agreed to a common plan that involved an element of criminality with other co-perpetrators and was therefore correctly charged and convicted as an indirect co-perpetrator; he was in a position to control the commission of crimes by the UPC/FPLC's members and had the power to frustrate their commission.

329. In light of the above considerations, the Trial Chamber was correct in convicting Mr Ntaganda as an indirect co-perpetrator through an organised power apparatus

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[445] Conviction Decision, para. 799, *referring to* para. 332.
[446] Conviction Decision, para. 799, *referring to* paras 290, 293.
[447] Conviction Decision, para. 800, *referring to* para. 373.
[448] Conviction Decision, para. 801, *referring to* section V.A.1.a)(3).
[449] Conviction Decision, para. 790, *referring to* para. 416; para. 803, *referring to* paras 558, 560.
[450] Common Judgment, para. 1064.

embodied in the UPC/FPLC.

B. The kind of knowledge and intent required within the meaning of Article 30 of the Statute in indirect co-perpetration

1. Mr Ntaganda's challenge and determination in the Common Judgment

330. In relevant part of the eleventh ground of appeal, Mr Ntaganda submitted that it was unreasonable for the Trial Chamber to establish his knowledge of the rape and sexual enslavement of three UPC/FPLC soldiers.[451] On the basis of the findings entered by the Trial Chamber and the evidence underlying them, the Common Judgment determined that the Trial Chamber's conclusion that Mr Ntaganda knew of the sexual violence inflicted on individuals under the age of 15 was not unreasonable.[452]

331. Under the twelfth ground of appeal, Mr Ntaganda challenged the Trial Chamber's finding on his intent and knowledge of the enlistment, conscription or use of individuals under the age of 15 to actively participate in hostilities.[453] In particular, he submitted that none of the statements attributed to him by the Trial Chamber made during recruitment meetings show 'any intention' to recruit persons under the age of 15[454] and that the Trial Chamber ignored evidence that the UPC/FPLC's age assessment of recruits was done on the basis of a 'physical size test'.[455] After carrying out a careful evidentiary review, the Common Judgment found that there was no unreasonableness in the Trial Chamber's findings that: (i) Mr Ntaganda's escort within the UPC/FPLC included individuals who were under 15 years of age; (ii) individuals under the age of 15 years were enlisted in the UPC/FPLC and actively participated in the hostilities; (iii) the UPC/FPLC 'extensively recruited individuals of all ages, in particular "young people", including individuals under the age of 15'; (iv) Mr Ntaganda was involved 'in the recruitment process'; and (v) upon their arrival to a 'training location, recruits were

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[451] Mr Ntaganda's Appeal Brief – Part II, paras 259, 270.
[452] Common Judgment, paras 854-855.
[453] Mr Ntaganda's Appeal Brief – Part II, paras 272 – 277.
[454] Mr Ntaganda's Appeal Brief – Part II, para. 275.
[455] Mr Ntaganda's Appeal Brief – Part II, paras 276-277.

screened based on their physical ability, and age as such was not a bar for them to receive training'.[456]

332. In relevant part of the thirteenth ground of appeal, Mr Ntaganda submitted that the Trial Chamber erred in concluding that he, together with the other co-perpetrators, had agreed to the commission of specific crimes.[457] He further contended that the Trial Chamber erred in determining that the co-perpetrators foresaw rape and sexual slavery of child soldiers as a virtually certain consequence of the implementation of the common plan.[458]

333. After a careful review of the Trial Chamber's findings, the Common Judgment determined that it was reasonable for the Trial Chamber to infer from the relevant evidence that the co-perpetrators meant for the crimes of murder, attacks against civilians, appropriation and destruction of property, rape, sexual slavery and forcible displacement of civilians to be committed by virtue of the common plan.[459] In particular, the Appeals Chamber found that the Trial Chamber's findings underlying its conclusion were 'sufficiently detailed and specific to the crimes in question.'[460] As to the foreseeability of commission of crimes against children, the Common Judgment rejected Mr Ntaganda's challenge and found that the Trial Chamber's findings relevant to the existence of a common plan demonstrated, '*inter alia*, the co-perpetrators' knowledge of and participation in the crimes, the frequency of the crimes in issue and the co-perpetrators' failure to prevent and punish those crimes.'[461]

334. Under the fourteenth ground of appeal, Mr Ntaganda argued that the Trial Chamber erred in its finding that he possessed the requisite *mens rea* as an indirect co-perpetrator for crimes committed during the First Operation. First, he averred that the Trial Chamber erred in fact in relying on two alleged directives given by him to enter a finding about his *mens rea*.[462] Second, Mr Ntaganda contended that none of the other

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[456] Common Judgment, IV.L.3.
[457] Mr Ntaganda's Appeal Brief – Part II, paras 301-305.
[458] Mr Ntaganda's Appeal Brief – Part II, paras 306-309.
[459] Common Judgment, IV.M.2.(f).
[460] Common Judgment, para. 939.
[461] Common Judgment, para. 945.
[462] Mr Ntaganda's Appeal Brief – Part II, 321, 323-347.

factors relied upon by the Trial Chamber to infer his intent for the crimes charged either collectively or individually, sustain its finding of *mens rea*.[463] Third, he argued that in inferring the existence of a fact upon which a conviction relies, the Trial Chamber failed 'to consider the reasonable possibility of other available conclusions, and associated relevant evidence'.[464] After a careful review of the evidence underlying each of the Trial Chamber's factual findings supporting its findings on the *mens rea*, the Common Judgment concluded that none of Mr Ntaganda's challenges rendered the Trial Chamber's determination on his knowledge and intent of the crimes unreasonable.[465]

335. In relevant part under the fifteenth ground of appeal, Mr Ntaganda submitted that in assessing his *mens rea* for the crimes committed during the Second Operation, the Trial Chamber failed to find that he was aware of the factual circumstances, which allowed him to exert control over the crime.[466] The Common Judgment rejected Mr Ntaganda's challenge, noting that 'the "knowledge" component of *mens rea* includes an awareness on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime.'[467] The Common Judgment further emphasised that 'the Trial Chamber was not required to assess Mr Ntaganda's *mens rea* in respect of the specific criminal acts committed in each operation', stating that 'rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape, persecution, pillage etcetera, committed in implementation of the common plan'.[468] In light of those considerations, and a careful review of the Trial Chamber's approach to the evidence on the record, the Common Judgment rejected Mr Ntaganda's challenge to the Trial Chamber's findings regarding his knowledge and intent with respect to the Kobu massacre.[469]

336. While this Opinion agrees with the determinations made in the Common Judgment, it deems it necessary to elaborate on the mental element required in cases of indirect co-perpetration and its differences from those required in cases of direct

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[463] Mr Ntaganda's Appeal Brief – Part II, paras 348-352.
[464] Mr Ntaganda's Appeal Brief – Part II, paras 353-358.
[465] Common Judgment, IV.N.
[466] Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II, para. 48.
[467] Common Judgment, para. 1045.
[468] Common Judgment, paras. 1065.
[469] Common Judgment, IV.O.4.(c).

perpetration. The ultimate aim is to strengthen the Common Judgment.

2. Legal framework and relevant juridical considerations

a. Wording of article 30 of the Statute

337. Article 30(1) of the Rome Statute provides that '[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'.

338. Article 30 of the Statute defines the requirement of 'intent' by reference to two factors: conduct and consequence. First, pursuant to article 30(2)(a) of the Statute, a person has intent if he or she 'means to engage in the conduct'. Second, under article 30(2)(b) of the Statute and in relation to a consequence, it is necessary that the individual means to cause that consequence, or is aware that it will occur in the ordinary course of events.

