Annex 2: Separate opinion of Judge Howard Morrison on Mr Ntaganda's appeal

SEPARATE OPINION OF JUDGE HOWARD MORRISON

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I. Introduction

1. I write separately to explain my reading of article 25(3)(a) of the Statute and, in particular, to set out my concerns regarding the theory of indirect co-perpetration as elaborated and applied to crimes committed through organisations in the jurisprudence of the ICC. I will refer to the theory applied in the organisational context as 'Indirect Co-perpetration'.

2. Notwithstanding my reservations about the Trial Chamber's reliance on article 25(3)(a) of the Statute as a basis for conviction, I should state at the outset that I am convinced that Mr Ntaganda was responsible for the crimes of which he was convicted and that his sentence reflected the gravity of his conduct. In accordance with the standard of review, and taking into account the fact that the Trial Chamber in this case was following existing jurisprudence, plus the fact that this jurisprudence was known to the appellant from the outset of the proceedings and therefore part of the case he knew he had, or might have had, to meet, I do not feel that it would be justified to modify the findings and conviction founded upon the basis of this theory and the evidence as the Trial Chamber found it to be.

3. My concerns regarding the theory of Indirect Co-perpetration as elaborated in the jurisprudence of the ICC broadly align with concerns that have been articulated by Judge Fulford and Judge Van den Wyngaert in previous cases, as well as by my colleague Judge Eboe-Osuji in the present case.[1] In the first section of this opinion, I will set out the central lines of reasoning which lead me to conclude that the theory of Indirect Co-perpetration is an unnecessary importation into the Court's legal framework that has no basis in the Statute. I understand that the motivation for finding that this theory can be read into article 25(3)(a) of the Statute stems from a perceived need to distinguish between principal perpetrators and accessories in an effort to fairly label their conduct, so the second part of my opinion evaluates the usefulness of the theory

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[1] *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Adrian Fulford, 14 March 2012, ICC-01/04-01/06-2842 ('Judge Fulford's Opinion'); *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4 ('Judge Van den Wyngaert's Opinion'); Annex 5, Partly concurring opinion of Judge Chile Eboe-Osuji ('Judge Eboe-Osuji's Opinion').

as a tool for this purpose. Finally, I set out my views on the proper interpretation of article 25(3)(a) of the Statute.

II. Indirect Co-perpetration: An Erroneous Legal Interpretation of Article 25(3)(a)

4. The theory of Indirect Co-perpetration applied by the Court is inspired by the writings of German legal theorist, Claus Roxin, who developed a theory of control over crimes achieved through organised power structures. Roxin started from the position that 'domination of the act' or control of the crime is the defining element of perpetration in all its forms.[2] Domination may occur in three ways: (i) when the person physically carries out the criminal act (direct perpetration); (ii) when the person carries out the act jointly with another person (co-perpetration); or (iii) when the person carries out the act through another person (indirect perpetration).[3]

5. While German law traditionally allowed only for indirect perpetration in circumstances where the direct perpetrator was innocent of the crime, Roxin argued that control or domination of the act could also be achieved when the direct perpetrator is fully criminally responsible in the context of organised structures of power.[4] The organisations envisaged by Roxin would have a tight hierarchical structure and a ready supply of interchangeable members, and would operate outside the legal order.[5] The decisive element allowing for control of the crime in such situations is the certainty that orders issued by an indirect perpetrator who controls the organisation will be implemented by a member of the organisation. In this context, if an individual, retaining control over their actions, decides not to implement the order, another member of the organisation will take their place.[6] Thus, the will of the direct perpetrator becomes irrelevant due to the availability of numerous other actors willing to implement orders.

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[2] G. Werle and B. Burghardt, *Claus Roxin on Crimes as Part of Organized Power Structures, Introductory Note*, Journal of International Criminal Justice, Volume 9, Issue 1, March 2011 p. 191; T. Weigend, *Perpetration through an Organization*, Journal of International Criminal Justice, Volume 9, Issue 1, March 2011 ('Weigend'), pp. 95-96; E. Van Sliedregt, Perpetration and Participation in Article 25(3) of the Statute of the International Criminal Court in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015) ('Van Sliedregt'), pp. 507-508.
[3] Van Sliedregt, p. 507. *See also* Weigend, p. 95.
[4] C. Roxin, 'Crimes as Part of Organized Power Structures' in *9 Journal of International Criminal Justice* (2011) ('Roxin'), pp. 196-198.
[5] Roxin, pp. 202-204.
[6] Roxin, pp. 198-199.

