ANNEX 5: Partly concurring opinion of Judge Chile Eboe-Osuji

Partly Concurring Opinion of Judge Eboe-Osuji

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Partly Concurring Opinion of Judge Eboe-Osuji

1. With respect, I regret my inability to join my highly esteemed colleagues in confirming the trial judgment in its entirety. We may look beyond the feat of perfection in outcomes, which produced conviction of the appellant on *all* 18 counts laid against him. I accept that the possibility of perfection ought not to be entirely foreclosed in human affairs, notwithstanding the odds usually assumed against it. In this case, however, the difficulty stems from unease with some of the reasoning methods used to achieve that perfect outcome against the appellant.

2. The difficulties in question concern, amongst other things, the resort to certain extraneous and doubtful theories of criminal responsibility; and, the use of unsworn witness statements to support conviction. There is, however, a limited path of conviction in this case, that being in relation to six counts, which I shall explain.

3. I shall also explain my view of the concept of 'organisational policy' in the discourse of crimes against humanity; as well as the concept of 'directing attacks.' I shall also engage the place of 'revolutions' in the context of international criminal law, given the appellant's self-profession in that regard.

PART I

Use of Unsworn Witness Statements

4. The Prosecutor submits that the Trial Chamber 'properly relied on the rule 68(2)(c) statements of P-0022 and P-0027 to enter discrete factual findings.'[1]

5. I am not persuaded. During the hearing, Ms Samson, appearing for the Prosecution, impressively sought to reassure the Appeals Chamber that those statements did not relate to acts and conducts of Mr Ntaganda. And I'm still not persuaded.

6. Rule 68(2)(c), it may be noted, is the ostensible legal basis for receiving those unsworn witness statements into the record of the proceedings. To begin with, there is a technical question concerning whether unsworn witness statements may at all be introduced through rule 68, given that the provision deals

[1] See Prosecutor's Response to Mr Ntaganda's Appeal Brief, Part II, paragraph 131.

with introduction of 'prior recorded *testimony*.' That means narrative evidence given under or oath or solemn affirmation, warranted by the risk of perjury. *Unsworn* witness *statements* do not qualify as 'testimony.' The statements of P-0022 and P-0027 were certainly not transcripts of judicial proceedings or depositions before a judicial officer. And on the face of both documents, there is no indication that the statements were made under solemn declaration assured by risk of perjury.

7. But there are more substantive questions beyond that technicality. They begin with recognising that article 51(5) of the Statute gives article 67(1)(e)—of the *Statute*—the right of way in the event of a clear conflict with rule 68(2)(c) of the *Rules of Procedure and Evidence*. To the extent that the two witnesses in question did not testify in Court and were not examined by Defence Counsel, the Prosecutor's submissions run into the obstacle of article 67(1)(e) of the Rome Statute, which guarantees for an accused person a 'minimum' right to 'examine, or have examined, the witnesses against him or her.'

8. What is more, rule 68—as amended in 2013 to permit the introduction of the kinds of evidence therein contemplated—is specifically subject to the proviso 'that this would not be prejudicial to or inconsistent with the rights of the accused' in addition to other caveats set out in rule 68. No doubt, article 67(1)(e) sets out one of those rights which rule 68 evidence must not prejudice. It may also be noted that when rule 68 was introduced in 2013, it was evidently inspired by rule 92*bis* common to the Rules of Procedure and Evidence of both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Those rules were explicit in saying that the contemplated kind of evidence is that which 'goes to proof of a matter *other than* the acts and conduct of the accused as charged in the indictment.' [Emphasis added.] That proviso is, in the essence, captured in the provisos to rule 68 for purposes of trials at the ICC.[2]

9. There is indeed much by way of an out-of-court statement of a witness that can compose the circumstances of a case or give texture to the facts—in a material way—without directly engaging the defendant's acts and omissions as such. It is

[2] See ICC Rules of Procedure and Evidence, rule 68(2)(b), (2)(c)(ii), and 2(d)(iv). It is noted, of course, that while rule 68(2)(c) and (d) may not completely bar the introduction of prior recorded testimony going to proof of acts and conduct of an accused in the circumstances covered by those sub-rules, this may be a factor against the introduction of such evidence, or part of it.

accepted, of course, that article 69(2) of the Rome Statute (which permits the admission of out-of-court testamentary evidence) may afford a basis to dismiss a defence objection to the admission of evidence that only goes to circumstances or textures,[3] when the objection is based on the argument that even evidence of circumstance or texture may supply a necessary link or layer to a finding of guilt. For instance, 'discrete factual findings' may be made on the basis of evidence tending to prove a circumstance of widespread or systematic attacks against a civilian population, without speaking of the acts and conduct of an accused person. Yet, without such evidence of widespread or systematic attacks against a civilian population, an accused cannot be convicted on a charge of crimes against humanity. Up to a point, then, article 69(2) may justify the dismissal of the objection to the admission of such evidence—on the basis that circumstances of widespread or systematic attacks are what they are. They need not engage acts and conducts of the accused. Notably, however, article 69(2) is subject to the following limitations: what is admitted as out-of-court evidence must qualify as 'testimony'; and, even so, the measures employed to admit such testimony 'shall not be prejudicial to or inconsistent with the rights of the accused.'

10. In any event, it will be going too far in the erosion of the rights of the accused, if the 'discrete factual findings' that a trial chamber makes are those that directly address acts and omissions of the accused; and they are made on the basis of rule 68 material. That, in my view, would be a violation of the minimum right guaranteed in article 67(1)(e). This is the case, notwithstanding that those 'discrete factual findings' are only corroborative rather the 'sole or decisive' evidential basis for findings as to the acts and omissions of the defendant. Whenever it is needed, the value of corroboration is to strengthen the backbone of conviction. To derive that strengthening from evidence of acts and conduct of the accused is to violate what article 67(1)(e) guarantees for the accused as a minimum right.

11. In the particular circumstances of this case, the danger of violating article 67(1)(e) is all too acute. And it is acute in a way that truly engages acts and conducts of the accused. This is because the evidence was used to buttress

[3] Notably, article 69(2) provides as follows: 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.'

evidence used to convict him as an 'indirect co-perpetrator' in a case where the unsworn statements in question speak to the acts and conducts of those *through whom* he was found to have committed the crimes in question. This is not the same thing as using such unsworn statements to demonstrate nothing more than the incidence of 'widespread or systematic attack against a civilian population.'

12. That being so, I am persuaded by the appellant's complaint that the Trial Chamber committed an error in relying on the statements of P-0022 and P-0027, even as a matter of corroboration, in as much as those statements purported averments as to the acts and conduct of the appellant.

PART II

Doubtful Theories of Criminal Responsibility

13. This appeal engages certain concerns about theories of criminal responsibility currently espoused in the operation of the Rome Statute. It is my humble observation that early efforts at interpretation had imported wholly needless complications. It is possible that such complications had resulted from the seduction of scholarly ponderings that are interesting at best, as by familiar thought habits from back home notwithstanding material differences in the law. It seems that there was insufficient appreciation of the significance of the actual text of the relevant provisions. This is especially so in the context of other provisions or equivalent general practice that might have inspired better appreciation of the actual provisions in the Rome Statute. It remains possible to keep the analysis simple.

i. Questionable Neologisms

14. In the working lexicon of the ICC and of academic commentary, the terminology of 'perpetration' appears now to have arrested all discourse on the subject of criminal responsibility under the Rome Statute. This litigation is a case study in that tendency.

15. The domination of the diction in that manner is remarkable indeed, given that the actual provisions of the Rome Statute on criminal responsibility—i.e. article 25 itself—nowhere employs such terminology. In the relevant respect, the actual word of the provision is 'commits.' As an aside, it remains to be seen whether switching terminology from 'commits' to 'perpetrates' makes it easier to

understand what 'commits' really means. The Rome Statute contemplates that one can commit a crime 'individually,' 'jointly with another [person]' or 'through another person.' There is a sense that in commentaries and jurisprudence—and indeed in indictments presented to the judges—these statutory terminologies now appear to have been set aside in practice, in favour of the fancier neologism of 'perpetration' and its reimagined copulatives.

16. There is need for care. The danger exists that the departure from the statutory language in this context may invite other problems of their own. For instance, it may be possible to live with the inductive inflexion according to which commit 'jointly with another [person]' (the statutory language) is brushed aside in favour of 'co-perpetration' (a non-statutory neologism). It is also possible to accommodate the substitution of 'indirect perpetration' (a non-statutory language) in the place of commit 'through another person' (the statutory language). But, it may be that also to invent and use the non-statutory phrase 'indirect co-perpetration' is to go too far. This is because there is quite simply no word or phrase in the Rome Statute that readily—and safely—converts into that invention. The coinage was conceived ectopically by the mere logic of coupling two ideas: to commit an offence 'through another person' and to commit an offence 'jointly with another [person].' But, the two concepts do not occur in that combination in any word or phrase appearing in article 25. The seduction of logic may encourage some to brush aside the objection. But, logic is not always a good friend to criminal law. It may be enough to recall here the wisdom of Justice Oliver Wendell Holmes's much travelled quote: 'The life of the law has not been logic: it has been experience.' It is thus difficult to avoid seeing the creative exercise that produced the terminology of 'indirect co-perpetration' as an exercise in the logical extension of ideas—by *analogy*. That, of course, provokes the question whether the coinage can be safely used as a basis for conviction at the ICC, in the light of article 22(2), which provides that the 'definition of a crime shall be strictly construed and shall *not* be extended by *analogy*. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' [Emphasis added.] I only raise the question.

ii. Committing a crime 'as an individual, jointly with another or through another person'

17. Before explaining why the creative reading of the concept of 'indirect co-perpetration' into the Rome Statute is at worst legally wrong and at best unnecessary, I should pause here and reflect on the meaning of 'commits' and the manner in which I understand the word as used in article 25(2) and 25(3)(a) of the Statute.

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18. Article 25(2) provides as follows: 'A person who *commits* a crime within the jurisdiction of the Court shall be *individually responsible and liable for punishment* in accordance with this Statute.' [Emphasis added.] The unique value of the provision lies only with the restatement of the norm that in international criminal law both *responsibility* and *punishment* are *individual*—never *collective*. It may also be the case (as I think it is) that the intendment of the provision is to hold associated persons—criminally responsible—individually—for the crime that *was committed*. The nuance in the altered sentence structure conveys legally significant meaning in relation to the notion of *commit*, which is consistent with the overall scheme of article 25: for, the contemplated criminal responsibility need not rest only with the person who actually *committed* the crime in the true sense of the word (as we shall see presently). 'Commits' serves a cleaner purpose in the following provision—i.e. article 25(3)(a)—where it also occurs. The problem with the manner in which 'commits' is employed in article 25(2) is that it may leave a non-expert reader to wonder whether it serves a particular purpose there in giving flesh to the interpretation of 'commits' or 'commission' as employed elsewhere in the Statute. It does not. The better models of the same provision occur in article 2(1) of the draft Code of Crime against the Peace and Security of Mankind and article 3(1) of the Statute of the Special Tribunal for Lebanon. They respectively provide as follows: 'A crime against the peace and security of mankind entails individual responsibility' and 'A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person …,' following which appear the equivalents of article 25(3) of the Rome Statute.

19. That is to say, article 25(2) of the Rome Statute retains its full value in expressing the concept of individual criminal responsibility and punishment for it, without regard to the occurrence of the word 'commits,' which more sensibly recurs in article 25(3), more symmetrically with other modes of responsibility. In

that connection, the Appeals Chamber was correct to say in *Lubanga* that 'commits' serves no added purpose in article 25(2). As the Appeals Chamber put it on that occasion:

> At the outset, the Appeals Chamber notes that article 25(2) of the Statute, which establishes the principle of individual criminal responsibility, also uses the term 'commit' a crime. However, this provision refers generally to individual criminal responsibility for the crimes under the jurisdiction of the Court and therefore cannot assist in defining the term '[c]ommit' in paragraph 3(a) of the provision. Accordingly, article 25(2) of the Statute need not be considered any further.[4]

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20. Article 25(3)(a) of the Rome Statute captures the criminal responsibility of the defendant who 'commits' the crime individually or jointly with another person or through another person. Where only one person and nobody else is involved in a crime, there is usually no difficulty in appreciating who 'commits' the crime. It is the person who accomplished the *actus reus* of the crime with the requisite *mens rea*. The discussion about who 'commits' a crime arises where more than one person are alleged to be involved in it. In those circumstances, one often encounters the terminology of 'principal' offender, 'joint principal' offender and 'secondary parties' or 'accessories' to the crime, as describing the relative involvement of the various defendants. Regarding 'principal' offenders, the authors of a leading textbook provide the following explanation:

> Where there are several participants in a crime we define the principal as the participant 'whose act is the most immediate cause of the *actus reus*.' With offences in which there is no result or consequence to be proved, the principal offender is perhaps more accurately the person who engages in the conduct element of the *actus reus*. Thus, in murder for example, he is the person who, with *mens rea*, fires the gun or administers the poison which causes death; in theft, the person who, with *mens rea*, appropriates the thing which is stolen, etc.[5]
>
> …
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> There may be two or more principal offenders in the same crime. If D1 and D2 make an attack on V intending to murder him and the combined effect of their blows is to kill him, both are guilty of murder as joint principal offenders. ... The position is different if D leads another person, X (who is fully aware of the circumstances and consequences of what he is being persuaded to do, so is not an innocent agent ..., by persuasion or otherwise, to commit the offence. That does not amount to D causing the *actus reus*. X's voluntary intervening conduct 'breaks the chain of causation' so that D is not a principal offender. X

[4] *Ibid*, paragraph 461.
[5] David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law*, 13th edn (2020) p 493.

will be liable as the principal offender. D may be liable ... depending on his *mens rea* ... as a secondary party.[6]

21. Professor Andrew Ashworth of Oxford University teaches that 'the simplest way of drawing this distinction is to say that a principal is a person whose acts fall within the legal definition of the crime, whereas an accomplice (sometimes called an "accessory" or "secondary party") is anyone who aids, abets, counsels or procures a principal. It does not follow from this that where two or more persons are involved in an offence, one must be the principal and the others accomplices.'[7]

22. In *Black's Law Dictionary*, 'commit' is defined as '[t]o perpetrate (a crime).'[8] And in his legal classic *Textbook of Criminal Law*, Professor Glanville Williams explained that '[p]erpetrator' means, and means exclusively, the person who in law *performs* the offence.'[9] This performance oriented definition of perpetration or commits accords with the understanding of the International Law Commission on the meaning of 'commits' in international criminal law. Article 2 of the ILC draft Code of Crime against the Peace and Security of Mankind provides as follows:

> 1. A crime against the peace and security of mankind entails individual responsibility.
>
> 2. An individual shall be responsible for the crime of aggression in accordance with article 16.
>
> 3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
>
> (a) Intentionally commits such a crime;
>
> (b) Orders the commission of such a crime which in fact occurs or is attempted;
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> (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

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[6] *Ibid*, pp 493—494.
[7] Andrew Ashworth, *Principles of Criminal Law*, 6th edn (2009) p 404. [NB: Although the book has since undergone subsequent editions with Professor Jeremy Horder as co-author or with Professor Horder alone, the parts of the work referred to in this opinion have remained unchanged. Further references to book will remain to the 2009 edition that Professor Ashworth authored alone.]
[8] *Black's Law Dictionary*, 7th edn (1999).
[9] Glanville Williams, *Textbook of Criminal Law* (1978) p 285, emphasis added.

