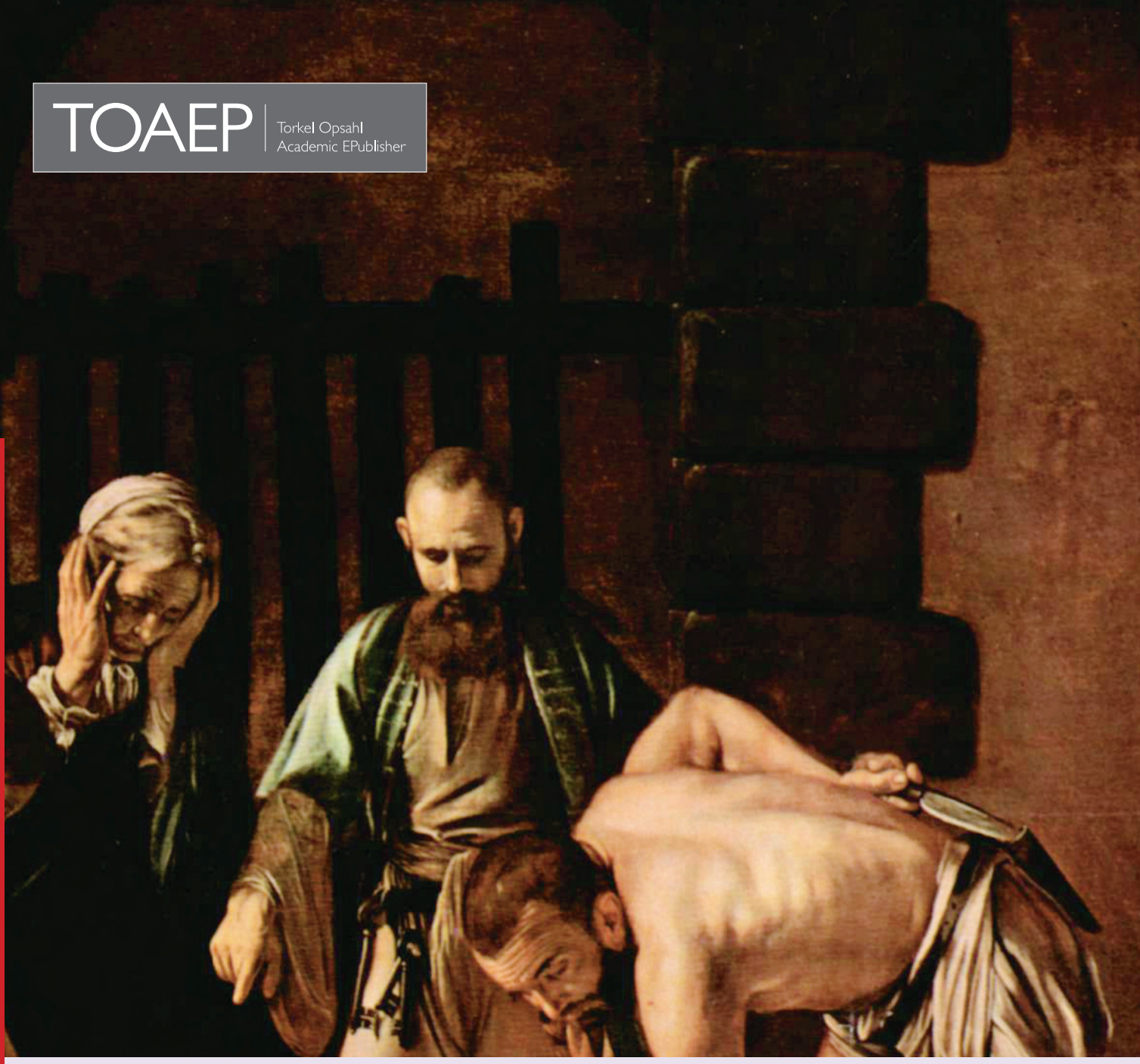
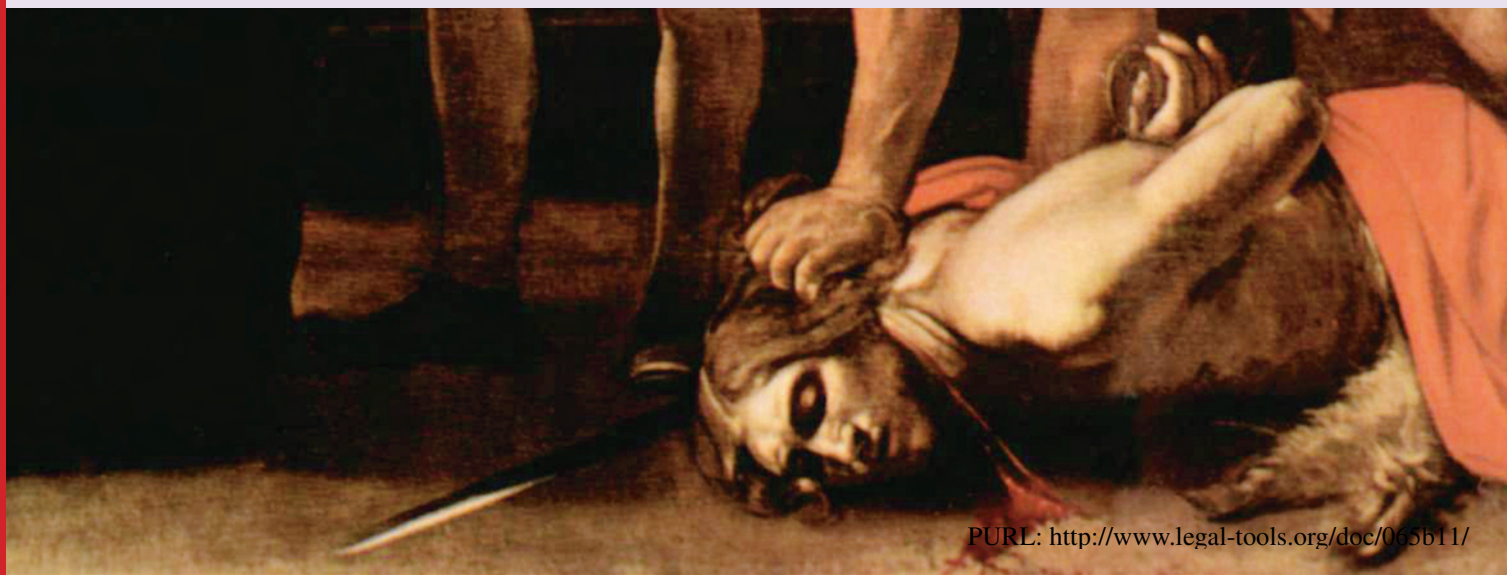
TOAEP | Torkel Opsahl Academic EPublisher