6. I have no difficulty with the idea that a person who commits a crime with or through another person may be prosecuted as a principal perpetrator when the nature of his or her role in relation to the crime shows control over its commission. As set out further below, in simple forms of joint criminality involving a limited number of actors, I can see how this is a sensible way of rationalising why persons who do not physically carry out the crime should nevertheless be regarded as principal perpetrators. I can also accept that Roxin's theory of control over the crime *through an organisation* makes perfect sense in a legal system that provides for limited forms of criminal responsibility and mandates automatically lower sentences for forms of responsibility other than perpetration. In such legal systems, it may indeed be necessary to interpret the law in a manner that allows for persons who orchestrate crimes committed by low ranking members of an organisation to be prosecuted and punished in a manner commensurate with their responsibility.

7. However, it must be recognised that there are vital differences in context between the systems in which this theory has been elaborated and applied and the legal framework applicable at the Court.[7] The first difference is that the Statute contains multiple other forms of criminal responsibility apt to capture the type of criminality envisaged by Roxin. The most obvious candidate to deploy in the scenario he envisaged is ordering under article 25(3)(b) of the Statute, which captures in essence the same type of relationship between the actor and the crime committed. Simply put, the Statute does not suffer from the problem that Roxin set out to resolve and it is unnecessary to rely on such a theory when there are clear alternatives available to prosecute the type of criminality envisaged. Yet, the experience of the Court to date shows that types of contributions to criminal activities carried out in an organisational context that readily correspond to ordering, soliciting, inducing, aiding, abetting, assisting, providing the means for the commission of a crime or contributing in any other way, have in all but atypical cases been subsumed by the invasive species that is Indirect Co-perpetration.

8. Second, the sub-paragraphs of article 25(3) of the Statute do not establish a hierarchy of blameworthiness.[8] I understand the natural tendency to regard persons who

[7] *See* Judge Fulford's Opinion, para. 10; Judge Van den Wyngaert's Opinion, paras 5, 52.
[8] *See* Judge Fulford's Opinion, para. 8; Judge Van den Wyngaert's Opinion, paras 22-27.

physically carry out a crime as bearing greater culpability than those who merely assist, encourage or otherwise contribute to its commission, who are generally considered to bear a lower level of moral blameworthiness. However, these perceptions are derived from our understanding of simple and traditional models of criminality and are frequently challenged when applied to the activities of organised criminal groups. For example, the conduct of those who aid and abet systemic criminality such that they play a role in *all* of the crimes actually committed (and are responsible under article 25(3)(c) of the Statute) may be considered more reprehensible than that of the direct perpetrators who actually carry out a limited number of crimes (and are responsible under article 25(3)(a) of the Statute). Similarly, the moral responsibility of those at the top of a hierarchical criminal structure at whose instance *all* of the crimes are committed can surely not be equated with the moral responsibility of those at the bottom who execute a limited number of individual crimes; yet according to much of the Court's jurisprudence they would all be categorised together under article 25(3)(a) of the Statute. In my view, labelling the activities of an accused person under one or other of the sub-paragraphs of article 25(3) of the Statute does not inform the moral blameworthiness of that person.

9. Third, article 25(3) of the Statute does not contain mutually exclusive categories of criminal responsibility.[9] While the sub-paragraphs of article 25(3) of the Statute may be distinguished from each other at a theoretical level, any such distinction will inevitably break down under scrutiny of how the sub-paragraphs are applied in fact. The distinction between perpetration through another person under article 25(3)(a) and ordering under 25(3)(b) in many cases will be one of degree, which will almost certainly vary in accordance with the subjective appreciation of the judges seized with a particular case. Similarly, aiding and abetting under article 25(3)(c) and contributing in any other way to the commission of a crime by a group of persons under article 25(3)(d) are likely to overlap considerably in practice. The factual scenarios presented by mass and systemic criminality are too many and varied to be accounted for by neat

[9] *See The Prosecutor v Bemba et al.*, Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute', 8 March 2018, ICC-01/05-01/13-2276-Red, para. 59; Judge Fulford's Opinion, paras 7-9; Judge Eboe-Osuji's Opinion, para. 96 *et seq*.

distinctions between the particular categories of responsibility under articles 25(3) of the Statute. In my view, an attempt to create bright-line rules that would allow for these categories to be hermetically distinguished in practice is a doomed enterprise.