> (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
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> (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
>
> (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;
>
> (g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

23. Concerning criminal responsibility for 'commits' as they employed the term in article 2(3)(a) of the draft Code, the ILC explained as follows:

> Subparagraph (a) addresses the responsibility of the individual who actually 'commits such a crime.' This subparagraph provides that an individual who *performs* an unlawful act or omission is criminally responsible for this conduct under the subparagraph. As recognized by the Nurnberg Tribunal, an individual has a duty to comply with the relevant rules of international law and therefore may be held personally responsible for failing to *perform* this duty. Subparagraph (a) is intended to cover two possible situations in which an individual 'commits' a crime by means of an act or an omission depending on the rule of law that is violated. In the first situation, an individual incurs criminal responsibility for the *affirmative conduct of performing an act* in violation of the duty to refrain from *performing* such an act. In the second situation, an individual incurs criminal responsibility for an omission by *failing to perform an act* in violation of the *duty to perform* such an act.[10]

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24. It is apparent that the selling point for the 'control over crime' theory is that it helps to make operable the idea of 'commits … through another person, regardless of whether that other person is criminally responsible,' as provided for in article 25(3)(a) of the Statute. While there is sympathy for the indicated aim, it is possible to derive the better interpretation of this provision from other jurisdictions where there is a simplified or monistic regime of criminal responsibility: by imposing it on all who helped to inspire, motivate, encourage, or facilitate the commission of the crime that *was committed*. The idea of committing

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[10] See International Law Commission, Commentary to the Draft Code of Crimes against the Peace and Security of Mankind (1996), *Yearbook of the International Law Commission* (1996) vol II, Pt 2, p 20, commentary 7, emphasis added.

a crime 'through another person' is well known in those jurisdictions—typically comprised in the terminology of 'procuring' the crime. Professor Ashworth helpfully throws some light on this in his discussion on 'counselling' and 'procuring.'[11] As he put it:

> The characteristic contribution of the counsellor or procurer is to incite, instigate, or advise on the commission of the substantive offence by the principal. … In practice, however, there are many shades of culpability between helpers and instigators, a point which strikes the … lawyer more forcefully because of the uncertain limits of the terms 'counselling' and 'procuring.' The ordinary meaning of 'counselling' may fall well short of inciting or instigating an offence, and covers such conduct as advising on an offence and giving information required for the offence; whereas the ordinary meaning of 'procuring' is said to be 'to produce by endeavour,'[12] which goes beyond mere instigation.

25. The spectrum of culpable conducts that come within the concepts of counselling and procuring range from 'giving advice or information,' moving up to 'encouraging or trying to persuade another to commit the crime,' or 'shaming … by taunts of cowardice'—and all the way to 'threatening or commanding that the offence be committed.'[13] Elaborating on the point, Ashworth correctly explained that '[g]enerally speaking, the accomplice's culpability increases as one proceeds towards the extreme of a command backed by threats. In that extreme situation the principal may have the defence of duress, and may be regarded as an *innocent agent* of the threatener, who then becomes the principal.'[14] An 'innocent agent,' notably, is someone who directly accomplishes the *actus reus* of a crime without being a party to the crime, because he or she lacks the *mens rea* or has an affirmative defence such as infancy or infirmity of the mind.[15] Although this is the most classic example of how a crime is committed 'through another person,' Ashworth was careful to explain—and quite correctly—that it is not the only way of procuring a crime. Nor need it involve command backed by threats such as may validate the defence of duress. In some cases of procuring—i.e. committing through another person—the person who committed the actual crime may not realize that someone is trying to bring about an offence. This is the case, for instance, where the procurer surreptitiously laces a driver's drink with intoxicant knowing that the driver intended to drive, thus causing him to drive while drunk.[16]

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[11] Ashworth, *Principles of Criminal Law*, supra, p 413.
[12] This definition comes from Lord Chief Justice Widgery's pronouncement in *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 [Court of Appeal for England and Wales].
[13] See Ashworth, *supra*, p 414.
[14] *Ibid*, emphasis added.
[15] See Smith and Hogan, *Criminal Law*, 12th edn (by David Ormerod, 2008) p 181.
[16] See Ashworth, *supra*, p 414.

26. One defining feature of procuring is the presence of a demonstrable 'causal relationship between the accomplice's procuring and the principal's act.'[17] Hence, the understanding is summed up as follows in another leading textbook on criminal law: '"(1) procuring" implies causation but not consensus; (2) "abetting" and "counselling" imply consensus but not causation; (3) "aiding" requires actual assistance but neither consensus nor causation.'[18]

27. From the foregoing review, it should be clear enough that 'producing by endeavour'—including the endeavour of which the actual perpetrator was unaware or in extreme case 'command backed by threat'—must make the idea of 'committing through another person' more operable than the theory of 'control over crime.' But the former theory has the advantage of not being burdened by the radical idea that 'control over crime' imports into the inquiry, as the latter theory asks whether the party to whom 'control' is attributed was truly in *control* of the crime.

28. All that is required for the theory of 'producing by endeavour' is a demonstration of intentional endeavour to occasion the commission of a crime coupled with causal connection between the endeavour and the crime that was committed. It is not necessary to inquire whether the party producing the endeavour had control over the crime that the endeavour helped to produce.

iii. A Mistaken Distinction

29. The allure of the 'perpetration' diction in ICC proceedings results from the apparent impulsion to classify defendants' conducts within the category of criminal responsibility perceived as 'the highest'[19]—i.e. to 'commit' the crime—under article 25(3)(a). The 'perpetration' preference pressure has produced other neologisms such as 'co-perpetration,' 'direct perpetration,' 'indirect perpetration,' 'perpetration-by-means,' 'perpetrator behind the perpetrator,' 'indirect co-perpetration,' 'joint indirect perpetration' and so on. It is all about … perpetration! In the result, other modes of criminal responsibility now appear understood as relegated to a lesser order of culpability—subconsciously as *merely* accessorial. According to that sentiment, the following modes—accounted for under article

[17] *Ibid*.
[18] See Smith and Hogan, *supra*, p 189.
[19] See Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th edn (2020) at §644 at p 249.

25(3)(b) to (d)—would be relegated to the *merely* accessorial mode of criminal responsibility under the Rome Statute:

- orders, solicits or induces the commission of a crime within the Rome Statute, which in fact occurs or is attempted;
- facilitating the commission of such a crime by aiding, abetting or otherwise assisting in commission or attempted commission, including by providing the means for its commission; and
- contributes in any other way to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

30. One commentator put the matter in terms of making 'clearer the distinction between principal and accessorial liabilities within the context of the collective and multi-level commission of crimes.'[20] Hence, where it is not possible to classify the defendant as a 'perpetrator' (i.e. principal), then he is to be treated as an 'accessory.' Oddly enough, this preoccupation seems entirely unique to the affairs of the ICC. It was generally not an issue with administration of international criminal justice before the ICC began its work!

31. In an interesting commentary on the German and Japanese criminal justice systems, which he characterised as falling within the realms of 'Complicity System countries,' Professor Shin Matsuzawa of Tokyo's Waseda University provides an insight into the anxiety here at play. As he put it: 'In Complicity System countries, an accomplice is regarded as a less serious criminal category than the principal, often being described as a form of "secondary liability".'[21]

32. Unfortunately, certain pronouncements in the *Lubanga* appeal judgment appear to have enlivened that view in relation to the modes of criminal responsibility indicated in article 25(3) of the Rome Statute. There, the Appeals Chamber engaged the 'interplay' between 'commits' and the 'other forms of

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[20] See Kirsten Bowman, 'Article 25: Individual Criminal Responsibility—General Remarks', Commentary 264, in CILRAP » Case Matrix Network » CMN Knowledge Hub » ICC Commentary (CLICC) » Commentary Rome Statute » Commentary Rome Statute: Part 3. See here <www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>

[21] Shin Matsuzawa, 'Accomplice criminal liability to masterminds', at §1.4. See here <www.researchgate.net/publication/278026511>

criminal liability set out in article 25(3) of the Statute.'[22] In that regard, the Appeals Chamber observed as follows:

> [U]nder this provision, an individual can be held criminally responsible for either *committing* a crime (sub-paragraph a)) or for *contributing* to the commission of a crime by another person or persons in one of the ways described in sub-paragraphs (b) to (d). This indicates that the Statute differentiates between two principal forms of liability, namely liability as a perpetrator and liability as an accessory. In the view of the Appeals Chamber, this distinction is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons. Accordingly, it contributes to a proper labelling of the accused person's criminal responsibility.[23]

33. I am respectfully unable to share the view, given impetus in the *Lubanga* appeal judgment, that the Rome Statute recognises the separation of criminal responsibility into two broad divisions comprising those who *commit* the crime—to be described as 'perpetrators' (or principals); and, those who *contribute* to the commission of the crime—to be described as 'accessories.'[24]

34. The supposed objective of the 'control of crime' theory would be the attribution of criminal responsibility to a superior or to a participant in a common criminal plan. The value of the theory thus lies in the need to hold him up as a 'co-perpetrator' under article 25(3)(a), in order to rationalise his culpability as a person who 'commit[ted]' a crime 'jointly with' or 'through' *someone else*.

35. With respect, while the theory might have served salutary value in the land of its birth, the theory hinders more than it helps analysis—within the domain of the Rome Statute.

36. The origins of this theory are generally credited to the German jurist Claus Roxin.[25] He devised it as a fair-labelling strategy for purposes of attributing to an accused an appropriately higher level of criminal responsibility as a principal offender, rather than a mere accessory punishable only on a lower level of criminal responsibility.

37. More specifically, Roxin devised the theory in Germany because of the uniqueness of classification of modes of responsibility—between perpetrators

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[22] See *Prosecutor v Lubanga* (Judgment) dated 1 December 2014, paragraph 462 [Appeals Chamber].
[23] *Ibid*. See also paras 463, 467 and 468.
[24] See *ibid*, paras 462, 463, 467 and 468.
[25] See Gerhard Werle and Boris Burghardt, 'Claus Roxin on Crimes as part of Organized Power Structures' (2011) 9 *Journal of International Criminal Justice* 191.

and their accessories, with perpetrators receiving mandatory higher punishment. Because of that classification, the German judges of the post-World War II era had been reluctant to convict anyone else as 'perpetrators' of Nazi atrocities, if such persons did not belong to the leadership of the Third Reich. Perturbed by the legal classifications that accommodated that reluctance, Roxin devised the 'control' or 'domination' of crime theory—in order more correctly to label as 'perpetrators' persons who would otherwise be considered as mere 'accessories' to the crimes charged. According to Roxin's theory, where an accused person made a controlling or dominant contribution to a crime, that contribution would be considered as more than merely accessorial. In other words, if the accused was in a position to control or dominate the course of events, particularly so if his involvement in the events put him in a position to prevent or direct the crime as committed, he would have had 'control' or 'domination' over the crime.[26] Thus, he would not be merely an accessory.

38. We are informed that Roxin was amongst German scholars who offered various theories on the subject during the 1960s. In the end, Roxin's theory appeared to have been reflected in the resulting reform of the General Part of the German Criminal Code (*Strafgesetzbuch 'StGB'*) adopted in the late 1960s.[27]

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[26] In an effort to shed light on the theory, Professor Gerhard Werle and Boris Burghardt of Humboldt-Universität zu Berlin explained its utility as seeking to temper 'a social climate of denying or minimizing responsibility' for Nazi atrocities on the part of 'all other officials' who did not belong to the leadership of the Third Reich. [See Werle and Burghardt, *ibid*, at 192.] According to Werle and Burghardt, Roxin 'tried to show that the definitional criterion of all forms of perpetration is "domination of the act" (*Tatherrschaft*). A perpetrator, Roxin held, is a person who "dominates" the commission of the criminal offence in that he or she has the power to determine whether or not the relevant acts are carried out.' [*Ibid*, p 191.] Roxin's theory marked a deliberate departure from the orthodoxy, which Werle and Burghardt explained as follows:

> In contrast, German courts were reluctant to accept Roxin's approach and continued to adhere to the subjective theory. This theory suggests that any person acting with the mind of a perpetrator (*animus auctoris*) will be treated as such regardless of the importance of his or her factual contribution. On the other hand, a person who only wishes to help another person to commit the crime acts with the mind of an assistant (*animus socii*). Such a person is an aider and abettor even if he or she personally fulfils every element of the definition of the crime.

The controversy about how to distinguish principals and accessories has to be seen against the background of the prosecution of Nazi crimes in the Federal Republic of Germany (hereinafter: FRG): After a resolute start by the Supreme Court for the British Occupied Zone, applying Control Council Law No.10, prosecutions of Nazi crimes in the FRG ceased almost entirely in the 1950s. The dominant tendency in West German society after 1945 was to blame Hitler and the rest of the Nazi elite for the horrendous atrocities committed between 1933 and 1945 and to downplay individual responsibility of all other officials. Any effort to bring to trial individuals was largely considered to be stirring things up unnecessarily instead of letting bygones be bygones.' [*Ibid*, pp 191—192.]

[27] See Thomas Weigend, 'Perpetration through an Organisation: the Unexpected Career of a German Legal Concept' (2011) 9 *Journal of International Criminal Justice* 91, at pp 94—95.

39. It is notable, of course, that even in the modern German Criminal Code that Roxin reportedly influenced as such in the relevant part, there remains a distinction in the classification of criminal responsibility according to (i) commission; (ii) abetting; and, (iii) aiding. And, quite significantly, the *StGB* prescribes punishments differently in each classification. According to the classification of *commission*, anyone who *commits* an offence personally or through someone else incurs a penalty as an offender.[28] Where several persons commit an offence jointly, each would incur penalty as an offender.[29] The next serious classification is *abetting*. It consists of intentional inducement of someone else to commit an unlawful act intentionally. Although an abettor incurs the same penalty as an offender,[30] there are (as will be discussed shortly) circumstances in which the *StGB* imposes a regime of mitigation for abettors. The final classification of responsibility concerns *aiding*. An aider is anyone who intentionally assists another in the intentional commission of an unlawful act.[31] Although an aider's punishment takes its bearing from that of the offender, the punishment *must* be mitigated in accordance with s 49(1).[32] The same mitigation regime *must* also apply to abettors (as well as aiders) in whom there is an absence of the 'special personal characteristics' that establish the criminal liability of the offender.[33] Section 14(1) establishes what those special personal characteristics are.[34]

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[28] See the Criminal Code of Germany, s 25(1).
[29] *Ibid*, s 25(2).
[30] *Ibid*, s 26.
[31] *Ibid*, s 27.
[32] Section 49 provides as follows:
(1) If the law requires or allows for mitigation under this provision, the following applies:
1. Imprisonment for life is substituted by imprisonment for a term of at least three years.
2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum sentence may be imposed. In case of a fine, the same applies to the maximum number of daily rates.
3. Any increased minimum statutory term of imprisonment is reduced as follows:
- in the case of a minimum term of ten or five years, to two years,
- in the case of a minimum term of three or two years, to six months,
- in the case of a minimum term of one year, to three months,
- in all other cases to the statutory minimum.

(2) If the court may, at its discretion, mitigate the penalty pursuant to a law which refers to this provision, it may reduce the penalty to the statutory minimum or impose a fine instead of imprisonment.
[33] See, *ibid*, s 28(1).
[34] According to s 14(1), 'If a person acts: (1) in the capacity as an organ which is authorised to represent a legal entity or as a member of such an organ, (2) in the capacity as a partner who is authorised to represent a partnership with legal capacity, or (3) in the capacity as statutory representative of another, then any law under which special personal attributes, relationships or circumstances (special personal characteristics) give rise to criminal liability also applies to the

40. Notably, Professor Matsuzawa summarised the foregoing phenomenon in two countries he classified as belonging to the 'Complicity System': 'In Japan and Germany, penalties for criminal acts involving multiple persons are *determined systematically*, by identifying the form of involvement of each offender, and applying the penalty *requirement* corresponding to the form of involvement.'[35]

41. Werle and Jessberger inform that several national courts have 'relied on the concept of commission through another by means of control over a hierarchical organisation in cases concerning state-orchestrated macro-criminality.'[36] In addition to Germany, two other countries where national courts have employed this theory are Argentina and Peru.[37] But, it may be pointed out that these are all countries that would belong to what Matsuzawa described as 'Complicity System countries,' where the applicable criminal code requires that penalty be applied according to a tabulated scheme of complicity. For instance, article 45 of Argentina's Criminal Code provides for the criminal responsibility of perpetrators—and anyone who lent assistance without which the crime could not have been committed. Roxin's 'control' over the crime theory is identifiable in the idea of assistance without which the crime could not have been committed. In Argentina's Criminal Code, culprits in this category are punished as authors of the crime. Article 46 provides for criminal responsibility of anyone who cooperated in any other way in the execution of the crime. The penalty for this category will be reduced from one third to one-half relative to the penalty of the author of the crime. Article 23 of the Criminal Code of Peru provides that the penalty for perpetrators and co-perpetrators shall be that prescribed for the offence. In article 24, anyone who intentionally instigates the commission of an offence shall bear similar criminal responsibility as the author. But article 25 contemplates two types of complicity—primary and secondary. A primary complicity entails wilful assistance without which the crime would not have been committed—i.e. a person who had 'control' over the crime, to use Roxin's language. Such a primary accessory is punished as if he were the author of the crime. A secondary complicity entails the lending of any other kind of intentional assistance to the crime. Secondary complicity attracts 'prudent' reduction in penalty.