On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)



3

The ICC Case Law on the Contextual Elements of Crimes Against Humanity

Eleni Chaitidou*

The proposed International Convention on the Prevention and Punishment of Crimes Against Humanity[1] aims to close the still-existing gap concerning this category of crimes in the normative architecture of international criminal law. It offers for the first time, outside of the context of the International Criminal Court ('ICC'), a conventional text on crimes against humanity which, it is hoped, will aid in "shoring up the capacity for national legal systems to pick up cases involving crimes against humanity".[2] Attracting particular attention is the manner in which the definition of these crimes has been articulated in the Convention and the relationship between this proposed instrument and the Rome Statute ('Statute'), the founding treaty of the ICC. Clarity is soon provided in paragraph 12 of the preamble of the Convention which makes explicit reference to "Article 7 and other relevant provisions of the Rome Statute of the International Criminal Court", thus putting a spotlight on the ICC. Indeed, Article 3 of the Convention reflects almost verbatim the statutory definition of crimes against humanity applicable before the ICC. By doing so, the Convention unequivocally pays special tribute to the final compromise on the definition of crimes against humanity that States reached in their multilateral negotiations in Rome in 1998 and cements this definition's future

* **Eleni Chaitidou** is Legal Officer in the Pre-Trial Division of the International Criminal Court since 2006. The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court. The author wishes to thank Gilbert Bitti and Donald Riznik who kindly commented on earlier versions, and expresses her gratitude to Erin Rosenberg and Teodora Jugrin for proof-reading the manuscript. Finally, this article is dedicated to the memory of Judge Hans-Peter Kaul.

1 For the text of the Proposed Convention, see Annex 1, or in Leila N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011, p. 359 *et seq*.

2 Leila Sadat, "Preface and Acknowledgments", in Leila Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. xxiii.

use. What was meant to be a special definition for the purpose of the ICC Statute[3] appears to have the potential of gaining universal recognition.

Reliance on this statutory definition implies that questions of interpretation that arose under the ICC Statute are also likely to arise under the Proposed Convention. It seems therefore appropriate to look to certain decisions of the ICC that provide guidance on how different components of crimes against humanity have been construed and which aspects of the definition have challenged the effective prosecution of crimes against humanity. This chapter seeks to provide an overview of one aspect of the statutory definition of crimes against humanity which has aroused much controversy in the early case law of the ICC, that of its contextual elements. The author does not claim to resolve the complex issues pervading Article 7 of the Statute, but seeks to explain some of the issues that arose in the ICC jurisprudence which may, it is hoped, offer some lessons for the application of Article 3 of the Proposed Convention.

3.1. Introduction

Crimes against humanity have been an essential part of investigatory and prosecutorial activity before the ICC from the beginning of the Court's operation. To date, 16 out of 19 cases[4] involve(d) allegations of crimes against humanity pursuant to Article 7 of the Rome Statute.[5] Indeed, the

[3] See Article 10 of the Statute.