10. In similar vein, I note that article 25 of the Statute does not distinguish between principal perpetrators and accessories.[10] Although it is frequently assumed that article 25(3)(a) contains the responsibility of principal perpetrators, while article 25(3)(b)-(d) sets out accessorial forms of liability, the Statute does not make any such distinction and, in fact, does not use the words principal or accessory or any variation thereof. Any assumptions regarding which forms of criminal responsibility correspond to either perpetration or accessorial responsibility is further complicated by the fact that domestic systems differ in their approach to distinguishing between principals and accessories. For example, while certain countries treat ordering, as set out in article 25(3)(b) as a form of accessorial responsibility, others treat it as a form of principal perpetration.[11]

11. The factual complexity of ascribing responsibility for mass crimes committed by organised groups is the very reason that article 25 of the Statute does not establish a

[10] Judge Eboe-Osuji's Opinion, para. 33.

[11] Article 121-7 of the French Penal Code: 'The accomplice to a felony or a misdemeanour is the 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'; Article 28, Spanish Penal Code: 'Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person, or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration'; Article 29, Spanish Penal Code: 'Accessories are those who, not being included in the preceding Article, co-operate in carrying out the offence with prior or simultaneous acts'; Article 18. § 1 of the Polish Criminal Code: 'Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person, or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration'; § 2. 'Whoever, willing that another person should commit a prohibited act, induces the person to do so, shall be liable for instigating'; § 3. 'Whoever, with an intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for aiding and abetting'; Article 26 of the Portuguese Criminal Code: 'Authorship: He who performs the act, by himself or by someone as an intermediary, or who directly participates in its execution, in agreement or together with other person, or other persons, or who intentionally determines other person to carry out the act, is punishable as principal, if there has been execution or the beginning of execution'; Article 27(1): 'Complicity: He who, intentionally or in whatever form, materially or morally helps other person to perform an intentional act, is punishable as accomplice'.

hierarchy of blameworthiness or mutually exclusive categories of criminal responsibility and does not differentiate between principals and accessories. However, this does not mean that the Statute is blind to the moral culpability of criminal actors. It simply allows for this to be accounted for during sentencing. According to articles 77 and 78 of the Statute, the Court must take into account the gravity of the crime and the individual circumstances of the convicted person in sentencing, while rule 145(1)(a) specifies that the totality of any sentence imposed 'must reflect the culpability of the convicted person'. Rule 145 of the Rules sets out a detailed list of considerations that must be taken into account for this purpose. The legal characterisation of the convicted person's criminal responsibility does not feature amongst them and it would be wrong for this to inform the determination as to sentence. This shows that the role of the convicted person in relation to the crimes committed becomes important in terms of assessing their blameworthiness at the sentencing stage and this is properly assessed based on the facts, and not on the legal characterisation given to the facts for the purpose of conviction.

12. Finally, as a matter of statutory interpretation, it is my view that the theory of control over the crime in the context of organised criminality cannot be derived from the words '[c]ommits such a crime, […] jointly with another or through another person, regardless of whether that other person is criminally responsible'.[12] I believe that the multiple and varying objective and subjective legal requirements that have been built upon these words through the Court's jurisprudence do not comport with the language of the Statute and cannot be arrived at through principles of statutory interpretation or the applicable law under article 21 of the Statute.

13. These differences in context between the systems in which this theory has been elaborated and applied and the legal framework applicable at the Court lead me to conclude that the theory of Indirect Co-perpetration has no basis in the Statute.

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[12] *See* Judge Fulford's Opinion, para. 13; Judge Van den Wyngaert's Opinion, paras 10-21.

II. Indirect Co-perpetration Based on the Control of the Crime Theory as a Normative Tool for Distinguishing between Perpetrators and Accessories in Practice

1. Introduction

14. Despite the objections to the theory of Indirect Co-perpetration outlined above, it has been repeatedly adopted and applied in the Court's jurisprudence. The justifications given for relying on this theory are that: (i) it allows for the conduct of those most responsible to be fairly labelled as perpetration rather than assistance in the perpetration of a crime; and relatedly; (ii) it is the only acceptable normative tool for distinguishing between principal perpetrators and accessories.[13] For the reasons explained below, I believe that the application of the theory in practice does not deliver on these promises and, in fact, goes a considerable distance towards achieving precisely the contrary effect.

15. The manner in which it was articulated by the Trial Chamber in this case, which was based on the Appeals Chamber's judgment in the *Lubanga* case and other jurisprudence of the Court, is illustrative of the theory generally applied.[14] The Trial Chamber found that, in order to establish Indirect Co-perpetration, the subjective elements must be fulfilled 'as required by article 30 and any *lex specialis*'.[15] In addition, it found that two objective legal elements need to be fulfilled. The first requirement is the existence of an agreement or common plan (express or implied, previously arranged or materialising extemporaneously) between the accused and one or more other persons, to commit the crimes or to engage in conduct which, in the ordinary course of events,

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[13] Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, paras 1383-1394; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red ('*Lubanga* Appeal Judgment'), paras 462-473.