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representative if these characteristics do not exist in the person of that representative but in the entity, partnership or person represented.'

[35] Matsuzawa, *supra*, at §1.2. See here <www.researchgate.net/publication/278026511>

[36] Werle and Jessberger, *supra*, § 467 at p 250.

[37] *Ibid*.

42. As will be seen later, this regime of compulsory mitigation of punishment for those whose responsibility is not characterised as 'perpetration' is what the Appeals Chamber described in a later judgment as 'mandatory mitigation in case of conviction as an accessory,' which is nowhere prescribed in the legal framework of the ICC.[38]

43. The value of the 'control of crime' theory would thus be evident—and it is no doubt a significant value—in the circumstances of a legal system like that in which Roxin introduced it. But, given even Roxin's own reasons for conceiving it, his theory is happily unnecessary in other legal systems—including the international criminal legal order—that do not draw such juristic distinctions between the principal offenders who actually *commit* the crime and their accessories, with the view to mandatory or recommended reduction in punishment on the understanding of reduced blameworthiness.

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44. The purpose of the catalogue of conducts set out in article 25(3)(a) to (d) of the Rome Statute is not to erect a *distinction* between degrees of criminal responsibility, in order to ascribe a higher degree of 'blameworthiness' for a person who commits a crime, in contrast to 'a person who contributes to the crime of another person or persons.'[39]

45. The red flag of flaw should worry any view which suggests that someone who *ordered*, *induced*, or *planned* the commission of a crime that might not have been committed—the responsibility for which is immediately captured in article 25(3)(b) or (d) of the Rome Statute—is less blameworthy than someone who *committed* the crime as ordered (the responsibility for which is captured in article 25(3)(a)). For instance, it cannot be seriously said that Osama bin Laden was less blameworthy for ordering, inducing or planning the destruction of the Twin Towers in New York City (if charged under article 25(3)(b) or (d)), leaving the suicide pilots with the greater blame for having *committed* the crime by physically flying the plane into the Towers (in view of article 25(3)(a)). Nor is it factually convincing to say that Osama bin Laden had 'control' over that crime from his remote hideaway in Afghanistan, when any of the suicide pilots could have foiled the plan by declining to execute it, and by sensibly informing American security

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[38] See *Prosecutor v Bemba & ors* [Sentencing Judgment] dated 8 March 2018 [Appeals Chamber] paragraph 60.
[39] *Cf*, *ibid*, paragraph 462.

officials about it and seeking their protection. But, the fact that Bin Laden could not convincingly be said to have had 'control' over the crime, nor to have *performed* the offence, in the exclusive sense of the idea conveyed by Professor Glanville Williams,[40] in no way diminished his criminal responsibility for the crime by ordering, inducing or planning it. Quite the contrary, his role as the mastermind should heighten his criminal responsibility.

46. Indeed, the heightened criminal responsibility of masterminds of crimes in international law is correctly acknowledged by the International Law Commission as regards the role of those involved in the planning and conspiracy that were the prime movers of the commission. According to the ILC, the criminal responsibility for planning and conspiracy captured in article 2(3)(e) of the draft Code of Crimes is:

> intended to ensure that high level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for *the major role that they play which is often a decisive factor in the commission of the crimes* … . This principle of individual responsibility is of *particular importance for [international crimes] which by their very nature often require the formulation of a plan or a systematic policy* by senior government officials and military commanders. Such a plan or policy may require more detailed elaboration by individuals in mid-level positions in the governmental hierarchy or the military command structure who are responsible for ordering the implementation of the general plans or policies formulated by senior officials. The criminal responsibility of the mid-level officials who order their subordinates to commit the crimes is provided for in subparagraph (b). Such a plan or policy may also require a number of individuals in low-level positions to take the necessary action to carry out the criminal plan or policy. The criminal responsibility of the subordinates who actually commit the crimes is provided for in subparagraph (a). Thus, the combined effect of subparagraphs (a), (b) and (e) is to ensure that the principle of criminal responsibility applies to all individuals throughout the governmental hierarchy or the military chain of command who contribute in one way or another to the commission of [an international crime].[41]

47. What then is the object of article 25(3)? It is to *capture* the various conducts that would make an individual 'criminally responsible and liable for punishment for a crime within the jurisdiction of the Court'[42]—in a similar way. The purpose is to give the world a fair notice that anyone whose conduct falls into any of those descriptions would be individually culpable and punishable for any of the nominate crimes in the Rome Statute. That is to say, if **D1** is found guilty of

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[40] It is recalled that Glanville Williams insisted that '[p]erpetrator' means, and means exclusively, the person who in law performs the offence': Williams, *supra*, p 285.
[41] International Law Commission, Commentary to the Draft Code of Crimes against the Peace and Security of Mankind (1996), *Yearbook of the International Law Commission* (1996) vol II, Pt 2, p 20, commentary 14, p 21, emphases added.
[42] Article 25(3).

committing genocide by having performed an act of genocide with the requisite *mens rea*, within the meaning of article 25(3)(a), he would be found guilty and punished for *genocide* and branded a *genocidaire*. If **D2** is found guilty of having, within the meaning of article 25(3)(b), *solicited* the genocide which D1 committed, then D2 would, like D1, be found guilty and punished *plainly* for genocide and would also be branded a *genocidaire*, in unqualified terms. And, if within the meaning of article 25(3)(d), **D3** contributed in any way in the *planning* of the genocide that D1 committed, then D3 would, like D1, be found guilty of genocide and punished for it and be branded a *genocidaire*—with no need to qualify his culpability in any way that reflects lesser opprobrium than that of D1.

48. To put it differently, to the extent of the categories of conduct listed in it, article 25(3) is a dragnet. It is not a gauge of blameworthiness. Perhaps, a litmus test of whether the provision is intended as a gauge is to ask whether the Rome Statute indicates the uses of that gauge. Ordinarily, the value of the gauge would be to avoid criminal responsibility for the particular crime, to diminish responsibility or to adjust punishment such as by way of mitigation of penalty. The value of such calibration must be stipulated as such in the Rome Statute itself—as a statutory requirement and not judicial discretion. There is no such stipulation in the Rome Statute, as the Appeals Chamber later acknowledged in *Bemba No 2*, when it observed that 'the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence.'[43] The judges are not assisted by interesting academic theories that only tell them that there is a difference between the conducts indicated as modes of responsibility under article 25(3). Judges know that.

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49. There is, indeed, no aberration at all in the understanding of article 23(3) as seeking to capture the various manner of conducts that might attract individual criminal responsibility rather that the gradation of criminal responsibility. We may begin by noting that no such graded distinctions were recognised in the equivalent provisions common to the statutes of the ICTR, the ICTY and Special Court for Sierra Leone, as well as the constitutive laws respectively of the Extraordinary Chamber in the Courts of Cambodia and of the Kosovo Specialist

[43] *Ibid*, paragraph 60.

Chambers. They simply provided as follows: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in … the present Statute, shall be individually responsible for the crime.'[44] It may also be noted that the provisions of the Statute of the Special Tribunal for Lebanon, which bear the closest structural arrangement to the equivalent provisions of the Rome Statute, do not indicate gradations of criminal responsibility that vary with the indicated conducts.

50. It is no aberration that, similar to the Rome Statute, none of the instruments of these *ad hoc* tribunals contains any word that suggests variations of criminal responsibility according to the conducts listed in the relevant provisions. It is no aberration because there are many legal systems that no longer draw a distinction between principals and accessories before the fact. Notably, in common law jurisdictions, persons connected to a felony were classified into any of the following categories: '(1) principal in the first degree; (2) principal in the second degree; (3) accessory before the fact; and (4) accessory after the fact.'[45] For various reasons, '[t]his classification gave rise to many procedural difficulties ...'.[46] In the course of law reform, the functional distinctions between these categories 'have now been largely abrogated';[47] though the vestiges remain in discourse, mostly for pedagogic purposes. A classic model of that law reform is the Accessories and Abettors Act (1861) of the United Kingdom. It provides as follows in s 8: 'Whomsoever shall aid, abet, counsel, or procure the commission of [any indictable offence] … *shall be liable* to be tried, indicted, and punished *as a principal offender*.' [Emphasis added.] A similar regime obtains in the United States. Section 2 of Title 18 of the US Code provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[48]

51. In a commentary that is representative of the legislative intent in the legal systems that no longer recognise a distinction between principals and accessories

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[44] See article 6(1) of the ICTR Statute, article 7(1) of the ICTY Statute and article 6(1) of the SCSL Statute. See also article 29 of Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia with inclusion of amendments as promulgated on 27 October 2004 and article 16(1)(a) of the Law No Law No 05/L-053 of the Kosovo Specialist Chambers.
[45] Wayne LaFave, *Criminal Law*, 4th edn (2003) p 664.
[46] *Ibid*.
[47] *Ibid*.
[48] SEE 18 US CODE § 2.

before the fact, the Cornell Law School's Legal Information Institute explains the foregoing provision as follows:

> Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures.'
>
> The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who 'aids, abets, counsels, commands, induces or procures' another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.
>
> It removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[49]

52. In Australia, the law is even more striking in its language. According to s 11.2(1) of the Criminal Code Act, 'A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.' Also in Canada, the language of criminal responsibility has been simplified in the direction of classifying as 'a party' everyone connected with the crime. In other words, '[e]very one is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it.'[50] Where two or more persons form a common intention to carry out an unlawful purpose and to assist each other therein, should any one of them, in carrying out the common purpose, commit an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.[51] Anyone who 'counsels' another person 'to be a party' to a crime will himself be a party to the offence, notwithstanding that the offence was committed in a manner different from what was counselled.[52] What is more, the person who counsels another person to a party to an offence is a party to every offence that the counselled party commits in consequence of the counselling, if the counselling party knew or ought to have known of the likelihood that the further offence might be committed in consequence of the counselling.[53] Under the Canadian Criminal

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[49] Cornell Law School, Legal Information Institute, Historical and Revision Notes: Title 18 US Code § 2. See <www.law.cornell.edu/uscode/text/18/2>
[50] See *Criminal Code* of Canada, s 21(1).
[51] *Ibid*, s 21(2).
[52] *Ibid*, s 22(1).
[53] *Ibid*, s 22(2).

Code, to counsel an offence includes to procure, solicit or incite it.[54] In the Republic of Ireland, 'Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.'[55] In Malta, an accomplice in a crime shall be liable to the punishment established for the principal, unless otherwise provided by law.[56] The provisions of the New Zealand Crimes Act are essentially to the same effect[57] as the Canadian Criminal Code. To the same general effect, the Nigerian Criminal Code also recognises no difference in criminal responsibility between actual perpetrators and accessories before the fact.[58]

53. Against the background of differences of approach between the major legal systems, it is important to stress that the monistic regime of criminal responsibility, involving no distinction between perpetrators and accomplices, is not unique to common law systems. France is a major continental jurisdiction that

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[54] *Ibid*, s 22(3).
[55] *Criminal Law Act* of Ireland, s 7(1).
[56] See s 43 of the *Criminal Code* of Malta.
[57] See the *Crimes Act* of New Zealand, s 66.
[58] In the relevant part, the Nigerian *Criminal Code* provides as follows:
7. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;
(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
(c) every person who aids another person in committing the offence;
(d) any person who counsels or procures any other person to commit the offence.

In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.
8. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.
9. When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

does not recognise differentiated blameworthiness between perpetrators and accomplices. Notably, article 121-4 of the Penal Code of France designates as a 'perpetrator' the person who 'commits the criminally prohibited act' or 'attempts to commit a felony or, in the cases provided for by Statute, a misdemeanour.'[59] The criminal responsibility for accomplices is provided for in article 121-6, as follows: 'The accomplice to the offence, in the meaning of article 121-7, is *punishable as a perpetrator*.' [Emphasis added.] And within the meaning of article 121-7, an accomplice is a 'person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.'

54. Similarly in Italy, the Penal Code makes no distinction between perpetrators and accomplices in any way that suggests lesser blameworthiness for the latter. Notably, article 110 provides that when more than one person participates in the same crime, each of them shall be subject to the punishment prescribed for the crime.

55. Indeed, the Italian Penal Code tends to aggravate the criminal responsibility of masterminds. For instance, article 111 provides that anyone who induced the commission of an offence by a person who is not responsible, or not punishable because of a personal characteristic or condition, shall be liable for the offence committed by that person. And, perhaps more importantly, the inducer's punishment shall be increased. Also, in respect of committed offences, article 112 provides that punishment shall be increased for the participants in the following circumstances: (i) where five or more persons participated in the crime, except when the law provides otherwise; (ii) for anyone who promoted or organised collaboration in the crime or directed the activity of persons participating in the same crime; (iii) for anyone who, in the exercise of his authority, direction or supervision, induced subordinates to commit an offense; or, (iv) for anyone who, induced commission of a crime by a person under the age of eighteen years or by a person suffering from mental infirmity or deficiency, apart from the case designated in article 111.

56. Articles 132 permits discretionary sentencing within the statutory limits; and article 133 prescribes factors of gravity that must be taken into account when

[59] According to article 121-5, 'An attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect solely through circumstances independent of the perpetrator's will.'

such sentencing discretion is exercised. But, this does not comprise a regime of mandatory reduction of punishment for persons who were not perpetrators. Articles 132 and 133 apply to everyone, whether or not he or she is perpetrator or accomplice.

55. The declension of distinction between principals and accessories, for purposes of differentiated criminal responsibility is also identifiable in early iterations of international criminal law, administered at Nuremberg. Notably, according to article 6 of the Charter of the International Military Tribunal, '[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit' any of the crimes over which the Tribunal has jurisdiction 'are responsible for all acts performed by any persons in execution of such plan.' A similar provision appears in article 5 of the Charter of the International Military Tribunal for the Far East. All that is in those provisions is adequately accommodated in article 25(3)(d) of the Rome Statute which also deals with common plan.

57. For its part, article II(2) of the Control Council Law No 10 provided as follows:

> Any person without regard to nationality or the capacity in which he acted, *is deemed to have committed* a crime as defined in paragraph 1 of this Article[60], if he was (a) a *principal* or (b) was an *accessory* to the commission of any such crime or *ordered* or *abetted* the same or (c) *took a consenting part* therein or (d) was *connected with plans or enterprises involving its commission* or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1(a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

58. It has been correctly observed that '[t]he Nuremberg jurisprudence did not distinguish between principal and accessory (secondary or derivative) participation on the level of attribution of criminal responsibility, but rather considered any form of (factual) participation in a crime sufficient to hold a participant accountable.'[61] A reflection of that attitude is the following famous pronouncement of the International Military Tribunal on the crime of aggression:

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[60] Paragraph 1 of article II of Control Council Law No 10 nominates crimes against peace, war crimes, crimes against humanity and Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

[61] Kai Ambos, *Treatise on International Criminal Law*, vol I: Foundations and General Part (2013) p 106.

Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.[62]

59. In the *Zyklon B* case, Bruno Tesch and Karl Weinbacher were found guilty by a British Military Court, for participating in the project of exterminating human beings at Auschwitz. They were not punished as mere accessories who only *helped* the SS (the perpetrators) by supplying the poison gas used in the extermination. They claimed that they had supplied the gas for purposes of exterminating lice and rodents in the camp. The Tribunal held that due to the large quantities of gas they were supplying, they ought to have known that their product was being used to exterminate human beings. They were thus sentenced to death and hanged.[63]

60. In *US v Pohl et al*, Oswald Pohl was found guilty and sentenced to death (by hanging) for the crime of exterminating Jews and appropriating their belongings.[64] In an application for reconsideration of the judgment and sentence, his counsel argued that Pohl played no 'decisive part' in the 'organization' or 'execution' of the crime. In dismissing the plea and confirming sentence,[65] the Tribunal said as follows:

In order for Pohl to have been criminally liable for the liquidation of the Jews and the appropriation of their property, it was not necessary for him to have had a decisive part in formulating the original plan, nor in carrying it out later. It would be sufficient to inculpate him, if he was an accessory to or abetted the criminal program or took a consenting part therein or was connected with plans or enterprises involving its commission. This could occur at any point in the course of the program [to exterminate Jews and appropriate their belonging].[66]

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[62] See *United States, France, United Kingdom, and the Soviet Union v Göring and ors* (Judgment) of 1 October 1946 [IMT], published in *Trial of the Major War Criminals before the International Military Tribunal* (1947), vol 1 at pp 226.
[63] See *The Zyklon B Case* (1947) 1 *Law Reports of Trials of War Criminals* 93.
[64] *US v Pohl et al*, Trials of War Criminals (1946-1949), vol V, p 1062.
[65] *Ibid*, 1178.
[66] *Ibid*, 1174. In explaining the principle of criminal responsibility in play in the case, the Tribunal said as follows: 'An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property, is obviously a task for more than one man. Launching or promulgating such a program may originate in the mind of one man or a group of men. Working out the details of the plan may fall to another. Procurement of personnel and the issuing of actual operational orders may fall to others. The actual execution of the plan in the field involves the operation of another, or it may be several other persons or groups. Marshaling and distributing the loot, or allocating the victims, is another phase of the operation which may be

61. It is also notable that the International Law Commission does not suggest in their relevant commentary[67] that the highest degree of criminal responsibility is reserved only for those who 'commit' an international crime within the meaning of article 2(3)(a) of the draft Code of Crimes, with their accomplices bearing a lesser degree of blameworthiness—a view invited by the Appeals Chamber in *Lubanga*. It is significant that the ILC observed that the purpose of criminal responsibility for planning and conspiracy, within the meaning of article 2(3)(e) of the draft Code of Crimes is generally 'intended to ensure that high level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for *the major role that they play which is often a decisive factor in the commission of the crimes* covered.'[68]

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62. It is thus not an aberration that the drafter of the Rome Statute did not make or intend a distinction between the modes of criminal responsibility set out in article 25(3), for purposes of differentiation of punishment between principals and accessories. Rather, the legislative intent operates in the opposite direction. It is similar to the legislative intent in the *Aiders and Abettors Act* as in 18 US Code § 2, which is to 'punish as a principal' any person whose conduct falls into any of the categories of conduct captured in article 25(3)(a) to (d).

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entrusted to an individual or a group far removed from the original planners. As may be expected, we find the various participants in the program tossing the shuttlecock of responsibility from one to the other. The originator says: "It is true that I thought of the program, but I did not carry it out." The next in line says: "It is true I laid the plan out on paper and designated the *modus operandi*, but it was not my plan, and I did not actually carry it out." The third in line says: "It is true I shot people, but I was merely carrying out orders from above." The next in line says: "It is true that I received the loot from this program and inventoried it and disposed of it, but I did not steal it nor kill the owners of it. I was only carrying out orders from a higher level." To invoke a parallelism, let us assume that four men are charged with robbing a bank. The first makes a preliminary observation, draws a ground sketch of the bank and of the best means of escape. The second drives the others to the bank at the time of the robbery and spirits them away after its completion. The third actually enters the bank and at the point of a gun steals the money. The fourth undertakes to hide or dispose of the loot, with knowledge of its origin. Under these circumstances, the acts of anyone of the four, within the scope of the over-all plan, become the acts of all the others. Control Council Law No. 10 recognizes this principle of confederacy when it provides in Article II paragraph 2 "any person … is deemed to have committed a crime as defined in paragraph 1 of this Article, if .he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission …"': *ibid*, pp 1173—1174.

[67] See International Law Commission, Commentary to the Draft Code of Crimes against the Peace and Security of Mankind (1996), *Yearbook of the International Law Commission* (1996) vol II, Pt 2, pp 20—22.

[68] *Ibid*, p 21, emphasis added.

63. It is mistaken to read that distinction into article 25(3)—possibly in thrall to habits of thought from national legal systems where such distinctions control the question of criminal responsibility and punishment. Indeed, it is striking that, in reading the 'control over the crime theory' into article 25(3)(a), the *Lubanga* Appeals Chamber sought guidance from approaches developed in other jurisdictions without the most rudimentary consideration of whether the criminal codes in those countries systemically resemble the Rome Statute in the forms of criminal responsibility they recognise. In so doing, it overlooked and negated the significance of the other forms of criminal responsibility involving a plurality of persons captured under article 25 as relating to persons whose role vis-à-vis the crime was somehow less significant than those who 'commit' the crime.

iv. Running Off the Legal Cliff

64. Under the Rome Statute, it is not necessary to construct such an involved theory as 'control of crime' or 'domination of crime' theory for purposes of attribution of criminal responsibility as a principal, under the rubric of 'commits' in article 25(3)(a). As with s 8 of the *Accessories and Abettors Act* of 1861, it need only be emphasised that article 25(3)(b) of the Rome Statute recognises no lesser degree of criminal responsibility for a person who 'orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.' Nor does the Rome Statute impose a regime of mitigation that s 49(1) and 28(1) of the *StGB* imposes. In other words, if the accused ordered, solicited or induced *someone else* to commit a crime or attempted crime which in fact occurs, the attribution of criminal responsibility for a nominate crime (i.e. genocide, a crime against humanity, war crime or the crime of aggression) under the Rome Statute does not require demonstration that the accused was a 'co-perpetrator' with the person who actually *committed* the crime or attempted crime.

65. The pre-occupation with 'commit' (or 'perpetration') as the overworked factotum of criminal responsibility—on the theory of distinction between principals and accessories—runs into another difficulty in the context of group criminality. The focus on article 25(3)(a) may ignore the fact that the provision is more suitable in cases where the partner in crime is a 'person' rather than a group. In other words, article 25(3)(a) concerns commission of a crime by the defendant

as an 'individual,'[69] or 'jointly with another or through another *person*, regardless of whether that other *person* is criminally responsible.'[70] [Emphasis added.]

66. Given the limitation of criminal responsibility to individuals under article 25(2), it will be possible to bring a charge specifically under article 25(3)(a) against multiple natural *persons* as such. But, it may be unsafe to extrapolate that possibility in the direction of charging the defendant with 'co-perpetration' with an aggregate entity such as a corporation let alone an entity that cannot be called a 'person'—such as an armed group. The provision says nothing about group criminality. Indeed, the 'control of crime' theory is not necessary to facilitate the attribution of criminal responsibility as a 'co-perpetrator,' when article 25(3)(d) already contemplates no lesser attribution of criminal responsibility for anyone who in 'any other way contributes' to the commission or attempted commission of a crime under the Rome Statute 'by a group of persons acting with a common purpose.' Responsibility for this is adequately accommodated under article 25(3)(d), thus making it unnecessary to saddle article 25(3)(a) with that function as well. This is the default provision or the *lex specialis* for the attribution of criminal responsibility arising from the criminal conduct of a 'group of persons acting with a common purpose.'

67. During the negotiation of the Rome Statute, early drafts of article 25(3)(d) were aimed at capturing the responsibility of those who plan or mastermind the commission of a crime, he or she who 'either: (i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or [(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted].'[71]

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[69] For example, a defendant who explodes a weapon of mass destruction (WMD) in a crowded stadium, with intent to destroy in part a group of persons sharing common nationality, ethnicity, race or religion, may be charged with 'individually' committing genocide.

[70] A person may commit a crime jointly with another *person* or through another *person*, in the manner of any of the following examples. The defendant may cooperate with someone else (who shares the same genocidal intent) in placing the WMD in the crowded stadium, in the example indicated in the preceding footnote. That would qualify as committing the genocide 'jointly' with another person. And in the scenario where the defendant used an innocent agent (i.e. a person necessarily lacking in *mens rea* or with a viable defence of infancy or mental infirmity) in delivering the WMD into the stadium, the defendant would be charged with committing genocide 'through' another person.

[71] See Preparatory Committee on the Establishment of an International Criminal Court, Working Group on General Principles of Criminal Law and Penalties, Chairman's Text, 19 February 1997A/AC.249/1997/WG.2/CRP.2/Add.2; Preparatory Committee on the Establishment of an International Criminal Court, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in

Inclusion of a third type of criminal association was also contemplated to address 'the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".' However, the draft documents note that the inclusion of this subparagraph gave rise to divergent views, presumably based on the different legal approaches of the negotiating states to criminalising coordinated and organised crimes by groups of individuals.

68. At this juncture, it is important to underscore that the drafters of the Rome Statute were not alone in contending with the problem of how to accommodate divergent approaches to the criminal responsibility of those who plan and participate in organised criminality. Drafters of various United Nations conventions aimed at combating types of transnational or organised criminality (or both) were also in the process of formulating and developing approaches to the prosecution of such criminality that could be adopted and applied across a broad spectrum of national systems.

69. The Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime (the 'Palermo Convention') tells us that:

> The approaches adopted by States to criminalize participation in organized criminal groups vary depending on historical, political, and legal backgrounds. Traditionally, common law jurisdictions mostly relied on the offence of conspiracy, while civil law jurisdictions developed the offence of criminal association.[72]

70. Reflecting these different approaches, the Palermo Convention provides for two different approaches to this type of criminality—the agreement-type offence akin to the common law conspiracy model (set out in article 5(1)(a)(i))

Zutphen, 4 February 1998, A/AC.249/1998/L.13, pp 53-54; Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, A/CONF.183/2/Add.1, p 50.

[72] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, paragraph 71. Nevertheless, it subsequently notes that: 'Since the Organized Crime Convention was conceived, the traditional division between common law and civil law approaches to criminalizing participation in an organized criminal group has started to fade, and the laws of individual States parties have evolved and diversified. For example, many common law jurisdictions have introduced offences criminalizing the participation in an organized criminal group in addition to existing conspiracy offences. Similarly, several civil law jurisdictions have supplemented existing criminal association offences with more specific and aggravated offences that criminalize particular types of organized criminal groups and/or particular types of involvement in or offences committed by such groups' (see *ibid*. paragraph 106).

and the criminal association offence based on the criminal association laws developed in several civil law countries (set out in article 5(1)(a)(ii))—and requires each State Party to establish either or both as criminal offences.[73] The requirements of the latter are broadly similar to those adopted under article 25(3)(d) of the Rome Statute.

71. The Legislative Guide for the Palermo Convention explains that one of the purposes of article 5 'is to extend criminal liability for different ways in which a person may participate in the commission of a serious crime involving an organized criminal group, including as organizers, directors and those who aid, abet, facilitate or counsel the commission of serious crime involving an organized criminal group. Importantly, States parties that implement the criminal association offence, contained in article 5(1)(b), are able to hold accountable those who plan, mastermind, found, finance or actively support the criminal activities of an organized criminal group *but who themselves do not commit, or have not yet committed, a specific criminal offence*.'[74]

72. These discussions at the international level are instructive for our purposes because they again highlight and demonstrate that the forms of criminal responsibility captured in article 25(3)(b), (c) and (d) are not subsidiary or less than the form of criminal responsibility set out in article 25(3)(a). Rather, they are a means to an end—to ensure that those involved in group criminality in any

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[73] According to article 5(1) of the Palermo Convention:
Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
> > a. Criminal activities of the organized criminal group;
> > b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

[74] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, paragraph 73, emphasis added.

capacity can be held accountable and punished in accordance with the effectual degrees of their culpability in the crime.

73. The text of article 25(3)(d) of the Statute was undeniably modelled on the same precedent as the text contained in article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings.[75] There can be no doubt that its purpose was not merely to capture a lesser form of criminal responsibility, in contrast to that of criminal participants who might be considered more culpable for the crime because they are perceived to be the persons who *actually* 'committed' the crime in the true sense of the term, as perpetrators.

74. On the other hand, the Convention's article 2(3)(c) may be compared with article 2(1) of the same instrument. The latter is the equivalent of article 25(3)(a) of the Rome Statute. They both concern criminal responsibility for 'commission.' It is clear that this form of responsibility relates to the physical perpetrator only,[76] with no suggestion at all that it attracts greater culpability than those whose responsibility is more readily captured in article 2(3)(c) of the Convention or article 25(3)(d) of the Rome Statute.

75. And, that affords a further demonstration of the flaws of the idea of reading into article 25(3) a legislative intent to differentiate degrees of 'blameworthiness' between 'committing' and the other modes of criminal responsibility outlined in the provision.

76. The ICC appears to be alone in pursuing at all costs an interpretation of commission that allows those persons deemed to be most morally responsible to be prosecuted as 'principal perpetrators'. On the international plane and at the domestic level, the 'control over the crime theory' remains an outlier in tackling

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[75] Article 2(3)(c) of the International Convention on the Suppression of Terrorist Bombings contemplates 'commission' degree of responsibility for any person who 'In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.'

[76] According to article (2)(1) (of the International Convention on the Suppression of Terrorist Bombings): 'Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: (a) With the intent to cause death or serious bodily injury; or (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.'

the organised criminal activities of multiple persons acting together because, in most contexts, it is unnecessary and ill-adapted for this purpose.

v. The 'Control of Crime' Theory

77. Even on its own merit, the control of crime theory is indeed a difficult one to apply at the level of a superior or other accomplice not situated closely to the actual commission of the crime. For one thing, it is truly easy to lose control of its analytical structure, given its multiple moving parts and union joints, each with its own discrete elements that invite further analysis. By the time one is done trying to coral all those elements to harness their disparate attributes in the overall analysis, one is either hopelessly lost—or doggedly determined to make it work without acknowledging the many analytical difficulties that must be resolved. For instance, the notion of 'control' is exacting. It does not depend only on anyone's view of the ability of the protagonist—for his own part alone—to bring about the outcome that he intended. Much like dancing Tango, it also depends on the unavoidable circumstance of his cohorts to cooperate in bringing about precisely the same outcome in the manner that the protagonist intended it.

78. In other words, if liability is said to rest on the ability of the accused to 'control' or 'dominate' the crime, it cannot be readily said that an accused is liable for the crime—in the sense of being 'in control' of it—in the context of group criminality involving any number of necessary human links that could have been broken anywhere along the chain, thus resulting in the frustration of the eventual crime. This difficulty exists as such even when what is contemplated is only a vertical organisational structure with one person exercising control at every level of the available hierarchy. Yet, it is in that scenario that Roxin's notion of 'control' or 'domination' of crimes should appear theoretically simplest. I shall return to this presently.

79. I may pause to note that the conceptual problem is no less acute at the horizontal level between co-participants. There, the reality of organised crime structures is more complex and difficult to accommodate within any notion of 'control' or 'domination' of the crime. Generally speaking, the upper echelons of such structures are composed of multiple participants, each of whom may exercise a degree of control and power to frustrate the commission of a crime. Yet, each is replaceable if they have second thoughts about the criminal activity in which they are engaged. It is difficult to see the value in attempting to isolate control over the crime in one individual when the commission of the crime depends on the actions

of multiple participants. The theory of 'indirect co-perpetration' represents a sprawling attempt to do the impossible, pretending that it has really worked.