[4] The cases are the *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06); *Prosecutor v. Germain Katanga* (ICC-01/04-01/07); *Prosecutor v. Mathieu Ngudjolo Chui* (ICC-01/04-02/12); *Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06); *Prosecutor v. Callixte Mbarushimana* (ICC-01/04-01/10); *Prosecutor v. Sylvestre Mudacumura* (ICC-01/04-01/12); *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (ICC-02/04-01/05); *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08); *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (ICC-02/05-01/07); *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09); *Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09); *Prosecutor v. Abdallah Banda Abakaer Nourain* (ICC-02/05-03/09); *Prosecutor v. Abdel Raheem Muhammad Hussein* (ICC-02/05-01/12); *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11); *Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11); *Prosecutor v. Saif Al-Islam Gaddafi* (ICC-01/11-01/11); *Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11); *Prosecutor v. Simone Gbagbo* (ICC-02/11-01/12); *Prosecutor v. Charles Blé Goudé* (ICC-02/11-02/11). The overall number of 19 cases does not factor in the two proceedings pursuant to Article 70 of the Statute.

[5] From the outset, proceedings against *Thomas Lubanga Dyilo*, *Bahar Idriss Abu Garda*, and *Abdallah Banda Abakaer Nourain* concerned allegations of war crimes only. In a fourth case against *Sylvestre Mudacumura*, the Prosecutor had requested the issuance of a

Court's interventions in the situations in the Republic of Kenya, Libya and Côte d'Ivoire have focused exclusively on Article 7 crimes. One may therefore assume that, in the future, crimes against humanity will form the most important aspect of the cases before the ICC.[6]

In the first years, the interpretation and application of Article 7 of the Statute did not seem to raise any particular difficulties (see section 3.3.). The first situations contemplated by the Court, that is, the situations in the Republic of Uganda, the Democratic Republic of the Congo, the Central African Republic and Sudan/Darfur, concerned protracted armed conflict situations during which crimes were allegedly committed against civilians by, as the case may be, governmental forces, rebel movements and/or other armed groups. It was above all the Pre-Trial Chambers, assigned to issue warrants of arrest[7] and decide on the confirmation of charges,[8] that developed the applicable law before the ICC in the first set of cases emanating from the above-mentioned situations. Lacking any previous rulings on the different components of crimes against humanity pursuant to Article 7 of the Statute, the Judges resorted to the jurisprudence of the *ad hoc* tribunals and unhesitatingly borrowed relevant definitions and criteria therefrom. The elaborateness of their interpretative findings on the law was determined by the facts presented before them. But, as will be shown below, the legal determinations were also charged with ambiguity and conceptual vagueness. The fact that various Chambers cross-referenced to and relied on each other's decisions led to a first phase of consolidation of – but also a continuation of ambiguities in – the Court's jurisprudence on Article 7 of the Statute, pending the prospective contribution of the Trial and Appeals Chambers. All in all, the emerging consensus at the Court on the definition of crimes against humanity in the early years was not disturbed by critical questions.

warrant of arrest also involving crimes against humanity. However, Pre-Trial Chamber II rejected this request and did not include any counts of crimes against humanity in the warrant of arrest. This does not prevent the Prosecutor from re-characterizing the facts of the case as crimes against humanity in light of new evidence at the confirmation stage or from presenting a new request under Article 58 of the Statute for the issuance of a warrant of arrest involving crimes against humanity. The *Mudacumura* case will be presented in section 3.5.

6 To date, 13 out of 19 cases involve allegations of war crimes and only one case involves allegations of genocide.

7 Article 58 of the Statute.

8 Article 61(7) of the Statute.

It was only with the initiative of the former Prosecutor Luis Moreno Ocampo in November 2009 to intervene *proprio motu* in the situation in the Republic of Kenya that a discussion on the definition of crimes against humanity, and more precisely on the contextual elements of crimes against humanity, was opened for the first time (see section 3.4.). The reason for this development may be found in the fact that the Judges were confronted with a scenario which differed markedly from the situations they had hitherto examined. The events to be assessed under the purview of Article 7 of the Statute did not involve armed groups or armed rebel movements launching attacks against civilians. Rather, the criminal acts were committed by ordinary civilians, perceived to be associated with political parties, at different times and locations and with varying degrees of intensity over a period of approximately two months. Would the facts as presented at the time meet the statutory requirement of an "organizational policy" within the meaning of Article 7(2)(a) of the Statute? Concerns as to the fulfilment of this contextual element sparked a conflict of opinion within the competent Pre-Trial Chamber that was tasked with authorizing the Prosecutor's first-ever *proprio motu* investigation under Article 15 of the Statute. The disagreement remained throughout the two case proceedings that derive from this situation.