[14] The Trial Chamber described the theory of indirect co-perpetration it applied in the present case as a particular form of co-perpetration where a 'common plan is executed through other persons, who function as a tool of all of the co-perpetrators' (*see* Conviction Decision, para. 772).

[15] Conviction Decision, para. 774. Article 30 of the Statute provides: 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

would result in the commission of the crime.[16] The Trial Chamber added that it was 'not required that the common plan between individuals was specifically directed at the commission of a crime; it suffices that the common plan contained a critical element of criminality, and that it was virtually certain that the implementation of the common plan would lead to the commission of the crimes at issue'.[17]

16. The second requirement is that the members of the common plan must control the person or persons who execute the material elements of the crimes 'to such a degree that the will of that person or persons becomes irrelevant, and that their action must be attributed to the perpetrators as if it were their own'.[18] The Trial Chamber found that the accused must have 'control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission'.[19] It found that one means through which the will of the direct perpetrators may be subjugated is through the existence of an organisation, within which the potential physical perpetrators are interchangeable.[20] In that context, it found that 'the criterion of control means that the indirect perpetrator used "at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed"'.[21]

17. The first point of note is the complexity of the legal requirements used to establish Indirect Co-perpetration through an organisation and the increasingly lengthy and sometimes divergent explanations of what these mean or whether they are actually legal requirements in the Court's jurisprudence. This diversity in interpretation lends the theory a certain elasticity so that criminal responsibility may be broadly stretched over: (i) groups that are not as tightly organised as the hierarchical power structures envisaged by Roxin; and (ii) figures whose power to control the crimes committed through such groups is dubious. In my view, there is often discordance between the ostensibly strict requirements for Indirect Co-perpetration (existence of a hierarchical structure of

[16] Conviction Decision, paras 774-775.
[17] Conviction Decision, para. 776.
[18] Conviction Decision, para. 777.
[19] Conviction Decision, para. 779.
[20] Conviction Decision, para. 778.
[21] Conviction Decision, para. 778.

power, essential contribution, control of the crime) and the facts that are relied upon to establish them.

2. *Hierarchical power structure or group of persons acting with a common purpose?*

18. The present case provides a useful factual example of a problematic contortion of the concept of a hierarchical structure of power in order to justify finding control over the crime. The Trial Chamber found that Mr Ntaganda was responsible as a principal perpetrator for murder and pillage committed in Mongbwalu not only by the UPC/FPLC, but also by Hema civilians.[22] The Trial Chamber found that the will of the Hema civilians had become irrelevant, and that they functioned as a tool in the hands of the co-perpetrators and were 'controlled through soldiers of the UPC/FPLC, an organisation which was itself a tool in the hands of the co-perpetrators'.[23]

19. The Trial Chamber's conclusion that Mr Ntaganda controlled the Hema civilians through the UPC/FPLC soldiers was based on: (i) the general coercive circumstances in which they committed the crimes, given 'the presence of armed UPC/FPLC soldiers';[24] and (ii) its finding that they followed orders of the UPC/FPLC leadership.[25] The latter finding is contradicted by a finding elsewhere in the Conviction Decision that, '[w]hile an order to stop the looting and the killings in Mongbwalu was issued by the UPC/FPLC several days after they had taken over the town, the looting and killings continued'.[26] This apparent contradiction is not explained. The Trial Chamber also did not explain how the Hema civilians were organised, or indeed whether they operated under any kind of command structure, or the relationship or chain of command through which they were controlled by the UPC/FPLC soldiers. In short, there is no discussion of the chain of command that existed between Mr Ntaganda and the Hema civilians whose criminal acts were imputed to him. The witnesses relied upon by the Trial Chamber to establish that the civilians followed orders did not seem to have much information about how they were organised. P-0898 stated that '[t]hey were very badly

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[22] Conviction Decision, paras 821-824.
[23] Conviction Decision, paras 821-824.
[24] Conviction Decision, para. 822.
[25] Conviction Decision, para. 822.
[26] Conviction Decision, para. 512.

organised and disorderly', and that 'it was very difficult to ascertain who their leader was'.[27]

20. With the greatest respect to the Trial Chamber and to my colleagues in the majority of the Appeals Chamber, I cannot see how the facts established in this case (that the civilians committed the crimes in the presence of armed UPC/FPLC soldiers and (mostly) followed their orders) justify a conclusion that the Hema civilians, who were not part of the hierarchical structure of power, were under the control of Mr Ntaganda or that their will had become irrelevant. Yet, six judges of this Court were satisfied that control over the crimes committed by the Hema civilians was properly established on the basis of these facts.