80. As indicated earlier, the problem is also apparent at the vertical level, given the numerous persons potentially responsible when crimes are orchestrated through, for example, a military chain of command. The dictates of conscience and morality would require anyone along the chain to frustrate or refuse to obey an unlawful order—to the extent possible. In the trial of Göring and the other major Nazi war criminals, the International Military Tribunal at Nuremberg recognised this in the following words:

> It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8: 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.'
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> The provisions of this article are in conformity with the law of all nations. *That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality*, though, as the Charter here provides, the order may be urged in mitigation of the punishment. *The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible*.[77]

81. Consistent with '[t]he true test' articulated by the Nuremberg Tribunal, comprising 'whether moral choice was in fact possible,' the ICTY Appeals Chamber's jurisprudence offers some guidance in their leading case on duress. In an opinion with which the ICTY Appeals Chamber agreed,[78] Judge McDonald and Judge Vorah observed as follows in *Erdemović*:

> [I]t is, in our view, a general principle of law recognised by civilised nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress. We would use the term 'duress' in this context to mean '*imminent threats to the life of an accused* if he refuses to commit a crime.'[79]

82. Similarly, in the *Einsatzgruppen* case, a Nuremberg Military Tribunal had elaborated that it was not enough to plead duress as entailing 'serious

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[77] See *United States, France, United Kingdom, and the Soviet Union v Göring and ors* (Judgment) of 1 October 1946 [IMT], published in *Trial of the Major War Criminals before the International Military Tribunal* (1947), vol 1 at pp 223-224, emphasis added.
[78] See *Prosecutor v Erdemović* (Judgment) 7 October 1997 [ICTY Appeals Chamber], paragraph 19.
[79] See *Ibid*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paragraph 66, emphasis added.

consequences'[80] to a subordinate who refuses to commit a crime as ordered. More than that, '[t]he threat … must be imminent, real and inevitable.'[81] It is also necessary to consider 'whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order.'[82] Applying these considerations in the context of superior orders, '[s]uperior means superior in capacity and power to force a certain act. It does not mean superiority only in rank.'[83] Effective control, in other words.

83. It may then not be presumed that the frustration of an unlawful order should *always* result in unpleasant personal consequences, such that the fear of *any* harm at all would suffice to deflect the requirement of moral choice. To the contrary, in the foregoing quotation, the Tribunal adumbrated the kinds of personal consequences that might overwhelm 'moral choice' in the true sense of the idea. This is where there is a reasonable fear that the subordinate might 'forfeit his life or suffer serious harm.'[84]

84. It may further be considered, of course, that *in extremis*, soldiers would know how to frustrate even legitimate military operations without ready detection in every case. Some might even consider it a good cause to do so when the order is patently unlawful. That is very much the case not only because the dictates of conscience and morality might urge it; but, more importantly, because it is not open to dispute that international law requires every soldier to disobey a patently unlawful order.[85] Certainly so, by denying duress as a complete defence to the commission of a crime. The International Law Commission expressed the proposition as the Nuremberg Principle IV, as follows: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from

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[80] *US v Ohlendorf* (Opinion and Judgment) of 8, 9 April 1948, published in *Trials of War Criminals before the Nuremberg Military Tribunals, vol IV* (1949) at p 480.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.
[85] For instance, American servicemen and women at instructed as follows: 'Each member of the armed services has a duty to: (1) comply with the law of war in good faith; and (2) refuse to comply with clearly illegal orders to commit violations of the law of war': United States Department of Defense, *Law of War Manual* (2015, updated 2016), § 18.3 at p 1074. Their British counterparts are instructed: 'A serviceman is under a duty *not* to obey a manifestly unlawful order': UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), s 16.47.3 at p 446. Norwegian soldiers are taught that 'the plea of superior orders may only be invoked successfully as a ground for excluding criminal responsibility if the person carrying out the orders did not know them to be unlawful and that they were not manifestly unlawful. A person carrying out orders will therefore be criminally liable if he understood the orders to be unlawful or should have understood them to be so. …': Norwegian *Manual of the Law of Armed Conflict* (2013, unofficial English translation) s 14.16. See also s 13.42 of the Australian *Law of Armed Conflict*.

responsibility under international law, provided a moral choice was in fact possible to him.'

85. But, the law's denial of complete defence of duress, let alone obedience to superior order, must trouble the control of crime theory even more. It is so because we cannot truly say that an accused commander has control or domination over the crime he ordered to be committed, if those who passed down that order or executed it are denied complete defence from the resulting criminal conduct, by reason of that order—especially if it was at all possible to frustrate the order. In that scenario, it is evident that the person with the real 'control' over the crime is the subordinate in the position to frustrate the crime, because the crime would not have been committed but for the role he played. Conversely, it would unjust to absolve the commander from criminal responsibility—or diminish it—in the perpetration of the crime that he ordered to be committed, merely because it was possible for a subordinate to frustrate it. The point rather is to highlight the shortcomings of the logic of the control—or domination—of crime theory as a reliable analytical tool of criminal responsibility.

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86. The difficulties of the control of crime theory are not sufficiently mitigated by the Appeals Chamber's pronouncements in the *Lubanga* case about 'essential contribution,' apparently a rational gateway to better understanding of the control of crime theory. There, the Appeals Chamber put it this way:

> In this context, the Appeals Chamber notes that the Pre-Trial and Trial Chambers have relied on the 'control over the crime' theory in order to distinguish those who are considered to have 'committed' the crimes from those who have contributed to crimes of others. They found that a co-perpetrator is one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime. The essential contribution can be made not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived. At the core of this approach is the assumption that a co-perpetrator may compensate for his or her lack of contribution at the execution stage of the crime if, by virtue of his or her essential contribution, the person nevertheless had control over the crime. The Appeals Chamber considers that this is a convincing and adequate approach to distinguish co-perpetration from accessorial liability because it assesses the role of the person in question vis-à-vis the crime.[86]

87. I must register a different view, very respectfully. To begin with, the persuasiveness of a theory of criminal responsibility is necessarily compromised

[86] See *Prosecutor v Lubanga* (Judgment), *supra*, paragraph 469 [Appeals Chamber].

when 'the core' of the approach rests on an 'assumption' that is speculative at best, notably 'the *assumption* that a co-perpetrator *may* compensate for his or her lack of contribution … [etc].' [Emphasis added]. But, more fundamentally, there is a further concern. If 'co-perpetration' depends on 'control over crime' in the sense of 'power to frustrate the commission of the crime,' what then becomes of the theory in those circumstances in which co-perpetration is obvious, yet the determination of control over the crime (in the sense of the ability to frustrate it) is not easily done, except, perhaps through casuistry? Consider, in the first dilemma, that two or three people simultaneously shoot at the victim, killing him. In that scenario, it is not easy to say which of the assailants might have had control over the crime. Or, in the second dilemma, what if one of those shooting at the victim is a lackey (though with no legal mental disability), does he no longer become a co-perpetrator with full responsibility merely because his co-perpetrator(s) would have committed the crime anyway, without him?

88. But, if we must go by the requirement of 'essential contribution' then it may be noted that 'essential contribution' need not mean the ability to frustrate—that being the defining factor that 'control over crime' suggests. It is enough that 'essential contribution' means a contribution that goes beyond a scintilla, enough to give a conduct its objective essence as a crime, whether or not such a conduct is capable of frustrating the crime itself. Hence, when two people simultaneously shoot hales of bullets into a victim killing him, it is not necessary to inquire whether any of them was able to frustrate the killing by pulling out before the shooting started, or while it was in progress. In that connection, it is enough that 'essential' contribution is a contribution that is more than '*de minimis* contribution,' on any objective view of the facts.

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89. In the historical drama movie *Nuremberg* (2000), the character of Robert H Jackson, played by Alec Baldwin, observed that 'a fair trial means an uncertain outcome. If we don't prove the defendants' guilt, we have to let them walk, even if we smell the blood on their hands …'. But, that is only another way of rendering what is popularly known as Blackstone's ratio—named after William Blackstone, who observed that 'it is better that ten guilty persons escape than that one innocent suffer.'[87]

[87] See William Blackstone, *Commentaries on the Laws of England* [George Sharswood edition, 1893] Bk IV, ch 27, p 357.

90. All of that is reflected in the usual standard of proof, which insists that in criminal cases, guilt must be established beyond reasonable doubt. That standard is specifically enshrined in article 66(3) of the Rome Statute. It imposes the following obligation of conviction upon judges of the Court: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.' This obligation of conviction does not justify a conviction merely because there is evidence that has conceivable connection to the defendant—through creative, sophisticated or recondite legal reasoning,[88] sufficient to justify a conviction in the minds of those who prefer that interpretation. The obligation is not even discharged where the evidence on record makes it *more likely than not* that the defendant committed the crime—i.e. on a balance of probability. Rather, the evidence must *emphatically* demonstrate beyond reasonable doubt that the defendant is guilty of the crime.

91. Conscience pulls me towards greater sympathy for the defendant appellant's complaint as regards the standard of proof concerning much of the principal reasoning that the Trial Chamber used to convict him as a perpetrator with control over the crimes. In my view, the reasoning shows, in a number of critical instances, an overpowering inclination to interpret available evidence and inferences in the direction of culpability, more than it shows an overpowering ability of the actual evidence to prove emphatically that the defendant controlled the crimes committed.

92. Thus, the awkwardness of the 'control over crime' theory is all too evident in the present case, for the same practical reasons that Judge van den Wyngaert perceived difficulties in its application as she explained it in *Katanga*.[89] There, she complained that a theory that should serve properly as a defence runs the risk of being inverted to produce convictions. Her point is readily seen. A theory the

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[88] Notably, it may be in a need to reduce the footprint of lawyers on questions of guilt and innocence in a criminal case that recommended trials by jury. As Lord Devlin once observed: 'The malady that sooner or later affects most men of a profession is that they tend to construct a mystique that cuts them off from the common man. … Judges, as much as any other professional, need constantly to remind themselves of that. … [T]rial by jury ensured that Englishmen got the sort of justice they liked and not the sort of justice that the government or the lawyers or anybody of experts thought was good for them.' Patrick Devlin, *Trial by Jury* (1956) at pp 159-160. Ultimately, trial by jury is 'an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just': *ibid*, p 160. The common sense value of the jury system is adequately understood without casting jurors in the choice language of the 1853 UK Common Law Commissioners: 'unaccustomed to severe intellectual exercise or to protracted thought': *ibid*, p 4.

[89] See *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Rome Statute) dated 7 March 2014, Minority Opinion of Judge Christine van den Wyngaert, paragraph 58 [Trial Chamber II].

defining tenet of which is that responsibility depends on ability of the accused to control the actions of the actual perpetrators—perpetrators who must be seen as having ability to frustrate the eventual commission of the crime but did not because they were somehow under the total control of the accused—must make it more difficult than not to convict the accused in any scenario in which the accused is one individual with autonomy of the mind, let alone where the actual perpetrators comprise of many human beings each of whom has his or her own mind.

93. I'm not persuaded that Mr Ntaganda was able to 'control' or 'dominate' the conduct of the UPC/FPLC operatives in the way that the control theory supposes. It is not easy to control an articulated piece of mechanical equipment in that way, let alone an aggregate collection of a human multitude under a headman.

94. In the manner in which it is sought to be applied in this case to support a conviction, the theory becomes a particularly dangerous one. Its parallel application will make it easy to convict most superiors for the crimes of rogue subordinates who commit crimes in circumstances in which fault is not reasonably attributable to the superior.

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95. Beyond the foregoing observations, I largely share the additional views of Judge Van den Wyngaert (writing in *Ngudjolo*[90]), Judge Fulford (in *Lubanga*[91]) and now Judge Morrison (in the present appeal) on this subject.

vi. The Emergence of a More Enlightened View—Bemba No 2

96. Evidently, the seeds of the confusion sown in understandings like those expressed in the *Lubanga* pronouncement did grow into troubling weed in *Bemba No 2*. It may be recalled that the case involved charges that Jean-Pierre Bemba had together with his defence team in a first case interfered with the course of justice relating the trial of that case. The defendants included Aimé Kilolo his lead counsel. The facts involved allegations that they had engaged in subornation of defence witnesses in that case. At all materials times during the course of the trial, Mr

[90] See *Prosecutor v Mathieu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) dated 18 December 2012, Concurring Opinion of Judge Christine Van den Wyngaert [Trial Chamber II].
[91] See *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) dated 14 March 2012, Separate Opinion of Judge Adrian Fulford, appended after p 593 of the Chamber's judgment [Trial Chamber I].

Bemba was in custody pending the duration of the trial. He was convicted and sentenced.

97. On appeal, the Appeals Chamber was confronted with the troubling implications of its earlier pronouncement in *Lubanga* that 'generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime ...'.[92] Notably in the course of their sentencing judgment, the Trial Chamber 'emphasise[d] that it ha[d] *distinguished* between the offences that [Mr Kilolo and Mr Bemba] committed as co-perpetrator[s] and those in relation to which [they were accessories]'.[93] The Trial Chamber did not elaborate the point, nor did it say anything more on it in the rest of its sentencing judgement. Nevertheless, the Appeals Chamber was concerned that the 'distinction appears to have been the basis for the Trial Chamber's imposition of a lower individual sentence for the conviction for the offence ... which Mr Kilolo and Mr Bemba induced or solicited (within the meaning of article 25(3)(b) of the Statute) than the individual sentences for the conviction for the other offences which Mr Kilolo and Mr Bemba committed as co-perpetrators (within the meaning of article 25(3)(a) of the Statute).

98. Seeking now to manage the awkwardness of comparative hierarchy of blameworthiness that it suggested in *Lubanga*, the Appeals Chamber was constrained to say as follows in their sentencing judgment in *Bemba No 2*:

> The Appeals Chamber recalls its previous holding that 'generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons.' As correctly pointed out by the Prosecutor, this statement does not suggest that, as a matter of law, a person who commits a crime within the meaning of article 25(3)(a) of the Statute is automatically more blameworthy—and thus deserves a higher punishment—than the person who contributes to it. The Appeals Chamber's finding was indeed made only 'generally speaking' and under the condition of 'all other things being equal.' *Especially with respect to the distinction between the mode of liability under article 25(3)(a) of the Statute and that under article 25(3)(b) of the Statute, the Appeals Chamber is not persuaded that a person who instigates someone to commit a crime is to be generally considered less culpable than the person who acts upon that instigation.*[94]

99. Even in relation to the application of rule 145(1)(c) on sentencing, which contemplates the 'degree of participation' and the 'degree of intent' amongst the

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[92] *Lubanga Appeal Judgment*, *supra*, paragraph 462.
[93] See *Prosecutor v Bemba & ors* [Sentencing Judgment] dated 8 March 2018 [Appeals Chamber] paragraph 58.
[94] *Ibid*, paragraph 59, emphasis added.

factors of sentencing, the Appeals Chamber still remained keen to drive home the message that there is no hierarchy of blameworthiness attending the indication of modes of liability set out in article 25(3). As the Appeals Chamber put it:

> The Appeals Chamber recognises that a mode of liability describes a certain typical factual situation that is subsumed within the legal elements of the relevant provision, and that the difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145(1)(c) of the Rules. *This however does not mean that the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence. Whether this is actually the case ultimately depends upon all the variable circumstances of each individual case. [Footnote 38] In this regard, the Appeals Chamber observes that the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence.* Rather, as pointed out by the Prosecutor, the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case.[95]

100. It is highly instructive that in footnote 138 appearing in the above passage, the Appeals Chamber had cited with approval the relevant passage in the judgment of the Trial Chamber in the *Katanga* case saying as follows:

> [A]rticle 25 of the Statute merely identifies various forms of unlawful conduct and, in that sense, the distinction between the liability of a perpetrator of and an accessory to a crime *does not under any circumstances constitute* a 'hierarchy of blameworthiness,' let alone enunciate a tariff, not even implicitly. […] [N]either the Statute nor the Rules of Procedure and Evidence prescribe a rule for the mitigation of penalty for forms of liability other than commission and the Chamber sees no automatic correlation between mode of liability and penalty. From this it is clear that a perpetrator of a crime is not always viewed as more reprehensible than an accessory.[96]

101. The evolution of the jurisprudence in *Bemba No 2*, as shown above is a movement in the right direction. It requires consolidation in the more categorical footing that the *Katanga* Trial Chamber stated the proposition. That is to say, article 25 of the Rome Statute 'does not under any circumstances constitute a "hierarchy of blameworthiness"'. It is unhelpful to allow any further scope to the *Lubanga* pronouncement, on the basis that the Appeals Chamber on that occasion had only meant it as '*generally speaking* and *all other things being equal*, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons.' [Emphasis

[95] *Ibid*, paragraph 60, emphases added.
[96] *Ibid*, footnote 138.

added.] If 'all other things' in life are seldom equal, confusion becomes the general result of the rule that is based on the nebulous premise.

