

SEPARATE OPINION OF JUDGE KUNIKO OZAKI

1. I write separately to explain my views in relation to the interpretation of:
 - (i) the chapeau of Article 28(a) of the Statute, in particular, the term “as a result of his or her failure to exercise control properly”; and, briefly, (ii) the term “organizational policy” in the contextual elements of crimes against humanity.

Article 28(a)

2. Article 28(a) stipulates that a military commander, or person effectively acting as such, shall:

[...] be criminally responsible for crimes [...] committed by forces under his or her effective command and control, or effective authority and control as the case may be, *as a result of his or her failure to exercise control properly over such forces*, where:

- (i) [...]; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution (emphasis added).

3. In my view, the portion of text emphasised above raises a number of inter-related interpretative questions. First, competing views have been expressed as to whether this clause properly attaches to the criminal responsibility of the commander or to the commission of the crimes. Second, the scope of the phrase “to exercise control properly” and its relationship with Article 28(a)(ii) is to be considered. Third, the nature of the nexus implied by the words “as a result of” must be considered, particularly if the failure of control is deemed to correlate to the commission of the crimes.

4. I note that those questions are also directly linked to the nature of liability under Article 28, as addressed in paragraphs 171 to 174 of the Judgment.
5. I fully endorse the Chamber's finding that Article 28(a) provides for a mode of liability for crimes committed by a commander's¹ subordinates. This is as opposed, for example, to it constituting a separate crime of omission. The reasoning in the Judgment explains the basis for that conclusion. I additionally note that the jurisdiction of the Court is complementary to national jurisdictions,² and should focus on addressing the most serious crimes of concern to the international community and those persons most responsible for them, rather than addressing a dereliction of duty as such.
6. I also agree that such liability is *sui generis* in nature. As noted in the Judgment, this finding arises from the specific basis for the attribution of responsibility for the crimes to a commander, namely, the commander's failure to discharge the duties of control required by international law.³ Such a basis of liability is unique within the statutory framework, including in comparison with any of those bases of liability provided for in Article 25(3). Further, liability under Article 28 is inherently of a more passive nature, more focused on prevention or interruption of the crimes under the jurisdiction of the Court, rather than on direct involvement in the material elements of the crimes themselves.
7. I additionally concur that, in certain circumstances, a superior's conduct, whether act or omission, may be capable of satisfying a material element

¹ I use the term "commander" here to also encompass a person "effectively acting as a military commander" within the meaning of Article 28(a).

² Preamble and Article 1.

³ Judgment, para. 172. *See also* Judgment, paras 173-174.

of one or more modes of liability.⁴ For example, a superior's omission - which could take the form of a failure to prevent or punish - might contribute to the commission of a crime by encouraging the perpetrator.⁵ Consequently, the appropriate legal characterisation of the superior's conduct would fall to be considered. In my view, this would require a normative assessment of the role of the accused person, in the specific circumstances of the case.

8. I now turn to the first question identified above, that is, whether the clause appropriately attaches to the criminal responsibility of the commander or to the commission of the crimes. The Pre-Trial Chamber, without discussion, adopted the latter approach,⁶ which is supported by the Defence.⁷ By contrast, the Prosecution, at least in its oral closing submissions, supported the former view.⁸ I observe that linguistically, in the English version of the Statute, either interpretation is possible.
9. I consider, however, that when the clause is viewed in context, and in light of the object and purpose of the Statute, the appropriate reading is that a nexus between the commander's failure to exercise control properly and the commission of the crimes is required. I am particularly mindful in this regard that the Chamber has found that Article 28 provides for a mode of liability for the crimes committed, as opposed to an independent crime of omission. As noted in the Judgment, it is a core principle of criminal law

⁴ It has been posited that, with one exception, each of the modes of liability reflected in Article 25(3) of the Statute are capable of being fulfilled by way of omission, Kai Ambos, *Treatise on International Criminal Law* (2013), page 190. *See also*, ICTY, *Galić* Appeal Judgment, para. 176 (for the view that "ordering" cannot be performed by way of omission).