339. Finally, according to article 30(3) of the Statute '"knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.

340. Eser correctly notes that 'the requirement of a mental element in Article 30 of the ICC Statute makes clear that the crime must also be subjectively attributable to the perpetrator, even if the crime definitions in Articles 6 to 8 do not explicitly require a certain state of mind'.[470]

341. According to the early practice of the Court and as pointed out by scholars, the formula 'with intent and knowledge' refers to will and cognition as both being necessary components of the one mental element of intent.[471] Werle and Jessberger explain that '[t]he "intent and knowledge" elements distinguish cognitive from voluntative conditions of criminal responsibility; their cumulative presence at the time

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[470] A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court*: *A Commentary*, *Vol. I* (2002), p. 902.
[471] *See e.g.* *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 529; A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court*: *A Commentary*, *Vol. I* (2002), p. 907.

of the conduct is necessary for liability'.[472] As noted by these scholars, '[t]he points of reference for both elements -intent and knowledge- are the material elements of the crime'.[473]

342. In interpreting article 30 of the Statute, Eser helpfully explains that 'the mental element is determined by (the presence or absence of) cognitive and volitional components both of which can vary in different degrees'.[474] He then refers to various gradations of the mental element most common in national criminal codes and textbooks: *dolus directus* in the first degree (characterised by 'the perpetrator's full knowledge of all material elements of the crime and by his purposeful will to bring about the prohibited result'); *dolus directus* in the second degree (*dolus indirectus*) where he gives the example of a perpetrator who 'aims at destroying a certain building, while not wishing, however certainly knowing that he cannot reach his military aim without inevitably killing innocent civilians'; *dolus eventualis* where 'in the aforementioned example of a war crime the perpetrator does not wish to kill civilians, but in being aware of this danger is prepared to approve of it if it should happen'.[475]

343. Jeschek notes that '[k]nowledge is here taken to mean "awareness, that [...] a consequence will occur in the ordinary course of events" (Article 30(3) of the ICC Statute), including the concept of *dolus eventualis* used in continental European legal theory'.[476] In a similar line of reasoning, Piragoff and Robinson note that 'in most legal systems, "intent" does not only include the situation where there is direct desire and knowledge that the consequence will occur or be caused, but also situations where there

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[472] G. Werle and F. Jessbeger, 'Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' in *Journal of International Criminal Justice* (2005), pp. 35-55 at p. 38.
[473] G. Werle and F. Jessbeger, 'Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', Journal of International Criminal Justice (2005), pp. 35-55 at p. 38.
[474] A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court*: *A Commentary*, *Vol. I* (2002), p. 905.
[475] A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court*: *A Commentary*, *Vol. I* (2002), pp. 905-906. Eser also refers to other gradations, namely recklessness or conscious negligence and unconscious negligence.
[476] H. Jescheck 'The General Principles of International Criminal Law Set Out in Nuremberg, As Mirrored in the ICC Statute' in *2 Journal of International Criminal Justice* (2004), p. 45.

is knowledge or foresight of such a substantial probability, amounting to virtual certainty, that the consequence will occur'.[477] In their view, '[t]his is likely the meaning to be attributed to the phrase "will occur in the ordinary course of events"'.[478] They note that '[i]n civilian legal systems, [the phrase "will occur in the ordinary course of events"] is a notion captured by the concept of *dolus eventualis*'.[479]

344. In the context of the Court's jurisprudence, it is worth highlighting the decision on the confirmation of charges rendered in the case of *The Prosecutor v. Thomas Lubanga Dyilo* where the Pre-Trial Chamber noted that: *dolus directus* of the first degree refers to 'situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime';[480] *dolus directus* of the second degree (*dolus indirectus*) refers to 'situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions';[481] and *dolus eventualis* refers to 'situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it'.[482]

345. In the same decision, the Pre-Trial Chamber noted that '[w]here the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements, and hence would not meet the "intent and knowledge" requirement embodied in article 30 of the Statute'.[483]

346. This Opinion notes that the cumulative reference to 'intent' and 'knowledge' in article 30 of the Statute requires the existence of a volitional element on the part of the

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[477] D. K. Piragoff, D. Robinson, 'Article 30: Mental Element' in O.Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 850.
[478] D. K. Piragoff, D. Robinson, 'Article 30: Mental Element' in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 850.
[479] D. K. Piragoff, D. Robinson 'Article 30: Mental Element' in O.Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 860.
[480] *Lubanga* Decision on the Confirmation of Charges, para. 351.
[481] *Lubanga* Decision on the Confirmation of Charges, para. 352.
[482] *Lubanga* Decision on the Confirmation of Charges, para. 352.
[483] *Lubanga* Decision on the Confirmation of Charges, para. 355.

suspect that is generally known as *dolus*, that is, the crimes must be committed with intent and knowledge. According to this Opinion, article 30 encompasses all different types of *dolus*.

b. The knowledge and intent required in indirect co-perpetration through an organised power apparatus

347. For the reasons that follow, this Opinion agrees with the Common Judgment insofar as it finds that

> the 'knowledge' component of *mens rea* includes an awareness on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime.[484]

348. In the decision on the confirmation of charges in the *Katanga and Ngudjolo* case, the Pre-Trial Chamber properly set out the three requirements for the configuration of the mental element provided in article 30 of the Statute in cases of indirect co-perpetration through an organised power apparatus.[485] First, the co-perpetrators must be 'mutually aware that implementing their common plan will result in the realisation of the objective elements of the crime'.[486] Second, the co-perpetrators must 'undertake such activities with the specific intent to bring about the objective elements of the crime, or [be] aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events'.[487]

349. Finally, the co-perpetrators must be 'aware of the factual circumstances enabling them to exercise control over the crime through another person'.[488] As previously held at this Court, in the context of perpetration through an organised power apparatus, this 'involves an objective element, consisting of the appropriate factual circumstances for exercising control over the crime through the functional control of the organised power apparatus, and a subjective element, consisting of the awareness of such

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[484] Common Judgment, para. 1045.
[485] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 533 et seq.
[486] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 533.
[487] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 533.
[488] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 534. *See also* *Lubanga* Decision on the Confirmation of Charges, para. 366; *Katanga* Conviction Decision, para. 1414: 'the Chamber further considered that indirect commission requires the perpetrator's awareness of the factual circumstances which allow him or her to exert control over the crime'.

circumstances'.[489] More specifically, the accused person must be 'aware of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near automatic compliance with their orders'.[490]

350. This requires that the accused person be

> aware: (i) of his essential role in the implementation of the common plan; (ii) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.[491]

351. As noted in the academic literature, the defendant must know that by not acting through a third person or through an organised and hierarchical apparatus of power, he or she can frustrate the commission of the crime.[492]

352. Trial Chamber II has properly explained that in the specific form of indirect perpetration through an organised power apparatus, 'the Chamber will satisfy itself that when exerting such control [over the crime], the indirect perpetrator was aware of the position he or she held within the organisation and the essential features of the organisation which secured the aforementioned functional automatism'.[493]

353. This Opinion further finds it necessary to clarify the specificity of the required knowledge/intent of an indirect perpetrator or co-perpetrator with respect to crimes committed through an organised power apparatus. In this regard, it is instructive to recall some of the findings of the Appeals Chamber regarding the essential contribution that a co-perpetrator makes to the implementation of the common plan. Of particular relevance to some of Mr Ntaganda's arguments, the Appeals Chamber has clarified that the requirement that the accused must make an essential contribution to the implementation of the common plan does not translate into a requirement that an

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[489] *Lubanga* Decision on the Confirmation of Charges, para. 331.
[490] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 534.
[491] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 539. *See also* *Lubanga* Decision on the Confirmation of Charges, paras 367.
[492] B. Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *Ad Hoc* Tribunals*; in 12 International Criminal Law Review* (2012), p 48.
[493] *Katanga* Conviction Decision, para. 1415.

essential contribution has to be made to each criminal incident.[494] This Opinion agrees with the Common Judgment insofar as it finds that 'Mr Ntaganda's *mens rea* with respect to the specific crimes committed during the Kobu massacre need not have been established. Rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape, persecution, pillage, *etcetera* committed in implementation of the common plan'.[495]

354. Indeed, often the indirect co-perpetrators are unaware of the specifics surrounding each of the criminal incidents occurring as a result of the common plan. It follows that, for the purpose of fulfilling the mental element in contexts of indirect co-perpetration through an organised power apparatus, the accused need not know the particularities of each criminal incident such as the exact time and place where it occurred, who was the material perpetrator or the identity of the victim, etc. This is because this mode of liability is distinct from direct perpetration where the perpetrator fulfils the elements of the crime in person and not *through* another person as in the case of indirect co-perpetration.

c. Conclusion on the legal framework and relevant juridical considerations

355. In light of the above analysis it is possible to draw the following conclusions. First, in order to fulfil the mental element of indirect co-perpetration: the co-perpetrators must be aware of, and intend: (i) the existence of a common plan that involves the commission of crimes; (ii) their coordinated realisation of the objective elements of the crime; (iii) the fact that implementing their common plan will result in the realisation of the objective elements of the crime or be aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events; (iv) the existence of an organised power structure hierarchically controlled by them that functions automatically and is composed of replaceable elements at the base willing to implement the common plan and commit crimes as a result.