21. While I have no difficulty in finding Mr Ntaganda criminally responsible for the crimes on the basis of the facts established and evidence relied upon by the Trial Chamber, which make it readily apparent that they coordinated their actions with the UPC/FPLC, including through Mr Ntaganda, and acted in pursuit of the same goal, in my view, it stretches the meaning of the words 'hierarchical structure of power' and 'control over crime' to characterise the relevant facts as such.

22. Another example of dubious reliance on an atypical hierarchical structure of power to prosecute persons as principal perpetrators for crimes committed through others is the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*. The Prosecutor alleged that Mr Ruto, together with others, established a network of perpetrators belonging to the Kalenjin community, 'comprised of eminent ODM [Orange Democratic Movement Party] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders'.[28] It is an unusual representation of a hierarchical apparatus of power so one might expect a particularly sound explanation of the level of organisation, discipline and the command structure within this grouping. The majority of the pre-trial chamber in that case confirmed the charges against Mr Ruto under article 25(3)(a) of the Statute,

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[27] Conviction Decision, para. 512, fn. 1513; P-0898: T-154, p. 13, line 20 to p. 14, line 2.

[28] Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 4 February 2012, ICC-01/09-01/11-373 ('*Ruto and Sang* Confirmation Decision'), para. 182.

finding that the network 'featured a hierarchal structure and apparatus of power' sufficient to establish control over the crime.[29] Judge Kaul dissented, characterising the network as '"essentially an amorphous alliance" of "coordinating members of a tribe with a predisposition towards violence with fluctuating membership" which existed temporarily for a specific purpose'.[30] Following the presentation of the Prosecution case at trial, the charges were vacated by the majority of the trial chamber on the basis that the existence of the network could not be established on the evidence.[31] Again, it is difficult to see how control over the crime or irrelevance of the will of the direct perpetrators can be realistically achieved in the context of a group drawn together in an *ad hoc* alliance based on ethnic affiliation. Yet, at least two judges were convinced that this was the case and legally characterised the organisation in question as such.

3. *Essential contribution to the common plan or to the crime?*

23. As set out above, the Trial Chamber found that the accused must have control over the crime, 'by virtue of his or her essential contribution to it and the resulting power to frustrate its commission'.[32] My colleagues in the majority of the Appeals Chamber have explained that, 'consistent with the principle of causation, which requires a causal link between the conduct of an accused and the crime, an accused's essential contribution must be to the crime for which he or she is responsible'. At the same time, they suggest that *contributions to the implementation of the common plan more generally may still suffice*.[33] They agree with the Appeals Chamber's previous pronouncement that '[t]he decisive consideration […] is whether the individual *contribution of the accused within the framework of the agreement* was such that

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[29] *Ruto and Sang* Confirmation Decision, para. 315.
[30] Dissenting Opinion by Judge Hans-Peter Kaul, *Ruto and Sang* Confirmation Decision, p. 146, para. 12. Although Judge Kaul's dissenting opinion related to the question of whether there was an organisation within the meaning of article 7(2)(a) of the Statute for the purposes of the contextual elements of crimes against humanity, his factual findings are equally relevant to the question of whether there was a hierarchical structure of power.
[31] Reasons of Judge Eboe-Osuji in Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red, para. 1. Although the dissenting judge, Judge Herrera Carbuccia, would have proceeded with the trial, she also found that Mr Ruto's responsibility could not be established under article 25(3)(a) of the Statute due to the lack of evidence showing that there was a network in a sense of a strict hierarchical organisation controlled by Mr Ruto (*see* Annex I, Dissenting Opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI, para. 72).
[32] Conviction Decision, para. 779.
[33] Majority judgment, para. 1041 (emphasis added).

without it, the crime could not have been committed or would have been committed in a significantly different way' (emphasis added).[34]

24. Again, the present case provides a useful example (in the form of Mr Ntaganda's contribution to the crimes committed during the second operation) of the theory's extension to those whose power to control particular crimes committed through such groups is dubious. Mr Ntaganda was the Deputy Chief of Staff in Charge of Operations and Organisation of the UPC/FPLC during the period relevant to the charges.[35] The Trial Chamber found that Mr Ntaganda made an essential contribution to *all* of the crimes charged over a certain period of time by UPC/FPLC soldiers, most of which were committed in two operations called the first operation and the second operation.[36] In relation to the first operation, Mt Ntaganda's contribution to the crimes committed was clear – he, *inter alia*, commanded the attack on Mongbwalu, oversaw the assault on Sayo, gave orders to commit crimes and personally engaged in violent conduct towards the enemies.[37]