⁵ ICTY, *Kordić and Čerkez* Trial Judgment, para. 371.

⁶ Confirmation Decision, ICC-01/05-01/08-424, paras 407, 420 and 423.

⁷ Defence Closing Brief, para. 603. *See also* Defence Closing Brief, paras 1047-1053.

⁸ Prosecution Oral Closing Statements, page 79, lines 17 to 24. That view is also supported, *inter alia*, in the *amicus curiae* submissions of Amnesty International presented before the Pre-Trial Chamber, *see* Amicus Curiae Observations on Superior Responsibility Submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 April 2009, ICC-01/05-01/08-406, para. 39.

that individual criminal responsibility should only attach to an accused where there is some form of personal nexus to the crime.⁹ In my view, it would be inconsistent with this principle to interpret Article 28(a) as not requiring any form of nexus or contribution to the crimes prior to their completion - as would, for example, particularly be the case for liability resting solely on a failure to punish already committed crimes. It is appropriate to note at this point that other international courts and tribunals, applying different statutory frameworks from that applicable at this Court, have rejected a “causality” requirement for command responsibility.¹⁰ This approach, however, has not been without a degree of confusion as to the proper characterisation of such liability.¹¹ Further, the

⁹ Judgment, para. 211. *See also Tadić Appeals Judgment*, para. 186 (“the foundation of criminal responsibility is the principle of personal culpability”).

¹⁰ The *Mucić et al.* Trial Judgment found that “[n]otwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject”, ICTY, *Mucić et al.* Trial Judgment, para. 398. Likewise, in *Blaškić*, considering the *Mucić et al.* Trial Judgment, the Appeals Chamber concluded that the existence of causality between a commander’s failure to prevent subordinates’ crimes and the occurrence of these crimes is not an element of command responsibility that requires proof by the Prosecution in all circumstances of a case. It considered this to be more a question of fact to be established on a case by case basis, than a question of law in general, ICTY, *Blaškić Appeal Judgment*, paras 75-77. *See also* ICTY, *Kordić and Čerkez Appeal Judgment*, para. 832; ICTY, *Hadžihasanović and Kubura Appeal Judgment*, para. 40. I do note that it is possible to identify discrete references in historical command responsibility jurisprudence which are suggestive of a causal element, however these are mainly inconclusive when considered in proper context. *See, for example, Wilhelm List et al. Judgment*, page 1286 (stating “[t]he evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant” (emphasis added)). I consider, however, that it is apparent from the passage in which this reference occurs that the tribunal was making a finding that the particular accused had not in fact failed in his duties given the extent of his material ability and the efforts which he had made, rather than making any pronouncement on a required nexus.

¹¹ *See, for example, ICTY, Krnojelac, Appeal Judgment*, para. 171 (stating that “[i]t cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control”); ICTY, *Orić Appeals Judgment*, Declaration of Judge Shahabuddeen, paras 18-26, and Separate and Partially Dissenting Opinion of Judge Schomburg, para. 12. These statements can be contrasted with, for example, *Mucić et al. Trial Judgement*, para. 331 (referring to “individual criminal responsibility for the illegal acts of subordinates” (emphasis added), as well as the consistent charging and conviction practice at the ICTY which invariably references the underlying crimes rather than a failure of duty (see though ICTY, *Orić Trial Judgment*, disposition).

sui generis nature of Article 28 liability, is not itself a basis not to apply such fundamental principles of criminal law.