356. Second, unlike in the cases of direct perpetration where the perpetrator fulfils the elements of the crime in person and not through another person, in indirect co-

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[494] *Bemba et al.* Appeal Judgment, para. 812.
[495] Common Judgment, para. 1126.

perpetration, as in the case of indirect perpetration through an organised power apparatus, there is no need for the accused person to be aware of the particularities of each criminal incident such as the exact time and place of commission, who was the material perpetrator or the identity of the victim.

3. Application to the case

357. In the present case, the Trial Chamber inferred Mr Ntaganda's knowledge and intent as indirect co-perpetrator with respect to the crimes of which he was convicted as an indirect co-perpetrator from various factors such as his role in the agreement and implementation of the common plan;[496] his senior status in the UPC/FPLC and his commanding role during the Mongbwalu assault;[497] and his 'presence, actions and directives' during both Operations.[498] In relation to the latter, the Trial Chamber noted in particular two orders issued by Mr Ntaganda to attack Lendu civilians.[499] This Opinion notes that all of these factors are relevant in order to determine Mr Ntganda's awareness of the character of his organisation, his authority within it, and the factual circumstances enabling near automatic compliance with his orders.

358. This Opinion further recalls the Trial Chamber's conclusion that, beyond reasonable doubt, the co-perpetrators intended

> (i) for civilians to be attacked and killed (Counts 1, 2 and 3); (ii) for their property to be appropriated and destroyed (Counts 11 and 18); (iii) for civilians to be raped and subjected to sexual slavery (Counts 4, 5, 7 and 8); (iv) for civilians to be forcibly displaced (Counts 12 and 13); and (v) for protected objects to be attacked (Count 17). Moreover, the Chamber finds beyond reasonable doubt that the co-perpetrators meant for the abovementioned conduct to be targeted towards the Lendu civilian population as such (Count 10).[500]

359. To support the above conclusion, the Trial Chamber referred to several considerations relevant to the crimes charged in the present case. For instance, in

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[496] Conviction Decision, para. 1177.
[497] Conviction Decision, para. 1179.
[498] Conviction Decision, para. 1180.
[499] Conviction Decision, para. 1181 *referring to* its findings (i) that the night before leaving Bunia for Mongbwalu, he had ordered UPC/FPLC troops to attack the Lendu using the term *kupiga na kuchaji*; and (ii) that, once on the ground, during the attack on Mongbwalu, he had ordered the UPC/FPLC troops to 'attack the Lendu' without distinguishing between Lendu civilians and militia.
[500] Conviction Decision, para. 810.

relation to the inclusion in the common plan of the crimes of murder and attacks against civilians, the Trial Chamber referred to its findings that: the recruits were given orders to kill the Lendu;[501] 'soldiers who participated in the Second Operation, notably the killings in Kobu, were not punished for their conduct';[502] the killing of a Lendu was not considered punishable conduct;[503] '[d]uring both the First and Second Operation, UPC/FPLC troops adapted their behaviour depending on the ethnicity of the individuals they were interacting with; Lendu were to be killed, while members of other ethnic groups could be released and stay alive';[504] and 'UPC/FPLC military leadership ordered troops to attack using the expression '*kupiga na kuchaji*', which was understood to mean attacking the Lendu civilians […]'.[505]

360. Similarly, in relation to the appropriation and destruction of property, the Trial Chamber referred to the findings that: the looting of Lendu property was not considered a punishable offence by UPC/FPLC soldiers;[506] the expression '*kupiga na kuchaji*' was understood to also mean looting the property of the Lendu civilians;[507] and 'looted items which were considered of high quality or value were usually given to the commanders under threat of punishment'.[508]

361. Moreover, the Trial Chamber referred to the following findings regarding the inclusion in the common plan of the objective of raping civilians and/or subjecting them to sexual slavery: that rapes went unpunished;[509] that acts of sexual violence were a tool to achieve the UPC/FPLC's objectives;[510] that in the context of side discussions in June 2002 in Kampala, 'reference was also made to using the rape of enemy women as a means of waging war';[511] that a particularly violent method was used for rapes; and that

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[501] Conviction Decision, para. 790, *referring to* para. 416.
[502] Conviction Decision, para. 797, *referring to* para. 639. *See also* para. 800, *referring to* para. 332.
[503] Conviction Decision, para. 799, *referring to* para. 332.
[504] Conviction Decision, para. 804, *referring to* paras 528, 546, 625. *See also* para. 805.
[505] Conviction Decision, para. 801, *referring to* para. 415. *See also* para. 802, *referring to* para. 493; para. 803, *referring to* para. 561; para. 807.
[506] Conviction Decision, para. 800, *referring to* para. 332.
[507] Conviction Decision, para. 801, *referring to* para. 415. *See also* para. 807.
[508] Conviction Decision, para. 801, *referring to* para. 515.
[509] Conviction Decision, para. 800, *referring to* para. 332.
[510] Conviction Decision, para. 805.
[511] Conviction Decision, para. 799, *referring to* para. 293. *See also* para. 805.

UPC/FPLC soldiers forced detained victims to sexually assault each other.[512]

362. Finally, the Trial Chamber referred to its findings relevant to the forcible displacement of civilians, namely that during the meeting in Kampala in 2002 'it was stated that one of the objectives of the UPC/FPLC was to drive out the non-natives, identifying the first target as the Nande, and then, the Lendu';[513] that the UPC/FPLC aimed to chase away Lendu civilians as well as those who were perceived as non-Iturians;[514] that, '[t]o achieve this, UPC/FPLC military leadership ordered troops to attack' Lendu civilians and loot their property;[515] and that instructions were given to the troops to drive out all the Lendu and to prevent the return of the Lendu inhabitants of Buli by torching the village.[516]

363. It is clear that the above findings are all relevant to establishing that Mr Ntaganda, as an indirect co-perpetrator, intended for the crimes to target 'the Lendu population as such' thereby also fulfilling the mental element for the crime of persecution.[517]

364. All of the above findings are relevant to establish Mr Ntaganda's level of awareness and intent in relation to all specific crimes, except those involving child soldiers.

365. In relation to crimes committed against children under the age of 15 recruited to the UPC/FPLC, the Trial Chamber found a slightly different form of intent. In particular, it found that

> as of at least the beginning of August 2002, the co-perpetrators were virtually certain that the implementation of their plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML would lead to: (i) the recruitment and active use in hostilities of children under the age of 15 within the UPC/FPLC (Counts 14, 15 and 16); and (ii) the rape and sexual slavery of these children (Counts 6 and 9). Indeed, the Chamber finds that, in the circumstances prevailing in Ituri at the time, the occurrence of these crimes was not simply a risk that they accepted, but crimes they foresaw

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[512] Conviction Decision, para. 806, *referring to* paras 545, 623, 943, 944.
[513] Conviction Decision, para. 799, *referring to* paras 290, 293.
[514] Conviction Decision, para. 801, *referring to* section V.A.1.a)(3).
[515] Conviction Decision, para. 801, *referring to* para. 415.
[516] Conviction Decision, para. 803, *referring to* paras 560, 609.
[517] Conviction Decision, para. 810.

with virtual certainty.[518]

366. In support of the above finding, the Trial Chamber referred to the findings that: at a meeting in June 2002 in Kampala, political leaders of the emerging UPC/FPLC decided that they should mobilise children to join the UPC and 'large scale recruitment efforts followed';[519] political and military leaders of the UPC/FPLC, including Mr Ntaganda, had children under the age of 15 as part of their personal escorts;[520] the military leaders employed methods to ensure that their commands would be obeyed by the recruits, including the youngest ones;[521] female members of the UPC/FPLC, including those under 15 years of age, were regularly raped or subjected to sexual violence, which was left largely unpunished;[522] and the military leaders 'did not create the necessary conditions to ensure a safe environment for the female members of the UPC/FPLC, in which they would not be sexually abused'.[523]