25. The second operation was commanded by Kisembo, the Chief of Staff of the UPC/FPLC, and Mr Ntaganda's superior officer.[38] Mr Ntaganda's actions in relation to the second operation were limited to relatively generic contributions to the military activities of the UPC/FPLC, namely the following: (i) his role was determinative in setting up a strong military group capable of driving Lendu civilians out of certain areas;[39] and (ii) he devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu, which in turn allowed the related first and second operations to take place.[40] The factual findings regarding any role he may have

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[34] Majority judgment, para. 1041 (emphasis added).
[35] Conviction Decision, para. 827.
[36] Conviction Decision, para. 846.
[37] Conviction Decision, paras 491, 500.
[38] Conviction Decision, para. 316.
[39] Conviction Decision, paras 830-833. For example, the Trial Chamber found that Mr Ntaganda was involved in the organisation's recruitment activities; established and selected the topics for instruction at the Mandro training centre; training of recruits; regularly paid visits to the various training camps; attended and spoke at graduation ceremonies at Mandro and Lingo; personally taught recruits at Mandro and attended *kitamaduni* sessions where songs were sung; and decided on the deployment of soldiers after training including those under the age of fifteen.
[40] Conviction Decision, paras 565, 834-846; 854. For example, the Trial Chamber found that Mr Ntaganda devised a tactic to approach the enemy in Mongbwalu from two sides; took part in two meetings planning the second operation; gave, together with Floribert Kisembo, instructions to Salongo

played in planning the second operation are relatively sparse.[41] The Trial Chamber assessed his contribution to all of the crimes together and found that he 'exercised control over the crimes committed by UPC/FPLC troops pursuant to the common plan to drive out all the Lendu from the localities targeted during the course of the First and Second Operation'.[42]

26. I have no difficulty in finding Mr Ntaganda criminally responsible for the crimes committed for the reasons set out by the Trial Chamber which show that he contributed to their commission and shared the common purpose of the group to drive the Lendu out of Ituri. However, in my view, it stretches the natural meaning of the word 'essential' to label his contribution to the crimes committed during the second operation as such. It seems dubious to suggest that Mr Ntaganda had control over these crimes or the power to frustrate their commission on basis of the facts considered by the Trial Chamber.

27. It is important that a criminal court produce judgments that can be understood by affected communities in terms of why the person is being held accountable for the crimes committed. It is also critical that the person him or herself can fully understand why he or she is charged with certain acts and why his or her acts attract criminal responsibility. In the present case, I can understand why the appellant may be perplexed by some aspects of his conviction.

4. Indirect Co-perpetration: strict in theory, fluid in practice

28. Theoretically, the focus of Indirect Co-perpetration seems to be on the link between the accused person's actions and the crimes committed and a close nexus (essential contribution to the crime) appears to be required, commensurate with the responsibility of a principal perpetrator. The problem with the application of this theory

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Ndekezi and Nduru Tchaligonza to handle the Lipri road; gave instructions to go by Centrale to pick up ammunition and bring it to the troops in Bambu; remained in contact with the commanders in the field and monitored the unfolding via the UPC/FPLC radio communications systems; reacted strongly, after receiving information that a commander had refused to depart for a specific assault forming part of the Second Operation by responding 'that no commander could refuse an order from his superiors and that this had never occurred before'.

[41] Conviction Decision, paras 550-561.

[42] Conviction Decision, para. 857.

in practice is that the higher a perpetrator is in the chain of command, the more opaque the link between his or her actions and the crimes committed is likely to become. In such cases, the focus will inevitably shift from contribution to the crimes to contribution to the execution of the common plan, which need not be specifically directed at the commission of a crime.[43] Thus, types of activities that appear to be relatively generic or neutral when considered in isolation may be incorporated into the analysis. When such factual descriptions are transformed into legal findings such as 'essential contribution to the crime' and 'control over the crime', the dubious logical relation between the facts established and the legal requirements makes the case against the accused appear to be weaker than it may be in reality.