10. I also observe that the drafting history of the provision, although not conclusive, may be read as additionally supporting the interpretation that a form of nexus to the commission of the crimes was envisaged.¹²
11. It is, however, important to recognise that the equally authentic,¹³ different language versions of the Statute contain certain variations. Like the English text, the Russian, Arabic and Spanish texts appear to each be, at least, capable of being read as either attaching the clause to the criminal responsibility of the commander or to the commission of the crimes. By contrast, the French¹⁴ and Chinese¹⁵ texts appear to favour the former interpretation, to differing degrees. In my view, these differences are sufficiently significant to prevent a common understanding of the texts based on the primary means of interpretation set out in Article 31 of the VCLT. Resort to supplementary means of interpretation, pursuant to Article 32 of the VCLT, also does not assist. Although, as noted above,

¹² Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996, UN Doc A/AC.249/1, 7 May 1996, page 85, Proposal submitted by the UK (“[i]n addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander is also criminally responsible (as an aider and abettor) for such crimes committed by forces under his command as a result of his failure to exercise proper control where:”); Applicable Law and General Principles of Law, Working paper submitted by Canada, UN Doc A/AC.249/L.4, 6 August 1996, page 15 (Alternative A: (“[i]n addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander [a superior] is also criminally responsible (as an aider and abettor) for such crimes committed by forces under his command [by a subordinate] as a result of the commander’s [the superior’s] failure to exercise proper control where: [...]” and Alternative B: “[t]he fact that a crime under this Statute was committed by a subordinate [forces under the command of a commander] [as a result of the commander’s failure to exercise proper control] does not relieve the superior [the commander] of criminal responsibility where [...]”).

¹³ See Article 128 of the Statute.

¹⁴ In the French version of the Statute Article 28(a) reads in relevant part: “Un chef militaire [...] est pénalement responsable des crimes [...] commis par des forces placées sous son commandement [...], lorsqu’il ou elle n’a pas exercé le contrôle qui convenait sur ces forces dans les cas où: [...]” (emphasis added).

¹⁵ The Chinese version of the Statute uses a formulation most readily translating to English as “[a] military commander or person effectively acting as a military commander, if he or she does not exercise control properly over the forces under his or her effective command and control, or effective authority and control, shall be criminally responsible for crimes within the jurisdiction of the Court committed by those forces where: [...]”.

certain aspects of the drafting history (bearing in mind that the Statute was negotiated in English) may favour an intention towards some form of required contribution to the commission of the crimes, I do not find the available *travaux préparatoires* to be sufficiently conclusive to resolve the ambiguities between the different authentic texts. In the circumstances,¹⁶ I consider that the principle of strict interpretation established in Article 22(2) of the Statute¹⁷ requires the Chamber to favour the interpretation which links the failure on the part of the commander to exercise control properly to the commission of the crimes.

12. I now turn to consider the second issue, which is the substantive content of the commander's obligation to "exercise control properly", as provided for in the chapeau to Article 28(a), and its relation to Article 28(a)(ii).

13. As a preliminary matter, I consider that the placement of the clause, in the chapeau, dictates that it be read consistently across the sub-clauses of Article 28(a). Therefore, the interpretation attributed to it should be capable of meaningful application regardless of which alternative standard of knowledge under Article 28(a)(i) is applied and regardless of which of the alternative failures of duty provided for under Article 28(a)(ii) apply in any particular case.

14. Unlike the Statutes of the *ad hoc* tribunals, Article 28(a) provides for an explicit duty to "exercise control properly", and, according to the interpretation above, the commission of the crimes has to be "as a result of"

¹⁶ Noting also in this context the provisions of Article 33(4) of the VCLT which states that the meaning which "best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

¹⁷ Article 22(2) provides that "[t]he definition of a crime shall be strictly construed" and "[i]n case of ambiguity [...] shall be interpreted in favour of the person being investigated, prosecuted or convicted".

the dereliction of this duty in order for the commander to incur criminal liability for such crimes.

15. I observe that there is a close but distinct relationship between the notion of exercising control properly as reflected in the chapeau, which bears similarities to the concept of responsible command, and the specific components under Article 28(a)(ii). The duty of a commander to exercise control properly may extend both temporally and substantively beyond the specific Article 28(a)(ii) duties.¹⁸ In this regard, I find guidance in international humanitarian law, most notably in Articles 86 and 87 of Additional Protocol I. Article 87(2) of Additional Protocol I, for example, identifies an obligation for commanders to “ensure that members of the armed forces under their command are aware of their obligations” under the Geneva Conventions and the protocol, “[i]n order to prevent and suppress breaches”.¹⁹ Further examples of measures undertaken in the exercise of proper control may include maintaining order,²⁰ and setting out operational systems of supervision and discipline.²¹ The scope of the measures will vary according to the specific roles and functions of the commander in question. However, these duties apply not only once a commander is, or should be, aware that crimes are about to be committed, but form part of the ongoing functions of responsible command. I,