367. When discussing Mr Ntaganda's knowledge and intent with respect to the crime of recruitment, enlistment and use of children under the age of 15 in hostilities, the Trial Chamber correctly emphasised that some of the 'children' within Mr Ntaganda's personal escort were '"manifestly" under 15 years of age' and referred to the 'frequency and proximity of their contacts' 'on a daily basis' with Mr Ntaganda.[524] The Trial Chamber found further that Mr Ntaganda was involved in large-scale recruitment drives conducted by the UPC/FPLC and that 'on at least three occasions, [he] made calls for young people to join the UPC/FPLC ranks and follow military training'.[525] The Trial Chamber noted that in his address to the population Mr Ntaganda called 'everybody to enrol, explicitly inviting individuals from all gender, age, or size to join'.[526]

368. Specifically in relation to sexual crimes committed against UPC/FPLC child soldiers, the Trial Chamber recalled that (i) one victim was raped 'by many different

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[518] Conviction Decision, para. 811.
[519] Conviction Decision, para. 787, *referring to* para. 347 and section IV.A.3.a).
[520] Conviction Decision, para. 788, *referring to* sections IV.A.3.c)(1)(b) and IV.A.3.c)(2).
[521] Conviction Decision, para. 790, *referring to* paras 322, 374-377, 409.
[522] Conviction Decision, para. 792, *referring to* paras 332, 407, 411-412.
[523] Conviction Decision, para. 792.
[524] Conviction Decision, paras 1191-1192.
[525] Conviction Decision, para. 1193.
[526] Conviction Decision, para. 1193 (emphasis omitted).

soldiers on a regular basis, including at the *Appartements* camp in Mongbwalu', which was 'Mr Ntaganda's base' at that location';[527] (ii) 'female members of the UPC/FPLC were regularly raped and subjected to sexual violence during their service' by 'male UPC/FPLC soldiers and commanders', and this was a 'common practice';[528] and (iii) 'Mr Ntaganda was among the commanders who inflicted rape on his female bodyguards', and sexual crimes within Mr Ntaganda's escort 'were left largely unpunished'.[529]

369. It is clear from the above that the Trial Chamber correctly assessed Mr Ntaganda's intent and knowledge by reference to, *inter alia*, his high position within the UPC/FPLC hierarchy and his actions during the relevant time. Specifically in relation to his position and responsibilities attached thereto, the Trial Chamber noted that Mr Ntaganda deliberately participated in UPC/FPLC activities throughout and beyond the period of the charges; that he had high-level status within its military branch at the time'; and that he testified at length about his 'responsibilities and related actions, notably in relation to the UPC/FPLC training efforts, the setting up of a company of bodyguards for himself, and the First Operation'.[530]

370. All of the above findings are relevant to establish Mr Ntaganda's knowledge and intent in relation to all crimes involving child soldiers.

371. Furthermore, contrary to Mr Ntaganda's submissions made in the appeals against both the conviction and the sentencing decision, in the context of indirect co-perpetration through an organised power apparatus, it is unnecessary to establish an accused's knowledge and intent with respect to the specific criminal acts, as the Common Judgment correctly found.[531] In the present case, it was therefore unnecessary to establish Mr Ntaganda's knowledge and intent with respect to the crimes committed in each operation. Both operations formed part of the same criminal plan and on the basis of the findings entered by the Trial Chamber, it was clear that Mr Ntaganda intended for the crimes charged to occur or, in relation to crimes against child soldiers,

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[527] Conviction Decision, paras 411, 527.
[528] Conviction Decision, paras 407, 1196.
[529] Conviction Decision, paras 407, 412 (*referring to* the testimony of witnesses P-0010, P-0768, P-0758 and P-0907), 1196.
[530] Conviction Decision, para. 1175.
[531] Common Judgment, paras 1065, 1126.

foresaw them with virtual certainty.

372. Indeed, when considering Mr Ntaganda's knowledge and intent in relation to the commission of crimes during the course of the First Operation and Second Operation, the Trial Chamber considered: (i) that 'Mr Ntaganda agreed and worked with others to achieve their plan to drive out all the Lendu from the localities targeted during the course of the First and Second Operation' and the execution of the agreement 'inherently involved the conduct that constitutes the crimes under consideration';[532] (ii) the repetition over time of crimes that followed a certain *modus operandi*;[533] (iii) Mr Ntaganda's position as the highest ranked leader of the FPLC;[534] (iv) Mr Ntaganda's non-hesitation 'to remind [UPC/FPLC troops] that they were expected to execute orders, as he did on 18 February 2003 in the context of the Second Operation';[535] (v) Mr Ntaganda being informed of the training and composition of the troops to be deployed;[536] (vi) Mr Ntaganda's announcement prior to the launching of the Second Operation of an important reorganisation concerning the assignment of commanders;[537] (vii) Mr Ntaganda's presence, actions and directives in the context of the First Operation;[538] and (viii) the fact that at the conclusion of the Second Operation 'Mr Ntaganda has a conversation with the G2 about the fact that UPC/FPLC soldiers killed civilians in Kobu under the command of Salumu Mulenda' during which Mr Ntaganda 'said that he was glad how things had turned out and also said that Salumu Mulenda was a "gentleman", "a brave, a fine person", or a "real man"' thereby approving the behaviour of Salumu Mulenda's troops during the Kobu massacre.[539]

373. Requiring a more detailed degree of knowledge and intent in cases of indirect perpetration through an organised power apparatus would effectively result in an impunity gap. This is because the perpetrators behind the desk such as Mr Ntaganda are rarely present or informed about details of the crimes, for instance the identity of the victims or the specific way in which the crime occurred. In the light of the foregoing, it

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[532] Conviction Decision, para. 1177.
[533] Conviction Decision, para. 1178.
[534] Conviction Decision, para. 1179.
[535] Conviction Decision, para. 1179.
[536] Conviction Decision, para. 1179.
[537] Conviction Decision, para. 1179.
[538] Conviction Decision, paras 1180-1184.
[539] Conviction Decision, para. 1185.

is irrelevant that Mr Ntaganda was not present in the theatre of war during the Second Operation. While his actions during the First Operation may have been more visible, this does not diminish in any way his knowledge and intent in relation to the crimes committed during both the First and the Second Operations because the crimes committed during both operations occurred as a result of the implementation of the common plan.

374. In light of his high position within the organised power apparatus as well as his actions and responsibilities, it was correct to infer that Mr Ntaganda knew about and intended to have functional control over the crimes that occurred as a result of the implementation of the common plan agreed upon with his co-perpetrators during both the First and the Second Operations.

375. It is therefore clear that the Trial Chamber properly established Mr Ntaganda's knowledge and intent with respect to the crimes of which he was ultimately convicted within the meaning of article 30 of the Statute.

C. Conclusion on the meaning and scope of indirect co-perpetration as a mode of liability under the Rome Statute

376. The thorough analysis above allows us to draw a number of conclusions and to arrive at a proper understanding of indirect co-perpetration through an organised power apparatus.

377. In relation to indirect co-perpetration as a mode of liability provided in the Rome Statute:

a. Article 25(3)(a) of the Statute enshrines all modalities of the well-established category of perpetration: direct perpetration, co-perpetration and indirect perpetration. Indirect co-perpetration is an integrated mode of liability encompassed in the Statute that combines the constitutive elements of co-perpetration and indirect perpetration and is therefore compatible with the principle of legality and the rights of the accused.

b. The control of the crime (hegemony over the act or *Tatherrschaft* in German and *dominio del hecho* in Spanish) serves as the

objective distinguishing criterion to differentiate perpetration in all its modalities from other forms of individual criminal responsibility (article 25(3)(b)-(d) and article 28 of the Statute) - while in the case of perpetration in all its modalities the accused person controls the crime and retains the power to frustrate its commission, in the other modes of liability this power is missing.

c. Indirect perpetration through an organised power apparatus, as provided in article 25(3)(a) of the Statute, is one modality of commission through another person in which, by virtue of his or her position within the hierarchical structure and its automatic functioning, the indirect perpetrator exercises functional control over the crimes and retains the power to frustrate their commission.

d. An organised power apparatus may be State or non-State. It may be a formal or informal organisation. Its key features are: its hierarchical structure; its automatic functioning; the replaceable nature of its members; and the fact that the criminal acts of the direct perpetrators are always to the benefit of the organised structure, its plans and objectives.