It is perhaps fair to say that the dispute over the contextual elements of crimes against humanity in the context of the *Kenya* situation was something of an eye-opener. It sensitized the prosecutorial and judicial authorities at the ICC to the need for definitional clarity of the contextual components of crimes against humanity as they have been framed in the Statute. But far more than that, the Kenya controversy seemed also to have brought about a turn in the evidentiary approach regarding crimes against humanity: some Chambers began to more rigidly scrutinize the fulfilment of each contextual legal requirement of crimes against humanity. Pre-Trial Chamber I, for example, declined to confirm any charges of crimes against humanity brought against *Callixte Mbarushimana* on the basis that there was no evidence sustaining the existence of a "policy". For the same reason, Pre-Trial Chamber II rejected a request to include allegations amounting to crimes against humanity in the warrant of arrest issued against *Sylvestre Mudacumura*. In the authorization proceedings of *proprio motu* investigations in the *Côte d'Ivoire* situation, Pre-Trial Chamber III ruled on including crimes against humanity by taking into

account the *Kenya* controversy.[9] In the first case emanating from this situation, the *Laurent Gbagbo* case, the majority of Pre-Trial Chamber I adjourned the hearing on the confirmation of charges and requested the Prosecutor to consider providing further evidence or conducting further investigation, *inter alia*, with respect to the alleged "organizational policy". Finally, in the *Germain Katanga* case, Trial Chamber II proposed a new definition of "organization" within the meaning of Article 7(2)(a) of the Statute, which, in its view, accords with the object and purpose of the Statute. As one can see, the debate on the contextual elements of crimes against humanity is still very much ongoing at the Court (see section 3.5.).

3.2. The Applicable Law

Crimes against humanity belong to the category of core crimes listed in Article 5 of the Statute that are considered to be "the most serious crimes of concern to the international community as a whole".[10] Article 7 of the Statute is presumed to codify the customary law definition of crimes against humanity.[11] Despite this principled approach, which – one would assume – could have facilitated reaching an agreement without difficulty at the Diplomatic Conference in Rome, participants at the time attest to the complicated negotiations concerning the exact definition of crimes against humanity. Considerations of "constructive ambiguity" in the wording finally allowed delegations to overcome their differences and adopt, by way of compromise, the text of Article 7 of the Statute. This achievement is underlined by the introductory words in Article 7(1) of the Statute, which sets out that this definition is "for the purpose *of this Statute*" (emphasis added).

Article 7 of the Statute contains three paragraphs: Article 7(1) of the Statute encompasses the *chapeau* elements reflecting the contextual ele-

9 Pre-Trial Chamber III, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" ('*Côte d'Ivoire* Authorisation of Investigation'), 15 November 2011, ICC-02/11-14-Corr, paras. 43, 45, 46 and 99 (http://www.legal-tools.org/doc/e0c0eb/).

10 Paragraph 4 of the preamble of the Statute.

11 Report of the Preparatory Committee on the Establishment of an International Criminal Court. Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly, 51st session, Supplement No 22, A/51/22 (1996), paras. 51−54; Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court", in Roy Lee (ed.), *The International Criminal Court: The Making of the ICC Statute*, Kluwer Law International, The Hague, 1999, p. 91.

ments of crimes against humanity in which the individual offences, as set out in sub-paragraphs (a) to (k), are embedded. Articles 7(2) and 7(3) of the Statute contain statutory definitions in relation to selected terms used in Article 7(1) of the Statute.

Of particular interest is the statutory articulation of the context of crimes against humanity as set out in the introductory sentence of Article 7(1) of the Statute, which reads:

> For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […]

Article 7(2)(a) of the Statute provides a legal definition for the notion "attack directed against any civilian population" used in Article 7(1) of the Statute, which is as follows:

> 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

In interpreting the Statute, Judges are assisted by the Elements of Crimes.[12] With respect to the current discussion, paragraph 3 of the Introduction to Crimes Against Humanity in the Elements of Crimes adds:

> "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in Article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.

Finally footnote 6 of the Elements of Crimes stipulates on the "policy" requirement:

> A policy which has a civilian population as the object of the attack would be implemented by State or organizational ac-

[12] Article 9 of the Statute. According to Article 21(1)(a) of the Statute, the Court shall apply, in the first place, the Statute and the Elements of Crimes.

> tion. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

A comparison of the above with other antecedent instruments reveals two significant discrepancies in wording. As has already been noted by others, any nexus requirement to the armed conflict, as found in other instruments,[13] is absent from the statutory definition of crimes against humanity. Likewise, any discriminatory grounds according to which the crimes occur[14] are also not required. Most importantly, there has been no attempt by the Court to read either of these two requirements into Article 7(1) of the Statute.[15]

Crimes against humanity are made of two components: the context and the specific acts. How they relate to each other is expressed in the chapeau of Article 7(1) of the Statute which confirms that the specific acts enlisted under Article 7(1)(a) to (k) of the Statute are to be considered as crimes against humanity "*when committed as part of* a widespread or systematic attack directed against any civilian population" (emphasis added). Hence, the specific acts are embedded into the wider contextual "attack". This requirement is commonly referred to as the nexus, linking the underlying act with the "attack".[16] The nexus requirement ensures that an individual offence is related to the "attack", excluding the possibility that it is an isolated act, unrelated to the prevailing context. Indicators, such as the "nature, aim and consequences" of the act, assist in the determination of

[13] See, *e.g.*, Article 6(c) of the Charter of the International Military Tribunal, as annexed to the London Agreement; Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

[14] See Article 3 of the Statute of the International Tribunal for Rwanda. A special intent element is, however, required for the crime of persecution within the meaning of Article 7(1)(h) of the ICC Statute.