¹⁸ The duty to prevent arises when the commander knows or, owing to the circumstances at the time, should have known that crimes were about to be committed (*see similarly* ICTR, *Bagosora and Nsenyirumva* Appeal Judgment, para. 642; ICTY, *Hadžihasanović and Kubura* Appeal Judgment, para. 260), while the duties to repress or submit the matter to competent authorities arise only once forces have started committing or have committed crimes.

¹⁹ *See also* ICTY, *Halilović* Trial Judgment, para. 83.

²⁰ ICTY, *Halilović* Trial Judgment, paras 82 and 84.

²¹ ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987) on Article 87 to Additional Protocol I, page 1017, para. 3560 (“[M]ilitary commanders are not without the means for ensuring respect for the rules of the Conventions. [...] They have the authority, and more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline. [T]hey are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach”); *see also* ICTY, *Halilović* Trial Judgment, paras 85 to 87.

therefore, consider that the reference to a “failure to exercise control properly” in Article 28(a) may be read as designed to encompass this broader and constant duty on the part of commanders.²²

16. I emphasise that a failure to discharge this duty of proper control would not in itself be sufficient for a commander’s responsibility to arise pursuant to Article 28(a). Criminal liability shall attach to the commander only when the specific failures outlined in Article 28(a)(ii) also occur, under the conditions set in Article 28(a)(i). The specific duties are the core of the duty to exercise control properly. Indeed, while the duty to exercise control properly is broad in its scope, Article 28(a)(i) and (ii) delimits the scope of liability both temporally and substantively to breach of the duties most directly relevant to avoidance of the harms envisaged by the Statute.

17. It can be readily imagined that a failure to exercise control properly might be relatively straightforwardly established where a failure to prevent had already been proven, as the evidence underlying each element is likely to significantly overlap. As for the duties to repress or to submit the matter to the competent authorities, I agree with the Pre-Trial Chamber that a failure in those duties cannot retroactively cause the crimes.²³ I am, however, not persuaded that the element of causation therefore does not relate to those duties.²⁴ Such a reading would not only be contrary to the plain construction of Article 28(a), but would also result in the chapeau clause being rendered meaningless in circumstances where the responsibility of the commander was alleged to rest solely upon a failure to fulfil either of

²² While I am aware of the jurisprudence of the *ad hoc* tribunals finding that distinguishing between “general” and “specific” obligations of superiors is “confusing and unhelpful”, I note the distinct statutory framework within which this Court operates.

²³ Although, as analysed in the Judgment, it is noted that the duty to repress includes both suppression of ongoing crimes and punishment of an already committed crime. In that light, a failure to repress could be envisaged as contributing to the commission of a crime.

²⁴ *Contra* Confirmation Decision, ICC-01/05-01/08-424, para. 424. *See also* para. 13 above.

those two latter duties. As noted above, there is, in any event, no need for such a reading: the duty to exercise control properly - including, as appropriate, to put effective systems of supervision and discipline in place - to which the nexus requirement attaches, is operative before the point in time when the forces are committing or about to commit the crimes.

18. It remains to consider the nature of the required nexus between the failure to exercise control properly and the commission of the crimes. I will now turn to this issue.