102. Consolidating the jurisprudence to clarify that article 25(3) lays down no hierarchy of blameworthiness will relieve those concerned from their unique consumption of straining to characterise every defendant as 'perpetrator,' 'co-perpetrator,' etc, for purposes of finding criminal responsibility under article 25(3)(a); and from the attendant preoccupation with such awkward theories as 'indirect co-perpetrator,' and 'control of crime' or 'domination of crime.' It would be easier to proceed under any of article 25(3)(b) to (d), if ICC prosecutors are confident that the judges clearly understand—contrary to the suggestion of the Appeals Chamber in *Lubanga*—that anyone whose responsibility is more readily captured in article 25(3)(b)—(d) is no less culpable or blameworthy than any 'perpetrator' whose responsibility falls more readily under the notion of 'commits' within the meaning of article 25(3)(a).

PART III

Directing 'Attack'

103. Another point of legal reasoning on which I must respectfully disagree with the Trial Chamber concerns their interpretation of the notion of 'attack' as employed in article 8(2)(e)(iv) of the Rome Statute. The provision proscribes, as a war crime, '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.'

104. Notably, the Trial Chamber held as follows in paragraph 761: 'As a matter of law, as also stated *below*, the Chamber does not consider that pillaging of protected objects constitutes an attack within the meaning of Article 8(2)(e)(iv) of the Statute.'[97] For that reason and more, the Trial Chamber concluded, in paragraph 763, that 'Mr Ntaganda does not bear individual criminal responsibility within the charge of attacks against protected objects, under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute (Count 17).'[98]

[97] See Trial Judgment, paragraph 761, emphasis added.
[98] *Ibid*, paragraph 763.

105. And, 'below' in the judgment, as they promised, the Trial Chamber makes a series of pronouncements. Notably in paragraphs 1136, the Chamber held as follows:

> [T]he term 'attack' is to be understood as an 'act of violence against the adversary, whether in offence or defence'. As with the war crime of attacking civilians, the crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities. Article 8(2)(e)(iv) only requires the perpetrator to have launched an attack against a protected object and it need not be established that the attack caused any damage or destruction to the object in question.[99]

106. Against that background, the Trial Chamber found in paragraph 1138 that in the context of the First Operation, the following occurred. UPC/FPLC soldiers looted the Mongbwalu hospital. During their advance into Sayo, the UPC/FPLC soldiers fired projectiles at the health centre. And, sometime after the assault on Sayo, the UPC/FPLC set up a base inside the church, broke the doors of the church, removed the furniture, dug trenches around the church, and started a fire inside to prepare their food.[100]

107. The Trial Chamber further found, in paragraph 1139, that in the context of the Second Operation, UPC/FPLC soldiers shot and killed nine patients at the Bambu hospital. The evidence showed bullet marks on the hospital's walls.[101]

108. In their application of the law, the Trial Chamber held that 'the shelling of the health centre in Sayo by UPC/FPLC soldiers constituted an "attack" within the meaning of Article 8(2)(e)(iv) of the Statute.'[102] However, in paragraphs 1141 to 1143, the Trial Chamber declined to accept that the rest of the UPC/FPLC conduct constituted 'attack' within the meaning of article 8(2)(e)(iv). In their own words, the Trial Chamber held as follows:

> However, contrary to the Prosecution's assertion, the Chamber *does not consider that pillaging of protected objects, in particular in this case of the Mongbwalu hospital, is an 'act of violence against the adversary' and, consequently, it does not constitute an attack* within the meaning of Article 8(2)(e)(iv) of the Statute. …[103]
>
> In addition, *given that the attack on the church in Sayo took place sometime after the assault, and therefore not during the actual conduct of hostilities, the Chamber finds that the first element of Article 8(2)(e)(iv) of the Statute is not met.* …[104]

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[99] *Ibid*, paragraph 1136.
[100] *Ibid*, paragraph 1138.
[101] *Ibid*, paragraph 1139.
[102] *Ibid*, paragraph 1140.
[103] *Ibid*, paragraph 1141, emphasis added.
[104] *Ibid*, paragraph 1142, emphasis added.

As concerns the events at a hospital in Bambu during the Second Operation, the Chamber observes that the facts established by the evidence indicate that *the acts of violence were directed at the patients present in the hospital. The facts do not support a finding that the hospital itself was made the object of the attack*. *Indeed, the mere presence of bullet marks on the walls cannot sustain an affirmative conclusion*.[105]

109. For reasons explained below, I am respectfully unable to endorse the Trial Chamber's reasoning as to what 'attack' must mean in the context of article 8(2)(e)(iv) of the Rome Statute.

110. First, in its basic connotation, as defined in the *Shorter Oxford English Dictionary*, for instance, the verb 'attack' means '[t]o go against with violence or force of arms'. Purpose or motive does not define a conduct as an 'attack.' An essentially violent conduct or use of force of arms remains an 'attack' notwithstanding that it is entirely gratuitous; or has a particular motive or purpose. The absence of an ulterior motive does not prevent characterisation as an 'attack' the conduct of a rabid dog that sets upon someone or another dog with injurious biting. The purpose or motive—when present—only explains the *reason* for the violence or the use of force arms, and that reason may be considered on its own intrinsic merit, terms or value. But, it does not alter the *fact* that violence or force of arms had been brought to bear—in the nature of an 'attack.'

111. Similarly, the space of time between the actual violence (or use of force of arms) itself and the actualisation of any discernible reason for it will not always alter the fact of the violence (or use of force of arms) as an 'attack.' Nor will the violence (or use of force of arms) always be readily dissociated from the consequences of the resulting coercive circumstances that might make it easier for derivative violations to occur. For instance, a sexual intercourse will not always escape the legal scrutiny that abjures rape, where the victim's submission resulted only from fear of imminent violence. This is so where the fear of imminent violence was the product of the perpetrator's prior use of violence (in the near or distant past), his general reputation for it or an over-arching threat of violence generated by the presence of armed force.[106] The same is true with *armed robbery*, which is what 'pillage' really entails in armed conflicts. Assailants need not shoot to rob their victims. Vocal or silent demand of compliance with force of arms is enough—

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[105] *Ibid*, paragraph 1143, emphasis added.

[106] It is for this reason that in relation to 'sexual violence,' the ICC Rules of Procedure and Evidence provide as follows, amongst other things: 'Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent' (rule 70(a)) and 'Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence' (rule 70(c)).

an understanding that the assailant wants 'your money or your life' is enough, whether or not the assailant vocalises that message.

112. Second, article 7(1) of the Rome Statute also proscribes 'attack directed' against a civilian population, in the context of crimes against humanity. Such crimes may be committed in peacetime as in war. Crimes against humanity are not limited to murder, extermination, torture and enforced disappearance of persons, which for the most part entail radical acts of violence. They also include enslavement; deportation or forcible transfer of a population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity; apartheid; and, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. But, on no view would it be reasonable to insist that such conducts may not amount to 'attack directed' against a civilian population, unless they are seen as actually involving the actual infliction of acute violence in every case.

113. Third, any inclination to draw sharp lines between crimes against humanity and war crimes (or humanitarian law) is not readily availing. It would require a compelling discernment of actionable difference *between* the interest of humanity that the proscription of crimes against humanity seeks to achieve in forbidding 'attack directed' against a civilian population in article 7, *and* the humanitarian interest that the proscription of war crimes seeks to achieve in proscribing 'directing attack' protected objects as provided in art 8(2)(e)(iv). Such discernment of actionable difference between the interest of humanity and the humanitarian interest becomes difficult when one takes into account eminent views that don't support such a distinction.

114. Perhaps, the most prominent of those views is apparent in the Martens Clause, the old great gap filler that ubiquitously appeared in the preambles to international humanitarian instruments, notably in 1899 Convention (II) with respect to the Laws and Customs of War on Land, and the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, to which was annexed the famous Regulations concerning the Laws and Customs of War on Land. The clause is expressed as follows:

> [U]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them,

inhabitants and belligerents remain under the protection and empire of *the principles of international law*, as they result from the *usages established* between civilized nations, from the *laws of humanity*, and the *dictates of the public conscience*.[107]

115. Sir Hirsch Lauterpacht also addressed the matter. In his preface to the fifth edition, in 1935, of *Oppenheim's International Law*, volume II, Lauterpacht effectively captured the futility of efforts to discern actionable difference between the interest of humanity and the humanitarian interest in the following words:

> [A] very considerable part of the laws of war ... is an attempt to mitigate the unscrupulousness and brutality of force by such considerations of humanity, morality and fairness as are possible and practicable in a relationship in which the triumph of physical violence is the supreme object and virtue. ... The well-being of the individual is the ultimate object of all law, and whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness.[108]

116. In a 1948 study, the United Nations War Crimes Commission conducted a survey of international efforts to regulate the laws of war such as culminated in the First Peace Conference of 1899 and the Second Peace Conference of 1907 that resulted in the Hague conventions respectively in the Hague Conventions of 1899 and the Hague Conventions of 1907. The study took into account efforts including the Declaration of Paris of 16 April 1856 respecting warfare on sea,[109] the Geneva Convention of 22 August 1864 for the amelioration of the conditions of wounded soldiers in armies in the field,[110] the Declaration of St Petersburg of 11 December 1868 prohibiting the use projectiles under 400 grammes which are either explosive or charged with inflammable substances. Through all these international efforts, the UN Commission discerned the considerations of humanity and human rights as the ultimate purposes of the international efforts to regulate war. As they put it:

> The principle which underlines all these enactments and conventions is *the principle of humanity*. Its aim is to establish, as firmly as possible, that all such kinds and degrees of violence as are not necessary for overpowering the opponent should not be permitted to a belligerent, and that, in contradistinction to the savage cruelty of former times, fairness

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[107] See the preamble to 1899 Hague Convention (II) with respect to the Laws and Customs of War on Land. See also the preamble to 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land. Emphasis added.

[108] See Elihu Lauterpacht (ed), *International Law*: *Collected Papers of Hersch Lauterpacht*, vol 5 (Disputes, War and Neutrality) (2004), p 480.

[109] The 1856 Declaration of Paris abolished privateering, recognised the principles that neutral flags protect non-contraband enemy goods, and that non-contraband neutral goods under an enemy flag may not be seized.

[110] It was followed by a Convention signed in Geneva on 6 July 1906. Its principles were later adapted to maritime warfare by conventions of the Hague Peace Conferences of 1899 and 1907.

of conduct and *respect for human rights* should be observed in the realisation of the purpose of war.[111]

117. It is indeed highly significant that the UN War Crimes Commission recognised that all war crimes—and the crime of aggression—are also crimes against humanity; though, appreciably, the reverse is not necessarily true. As they put it:

> [T]he terms 'crimes against humanity' and 'war crimes,' as defined in these documents, and the concepts they represent, are juxtaposed and inter-related to the extent that *while all acts enumerated under the heading 'war crimes' are also 'crimes against humanity,' the reverse is not necessarily true*. For instance, acts committed on enemy occupied territory or against allied nationals may be war crimes as well as crimes against humanity, whereas acts committed either when a state of war does not exist, or against citizens of neutral states, or against enemy nationals or on enemy territory, are crimes against humanity, but are not violations of the laws and customs of war, and hence not war crimes. It might be added that crimes against peace, namely the planning, preparation, initiation and waging of a war of aggression, which were declared by the Nuremberg Tribunal to be the supreme international crime, constitute also, in a general non-technical sense, a crime against humanity, since in certain circumstances *they involve violations of human rights*.[112]

118. More recently, Sir Christopher Greenwood, an eminent legal scholar in the field of international humanitarian law, re-echoed the same message, in the following words: '[A]lthough the original purpose of this body of rules was to provide guidance for the military … [t]oday, however, their principal purpose is the protection of *human values*—even in the most inhumane environment of warfare.'[113] By 'human values,' Greenwood no doubt meant *human dignity*, the protection of which is the principal purpose of international law's proscription of crimes against humanity.

119. It is obvious that the international instruments, which seek to mitigate such 'unscrupulousness and brutality of force' during war (as Lauterpacht put it), fall within the general ambit of 'the laws of humanity' (as they are termed in the Martens Clause). As such, the union of interests between such international humanitarian instruments and the Rome Statute becomes equally obvious in the

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[111] United Nations War Crimes Commission, The (Compilers), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office, 1948), p 25, emphasis added.
[112] *Ibid*, p 188, emphasis added.
[113] See Sir Christopher Greenwood's Klatsky Lecture on Human Rights, Case Western Reserve University Law School, 7 April 2010, available at <www.youtube.com/watch?v=Uo_Rvy1AXV8>. See also Christopher Greenwood, 'Human Rights and Humanitarian Law—Conflict or Convergence' (2010) 43 *Case Western Reserve Journal of International Law* 491, at p 496, emphasis added.

light of the Rome Statute's own preamble, which contains the following declarations amongst others:

> **Conscious** that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
>
> **Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
>
> **Recognizing** that such grave crimes threaten the peace, security and well-being of the world,
>
> **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes …

120. The central object of the Rome Statute, as explained in the Preamble, is anchored in the 'determin[ation] to put an end to impunity for the perpetrators' of 'the most serious crimes of concern to the international community as a whole,' which crimes come in the form of 'unimaginable atrocities that deeply shock the conscience of humanity.' This is to be achieved by ensuring that such crimes 'must not go unpunished,' by way of ensuring their effective prosecution—including at the ICC as a court of last resort. That central object may prove difficult to achieve if silos of understanding are artificially constructed around the meaning of the phrase 'attack directed' (under article 7 of the Rome Statute) and 'directing attack' (under article 8), as respectively in the spheres of crimes against humanity and war crimes.

121. Fourth, the law's purpose is not to exercise scholars' wits. It is to regulate the conduct of people—mostly ordinary people not learned in the law—guiding them away from conducts that harm others and society. As such, the law must make sense to Mr Bumble of *Oliver Twist* fame. How does one explain to the average soldier not well versed in the complex amalgam of international humanitarian law instruments ancient and modern—including now the Rome Statute—that precisely the same conduct would expose him to liability for crimes against humanity (in peacetime and in war) but not to war crimes (during war)? And how does that distinction assist the law in its purpose of suppressing or preventing violations against human dignity in peacetime and in war?

122. Fifth, in the course of oral submissions, it became evident that the overriding anxiety of the *amici curiae* (most of them former military lawyers), who

argued in defence of the Trial Chamber's reasoning, was the need to ensure that legitimate military operations are not punished as 'attacks' proscribed in the Rome Statute and in the broader international law. The anxiety is misplaced. International law does not punish fair targeting during war. The Rome Statute contains a number of overriding caveats to that effect. For instance, the Statute retains the justification of military necessity, when not used to justify the crime of aggression. Notable for present purposes is that article 8(2)(e)(iv) and other related provisions of the Rome Statute do not forbid attacks against legitimate 'military objectives.' It is also notable that the kind of 'attack' that is proscribed in the provision is one that is *directed* at the protected persons or objects. Such an attack must be intentional—including in the failure to observe the requirement of distinction between military and civilian targets—rather than merely accidental. Thus, a simpler or more consistent notion of 'attack,' which operates in both the spheres of crimes against humanity and war crimes, does not ensnare soldiers who engage in fair targeting.