e. The indirect perpetrator through an organised power apparatus controls the crimes by virtue of his or her position within the hierarchy, which enables him or her to control the functioning of the structure – the automatic functioning of the organisation given that the direct perpetrators on the ground are replaceable enables compliance with the implementation of directives, instructions, and ultimately, orders of the organisation. Although indirect perpetrators are often physically distant from the commission of crimes, this does not prevent them from bearing a high degree of responsibility.

f. Due to the nature of the crimes under the jurisdiction of the Court -crimes that generally involve large-scale and mass criminality-, indirect co-perpetration constitutes an appropriate tool to deal with

international crimes under the jurisdiction of the Court and to investigate, prosecute and convict those bearing the highest responsibility.

g. The constitutive elements of indirect co-perpetration are: the existence of an agreement or a common plan between the co-perpetrators; the coordinated realisation of the objective elements of the crime by the co-perpetrators; and the existence of an organised power apparatus hierarchically controlled by the co-perpetrators that functions automatically and is composed of replaceable elements at the base willing to implement the common plan which involves the commission of crimes.

h. In this case, the UPC/FPLC was an organised power apparatus – it was hierarchically organised and composed of replaceable members willing to carry out the criminal plan of the organisation. Throughout the period relevant to the charges, Mr Ntaganda (and others) exercised, by virtue of his high position in the hierarchy, control over the automatic functioning of the organisation which led to compliance with the plan, instructions, directives and orders by the replaceable direct perpetrators on the ground.

i. Mr Ntaganda was therefore properly charged and convicted as an indirect co-perpetrator through an organised power apparatus and the Trial Chamber was thus correct in convicting him as such.

378. As to the mental element required for indirect co-perpetration, this Opinion reaches the following conclusions:

a. The co-perpetrators must be aware of, and intend: (i) the existence of a common plan that involves the commission of crimes; (ii) their coordinated realisation of the objective elements of the crime; (iii) the fact that implementing their common plan will result in the realisation of the objective elements of the crime or be aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events; and (iv) the existence of

an organised power structure hierarchically controlled by them that functions automatically and is composed of replaceable elements at the base willing to implement the common plan and commit crimes as a result.

b. In the context of indirect perpetration through an organised power apparatus, unlike in cases of direct perpetration where the perpetrator fulfils the objective elements of the crime in person, there is no need for the accused persons to be aware of the particularities of each criminal incident such as the exact time and place of commission, who was the material perpetrator or the identity of the victim.

c. In this case, the findings entered by the Trial Chamber concerning Mr Ntaganda's high position within the UPC/FPLC hierarchy, his responsibilities, and his acts and conduct, confirm that he was aware that implementing the common plan agreed upon with his co-perpetrators would result in the commission of the crimes of which he was convicted; in light of his position in the hierarchy and authority and as reflected in his conduct, in particular orders issued to attack civilians, it is clear that Mr Ntaganda was aware of and intended for the commission of crimes that were indirectly perpetrated by UPC/FPLC forces and Hema civilians; Mr Ntaganda was aware of the characteristics of the organisation composed of replaceable members and direct perpetrators willing to carry out the criminal plan of the organisation, and of his functional control over it which enabled him to exercise control over the crimes.

d. The Trial Chamber correctly determined that Mr Ntaganda fulfilled the mental element provided in article 30 of the Statute.

VI. FINAL CONCLUSIONS

379. This Opinion has addressed in detail some issues of utmost importance for a proper understanding of the law applicable in international criminal law. In particular, it has elucidated the meaning and scope of the requirement that crimes against humanity are those committed further to an organisational policy to commit a widespread or systematic attack against a civilian population, as well as the meaning and scope of indirect co-perpetration as a mode of liability under the Rome Statute.

380. With respect to the organisational policy to commit a widespread or systematic attack directed against a civilian population, the following final conclusions are drawn:

a. **Meaning and nature of an organisation within the meaning of article 7 of the Statute:**

i. Although the State generally embodies the most complete form of organisation, other entities may also qualify as an 'organisation' under article 7(2) of the Statute.

ii. In the context of crimes against humanity, an organisation consists of a group of at least three persons who are hierarchically organised and structured and pursue a particular objective.

iii. The conformation of the organisation may be formal or informal and it could be a criminal or a non-criminal organisation.

iv. The criteria that defines an organisation within the meaning of article 7 of the Statute are those features that would allow it to carry out a widespread or systematic attack directed against any civilian population. This determination is fact-sensitive.

b. **Meaning and nature of the organisational policy:**

i. The policy element and the systematic nature of the attack are different – while the former is the cause, the latter is the result of its implementation.

ii. The policy need not be formalised or explicitly defined – it may be inferred from the existence of a planned, directed or organised attack that would exclude spontaneous or isolated acts of violence.

iii. Often, the policy crystallises once the attack against the civilian population is already underway and therefore sometimes it can only be defined once the acts have been committed and in light of the overall course of conduct.

iv. The organisational policy may be inferred from a variety of factors, *inter alia*, the level of planning, recurrent patterns of violence, the involvement of the State or organisational forces in the commission of crimes, statements attributable to the State or organisation condoning or encouraging the commission of crimes, an underlying motivation, deliberate omissions by the organisational hierarchy, the *modus operandi*, etc.

v. The policy element qualifies the widespread or systematic attack and not each individual underlying criminal act.

vi. It may be possible that the State or organisation is motivated by a legitimate aim but the means through which it seeks to achieve it (the policy) are criminal resulting in a widespread or systematic attack directed against the civilian population.

vii. When interpreted in light of the object and purpose of the Rome Statute, the policy element ought to be understood

as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity.

c. **Meaning and nature of a widespread or systematic attack directed against any civilian population:**

i. A widespread or systematic attack directed against any civilian population is the hallmark element of crimes against humanity and is the cross-cutting element against which all individual criminal acts charged in a given case must be assessed.

ii. While attacks in the sense of international humanitarian law are linked to armed hostilities, involve acts of physical violence, and target the civilian population as a means of war and thus with a military objective, a widespread or systematic attack against the civilian population for purposes of establishing crimes against humanity need not be physically violent in nature, need not be linked to an armed conflict, and the purpose for triggering the attack is irrelevant.

iii. A widespread and systematic attack in article 7 of the Statute amounts to a campaign of serious human rights violations that materialises in the multiple commission of acts referred to in article 7(1) of the Statute.

iv. A single criminal act may constitute a crime against humanity when committed in the context of a broader campaign against the civilian population.

v. While the widespread qualifier refers to the geographical scope of the attack and/or the number of victims, the

systematic character relates to the organised nature of the acts of violence and the improbability of their random occurrence.

d. **In the case at hand:**

i. The UPC/FPLC was a well-organised structure, consisting of a political structure (UPC) that had an armed wing (FPLC). This organisation had features that enabled it to plan, conceive and implement an organisational policy to commit a widespread or systematic attack against the civilian population.

ii. The organisational policy of the UPC/FPLC was to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians and it was to a large extent inferred from the planning and unfolding of the military operations during which crimes were committed.

iii. It was only once the widespread and systematic attack against the civilian population was set in motion that the UPC/FPLC policy to chase away the Lendu and those perceived as non-Iturians crystallised.

iv. While the aim of the UPC/FPLC to put an end to the power exercised by the RCD-K/ML in the territory of Ituri may have been legitimate, the means by which this objective was sought to be achieved crystallised into a policy to chase away the Lendu civilians and those perceived as non-Iturians.

v. The Trial Chamber determined the existence of a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute given that several crimes

(murder, rape, sexual slavery, persecution, forcible transfer of civilians, looting of goods and shops, and looting and burning of houses) occurred during the First and Second Operations, the assaults on Songolo, Zumbe, Komanda, and Bunia.

vi. The fact that the UPC/FPLC may have conducted other military operations in relation to which no evidence was presented on the commission of crimes against civilians was irrelevant to the Trial Chamber's findings that the attack comprised of multiple acts referred to in article 7(1) of the Statute was directed against Lendu civilians.

vii. The attack against the Lendu and those perceived as non-Iturians was widespread given its large scope in geographical terms and in the number of victims, and systematic in light of its organisation and the improbability of its random occurrence.

viii. The Trial Chamber was correct in determining that the UPC/FPLC conceived and implemented a policy to carry out a widespread and systematic attack directed against a civilian population.