29. As long as the accused is not present on the ground and involved in some very proximate manner, there are very likely to be many interferences from other actors, or remote factual circumstances, that have significant influence on the question of whether and how the crimes are committed. The problem stems from the number of actors involved and the mass nature of the crimes committed. While consideration of whether a co-perpetrator has control over the crime may be possible and useful in textbook forms of traditional joint criminality (where for example one perpetrator holds the victim while the other beats him), when transposed into an organisational setting, (as my colleague Judge Eboe-Osuji has pointed out) there are simply too many moving parts to allow anything more than a broad and speculative assessment of what would have happened without the contribution of an individual actor.[44]

30. The reality is that, in the vast majority of cases, individuals within the command structure of organisations are as replaceable as any of the direct perpetrators and the machinery of the organisation would roll on without them if they had a sudden crisis of conscience and withdrew their contribution. How then is the decisive question posed by my colleagues – whether the individual contribution of the accused within the framework of the agreement was such that *without it*, the crime could not have been committed or would have been committed in a significantly different way – to be answered? Roxin would say that a person is not freed from criminal responsibility

[43] *Lubanga* Appeal Judgment, para. 446.
[44] Judge Eboe-Osuji's Opinion, para. 77 *et seq*.

simply because someone else would have stepped in to take their place had they not acted and that this justifies holding them responsible as a perpetrator although they are just a link in the chain of command.[45] If this logic is accepted, the answer then must be that in all probability in most cases the crime would have happened anyway but this does not absolve the individual of guilt. The assessment brings us nowhere and is no more sophisticated than acceptance as a general principle that anyone operating effectively within the command structure of an organisation committing crimes may be held responsible as a principal perpetrator because of the nature of their role. There is no need to apply labels such as control over the crime, essential contribution to the crime (or to the common plan), or power to frustrate the commission of the crime.

5. Conclusion

31. Although the theory of Indirect Co-perpetration purports to offer a solid doctrinal basis to distinguish between principals and accessories, the manner in which it is applied in practice means that it treats very different scenarios in the same way. As alluded to above, in the manner in which Roxin's theory has been adapted and used at the Court, everyone involved in the chain of command may be prosecuted as a principal perpetrator responsible under article 25(3)(a) and treated equally at least as concerns the legal characterisation of their actions: (i) leaders allegedly responsible for orchestrating crimes through relatively loosely associated groups of individuals (Ruto); (ii) senior military commanders of armed groups in circumstances where they are not directly in the chain of command in respect of particular operations (Ntaganda), (iii) mid-level commanders of armed groups (Ongwen); and (iv) the direct perpetrators themselves. The practice shows that the control over the crime theory best serves the purpose of categorising a wide range of actors as principal perpetrators based on their perceived blameworthiness, or potentially their membership of organisations engaged in crime and the gravity of the crimes in question. To this extent, the well documented criticisms of the application of joint criminal enterprise as it was developed at the *ad hoc* tribunals are equally applicable to the manner in which Indirect Co-perpetration is applied at the Court.

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[45] Roxin, p. 200.

32. In my view, application of this theory in practice is no more useful than acceptance as a matter of principle that, in organised crime, persons who order, instigate or merely contribute in other ways to the commission of the crimes may be as culpable and indeed may be more culpable than those who physically carry out the crime. As a moral principle, this is easily and intuitively understood and does not require a complex legal architecture to categorise the criminal responsibility of persons at the top of a criminal hierarchy.

III. Proper Interpretation of Commission 'Jointly With Another or Through Another Person, Regardless of Whether that Other Person is Criminally Responsible' under Article 25(3)(a) of the Statute

33. Regarding the necessary requirements for establishing that two or more persons commit a crime jointly, I have no difficulty with accepting Judge Fulford's view that this requires: (i) '[t]he involvement of at least two individuals'; (ii) '[c]oordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime'; and (iii) '[i]ntent and knowledge, as defined in Article 30 of the Statute, or as "otherwise provided" elsewhere in the Court's legal framework'.[46]

34. In order to establish commission of a crime under article 25(3)(a) of the Statute, a sufficient nexus between the accused's actions and the crime committed is also required. From my perspective, it does not make a material difference if the person's contribution is described as having caused the commission of the crime (in the sense that, absent the contribution of the person, the crime would not have occurred) or having been essential to the commission of the crime such that it demonstrates control over the crime. It seems to me that much the same analysis is required under either construction.

35. In my view, it is difficult to maintain that there is a clear distinction between committing a crime with another person and through another person. In many cases of joint criminality, it will be a combination of both, given how unlikely it is that two persons will simultaneously pick up a gun, aim at the same person and pull the trigger. I consider joint commission of a crime to refer to the coordinated action of two or more

[46] Judge Fulford's Opinion, para. 16.

persons to bring about a crime, irrespective of who physically carries out the *actus reus* of the crime.

36. However, I believe that joint commission under article 25(3)(a) of the Statute should be reserved for cases of simple criminality where a limited number of persons agree to engage in a course of action that will result in crimes being committed. As I have attempted to explain above, the assessment of whether an individual made an essential contribution or controlled the crime in more complex forms of criminality committed by armed groups or through hierarchical structures of power with multiple actors is too unwieldy and indeterminate, leading to arbitrary results in practice. For this reason, I consider that joint commission of crimes in the organisational context may be appropriately prosecuted under article 25(3)(b)-(d) of the Statute in line with the nature of the contribution in question.