[15] Therefore, it has been said that the two requirements contained in other instruments no longer form part of the customary law definition of crimes against humanity, see also Rodney Dixon, revised by Christopher Hall, "Article 7", in Otto Triffterer (ed.), *Commentary on the ICC Statute of the International Criminal Court*, C. H. Beck, München, 2008, p. 174.

[16] In the Elements of Crimes, this requirement is one of the objective conditions for establishing a crime as a crime against humanity.

whether the act formed part of the attack.[17] The Court has followed the logic of the Statute and regularly first examines and establishes the existence of such context.[18] Failure to prove a widespread or systematic attack carries the consequence that there is no need to proceed with an examination of the underlying act.[19]

The establishment of the contextual elements is also of pivotal importance for another reason. A number of crimes, such as murder or rape, do not in and of themselves bear the character of an international crime. It is the context in which they occur that 'internationalizes' them and elevates them to the category of "the most serious crimes of concern to the international community as a whole". It has therefore been argued that it is the context that, when established, confers jurisdiction on the Court and triggers the Court's intervention.[20] This consideration suggests the follow-

[17] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ('*Bemba* Confirmation of Charges'), 15 June 2009, ICC-01/05-01/08-424, para. 86 (http://www.legal-tools.org/doc/07965c/); Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ('*Kenya* Authorization of Investigation'), 31 March 2010, ICC-01/09-19-Corr, para. 98 (http://www.legal-tools.org/doc/f0caaf/); Trial Chamber II, *Jugement rendu en application de l'Article 74 du Statut* ('*Katanga* Judgment'), 7 March 2014, ICC-01/04-01/07-3436, para. 1124 ("Les actes isolés qui, par leur nature, leurs buts et leurs conséquences, diffèrent clairement d'autres actes s'inscrivant dans le cadre d'une attaque ne relèvent ainsi pas de l'Article 7-1 du Statut.") (http://www.legal-tools.org/doc/9813bb/).

[18] Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ('*Bashir* Arrest Warrant 2009'), 4 March 2009, ICC-02/05-01/09-3, para. 53 (http://www.legal-tools.org/doc/e26cf4/). Exceptions are the judgment of Trial Chamber II in the *Katanga* case and the confirmation of charges decision of Pre-Trial Chamber I in the *Laurent Gbagbo* case, in which the specific acts were examined before the context was established. However, this is not grounded in a departure from the understanding of crimes against humanity, but rather in an effort to use the findings on the specific crimes for the purpose of the context, see Trial Chamber II, *Katanga* Judgment; Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent *Gbagbo* ('*Gbagbo* Confirmation of Charges'), 12 June 2014, ICC-02/11-01/11-656-Red (http://www.legal-tools.org/doc/5b41bc/).

[19] See also Pre-Trial Chamber I, Decision on the Confirmation of Charges ('*Mbarushimana* Confirmation of Charges'), 16 December 2011, ICC-01/04-01/10-465-Red, paras. 244 and 266 (http://www.legal-tools.org/doc/63028f/).

[20] Dissenting Opinions of Judge Hans-Peter Kaul, annexed to Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ('*Ruto et al.* Confirmation of Charges'), 23 January 2012, ICC-01/09-01/11-373, p. 155, para. 25 (http://www.legal-tools.org/doc/96c3c2/); and Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ('*Muthaura et al.* Confirmation of Charges'), 23 January 2012, ICC-01/09-02/11-382-Red,

up question about the true nature of the context and whether contextual elements of crimes against humanity are jurisdictional matters and/or matters relating to substantive law, as they form part and parcel of the definition of the crime. The answer to this query has important consequences in practice. Assuming that the context is bound up with 'jurisdiction', to what extent is the Court entitled to assess the contextual elements as a matter of accepting the Court's competence in the first place? If so, would the establishment of the context as a matter of 'jurisdiction' over a particular situation relieve the Court from later asserting its existence anew when discussing the substantive merits of a case? Which threshold is determinative for the establishment of the context: a jurisdictional threshold, such as that of "degree of certainty",[21] which is not an evidentiary threshold linked to the merits of a case,[22] or the progressively higher evidentiary

para. 32 (http://www.legal-tools.org/doc/4972c0/). See also Rodney Dixon, revised by Christopher Hall, 2008, *supra* note 15.

21 *Bemba* Confirmation of Charges, para. 24, *supra* note 17; Pre-Trial Chamber II, 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, para. 9 (http://www.legal-tools.org/doc/6c9fb0/); as recalled in *Ruto et al*. Confirmation of Charges, para. 25, see *supra* note 20; Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Brill, 2008, pp. 248−249.