123. Finally, a serviceable understanding of the geographic and temporal dimensions of the circumstances, which properly inform the meaning of 'attack' in article 8(2)(e)(iv), could derive some inspiration from the pronouncements of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Kunarac* case. There, the Appeals Chamber held that 'the acts of the accused must be closely related to the armed conflict.'[114] The Chamber elaborated upon that proposition from the perspectives of not only the temporal and geographic dimensions, but also from the perspective of the accused and the victims. From the geographic and temporal perspectives, the Appeals Chamber explained as follows:

> The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.[115]

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[114] See *Prosecutor v Kunarac & Ors (Judgment)* dated 12 June 2002, paragraph 55 [ICTY Appeals Chamber].
[115] *Ibid*, paragraph 57.

124. From the perspectives of the accused and the victims, the Appeals Chamber held amongst other things:

> […] The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[116]

125. Finally, the Appeals Chamber rejected the view that the laws of war only prohibit those acts that are specific to actual military operations, holding that the laws of war frequently address acts that are substantially related to the theatre of conflict, though committed outside that theatre. As the Chamber put it:

> In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.[117]
>
> The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts. The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime.[118]

126. Although the ICTY Appeals Chamber was addressing the reach of the laws of war in general, and not specific application of discrete norms codified in any particular provision of an international law instrument, these pronouncements remain important to guide the latter inquiry. The practical relationship between the two mischiefs is all too obvious. It is easy to see how the broader laws of war would effectively be precluded in the manner that the ICTY Appeals Chamber reproached, through the mere strategy of precluding the operation of the discrete norms that have been codified in a particular provision. The Trial Chamber in this case adopted the reasoning that the ICTY Appeals Chamber had specifically reproached quite correctly in *Kunarac*.

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[116] *Ibid*, paragraph 58.
[117] *Ibid*, paragraph 59.
[118] *Ibid*, paragraph 60.

127. In light of the foregoing analysis, I am unable to endorse the reasoning of the Trial Chamber as reflected in paragraphs 761, 763 and 1141 to 1143 of the Trial Judgment, as discussed above.

128. More specifically, the pillage of Mongbwalu hospital occurred in the course of a *ratissage* operation carried out by UPC/FPLC accompanied by some Hema civilians, during which some of the soldiers and the civilians engaged in the pillaging. But, the Trial Chamber declined to consider such a *ratissage* operation as an 'attack' on the hospital, because it occurred *after* the fall of Mongbwalu into the hands of the UPC/FPLC.[119] A similar reasoning is implicated in the Trial Chamber's pronouncements concerning the attack on the church in Sayo. The Trial Chamber declined to consider the attack as the concern of article 8(2)(e)(iv), 'given that the attack on the church in Sayo took place *sometime after* the assault, and *therefore not during the actual conduct of hostilities* ...'.[120]

129. *Ratissage* operations or *opération de ratissage*, as it is known in its original French, means 'search and sweep operation.' It traces its etymology to the French word *ratisser* [to rake].[121]

130. Thus, the purpose of *ratissage* is to make an area more secure in the aftermath of capturing it. That being the case, *ratissage* becomes part and parcel of capturing a place. It clearly falls within the circumstance that the ICTY Appeals Chamber had in mind in *Kunarac* when it observed '[t]he laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it.'[122] Thus requiring the trier of fact to consider 'that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.'[123]

131. It is, therefore, unrealistic to adopt a compartmentalised view of military operation, in the manner of insisting that only forefront military actions undertaken to capture a place will qualify as 'attack' for purposes of article

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[119] *Ibid*, paragraph 1141.
[120] *Ibid*, paragraph 1142, emphasis added.
[121] In *Le Multidictionnaire de la langue française,* the noun *ratissage* is helpfully denoted as *'[o]pération policière, militaire, de fouille méthodique d'un secteur*' [meaning, police or military operation of raking an area methodically.] The example is given: '*Les policiers ont effectué le ratissage d'un quartier pour des malfaiteurs'* [the Police carried out a *ratissage* operation of an area to search for criminals.]
[122] *Ibid*, paragraph 57, emphasis added.
[123] See *Prosecutor v Kunarac*, paragraph 59.

8(2)(e)(iv); but rear-guard actions, such as *ratissage* operations, taken to secure or consolidate the capture does not amount to 'attack' in that sense. To the contrary, any violations committed in the course of such *ratissage* operations would fall within the contemplation of the following pronouncement in the *Kunarac* case, seen earlier:

> A violation of the laws or customs of war may therefore occur *at a time when* and in a place *where no fighting is actually taking place*. As indicated by the Trial Chamber, the requirement that *the acts of the accused must be closely related to the armed conflict* would not be negated if the crimes were *temporally* and geographically *remote from the actual fighting*.[124]

132. The evidence in the present case tends to show that the Lendu combatants had probably fled the town of Mongbwalu before the *ratissage* began.[125] That consideration must, of course, operate alongside the value of *ratissage* operation as an exercise in military due diligence. Nevertheless, in all other respects the *ratissage* in Mongbwalu is consistent with the 'search and sweep operation,' described above. I am, thus, unable to accept the Trial Chamber's reasoning that the actions of the UPC/FPLC troops against the Mongbwalu hospital and the church in Sayo do not amount to 'attacks' for purposes of article 8(2)(e)(iv), merely because they occurred *after* actual combat operations to capture those locations and 'not during the actual conduct of hostilities.'

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133. Although it was not raised by the Prosecutor in her appeal, I also do not accept that what occurred at the Bambu hospital does not amount to an attack. The Trial Chamber declined to view the event as attack, notwithstanding the presence of bullet marks on the wall. But the factor of bullet marks on the wall need not distract the inquiry, given the absence of evidence to establish the precise circumstances of their incidence. The Trial Chamber's pronouncement of concern is rather that 'the facts established by the evidence indicate that *the acts of violence were directed at the patients present in the hospital*. The facts do not support a finding that *the hospital itself* was made the object of the attack.'[126]

134. With all due respect, the Trial Chamber's reasoning in relation to the Bambu hospital effectively removes the essential purpose of the interest that article 8(2)(e)(iv) seeks to protect. The very humanitarian interest. Such

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[124] *Ibid*, paragraph 57, emphasis added.
[125] P-0768, T-33, p. 43, lines 18-24, p. 67, lines 5-9.
[126] *Ibid*, paragraph 1143, emphasis added.

humanitarian interest is represented not merely by symbolic values that the protection entails in the life of a people. Admittedly, those symbols must remain important for protection, given the value they represent in peoples' lives. But, it would be curious indeed to detach monuments from the actual lives of the human beings that give them value. What good is there in protecting a town from military attack, if the inhabitants of the town are driven out or eliminated, using methods that preserve the town's buildings and facilities for the use of the occupying forces and their own people? What good is the protection of a magnificent place of worship, if that protection is not acknowledged when people are attacked as they worship there? Assuming that a place of worship is a place to 'worship' a deity, it may be that the anchor of its sanctity remains the worshippers, noting a famous aphorism in a major religion to that effect.[127] And, what good is the protection of a hospital, if patients and health care personnel are attacked while they are at the hospital engaged in the actual circumstances that give purpose to the protection of hospitals?

135. I am thus not able to accept the Trial Chamber's reasoning that the attack of the Bambu hospital is not the concern of article 8(2)(e)(iv), because the extent of the evidence shows that only patients were attacked, but does not show that the hospital itself was attacked.

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136. The foregoing analysis is without prejudice to the validity of insisting that the prosecutor's charge ought to be brought under any special provision that caters better to the conduct charged, where such a provision is available. For instance, where, in the course of an internal armed conflict, the property of an adversary was *destroyed* or *seized* in a manner that was not compelled by the necessities of the conflict, it may be more appropriate to bring the charge under article 8(2)(e)(xii) that deals with 'destroying or seizing'[128]; rather than article 8(2)(e)(iv), which deals with 'intentionally directing attacks against buildings.'[129]

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[127] Notably, in the Bible, God is reported as saying: 'For where two or three are gathered together in my name, there am I in the midst of them.' Matthew 18:20, King James Version.

[128] Article 8(2)(e)(xii) proscribes as a serious violation '[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.'

[129] It is recalled that 8(2)(e)(iv) proscribes as a serious violation of laws of war '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.'

It is for that reason that I shall decline to overturn the Trial Chamber's dispositif on this particular matter.

137. But, that is a matter of charging a crime under the *lex specialis* that is more suitable for the crime, than a view that the conduct of the accused does not amount to an 'attack'. *Ut res magis valeat quam pereat*. There may, of course, be cases where the *lex specialis* of a different provision may not cover the particular facts of the case. In those situations, the ordinary meaning of 'attack' may then serve to offer the fuller protection to humanity, as a matter of policy, deriving from the purpose of the Rome Statute in particular and of humanitarian law in general.

PART IV

Organisational Policy—a General Concern

138. The Trial Chamber convicted the accused on the overarching reasoning that he was a directing mind in an organisation whose belligerent operations were characterised by a policy of attacks against a civilian population. Thus, the notion of 'organisational policy' becomes, for the most part, the unique thread that runs through this case.

139. The Appeals Chamber considers, however, that the facts of this case don't call for a comprehensive exegesis on the meaning of 'organisational policy,' as the term appears in article 7(2)(a) of the Rome Statute. We should recall that, for purposes of crimes against humanity, the provision engages that notion in the following way:

> "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. [Emphasis added.]

140. Rather than delve into a comprehensive definition of the notion of 'organisational policy,' the Appeals Chamber has limited itself to the consideration that the facts of this case indicate that there is an aggregate entity that is an 'organisation' in the instrumental sense—rather than in the sense of a situation or a process. That aggregate entity is the UPC/FPLC, in which, as the Trial Chamber found, the defendant appellant operated as a directing mind, and which had a 'policy' in the sense of a uniting objective which guided the attacks that are the subject matter of the indictment in this case. Hence, the Appeals Chamber considers it unnecessary in this case to explore whether 'organisational policy'

could bear a more fundamental meaning. To be clear, it is the view of the Appeals Chamber that a future occasion may well make it appropriate to consider what other meaning that 'organisational policy' can bear.

141. I accord the greatest respect to the position of the Appeals Chamber as summarised above. I am of the respectful view, however, that in a case such as this, where 'organisational policy' forms the basis of an 18-count conviction and runs through them, this precisely is the right occasion to shed helpful light on the fundamental meaning of the concept. I proceed accordingly.

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142. There is a concern that a certain interpretation that many commentators have given to 'organisational policy' in article 7(2)(a) of the Rome Statute is ultimately inconsistent with the object and purpose of the Rome Statute, and certainly inconsistent with international criminal law more generally. That interpretation is to the effect that for purposes of the Rome Statute, a crime against humanity is committed only when it is shown that an apparent widespread or systematic attack against a civilian population was actuated by an aggregate entity as the central, coordinating agent that was propelling a palpable objective to attack the civilian population.

143. I shall reiterate presently my disagreement with that interpretation.[130] But, suffice it to remark immediately that this interpretation, if correct, can only mean a retrogression of the law of crimes against humanity; away from its understanding and application in the work of the *ad hoc* tribunals, where no such requirement had constrained the meaning of crimes against humanity.

144. My view is that the phrase 'organisational policy' as it is employed in article 7(2)(a) is nothing more than an imperfect expression of a requirement that the attack against a civilian population must have been coordinated and not spontaneous. 'Organisational policy' in this sense may be construed as meaning the coordinated course of action of an individual or group of individuals acting together.

145. My worry about retrogression of the law of crimes against humanity is not merely academic. It is that any conception of 'organisational policy' as requiring

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[130] See *Prosecutor v Ruto and Sang* (Decision on the Defence Applications for Judgments of Acquittal) dated 5 April 2016, Reasons of Judge Eboe-Osuji, Part VI [Trial Chamber V(A)]. Available at <https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF> See here.

proof of complicity of an aggregate entity the objective of which is to attack a civilian population, will make it truly harder to prosecute many instances in which crimes that shock the conscience of humanity are committed. It will put an unnecessary burden on the ICC Prosecutor, which the Prosecutors of the *ad hoc* tribunals never had to bear: thus tempting the ICC Prosecutor into contriving theories of the case about such aggregate entities and their federated criminal objectives, which theories may truly struggle to find meaningful reflection in the evidence. Such difficulty may not have been present in this case, because there was an organised armed force, with an ascertainable leadership hierarchy, to whom the attacks are attributed. But, there will be other instances of widespread or systematic attacks against a civilian population where there was no similarly organised armed group, or, at best an acephalous agentic actuality. There, the prosecution may feel compelled to construct fanciful theories of the case, which the evidence may not readily support, about an aggregate entity whose complicity anchored the attacks as a matter of a federated objective of the entity.

146. In my view, any requirement of proof of complicity of an aggregate entity that directed, condoned or motivated the attacks against a civilian population—as a matter of their federated objective—is ultimately inconsistent with the object and purpose of the Rome Statute.

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147. Let us consider in relation to this concern a certain phenomenon that has tormented the world in recent times. Terrorist attacks. Once considered the forte of conspiracies, law enforcement agencies now consider 'lone wolf' terrorists as a highly menacing in their own right. Christopher Wray, the FBI Director, recently testified to it, as follows:

> Preventing terrorist attacks remains the FBI's top priority. However, the threat posed by terrorism—both international terrorism (IT) and domestic violent extremism—has evolved significantly since 9/11.
>
> The greatest threat we face in the homeland is that posed by lone actors radicalized online who look to attack soft targets with easily accessible weapons. We see this lone actor threat manifested both within domestic violent extremists (DVEs) and homegrown violent extremists (HVEs), two distinct sets of individuals that generally self-radicalize and mobilize to violence on their own. DVEs are individuals who commit violent criminal acts in furtherance of ideological goals stemming from domestic influences, such as racial bias and anti-government sentiment. HVEs are individuals who have been radicalized primarily in the United States, and who are inspired by, but not receiving individualized direction from, foreign terrorist organizations (FTOs).

> Many of these violent extremists, both domestic and international, are motivated and inspired by a mix of ideological, sociopolitical, and personal grievances against their targets, which recently have more and more included large public gatherings, houses of worship, and retail locations. Lone actors, who by definition are not likely to conspire with others regarding their plans, are increasingly choosing these soft, familiar targets for their attacks, limiting law enforcement opportunities for detection and disruption ahead of their action.[131]

148. We may also consider the terrorist attacks in Christchurch, Paris, London, Madrid, Manchester and many other places. As it were, the States in whose territories those particular attacks occurred belong to the category of *able* States in the complementarity parlance of the Rome Statute. For, they could investigate and prosecute—regardless of the question whether the domestic laws requires proof of aggregate complicity in the attacks, beyond the involvement of the actual assailants. As the territorial States were able to do justice at home, no occasion arose for the ICC to intervene.

149. But, consider the incidence of a terror attack that is directed against what Director Wray would describe as 'soft targets,' comprising 'large public gatherings, houses of worship [or] retail locations,' possibly characterised by a common culture, religion, race, or any other shared identity. In particular, consider further the incidence of such an attack in the territory of a Rome Statute State Party that may be *unable* to investigate or prosecute the crime; hence engaging the jurisdiction of the ICC. On what purposive basis should prompt or successful prosecution and trial be obstructed by the question whether there was an aggregate entity complicit in the attack as matter of federated objective? What is more, we may note that there is no requirement for aggregate complicity as a precondition to successful genocide prosecution at the ICC. What then is the rational basis to prosecute such a crime as a genocide (if the genocidal intent is identifiable), yet it should not be possible to prosecute a charge of crime against humanity without proof of the complicity of an aggregate entity with a federated objective that favours the attack?