381. In relation to the meaning and scope of indirect co-perpetration as a mode of liability under the Rome Statute, the following conclusions are reached:

a. **Indirect co-perpetration as a mode of liability provided in the Rome Statute:**

i. All of the modalities of the well-established category of perpetration are enshrined in article 25(3)(a) of the Statute. Thus, indirect co-perpetration is merely an integrated modality that combines the constitutive elements of indirect perpetration and co-perpetration and is, as such, compatible with the principle of legality and the rights of

the accused.

ii. The control of the crime (hegemony over the act or *Tatherrschaft* in German and *dominio del hecho* in Spanish) serves as the objective distinguishing criterion to differentiate perpetration in all of its modalities from other modes of liability (article 25(3)(b)-(d) and article 28 of the Statute); while in the case of perpetration in all of its modalities the accused person controls the crime and retains the power to frustrate its commission, in other modes of liability that power is absent.

iii. Indirect perpetration through an organised power apparatus is one modality of commission through another person as provided in article 25(3)(a) of the Statute whereby by virtue of his or her position within the hierarchical structure and its automatic functioning, the indirect perpetrator exercises functional control over the crimes and retains the power to frustrate their commission.

iv. An organised power apparatus may be State or non-State. It may be a formal or informal organisation. Its key characteristics are: its hierarchical structure; its automatic functioning; the replaceable nature of its members; and the fact that the criminal acts of the direct perpetrators are always to the benefit of the organised power structure, its plans and objectives.

v. The indirect perpetrator through an organised power apparatus controls the crimes as a result of his or her position in the hierarchy which enables him or her to control the functioning of the structure – the automatic functioning of the organisation given that the direct perpetrators on the ground are replaceable enables compliance with the implementation of the plan,

directives, instructions, and ultimately, orders of the organisation. Although indirect perpetrators are often physically distant from the commission of crimes, this does not prevent them from bearing a high degree of responsibility.

vi. Due to the nature of the crimes under the jurisdiction of the Court -crimes that generally involve large-scale and mass criminality-, indirect co-perpetration constitutes an appropriate tool to deal with this type of criminality and to investigate, prosecute and convict those bearing the highest degree of responsibility.

vii. The constitutive elements of indirect co-perpetration are: the existence of an agreement or a common plan and its implementation; the coordinated realisation of the objective elements of the crime by the co-perpetrators; and the existence of an organised power apparatus hierarchically controlled by the co-perpetrators that functions automatically and is composed of replaceable elements at the base willing to implement the common plan which involves the commission of crimes.

b. **Knowledge and intent required in indirect co-perpetration through an organised power apparatus:**

i. The co-perpetrators must be aware of, and intend: (i) the existence of a common plan that involves the commission of crimes; (ii) their coordinated realisation of the objective elements of the crime; (iii) the fact that implementing their common plan will result in the realisation of the objective elements of the crime or be aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events; and (iv) the existence of an

organised power structure hierarchically controlled by them that functions automatically and is composed of replaceable elements at the base willing to implement the common plan and commit crimes as a result.

ii. In the context of indirect co-perpetration, as in the case of indirect perpetration through an organised power apparatus, there is no need for the accused person to be aware of the particularities of each criminal incident such as the exact time and place of commission, who was the material perpetrator or the identity of the victim because this is only required for direct perpetrators.

c. **In the case at hand:**

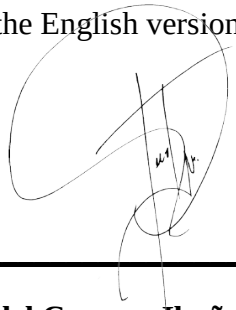
i. The UPC/FPLC was an organised power apparatus – it was hierarchically organised and composed of replaceable members willing to carry out the orders of the leadership, even if that involved committing crimes - throughout the period relevant to the charges, Mr Ntaganda (and others) exercised, by virtue of his high position in the hierarchy, control over the automatic functioning of the organisation that led to almost automatic compliance by the direct perpetrators with the orders issued. Mr Ntaganda was therefore correctly charged and convicted as an indirect co-perpetrator.

ii. The findings entered by the Trial Chamber concerning Mr Ntaganda's high position and authority within the UPC/FPLC hierarchy, as well as those relating to his acts and conduct, show that Mr Ntaganda was aware of and intended for the commission of crimes that were indirectly perpetrated by UPC/FPLC forces and Hema civilians as a result of the implementation of the common plan agreed

upon with his co-perpetrators; Mr Ntaganda was aware of the characteristics of the organisation and of his functional control over it which enabled him to exercise control over the crimes.

iii. The Trial Chamber was correct in convicting Mr Ntaganda as an indirect co-perpetrator through the organised power apparatus embodied in the UPC/FPLC.

Done in both English and French, the English version being authoritative.



Judge Luz del Carmen Ibañez Carranza

Dated this 30th day of March 2021

At The Hague, The Netherlands

SUMMARY OF THE SEPARATE OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

1. The Separate Opinion of Judge Ibáñez addresses two fundamental legal concepts that, as illustrated in the misinterpretations contained in submissions made in both the conviction and sentencing proceedings, require clarification. The aim of the Separate Opinion is to strengthen the Appeals Chamber Judgment and to assist in a better understanding of the criminal law applied at the Court for this and future cases before both this Court and other national and international jurisdictions. In this regard, the Opinion discusses: (i) the contextual elements of crimes against humanity, in particular the requirement that the widespread or systematic attack directed against any civilian population be carried out pursuant to or in furtherance of an organisational policy, and (ii) the meaning and scope of indirect co-perpetration, including through an organised power apparatus, as a mode of liability provided for in the Rome Statute.

2. In relation to the first issue, the Separate Opinion of Judge Ibáñez considers that the focus of the determination of whether an organisation qualifies as such within the meaning of article 7 of the Statute ought to be those features that would allow it to carry out a widespread or systematic attack directed against any civilian population. Furthermore, to establish the existence of a policy to commit an attack within the meaning of article 7 of the Statute, it is unnecessary to prove that such policy was underpinned by any sort of ideology or motivation. The Opinion sustains that it is possible that the State or organisation is motivated by a legitimate aim but the means through which it seeks to achieve it (the policy) are criminal resulting in a widespread or systematic attack directed against the civilian population. When interpreted in light of the object and purpose of the Rome Statute, the policy requirement ought to be understood as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity. Moreover, the Separate Opinion considers that a widespread or systematic attack in the context of crimes against humanity amounts to a campaign of serious human rights violations that materialises in the multiple commission of acts referred to in article 7(1) of the Statute.

3. In relation to the facts of this case, the Separate Opinion of Judge Ibáñez considers that the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (‘UPC/FPLC’) was a well-organised structure capable of planning, conceiving

and implementing an organisational policy to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians. While the aim of the UPC/FPLC to put an end to the power exercised by the *Rassemblement Congolais pour la Démocratie-Kisangani/Mouvement de Libération* ('RCD-K/ML') in the territory of Ituri may have been legitimate, the means by which this objective was sought to be achieved crystallised into a policy, the implementation of which resulted in a widespread and systematic attack against the civilian population during the First and the Second Operations. The Separate Opinion maintains that the fact that the UPC/FPLC may have conducted other military operations in relation to which no evidence on the commission of crimes against civilians was presented is irrelevant to the Trial Chamber's finding that the attack comprised of multiple acts referred to in article 7(1) of the Statute was directed against Lendu civilians.

4. With respect to the second issue, the Separate Opinion of Judge Ibáñez finds that indirect co-perpetration is an integrated mode of liability encompassed in article 25(3)(a) of the Rome Statute that combines the constitutive elements of co-perpetration and indirect perpetration and is therefore compatible with the principle of legality and the rights of the accused. The Opinion considers that the control of the crime (hegemony over the act or *Tatherrschaft* in German and *dominio del hecho* in Spanish) serves as the objective distinguishing criterion to differentiate perpetration in all of its modalities from other forms of individual criminal responsibility (article 25(3)(b)-(d) and article 28 of the Statute). Furthermore, the Separate Opinion of Judge Ibáñez finds that indirect perpetration through an organised power apparatus is one modality of commission through another person as provided in article 25(3)(a) of the Statute. By virtue of his or her position within the hierarchically structured organisation and its automatic functioning ensured by the replaceable nature of its members, the indirect perpetrator exercises functional control over the crimes and retains the power to frustrate their commission. The Separate Opinion of Judge Ibáñez finds that due to the nature of the crimes under the jurisdiction of the Court –crimes that generally involve large-scale and mass criminality–, indirect co-perpetration constitutes an appropriate tool to deal with such atrocities and to investigate, prosecute and convict those bearing the highest responsibility.