22 The formula 'attain the degree of certainty' was introduced by Pre-Trial Chamber II in the *Bemba* case without defining it. On the other hand, Pre-Trial Chamber I in the *Mbarushimana* case, refrained from making a pronouncement in the context of the suspect's challenge to jurisdiction, Pre-Trial Chamber I, Decision on the "Challenge to the Jurisdiction of the Court", 26 October 2011, ICC-01/04-01/10-451, para. 5 (http://www.legal-tools.org/doc/864f9b/). In any event, it is clear that the Court draws a distinction between preliminary procedural questions, such as those of jurisdiction and admissibility, and the merits of the case. This is supported by the fact that Chambers have declined to apply any of the already existing evidentiary thresholds pertaining to the criminal proceedings *stricto sensu* under the Statute. The same approach was followed in the context of admissibility issues which, as a concept, is also enshrined in Article 19(1) of the Statute, see, *e.g.*, Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, paras. 54−55 (http://www.legal-tools.org/doc/339ee2/). Pre-Trial Chamber II, when deciding on the admissibility challenge of the Republic of Kenya did not refer to any standard at all, see Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 41 ("[T]he Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions.") (http://www.legal-tools.org/doc/bb4591/).

thresholds[23] of the Statute? Which type of evidence would be considered sufficient to satisfy the relevant standards? Some of the above questions have been addressed but are not yet fully explored by the Court.

The practice of the Office of the Prosecutor suggests that contextual elements of the crimes (also) pertain to the issue of 'jurisdiction'. Indeed, during the preliminary examination of a 'situation',[24] the Prosecutor has regularly extended his/her analysis on the jurisdictional scope to a thorough legal and factual assessment of the contextual elements of the crimes, without applying any particular evidentiary threshold.[25] In fact, the opening of the investigation into the situation in Venezuela was declined on the grounds that "the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied".[26] The mandate of the Court, as expressed in Article 1 of the Statute, the limited resources of the Court, and the ensuing necessity for the Prosecutor to carefully select the situations in which the Court would eventually inter-

[23] Appeals Chamber, Judgment on the Appeal of the Prosecutor Against the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir", 3 February 2010, ICC-02/05-01/09-73, para. 30 (http://www.legal-tools.org/doc/9ada8e/); *Kenya* Authorization of Investigation, paras. 28 and 34−35, see *supra* note 17.

[24] Article 53(1) of the Statute sets out the criteria for the preliminary examination. Subparagraph (a) instructs the Prosecutor to consider whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed". This has been interpreted by Pre-Trial Chamber II to include all jurisdictional parameters, including *ratione materiae*, see *Kenya* Authorization of Investigation, para. 39, *supra* note 17.

[25] See the "Policy Paper on Preliminary Examinations" of 13 November 2013, paras. 36, 39 ("Accordingly, for the purpose of assessing subject-matter jurisdiction, the Office considers, on the basis of the available information, the relevant underlying facts and factors relating to the crimes that appear to fall within the jurisdiction of the Court; contextual circumstances, such as the nexus to an armed conflict or to a widespread or systematic attack directed against a civilian population, or a manifest pattern of similar conduct directed at the destruction of a particular protected group or which could itself effect such destruction"), 80 and 81 ("Phase 2 analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court").

[26] In the same decision, the Prosecutor also determined that, in relation to allegations of war crimes, the situation "clearly does not meet the threshold of an armed conflict", see Office of the Prosecutor, Decision of the Prosecutor Not to Open an Investigation Into the Situation in Venezuela dated 9 February 2006; see similarly the conclusion not to open an investigation into the situation in the Republic of Korea, Office of the Prosecutor, Article 5 Report, June 2014, paras. 42 *et seq.*, and 82.

vene justify such a reasonable approach. Likewise, in the context of 'situation'-related proceedings as to the authorization of the commencement of an investigation under Article 15 of the Statute, the analysis of the material under the rubric of 'jurisdiction' suggests that Pre-Trial Chambers also consider the contextual elements of crimes against humanity to be part of jurisdiction.[27] However, this approach changes the moment a 'case' is opened. There, the Court has deferred the assessment of the context to the discussion on the merits of the case.[28] In the context of the two *Kenya* cases, the Appeals Chamber in particular seized the opportunity to clarify this issue as a matter of principle. While it did not take a position on the proposition as to the jurisdictional nature of the context,[29] it nevertheless highlighted the risk of duplicating the discussion and cautioned against conflating the separate concepts of 'jurisdiction' with, at the time, the

[27] See *Kenya* Authorization of Investigation, *supra* note 17; *Côte d'Ivoire* Authorisation of Investigation, *supra* note 9.

[28] *Ruto et al*. Confirmation of Charges, para. 35, see *supra* note 20; *Muthaura et al*. Confirmation of Charges, paras. 33−34, see *supra* note 20. For a different view see Judge Hans-Peter Kaul:

> [T]he answer to the question of whether the Court has such jurisdiction is, in principle, not subject to the progressively higher evidentiary thresholds which apply at the different stages of the proceedings. [...] [A]n affirmative answer to that question is a pre-condition to the Court's discussion of the merits. Consequently, the question cannot be deferred to the merits but must be ruled upon definitively *ab initio*. In other words, the Court does not have limited jurisdiction when issuing a warrant of arrest or summons to appear; slightly more jurisdiction at the confirmation of charges stage; and jurisdiction 'beyond reasonable doubt' at trial, after the merits have been fully adjudged. The Court either has jurisdiction or does not.