19. The phrase “as a result of” literally indicates a form of causal relationship between the commander’s failure to exercise control properly and the commission of the crimes.²⁵ It is important to recognise at the outset that a wide range of different standards of causation are applied by both international and domestic jurisdictions in fulfilment of the principle of personal culpability.²⁶ A “but for” test is, for example, commonly employed in many domestic jurisdictions for the purpose of attaching liability, in particular to a principal perpetrator. In certain contexts such a test may, however, be neither appropriate nor sufficient for the purposes of proper attribution of responsibility for certain harms incurred.²⁷ Additionally, in cases where an accused’s liability is derived from that of another, in the sense of the accused not being the direct physical

²⁵ See, for example, *Prosecutor v Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, paras 79-80. It should, however, be noted that in Rule 85 the English phrase “as a result of” is translated to “du fait de” in the French version of the Rules, whereas, as noted above, the French translation in Article 28(a) is “lorsqu’il ou elle”, the latter being more indicative of a coincidence of events than a causal relationship.

²⁶ My use of the term “causation” here is intended to capture both legal (or proximate) causation and factual causation. For a general acknowledgment of the complexity of this area of law see *R v Royall* (1991) 172 CLR 378, at 448, McHugh J: “[j]udicial and academic efforts to achieve a coherent theory of common law causation have not met with significant success. Perhaps the nature of the subject matter when combined with the lawyer’s need to couple issues of factual causation with culpability make achievement of a coherent theory virtually impossible.”

²⁷ A typical example is where multiple sufficient causes exist.

perpetrator, typically no factual causation is required, and instead some form of contribution or other nexus is considered sufficient.²⁸

20. Although, as indicated in the Judgment, it is unnecessary on the facts of the case to delineate in detail the scope of Article 28(a) causation, I find it appropriate to note a number of factors which I consider relevant to this assessment. First,²⁹ the very nature of command responsibility presupposes the existence of multiple causes of the crimes, including the conduct of the direct perpetrators. This may in fact include multiple sufficient causes in certain contexts.

21. Second, as noted in the Judgment,³⁰ the fact that command responsibility rests on an omission requires a number of hypothetical evaluations. While Judges are accustomed to making such assessments, it can be particularly difficult where human actions are involved.³¹ Moreover, many of the cases before the Court are large scale and complex by nature, often requiring an assessment of the culpability of individuals who are physically or geographically remote from the scene of the crimes, and frequently involving many intervening actors. I concur with the finding in the

²⁸ Typically this arises in the case of accomplice liability. See, for example, *State v Tally*, 102 Ala. 25, 15 So. 722 (1894) (“The assistance given [...] need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it.”). See also e.g. *Stringer* [2011] EWCA Crim. 1396; *Wilcox v Jeffery* (1951) 1 ALL ER 464; *Thambiah v The Queen* [1966] AC 37; *R v Russell* [1933] VLR 59, 67 (Cussen ACJ). Various additional or alternative standards which have been applied to different modes of liability include: an “essential contribution” test (*Lubanga* Appeal Judgment, para. 7); a “substantial and operative cause” test (*R v Smith* [1959] ALL ER 193 CA; *Hennigan* [1971] 3 ALL ER 133); a “significant contribution” test (ICTY, *Krajišnik* Appeal Judgment, para. 215); an “increased risk” test (Confirmation Decision, ICC-01/05-01/08-424, para. 425); and a “reasonable foreseeability” test (*R v Royall* (1991) 172 CLR 378); *Roberts* [1971] 56 Cr App R 95 CA. See also ICTY, *Hadžihasanović* Trial Judgment, para. 193). This is not intended to in any way comprise a comprehensive or fully representative sample of relevant jurisprudence, which is beyond the scope of this opinion, but rather merely to highlight the wide diversity of practice.

²⁹ The order in which I have listed these factors is not intended to indicate an order of relative precedence or importance.

³⁰ Judgment, para. 212.

³¹ Hart and Honoré, *Causation in the law* (1985), pages 413-417.

Judgment that any standard of causation adopted should be capable of consistent and objective application, having regard to each of these elements.

22. Further, the *sui generis* nature of command responsibility and the distinct features of this mode of liability, as discussed above,³² should be carefully considered. This includes the fundamental responsibilities of commanders, and the powers of control upon which their liability rests. It also encompasses the derivative nature of superior liability, in the sense that it arises in relation to crimes for which the superior is not the direct perpetrator. Indeed, in this context, in considering causation under Article 28, the Chamber should be mindful not to significantly disturb the careful balance of culpability within the statutory framework.