5. The Separate Opinion of Judge Ibáñez considers that in the context of indirect co-

perpetration through an organised power apparatus, regarding the mental element, the accused persons must be aware of, and intend: (i) the existence of a common plan that involves the commission of crimes; (ii) their coordinated realisation of the objective elements of the crime; (iii) the fact that implementing their common plan will result in the realisation of the objective elements of the crime or be aware that the realisation of these elements will be a consequence of their acts in the ordinary course of events; and (iv) the existence of an organised power structure hierarchically controlled by them that functions automatically and is composed of replaceable elements at the base willing to implement the common plan and commit crimes as a result.

6. The Opinion further maintains that, unlike in cases of direct perpetration where the perpetrator fulfils the concrete elements of the crime in person, there is no need for the indirect co-perpetrator through an organised power apparatus to be aware of the particularities of each criminal incident because these are committed through another person; these are different modes of liability.

7. In this case, the Separate Opinion finds that the UPC/FPLC was an organised power apparatus given that it was hierarchically organised and composed of replaceable members willing to carry out the criminal plan of the organisation. Throughout the period relevant to the charges, Mr Ntaganda exercised, by virtue of his high position in the UPC/FPLC hierarchy, control over the automatic functioning of the organisation which led to compliance with the instructions, directives and orders by the replaceable direct perpetrators on the ground. The Separate Opinion of Judge Ibáñez considers that the facts of the case show that Mr Ntaganda was aware of and intended the commission of crimes that were directly perpetrated by UPC/FPLC forces and Hema civilians. He was therefore properly charged and convicted as an indirect co-perpetrator through an organised power apparatus.

The Hague, 30 March 2021.

RÉSUMÉ DE L'OPINION DISSIDENTE DE MADAME LA JUGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

1. Cette opinion dissidente (« Opinion ») aborde deux concepts juridiques fondamentaux qui, tels qu'illustré par les interprétations erronées figurant dans les écritures relatives tant à la détermination de culpabilité qu'au prononcé de la peine, nécessitent d'être clarifiés. Le but de cette Opinion est d'étayer le Jugement de la Chambre d'appel et de contribuer à une meilleure compréhension du droit pénal tel qu'appliqué par la Cour dans cette affaire et les affaires futures dont la Cour ou d'autres juridictions nationales et internationales auront à traiter. Dans cette optique, l'opinion aborde : (i) les éléments contextuels des crimes contre l'humanité, en particulier la condition d'une attaque généralisée ou systématique lancée contre toute population civile en application ou dans la poursuite de la politique d'une organisation ; et (ii) le sens et l'étendue de la coaction indirecte en tant que mode de responsabilité prévu par le Statut de Rome, y compris par l'intermédiaire d'un appareil de pouvoir organisé.

2. Concernant la première question, l'Opinion considère que la détermination de la qualification d'organisation au sens de l'article 7 du Statut doit se concentrer sur les caractéristiques permettant à celle-ci de mettre en œuvre une attaque généralisée ou systématique lancée contre toute population civile. De plus, afin de prouver l'existence d'une politique visant à commettre une attaque au sens de l'article 7 du Statut, il n'est pas nécessaire de prouver que celle-ci était soutenue par quelconque idéologie ou motif. À mon sens, il est possible que l'État ou l'organisation soit motivé par un but légitime mais que les moyens par lesquels il ou elle le mette en œuvre (*la politique*) soient criminels, donnant lieu à une attaque généralisée ou systématique lancée contre toute population civile. L'Opinion considère que, lorsqu'interprétée au vu de l'objet et du but du Statut, la condition de l'existence d'une politique doit être entendue comme imposant un seuil minimal dans le but d'exclure les crimes ordinaires du domaine des crimes contre l'humanité. De plus, concernant les crimes contre l'humanité, l'Opinion estime qu'une attaque généralisée et systématique équivaut à une campagne de graves violations des droits de l'homme, laquelle se matérialise à travers les commissions multiples d'actes prévus à l'article 7(1) du Statut.

3. En ce qui concerne les faits de l'affaire, l'Opinion considère que l'UPC/FPCL était une structure bien organisée, capable de planifier, concevoir et mettre en œuvre

une politique organisationnelle visant à attaquer et chasser la population civile Lendu ainsi que les individus perçus comme non-Ituriens. L'Opinion estime que, malgré l'éventuelle légitimité du but de l'UPC/FPCL de mettre un terme à l'exercice du pouvoir par le RCD-K/ML sur le territoire Iturien, les moyens employés afin de mettre en œuvre cet objectif se sont concrétisés sous la forme d'une politique dont l'élaboration a abouti à une attaque généralisée ou systématique lancée contre la population civile lors de la Première et Seconde Opération. L'Opinion considère que le fait pour l'UPC/FPCL d'avoir pu diriger d'autres opérations militaires, pour lesquelles aucune preuve de crimes commis à l'encontre de civils n'a été présentée, n'est pas pertinent quant aux conclusions de la Chambre de première instance selon lesquelles l'attaque, composée de multiples actes prévus à l'article 7(1) du Statut, était dirigée à l'encontre de civils Lendu.

4. Concernant la deuxième question, l'Opinion considère que la coaction indirecte est un mode de responsabilité couvert par l'article 25(3)(a) du Statut de Rome, lequel comprend les éléments constitutifs de la coaction et de la commission indirecte, et qui est par conséquent compatible avec le principe de légalité et les droits de l'accusé. L'Opinion considère que le contrôle sur le crime (*Tatherrschaft* en Allemand et *dominio del hecho* en Espagnol) représente le critère objectif distinctif permettant de différentier la commission sous toutes ses formes d'autres modes de responsabilité pénale individuelle (article 25(3)(b)-(d) et article 28 du Statut). En outre, l'Opinion estime que la commission indirecte à travers un appareil de pouvoir organisé est une des modalités de la commission par l'intermédiaire d'une autre personne prévue à l'article 25(3)(a) du Statut. En vertu de sa haut position au sein de l'organisation à structure hiérarchique et de son fonctionnement automatique assuré par l'interchangeabilité de ses membres, l'auteur indirect exerce un contrôle fonctionnel sur les crimes et conserve le pouvoir de faire échouer (ou frustrer) leur commission. L'Opinion estime que, au vu de la nature des crimes relevant de la compétence de la Cour, lesquels impliquent généralement une criminalité de masse et à grande échelle, la coaction indirecte constitue un outil approprié afin de traiter de telles atrocités et d'enquêter, de poursuivre et de condamner les plus hauts responsables.

5. Concernant l'élément psychologique, l'Opinion considère que, dans le contexte de la coaction indirecte au travers d'un appareil de pouvoir organisé, le ou les accusés

doivent être conscients, et avoir l'intention : (i) de l'existence d'un plan commun impliquant la commission de crimes ; (ii) de la réalisation coordonnée des éléments matériels du crime ; (iii) du fait que la mise en œuvre du plan commun aboutira à la réalisation des éléments matériels du crime ou être conscients que la réalisation des éléments matériels du crime adviendra dans le cours normal des événements en tant que conséquence de leurs actions; et (iv) de l'existence d'une structure de pouvoir organisée hiérarchiquement et contrôlée par le ou les accusés, laquelle fonctionne de manière automatique et est composée, à sa base, de membres interchangeables disposés à mettre en œuvre le plan commun et à causer le résultat.

6. De mon point de vue, contrairement aux cas d'action directe où l'auteur commet en personne les éléments matériels du crime, il n'y a pas lieu pour le coauteur indirect d'avoir conscience des particularités de chaque crime puisque ceux-ci sont commis par l'intermédiaire d'une autre personne et relèvent dès lors d'autres modes de responsabilité.