37. I agree with my colleague Judge Eboe-Osuji that article 25(3)(d) of the Statute provides a useful vehicle for the prosecution of commission of crimes by organisations.[47] The dual *mens rea* requirement means that it may be applied equally to persons who act 'with the aim of furthering the criminal activity or criminal purpose of the group' as well as those who act 'in the knowledge of the intention of the group to commit the crime' without sharing in its aim. This makes it a suitable tool to use in addressing the criminal complicity of persons engaged at different levels in group criminality.

38. Although article 25(3)(d) is often dismissed as a residual form of liability that should only be used in relation to types of contribution that are not captured in articles 25(3)(a)-(c) of the Statute, this focuses only on the first part of its wording '[i]n any other way contributes to the commission or attempted commission of such a crime'. If this were the sole purpose and scope of the provision, the drafters could have stopped there.

39. The better view of article 25(3)(d) of the Statute is that it is specifically aimed at dealing with group criminality and its defining feature is the reference 'to the

[47] *See* Judge Eboe-Osuji's Opinion, para. 66 *et seq*.

commission or attempted commission of such a crime by a group of persons acting with a common purpose'. In this sense, some of the features of responsibility under article 25(3)(d) of the Statute are similar to those of joint criminal enterprise in its first and second variants as applied at the *ad hoc* tribunals and a modified form of conspiracy.[48] This interpretation of article 25(3)(d) of the Statute is borne out by the drafting history relevant to this provision, which shows that the text has its origins in the International Law Commission's 1991 and 1996 Draft Code of Crimes against the Peace and Security of Mankind proposal to criminalise participation in planning or conspiring to commit a crime which in fact occurs, which was modified as a compromise in response to objections to incorporating notions of conspiracy in the Statute.[49]

40. The main advantage of dealing with organised group criminality under the heading of article 25(3)(d) of the Statute is that it allows for a common sense description and appreciation of the role of an individual within the common purpose group, including whether he or she was instrumental in forming and directing the group's criminal activity or purpose, and the effect that his or her actions have on all or part of the criminal activities of the group. Such an analysis comports with the factual analysis carried out under the theory of Indirect Co-perpetration, while avoiding confusing labels such as 'essential contribution', 'control over the crime' and 'hierarchical structure of power'. In my view, such an analysis would greatly facilitate the assessment of an individual's culpability for the purposes of sentencing.

IV. Conclusion

41. For the reasons set out above, it is my view that Indirect Co-perpetration is an unnecessary importation into the Court's legal framework that has no basis in the Statute. Although its necessity is often justified on the basis of fair labelling and distinguishing between principals and perpetrators, the manner in which the theory has been developed at the ICC contributes more to mislabelling facts and circumstances than it does to fair labelling of an individual's criminal responsibility. The complexity of the legal and factual parameters of the theory of Indirect Co-perpetration has also led

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[48] J. D. Ohlin, *Joint Criminal Confusion*,12 New Criminal Law Review 406 2009, pp. 408-410.
[49] O. Triffterer, K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2016), p. 1010; P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.), *The International Criminal Court the Making of the Rome Statute*, (1999), pp. 199-200.

to arbitrariness in their application. My conclusion is that it does not assist in either fair labelling, explaining the role of an accused person *vis-à-vis* the crimes committed, or transparency in the administration of justice.

42. In addition, the types of cases that come before the Court are usually those involving mass crimes committed by armed groups. Given that the theory of Indirect Co-perpetration could be applied to all those who function within the command structure of a hierarchically organised armed group,[50] it has the capacity to subsume under the heading of Indirect Co-perpetration many of the factual scenarios that arise and could be prosecuted under article 25(3)(b)-(d) of the Statute.[51] In my view, these other forms of contribution to the commission of crimes by organisations or large groups acting with a common purpose should be explored as alternatives to Indirect Co-perpetration under article 25(3)(a) of the Statute.

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

Judge Howard Morrison

Dated this 30th day of March 2021

At The Hague, The Netherlands

[50] It has been accepted that the theory applies not only to those who mastermind or control organisations as such, but also to those who operate at lower levels in the chain of command, who are themselves acting under the orders or control of higher level perpetrators.

[51] Article 25(3) of the Statute provides that a person shall be criminally responsible and liable for punishment for crimes within the jurisdiction of the Court if he or she: (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. *See also* Judge Eboe-Osuji's Opinion, para. 29.