23. It is on the basis of an assessment of, in particular, the factors identified above that I have concurred in the Chamber's findings that: (i) the requirement of a causal link under Article 28 would be clearly satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes from being committed; and (ii) that such a standard is higher than that required as a matter of law for the purposes of Article 28. I further consider that the language "as a result of" dictates that the standard adopted be more than a merely theoretical nexus to the crimes. In this regard, as indicated above, the starting point for the inquiry is the principle of personal culpability, which, in this context, requires that,

³² See paras 5-6 above.

at least, the liability of an accused should be confined to results that are reasonably foreseeable.³³

Crimes against humanity (Article 7)

24. Now I turn to the issue of interpretation of the contextual elements of crimes against humanity, and specifically of the term “organizational policy”.

25. While I have no objection to the relevant analysis in paragraphs 157 to 161 of the Judgment, I believe that the existence of an “organizational policy” should be distinguished from the question of how it is proven. Rather than relying on a negative list of “what should not be included in the definition” or possible evidence from which the existence of an organization and/or policy can be inferred, in my view, the Chamber should provide clearer guidance on its understanding of what this element requires, based on an approach applying the relevant provisions of the

³³ *R v Royall* (1991) 172 CLR 378 (Brennan J “[f]oresight or reasonable foreseeability marks the limit of the consequences of conduct for which an accused may be held criminally responsible”); *Roberts* [1971] 56 Cr App R 95 CA (“[w]as it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as a consequence of what he was saying or doing?”). See also ICTY, *Hadžihasanović and Kubura* Trial Judgment, para. 193 (“[f]irstly, a superior who exercises effective control over his subordinates and has reason to know that they are about to commit crimes, but fails to take the necessary and reasonable measures to prevent those crimes, incurs responsibility, both because his omission created or heightened a real and reasonably foreseeable risk that those crimes would be committed, a risk he accepted willingly, and because that risk materialised in the commission of those crimes. In that sense, the superior has substantially played a part in the commission of those crimes”). The ICTY Appeals Chamber found the Trial Chamber to have erred in law in suggesting that causation between a commander’s failure to prevent subordinates’ crimes and the occurrence of these crimes is a requirement of the doctrine of command responsibility (ICTY, *Hadžihasanović and Kubura* Trial Judgment, para. 40). However, the different framework under the Court’s Statute, as noted above, is recalled. I further note that this standard is an objective test, applied from the perspective of a reasonable person in the superior’s position, with the superior’s level of knowledge and powers of effective control. It is a test of causation and not a *mens rea* component. It requires an assessment of whether the commission of the crimes was a reasonably foreseeable result of the superior’s failure to exercise control properly. How this is proven in any particular case is a matter of evidence, rather than law.

VCLT. With one notable exception,³⁴ the jurisprudential focus at the Court to date has been predominantly on the question of “policy”, rather than on the required features of an “organization” within the meaning of Article 7(2)(a).³⁵ To the extent that the term “organization” has been considered in the dominant jurisprudence, the reasoning applied has tended to be circular and lacking in certainty. For example, the commonly stated test of whether an organization has sufficient capabilities to carry out an attack against a civilian population³⁶ does nothing to guard against the risk of simply reasoning backwards, using the fact that such an attack occurred to infer the existence of an organization. I therefore cannot agree that such a test provides appropriate or adequate guidance.

26. As a preliminary matter, I note that the jurisprudence of the *ad hoc* tribunals is of limited assistance on this issue. The ICTY Appeals Chamber in *Prosecutor v. Kunarac et al.* concluded that, under customary international law, proof of a policy or a plan to commit an attack against the civilian population is not a required element of crimes against

³⁴ *The Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya and Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, ICC-01/09-19-Corr; *The Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-1; Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", 15 March 2011, ICC-01/09-01/11-2; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute and Dissenting Opinion by Judge Hans-Peter Kaul, 23 January 2012, ICC-01/09-01/11-373; *The Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1; Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", 15 March 2011, ICC-01/09-02/11-3; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute and Dissenting Opinion by Judge Hans-Peter Kaul, 23 January 2012, ICC-01/09-02/11-382-Red.