See, *e.g.*, Dissenting Opinion of Judge Hans-Peter Kaul, annexed to *Ruto et al.* Confirmation of Charges, pp. 155−156, para. 26, *supra* note 20; and annexed to *Muthaura et al.* Confirmation of Charges, pp. 177−178, para. 33, *supra* note 20.

[29] Referring to the Dissenting Opinion of Judge Hans-Peter Kaul in the *Kenya* cases, in which the dissenting Judge advocated that the context relates to both the jurisdiction and the merits of the case, the Appeals Chamber replied that these arguments "do not affect the conclusion of the Appeals Chamber", see, *e.g.*, Appeals Chamber, Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang Against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" ('*Ruto et al*. Appeal Decision'), 24 May 2012, ICC-01/09-01/11-414, para. 30 (http://www.legal-tools.org/doc/6934fb/). The same finding was made in the *Kenyatta* case (ICC-01/09-02/11).

confirmation of charges process, during which this question surfaced.[30] Finally, the Appeals Judges concluded:

> […] the interpretation and existence of an 'organizational policy' relate to the substantive merits of this case as opposed to the issue of whether the Court has subject-matter jurisdiction to consider such questions. As the Prosecutor has expressly alleged crimes against humanity, including the existence of an 'organizational policy', the Appeals Chamber finds that the Court has subject-matter jurisdiction over the crimes […]. Whether the Prosecutor can establish the existence of such a policy, in law and on the evidence, is a question to be determined on the merits.[31]

The solution suggested above has left little flexibility for the Court to react at the stage of a 'case' – in admittedly exceptional situations where the context is controversial – in the same manner as it would during the 'situation' stage. As seen above, should the Prosecutor during the preliminary examination stage determine that the context of crimes against humanity does not exist, he/she would render a finding on 'jurisdiction'. The same applies for the Pre-Trial Chamber that reviews the Prosecutor's assessment in the context of the Article 15(4) authorization proceedings or Article 53(3)(a) review proceedings. For which reasons the same question is treated differently in the context of a 'case' is not further developed by the Appeals Chamber.[32] Rather, the Judges resolved the matter by highlighting the procedural 'context' of the cases *sub judice* in which this question arose. The consequence of the Appeals Chamber's ruling is that in 'case' proceedings any concerns as to the existence of the context must be postponed to the evidentiary discussion on the merits; the Judges cannot raise any concerns in relation to the jurisdictional test within the

[30] *Ibid*., *Ruto et al*. Appeal Decision, paras. 29−30; see also Appeals Chamber, Decision on the Appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta Against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" ('*Muthaura and Kenyatta* Appeal Decision'), 24 May 2012, ICC-01/09-02/11-425, paras. 35−36 (http://www.legal-tools.org/doc/b6aad9/).

[31] *Ibid*.

[32] In fact, should the Appeals Chamber entertain the question of 'jurisdiction' in the context of reviewing the Pre-Trial Chamber's relevant decisions under Article 15(4) or 53(3)(a)/53(1)(a) of the Statute, then a distinction between 'jurisdiction' and 'merits of the case' is no longer possible.

meaning of Article 19(1) of the Statute.[33] Effectively, the discussion on the context has been removed from the subject-matter jurisdiction of the Court; jurisdictional challenges under Article 19(2) of the Statute purporting an alleged absence of the context cannot be brought. Far more, the Appeals Chamber suggests that the Prosecutor's initial labelling of the crimes, which triggers the Court's intervention in the first place, be accepted unquestionably by the Judges: "As the Prosecutor has expressly alleged crimes against humanity, […] the Appeals Chamber finds that the Court has subject-matter jurisdiction over the crimes".[34] But, the actual effect of the above cited statement lies in entertaining the contextual elements at the stage of the merits, subjecting their assessment to the progressively higher thresholds of the Statute. Undoubtedly, as part of the definition of crimes against humanity, the contextual elements are inextricably intertwined with the substantive law. The case law of international courts and tribunals also supports this approach. But, whether this will prove to be a practicable and sustainable approach for the Office of the Prosecutor at the ICC still needs to be seen.[35] In the case of the *Prosecutor v. Laurent Gbagbo*, it became clear what such an assessment at the stage of the merits entails.

[33] "Even if the Trial Chamber were not to find, in law or on the evidence that there was an organizational policy this would not mean that the Court did not have jurisdiction over the case but rather that crimes against humanity were not committed", see *Ruto et al.* Appeal Decision, para. 30, *supra* note 29; *Muthaura and Kenyatta* Appeal Decision, para. 36, *supra* note 30.