7. Dans cette affaire, l'Opinion considère que l'UPL/FPCL est un appareil de pouvoir organisé dès lors qu'il est organisé de manière hiérarchique et est composé de membres interchangeables, disposés à mettre en œuvre le plan criminel de l'organisation. Tout au long de la période visée par les charges, M. Ntaganda, en vertu de sa position hiérarchique élevée, a exercé un contrôle sur le fonctionnement automatique de l'organisation, ce qui a donné lieu à l'exécution des instructions, des directives et des ordres par les auteurs directs et interchangeables qui se trouvaient sur le terrain. À mon sens, les faits de l'affaire démontrent que M. Ntaganda était conscient et avait l'intention que les crimes commis par l'intermédiaire des forces de l'UPC/FPCL et de la population civile Hema, le soient. Par conséquent, il a été justement accusé et condamné en tant que co-auteur indirect par l'intermédiaire d'un appareil de pouvoir organisé.

La Haye, 30 mars 2021

RESEÑA DE LA OPINIÓN SEPARADA DE LA JUEZA LUZ DEL CARMEN IBÁÑEZ CARRANZA

1. La Opinión Separada de la Jueza Ibáñez aborda dos conceptos jurídicos fundamentales que, tal como ha quedado ilustrado en las argumentaciones esgrimidas en apelación tanto en las actuaciones relativas a la condena como a la pena impuesta, requieren ser clarificados. El objetivo de la Opinión Separada de la Jueza Ibáñez es reforzar la sentencia de la Sala de Apelaciones y brindar guía para una mejor comprensión del derecho penal aplicado en la Corte para este y futuros casos ante esta y otras jurisdicciones nacionales e internacionales. A este respecto, la Opinión analiza: i) los elementos contextuales de los crímenes de lesa humanidad, en particular el requisito de que el ataque generalizado o sistemático contra una población civil se lleve a cabo de conformidad con la política de un Estado o de una organización, y ii) el significado y el alcance de la coautoría mediata (*indirecta*), incluido el caso en el cual la misma ocurre a través de un aparato organizado de poder, como uno de los modos de responsabilidad previstos en el Estatuto de Roma.

2. En relación con la primera cuestión, la Opinión Separada de la Jueza Ibáñez considera que la determinación de si una organización califica como tal en el sentido del artículo 7 del Estatuto debe centrarse en establecer si tal organización posee aquellas características que le permitirían llevar a cabo un ataque generalizado o sistemático dirigido contra cualquier población civil. Además, para establecer la existencia de una política de cometer un ataque en el sentido del artículo 7 del Estatuto de Roma, no resulta necesario demostrar que dicha política responde a ningún tipo de ideología o motivación. De acuerdo a lo establecido en la Opinión Separada de la Jueza Ibáñez, es posible que el Estado u organización esté motivado por un objetivo legítimo, pero los medios a través de los cuales busca lograrlo (*la política*) son criminales, resultando en un ataque generalizado o sistemático dirigido contra una población civil. Al ser interpretado a la luz del objeto y fin del Estatuto de Roma, debe entenderse que el requisito sobre la existencia de una política de llevar a cabo un ataque impone un umbral mínimo que tiene por objeto excluir los crímenes comunes del ámbito de los crímenes de lesa humanidad. Asimismo, la Opinión Separada de la Jueza Ibáñez considera que un ataque generalizado o sistemático a los fines de crímenes de lesa humanidad equivale

a una campaña de graves violaciones de los derechos humanos que se materializa en la múltiple comisión de actos referidos en el artículo 7, apartado 1, del Estatuto de Roma.

3. En relación con los hechos de este caso, la Opinión Separada de la Jueza Ibáñez considera que la *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* ('UPC/FPLC') era una estructura debidamente organizada capaz de planificar, concebir e implementar una política para atacar y ahuyentar a los civiles Lendu, así como a aquellos que eran percibidos como no Iturianos. Si bien el objetivo de la UPC/FPLC de poner fin al poder ejercido por el *Rassemblement Congolais pour la Démocratie-Kisangani/Mouvement de Libération* ('RCD-K/ML') en el territorio de Ituri puede haber sido legítimo, los medios por los cuales se buscó alcanzar este objetivo se cristalizaron en una política cuya implementación resultó en un ataque generalizado y sistemático contra la población civil durante la Primera y la Segunda Operación. En su Opinión Separada se explica que el hecho de que la UPC/FPLC pudiera haber llevado a cabo otras operaciones militares en relación con las cuales no se presentaron pruebas sobre la comisión de crímenes contra civiles carece de relevancia para las conclusiones de la Sala de Primera Instancia de que el ataque compuesto por múltiples actos mencionados en el artículo 7, apartado 1, del Estatuto fue dirigido contra civiles de etnia Lendu.

4. Con respecto a la segunda cuestión, la Opinión Separada de la Jueza Ibáñez considera que la coautoría mediata es un modo integrado de responsabilidad criminal comprendido en el artículo 25, apartado 3, letra a), del Estatuto de Roma que combina los elementos constitutivos de la coautoría y la autoría mediata o indirecta y, por lo tanto, es compatible con el principio de legalidad y los derechos del acusado. El criterio objetivo distintivo que permite diferenciar la autoría en todas sus modalidades de otras formas de responsabilidad penal individual (artículo 25, apartado 3, letra b) -d) y artículo 28 del Estatuto) es el llamado dominio del hecho (*Tatherrschaft* en alemán o *control over the crime* en inglés) que consiste en retener la posibilidad de frustrar la comisión del crimen en cuestión. Además, la Opinión Separada de la Jueza Ibáñez considera que la autoría mediata a través de aparatos organizados de poder es una modalidad de comisión a través de otra persona, tal como establece el artículo 25, apartado 3, letra a), del Estatuto. En virtud de su posición jerárquica dentro de la organización jerárquicamente estructurada y de su funcionamiento automático

garantizado por la naturaleza reemplazable de sus miembros, el autor mediato o indirecto ejerce un control funcional sobre los crímenes y conserva el poder de frustrar su comisión. La Opinión Separada de la Jueza Ibáñez señala que, debido a la naturaleza de los crímenes que son de competencia de la Corte, los cuales generalmente involucran criminalidad masiva y a gran escala, la coautoría mediata o indirecta (incluida aquélla a través de aparatos organizados de poder) constituye un instrumento adecuado para investigar, enjuiciar y sancionar a aquellos que revisten la máxima responsabilidad por tales atrocidades.

5. La Opinión Separada de la Jueza Ibáñez considera que en el contexto de la coautoría mediata a través de aparatos organizados de poder, con respecto al elemento subjetivo, los acusados deben tener conocimiento e intención sobre: (i) la existencia de un plan común que implique la comisión de delitos; (ii) la realización coordinada de los elementos objetivos del delito; (iii) el hecho de que la implementación de su plan común dará lugar a la realización de los elementos objetivos del delito o ser conscientes de que la realización de estos elementos será consecuencia de sus actos en el curso ordinario de los acontecimientos; y (iv) la existencia de una estructura de poder organizada controlada jerárquicamente por los coautores que funcione automáticamente y esté compuesta por elementos reemplazables en la base dispuestos a implementar el plan común y cometer delitos como resultado.

6. De acuerdo a lo indicado en la Opinión Separada de la Jueza Ibáñez, a diferencia de los casos de autoría directa en los que el autor ejecuta los elementos concretos del delito en persona, no es necesario que el coautor mediato o indirecto sea consciente de las particularidades de cada hecho delictivo porque éstos se cometen a través de otra persona, toda vez que se trata de diferentes modos de culpabilidad.

7. En relación a los hechos de este caso, la Opinión Separada de la Jueza Ibáñez considera que la UPC/FPLC era un aparato organizado de poder dado que estaba estructurado jerárquicamente y compuesto por miembros reemplazables dispuestos a llevar a cabo el plan criminal de la organización. A lo largo del período pertinente a las acusaciones, el Sr. Ntaganda ejerció, en virtud de su alta posición jerárquica, el control sobre el funcionamiento automático de la organización, lo que dio lugar al cumplimiento de las instrucciones, directivas y órdenes por parte de los autores directos sustituibles que se encontraban en la base de la organización. Los hechos del caso

demuestran que el Sr. Ntaganda tuvo conocimiento e intención de la comisión de los crímenes que fueron cometidos por las fuerzas de la UPC/FPLC y los civiles Hema. Por lo tanto, el Sr. Ntaganda fue correctamente acusado y condenado como coautor indirecto a través de un aparato organizado de poder.

La Haya, 30 de Marzo 2021