³⁵ It is noted in this regard that although the Statute uses the adjective “organizational” it is apparent that the intended sense is the policy “of an organization” (see e.g. Elements of Crimes, Introduction to Article 7 (referring to “the State or organization”); and ICC-01/09-19-Corr, Dissenting Opinion of Judge Hans-Peter Kaul, paras 37-38 (explaining his reasoning for reaching a similar conclusion).

³⁶ As also contained in the Trial Chamber II jurisprudence quoted in paragraph 158 of the Judgment.

humanity.³⁷ This Court, however, must apply the provisions of the Rome Statute.

27. The terms “organization” and “policy” are not defined in the statutory documents of the Court. Therefore, in accordance with the relevant provisions of the VCLT, the starting point is the ordinary meaning of those terms. As noted in the Judgment, the Oxford English Dictionary defines “organization” as “an organized body of people with a particular purpose”, while “organized” means “formed into a structured whole; systematically ordered and arranged”.³⁸ Similarly, Black’s Law Dictionary defines “organization” as “a body of persons (such as a union or corporation) formed for a common purpose.”³⁹

28. *The United Nations Convention against Transnational Organized Crime* (“UNTOC”) defines an “[o]rganized criminal group” in Article 2(a) as, in relevant part, “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of [...]”.⁴⁰ Although the UNTOC cannot be directly relied upon in interpreting the Rome Statute, and was adopted two years after the adoption of the latter,⁴¹ I note that the definitions above contain a number of commonalities. First, they each indicate that a collective, or plurality, of persons, rather than just a single individual, is required and, second, they indicate that there should be a particular purpose or aim. The UNTOC presents a further, and in my

³⁷ ICTY, *Kunarac et al.* Appeal Judgment, para. 98.

³⁸ Judgment, para. 158, *citing* to Concise Oxford English Dictionary (11th edition 2006). *See also* *Katanga* Trial Judgment, para. 1119.

³⁹ Bryan A. Garner (ed.), *Black’s Law Dictionary* (8th ed.)

⁴⁰ 2225 U.N.T.S. 209 (2000) (came into force on 29 September 2003). *See also* Article 2(c) defining a “structured group”, and the accompanying interpretative note on Article 2(c) “the term structured group is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined”.

⁴¹ I note, however, that the convention was negotiated, to some extent, in parallel with the Statute. The Convention has been ratified/acceded and applied by 186 state parties (as of 10 March 2016) including all major legal systems and jurisdictions. In this sense, it can be considered to offer one of the most widely accepted definitions of the term “organized” in criminal law.

view, important component by requiring a certain degree of temporal duration or continuity.⁴² That is, the collective of persons should exist for a certain period of time. In my view, such a requirement would, *inter alia*, assist in delineating an organization from, for example, a mere mob - or otherwise randomly formed and dissolved group of people engaging in spontaneous criminal conduct.

29. In light of the above, an organization could therefore be understood to require, at a minimum: (i) a collectivity of three or more persons; (ii) existing for a certain period of time, which, at least, transcends the period during which the policy was formed and implemented; (iii) with a particular aim or purpose, whether it is criminal or not, and (iv) with a certain structure. Additional potentially relevant factors which may be considered on a case-by-case basis could include: whether the group has an established internal hierarchy; whether the group exercises control over part of the territory of a state; the group's infrastructure and resources; and whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.⁴³

30. Turning to the term "policy", the ordinary meaning conveys the idea of the existence of certain guiding principles, or a proposed or adopted course of action towards a certain objective.⁴⁴ As mentioned in the Judgment, the Elements of Crimes specifies that the "policy" requires the active promotion or encouragement of an attack against a civilian population by a State or organization.⁴⁵ I note, however, that it would not

⁴² See also ICC-01/09-19-Corr, Dissenting Opinion of Judge Hans-Peter Kaul, para. 51 (referring to a "prolonged period of time" amongst a list of suggested possible criteria).