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150. Besides the difficulties that the impugned interpretation may present to the Prosecution, there is also the worry of very political abuse of that interpretation, in the manner of unfair labelling or worse. Once more, recent

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[131] Christopher Wray, Director, Federal Bureau of Investigation, 'Statement Before the House Homeland Security Committee, Washington DC, 17 September 2020. <www.fbi.gov/news/testimony/worldwide-threats-to-the-homeland-091720>

events around the world may point to that difficulty. In many parts of the world, in the past year, people engaged in seismic social protests. Amongst these were protests against systemic racism, most famously the **Black Lives Matter** protests. There were protests against apparent Police brutality against unarmed civilians, whether related to racial discrimination or not. There were protests for civil and political rights and freedoms. These events witnessed a variety of approaches and occurrences. Some were apparently peaceful, involving people doing no more than marching along, sitting down, standing around, carrying placards and chanting slogans. Some apparently involved such peaceful methods coupled with vigils. Some involved the more militant protesters who apparently engaged in destructive or disruptive activities, from the perspective that these were spontaneous eruptions of frustrations, after many years during which the more peaceful methods had produced no tangible results. Sometimes, these more militant protesters mingled themselves with the more peaceful protesters without the approval of the latter. Then, there were those who apparently engaged in naked criminal conducts such as looting, assaults, and serious bodily harm. Again, sometimes, these apparent criminals would mix themselves with persons in the earlier described categories, without approval. As varying as these approaches and tactics were, the two things that united them were timing and location (in each of the specific places where the protests were occurring).

151. In these circumstances, it is entirely conceivable that government authorities with a malevolent view of any of these protests (as it unfolded in their territory) may find it convenient to prosecute everyone, even those in the more peaceful categories. They could proceed under a theory that all the defendants were—because of the confluence of timing and location—operating under the same banner of aggregate complicity with a federated objective to engage in the activities that were clearly criminal.

152. In an extension of this example, the cause for protests could be allegations of rigged elections—a very realistic scenario in certain parts of the world. The protest could be about complaint that a member of an ethnic or religious group had escaped impunity for violent attack against a prominent (or not so prominent) member of another group. Or the cause could be complaints of group-based exclusion from the appurtenances of national life. There may be those who protest in peace. They may be joined by hotheads and criminals who may seize the opportunity to engage in criminal activity. The criminal activity in question could very well be characterised as crimes against humanity—where they engaged destruction of property, looting, assaults, serious bodily harm or homicide.

Although the impugned interpretation of 'organisational policy' is not inevitable in the mischief exemplified here, since such dubious prosecution can still take place even absent the interpretation, but the existence of that interpretation can aid the resulting unfair labelling.

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153. Another source of concern with the undue focus on complicity of the aggregate entity that anchors the crime against humanity is the latent contradiction between that idea and the idea of 'individual criminal responsibility.' That contradiction, no doubt, resonates in the overarching unease of international law as regards the idea of collective responsibility. This is evident in international law's proscription of collective punishment, making it a war crime.[132] More classically, and more relevantly, that discomfort was promptly registered by the Nuremberg Military Tribunal against the offence of declaration of an aggregate entity as a criminal organisation, pursuant to article 9 of the Charter of the Nuremberg Military Tribunal. In that regard, the Tribunal said as follows:

> Article 9, it should be noted, uses the words 'The Tribunal may declare' so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.
>
> A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by … as members of the organisation. Membership alone is not enough to come within the scope of these declarations.[133]

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[132] Hague Regulations, article 50; Third Geneva Convention, article 87, third paragraph; Fourth Geneva Convention, article 33, first paragraph; Additional Protocol I, article 75(2)(d); Additional Protocol II, article 4(2)(b).

[133] See Office of the United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Opinion and Judgment of the International Military Tribunal (1947) pp 85-86.

154. The concern here is not that an aggregate entity may never have criminality as its defining object. The concern rather is that to define a crime as anchored in the necessary complicity of an aggregate entity may come with a certain danger of over-imagining the presence of that anchoring complicity beyond what the evidence is able to show beyond a reasonable doubt. That danger becomes particularly acute in any system—such as the ICC—where prosecutors and the judges are under constant pressure from stakeholders to achieve conviction as the most tangible measure of 'success.'

155. The danger of over-imagining the presence of that anchoring complicity beyond what the evidence is able to show beyond a reasonable doubt is acute, indeed, when the requisite criminal act or intent is established in one or more individuals within the entity. The danger increases when the individual culprit is the entity's leader; but also when he is a subordinate. It is all too easy to see the mind-set at work, which will characterise or regard an entire entity as a criminal enterprise, or an entity whose activities or purposes are tainted with criminality, when the requisite criminal conduct has been personally established in its leader. But, also, the *actus reus* or *mens rea*—or both—established against one or more lower ranking members may prime the imagination to anticipate an uplink to the entity's leader, attributing the crime to him or her. The danger here becomes clearer if we compared the scenario to one in which criminal law is readily primed to hold the head of an entity consisting of human beings—such as a firm, a governmental department, or a State—criminally responsible for any murder or rape or any other crime that a subordinate committed within the entity in peace time. That is to say, during peacetime, the Head of State of a country rife with rampant homicide should not be held criminally responsible for the murders committed by the citizens that he or she leads—unless there is a clearly articulate theory based on concrete evidence that he or she created the danger. Nor should it be correct to prime criminal law to readily associate a subordinate with the criminal conduct of a superior.

156. It is, of course, possible that attacks by soldiers at the downstream of military hierarchy can form the basis of inference of organisational 'policy'—noting that policy connotes intent—formulated upstream in the hierarchy. But, that inference cannot be drawn, as a matter of law, without eliminating reasonable inferences that might explain such attacks more as a matter of failure of discipline than an organisational policy to commit the attacks.

157. I must recall here the troubling phenomenon that I have described elsewhere as the 'control paradox.' This engages a certain dissonance seldom acknowledged in the juristic reasoning that judges of international courts employ to hold superiors responsible for the crimes of their subordinates. This is in the sense that superior responsibility depends, on the one hand, on the existence of the superior's effective control over subordinates. Yet, the defining element of superior responsibility is the failure of control—in the manner of improper control. This presents the following legal conundrum. The *presence* of effective control anchors liability when the offence is, on an appreciable view, the *absence* of proper control expressed in article 28 of the Rome Statute as 'failure to exercise control properly.' The question thus arises whether proof of failure of control is not the very proof of absence of effective control. That of course begins to undermine the idea that a superior may be held criminally responsible *for* the actions (in the manner of crimes) of subordinates whom he could not control in the material circumstances.[134]

158. It is, of course, possible that the fault in a particular case may lie in the superior's failure to exercise *effective* control that (s)he has. That is a matter of proof beyond reasonable doubt. Yet, the *Yamashita* case demonstrates how easy it can be for judges to ignore this paradox. Japanese General Yamashita was convicted on the theory of superior responsibility over his troops, for failing to control them, and prevent them from committing war crimes in the Philippines during World War II. Particularly noteworthy was that his control over his troops had been disrupted by the military efficiency of the US offensive against him and his troops. He had been forced to order an evacuation. He then split his troops into three divisions. He ceded command over two of those divisions and retained command over only one. His evacuation order was not carried out. He was left isolated in a remote mountainous region; unable to communicate with his headquarters and the other two commanders.[135] His eventual conviction re-invited into view the submission that his counsel made at first instance, arguing that his client was 'charged not with having done something or having failed to do something, but solely having been someone. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.' The complaint found obvious sympathy in the dissenting opinion of US

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[134] See *Prosecutor v Bemba* (Judgment) dated 8 June 2018, [ICC Appeals Chamber]: Concurring Separate Opinion of Judge Eboe-Osuji, paragraph 264 *et seq*.
[135] See Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (2012), p 131.

Supreme Court Justice Murphy. For, in his own view, General Yamashita 'was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. ... *No one in a position of command in an army, from sergeant to general, can escape those implications*.'[136]

159. The apprehensions of Justice Murphy are also true in relation to the theory of 'organisational policy,' to the extent that possible attacks by soldiers can form the basis of inference of organisational policy which can result in the attribution of criminal responsibility to superiors, without proof of culpable criminal liability beyond reasonable doubt.

160. The danger of miscarriage of justice is both real and high. It is important to worry about it in the particular circumstances of the work of the ICC. This is considering the danger that the incidence of miscarriage of justice that may result from the risk identified above will not attract as much attention or outrage in situation countries that are not normally considered as powerful or significant enough in the realpolitik of global geopolitical order. There is no guarantee that any such miscarriage of justice may not be overlooked or glossed over in the tally of convictions that many have come to demand as a mark of success in the work of the ICC, in order to justify its existence.

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161. In conclusion, I should observe that in the *Ruto & Sang* trial judgment, in Part VI of my opinion, I engaged in an extensive discussion on the proper interpretation of the meaning of 'organisational policy' for purposes of article 7(2)(a) of the Rome Statute.[137] I have found no reason to reconsider those considerations. It is not necessary to repeat them here. It is enough only to advert to them.

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[136] *Ibid*, emphasis added.

[137] See *Prosecutor v Ruto and Sang* (Decision on the Defence Applications for Judgments of Acquittal), Reasons of Judge Eboe-Osuji, *supra*. Available at <https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF> See here.

PART V

A More Convincing View of Liability

i. Conviction

162. As indicated above, I am unable to uphold the convictions, in as much as they hinge on the Trial Chamber's reasoning that the evidence shows beyond reasonable doubt that the appellant was a co-perpetrator to all the crimes of UPC/FPLC soldiers now attributed to him because he had control over those crimes.

163. However, this is not to say that the appellant defendant is entirely free of questions of criminal responsibility on the basis of the facts amply established beyond reasonable doubt.

164. On the basis of the factual findings of the Trial Chamber, I am satisfied that the appellant defendant bears criminal responsibility for the mistreatment and killing of *Abbé* Bwanalonga. I fully concur with the reasoning of the Appeals Chamber in that regard.

165. I also fully concur with the Appeals Chamber that the appellant defendant bears criminal responsibility for military abuse of children under 15 years of age, by conscripting, enlisting and using them in armed conflict.

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166. On this subject, I must regret the terminology of 'child soldiers' that is often applied to these abused children, including in the proceedings in this case and repeatedly in the Trial Judgment.[138] It is both legally and sociologically illogical. It is legally illogical because a *child* cannot be a 'soldier,' given that the minimum age of qualification as a solider is 15 years. It is sociologically illogical because these children are in fact abused children, who should not have to share the same associative description of 'soldiers' with the adults who abused them.

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[138] See Trial Judgment, for instance, paragraphs 34, 86, 87, 144 and 160.

167. Although the Trial Chamber found that 'direct perpetration is not the appropriate mode of liability' under which to consider the appellant defendant's criminal responsibility for the crime of conscripting or enlisting children under the age of fifteen years,[139] I consider that these crimes engage his own acts and omissions. This is in light of his experience, responsibility and position as a military trainer (involving training recruits for the UPC/FPLC), his involvement in the setting up of a guard unit for himself, as well as his responsibility and position as Deputy Chief of Staff. I would, however, hold him responsible as a direct perpetrator for his own role.

168. I am, therefore, satisfied that the evidential record as analysed in the Trial Judgment, and upheld by the Appeals Chamber, establishes the guilt of the appellant defendant in relation to **Count 1** (direct complicity in murder as a crime against humanity committed against *Abbé* Bwanalonga); **Count 2** (direct complicity in murder as a war crime committed against the *Abbé*); **Count 10** (direct complicity in persecution as a crime against humanity committed against *Abbé* Bwanalonga); **Counts 14**, **15** and **16** (concerning direct complicity in the war crimes of conscripting, enlisting and using children under the age of 15 years to participate in hostilities).

169. In relation to the remaining crimes, I note that the Prosecutor charged the appellant defendant under articles 25(3)(a)(b) and (d) and 28(a) in the alternative to co-perpetration under article 25(3)(a). However, the Trial Chamber's conviction did not proceed on these bases and the appellant defendant did not have an adequate opportunity to make submissions on these alternatives in the course of this appeal. Therefore, while it may be possible to review the conviction on the basis of those alternative modes of responsibility, I am unable to confirm such a possibility on appeal. My preference would have been to commute the case back to the Trial Chamber to assess the evidence from the perspective of these alternative modes of responsibility. That, however, is legally impossible as a practical matter, given the outcome that results from the judgment of the majority of the Appeals Chamber.

ii. Sentencing

170. A similar practical difficulty confronts sentencing. Although my analysis would lead me to reverse the conviction on all but the six counts identified above,

[139] Trial Judgment, paragraph 759.

I recognise, as a practical matter, that my colleagues have come to a different view and the conviction has been confirmed by the majority of the Appeals Chamber on all the counts of the indictment. There is no further appeal. In these circumstances, I do not consider it useful to embark on the theoretical exercise of determining how I would sentence the appellant for the limited parts of the conviction that I would uphold. My views on the legal utility of 'indirect co-perpetration' or 'control of crime theory' do not impact on sentencing. Therefore, I will consider the sentencing appeal in the present case as an independent matter on the basis that the conviction has been upheld.

FINAL PART

'Revolutions'

171. In his final personal remarks to the Appeals Chamber during the hearing, Mr Ntaganda continued to profess his innocence. In that regard, he said he was a 'revolutionary' and not a criminal in international law. Regarding the latter, the judgment of the Appeals Chamber—including my limited confirmation of his conviction—speaks for itself.

172. But, I feel it necessary to engage his claim of being only a revolutionary. This requires saying that international law makes no value judgement—in either reprobation or approbation—about the propriety of 'revolutions' as such. The concern of international law is that civilians and persons not taking active part in an armed conflict—as well as buildings and objects that serve no military purpose—must suffer no attack in the form of genocide, crimes against humanity, war crimes or the crime of aggression. The Rome Statute affords an adequate guide for any inquiry into whether there was a violation of that norm in any given case. That inquiry is never distracted by the query whether or not accused persons were engaged in a 'revolution.'

173. It is possible for the banner of 'revolution' to be held up by those who commit crimes that shock the conscience of humanity. Indeed, the social aetiology of the work of the Special Court for Sierra Leone amply bears out the point. It was a judicial inquiry into some of the 20th Century's worse atrocities against civilians. In his new book on the legacy of the SCSL, Charles Jalloh summarises the Sierra Leone armed conflict and the atrocities committed in it, as follows:

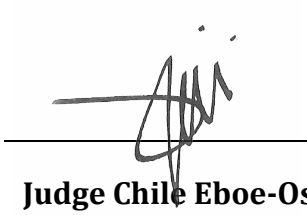
> The Sierra Leone war, which officially started on March 23, 1991 and ended on January 18, 2002, gained notoriety around the world for its *brutality and commission of some of*

the worst atrocities against civilians ever witnessed in a contemporary conflict. The conflict which was characterized by widespread killings, mass amputations, abductions of women and children, recruitment and use of children as combatants, rape, sexual violence against mostly women and underage girls (including their taking as 'bush wives'), arson, pillage, looting and burning, is estimated to have resulted in the deaths of between fifty and seventy thousand people. It also led to the displacement of about 2.6 million of the country's population of 5 million, the maiming of thousands of others, and the wanton destruction of private and public property. These included schools, government buildings, police stations and other public infrastructure that has since taken many years to rebuild.[140]

174. Indeed, much of what Professor Jalloh describes has been the subject of judicial pronouncements in the case law of the Special Court for Sierra Leone.[141] Much of those crimes were attributed to people who described themselves as 'revolutionaries'—the 'Revolutionary United Front' and the 'Armed Forces Revolutionary Council.'

175. It is therefore critical that those who engage in 'revolutions' must take especial care to refrain from directly committing crimes forbidden by international law. And leaders of 'revolutions' must also take all possible measures, as required by article 28 of the Rome Statute, to ensure that those acting under their command are prevented (in the first principle) from committing international crimes; or that those subordinates are punished adequately (in the second principle) when they commit criminal conducts that could not be reasonably prevented in the first place.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji

Dated this 30th day of March 2021

At The Hague, The Netherlands

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[140] Charles Jalloh, *The Legacy of the Special Court for Sierra Leone* (2020), p 31, emphasis added.
[141] See *Prosecutor v Brima & Ors (Judgment)* dated 22 February 2008 [SCSL Appeals Chamber] [the *'AFRC Case'*]; *Prosecutor v Sesay & Ors (Judgment)* dated 26 October 2009 [SCSL Appeals Chamber] [the '*RUF Case*']. See also *Prosecutor v Fofana & Anor (Judgment)* dated 28 May 2008 [SCSL Appeals Chamber] [the 'CDF Case'] and *Prosecutor v Taylor (Judgment)* dated 26 September 2013 [SCSL Appeals Chamber].