⁴³ See similarly ICC-01/09-19-Corr, para. 93.

⁴⁴ See, for example, Oxford English Dictionary defining policy as, *inter alia*, "4. A principle or course of action adopted or proposed as desirable, advantageous, or expedient; *esp.* one formally advocated by a government, political party, etc. Also as a mass noun: method of acting on matters of principle, settled practice. (Now the usual sense.)"

⁴⁵ Elements of Crimes, Introduction to Article 7, para. 3. See also *Katanga* Trial Judgment, para. 1108.

be necessary for every member of the organization to support or endorse the policy.⁴⁶ In my view, this requirement of active encouragement (or a deliberate failure to take action which is aimed at encouraging the attack)⁴⁷ is also consistent with Pre-Trial Chamber I's finding that "the concept of 'policy' [...] refers to a certain level of planning of the attack".⁴⁸ I note in this context that while a pattern of violence may be relevant from an evidentiary perspective, it does not itself constitute a "policy".

31. Finally, while resort to the drafting history is not required, I note commentators have indicated that the term "[s]tate or organizational policy" was introduced to Article 7 as a compromise for the question of whether the criteria of "widespread" and "systematic" should be disjunctive or conjunctive.⁴⁹ It has been further suggested that the formulation was based on the *Tadić* Trial Chamber's definition of "attack directed against any civilian population",⁵⁰ as well as on the ILC commentaries on its 1996 *Draft Code of Crimes against the Peace and Security of Mankind* ("1996 Draft Code").⁵¹ The *Tadić* Trial Judgment, while finding that "there must be some form of *governmental, organizational or group*

⁴⁶ See similarly, *The Prosecutor v. Germain Katanga*, Minority Opinion of Judge Christine Van Den Wyngaert, 11 March 2014, ICC-01/04-01/07-3436-AnxI, paras 192-193.

⁴⁷ Elements of Crimes, footnote 6.

⁴⁸ Gbagbo Confirmation Decision, ICC-02/11-01/11-656-Red, para. 216. See also Confirmation Decision, ICC-01/05-01/08-424, para. 81 (referring to an attack which is "planned, directed or organized").

⁴⁹ Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference", 93 *American Journal of International Law* 43 (1999). See also Herman von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court" in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), at pages 94-97.

⁵⁰ ICTY, *Tadić* Trial Judgment, para. 644.

⁵¹ Herman von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court" in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), page 95.

policy to commit these acts”,⁵² does not define “organizational policy” as such. Neither does the 1996 Draft Code.⁵³

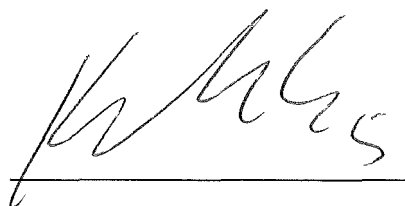
32. Nonetheless, the ILC’s *Commentary* on the 1996 Draft Code does observe that the requirement that the proscribed acts must be “instigated or directed by a government or by any organization or group” was added “to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization.”⁵⁴ In my view, such an understanding of the intent behind the development of the requirement of an “organizational policy” further supports the interpretation presented above.

⁵² ICTY, *Tadić* Trial Judgment, para. 644 (emphasis added). *See also* para. 654.

⁵³ *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), Article 18 (defining crimes against humanity as certain proscribed acts “when committed in a systematic manner or on a large scale and *instigated or directed by a government or by any organization or group*”) (emphasis added).

⁵⁴ Draft Code of Crimes against the peace and Security of Mankind with commentaries, 1996, *Yearbook of the International Law Commission, 1996*, vol. II, Part Two, page 47, para. 5. *Also* on 30 May 1946, the Legal Committee of the United Nations War Crime Commission held that: “Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims” (*see History of the United Nations War Crimes Commission and the Development of the Laws of War*, Compiled by the United Nations War Crimes Commission, 1948, page 179).

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

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

Dated this 21 March 2016

At The Hague, the Netherlands