[34] Also this statement is difficult to uphold in proceedings at the 'situation' level as the very essence of Article 15(4) and 53(3)(a)/53(1)(a) proceedings is to enquire, amongst other, into the Court's competence *ratione materiae*. Deference to the assessment of the Prosecutor is difficult to reconcile with the Pre-Trial Chamber's supervisory functions. By the same token, the argumentation advanced by the Appeals Chamber, *i.e.*, that a distinction must be made between the 'existence' and the 'contours' of the crime, must be viewed in light of the particular circumstances in which this statement was made. It borrowed this argument from the case law of other international tribunals that do not have any situation-related proceedings but deal with cases in a pre-defined situation only. Again, in the framework of Articles 15, 53(1)(a)/53(3)(a) proceedings, this argument does not carry over because a decision on the 'contours' of the crime is part and parcel of the Court's assessment, see *ibid*., *Ruto et al.* Appeal Decision, paras. 31−32, *supra* note 29; *Muthaura and Kenyatta* Appeal Decision, para. 37, *supra* note 30. It is unfortunate that the Appeals Chamber did not analyse the potential two-fold nature of the context broadly, by taking into account the operation of the Statute as a whole.

[35] See Dissenting Opinion of Judge Hans-Peter Kaul, *supra*, note 28.

Regardless of when the components of the contextual elements are to be assessed, considerations of legal certainty require that their meaning and scope be clearly defined. As the wording of Article 3 of the Proposed Convention replicates that of Article 7 of the Statute, how the statutory provision has been interpreted and applied in the context of the various situations before the Court may be of interest. As has been pointed out in the introduction, the jurisprudence of the Court began rather harmoniously but soon was upset by a number of discordant voices. The following summary of the evolution in the interpretation of Article 7 of the Statute is meant to assist in understanding where the Court stands today. A short description of the underlying cases will introduce these developments with a view to allowing the reader to understand the various approaches taken by the Chambers.

3.3. The First Cases

The first cases involving crimes against humanity emanate from situations which share a basic factual constellation: parts of the civilian population are menaced and targeted over several years by State forces or rebel groups/armed movements, which have adopted an inhumane and toxic policy to commit an attack against the former. Regularly, civilians are targeted because of their perceived affiliation with one side of the conflict. In the scenario involving a conflict situation between armed groups, the State is weak or not in a position to assert its authority over at least parts of the territory. The armed groups have filled this gap and pursue their goals by resorting to brutal violence. Below, four representative case studies, which provided the factual basis against which the Chambers developed the analysis of the applicable law, are introduced.

3.3.1. The Facts

The first case emanates from the situation in the Republic of Uganda which was referred to the Court by the Republic of Uganda itself. It concerns *Joseph Kony*, *Vincent Otti*, *Okot Odhiambo and Dominic Ongwen*,[36]

[36] A warrant of arrest was issued separately for each suspect. For ease of reference, only reference to the warrant of arrest against *Joseph Kony* will be made in this chapter. A further warrant of arrest was issued against the fifth suspect *Raska Lukwiya* who was killed subsequently. Proceedings against him were terminated and the warrant of arrest ceased to have effect, see Pre-Trial Chamber II, Decision to Terminate Proceedings Against Raska Lukwiya, 11 July 2007, ICC-02/04-01/05-248 (http://www.legal-tools.org/doc/3e6d25/).

leadership members of the 'Lord's Resistance Army' ('LRA'), for whom warrants of arrest were issued on 8 July 2005[37] on account of their alleged involvement in the commission of crimes in Northern Uganda. In the respective warrants, Pre-Trial Chamber II held that there were reasonable grounds to believe that the LRA had been carrying out an insurgency against the Government of Uganda and the Ugandan Army and local defence units since at least 1987.[38] In pursuing its goals the LRA leadership purportedly devised and implemented a strategy to brutalize and target the civilian population in a "campaign of attacks".[39] The Chamber further held that the LRA, led by *Joseph Kony*, is "organized in a military-type hierarchy and operates as an army"[40] and that *Joseph Kony* had "issued broad orders to target and kill civilian populations, including those living in camps for internally displaced persons".[41] Accordingly, *Joseph Kony* and the co-suspects were believed to be responsible, *inter alia*, for the commission of crimes against humanity and war crimes in connection with six attacks during sometime in 2003 and sometime in 2004.[42]

The second case stems from the situation in the Democratic Republic of the Congo ('DRC') which was referred to the Court by the DRC itself. *Germain Katanga*, President of the Ngiti militia 'Forces de résistance patriotique en Ituri' ('FRPI') and *Mathieu Ngudjolo Chui*, allegedly a member of the 'Front des Nationalistes et Intégrationnistes' ('FNI') were brought before the Court for their alleged participation in the attack of the village Bogoro on 24 February 2003 which "resulted in the deaths of approximately 200 civilians".[43] In the decision confirming the charges, Pre-Trial Chamber I found substantial grounds to believe that the Bogoro attack occurred in the context of a "widespread campaign of military attacks" against various locations throughout Ituri "from the end of 2002

37 The initial warrant of arrest against *Joseph Kony* was amended on 27 September 2005, see Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53 (http://www.legal-tools.org/doc/b1010a/).

38 *Ibid*., para. 5.

39 *Ibid*., paras. 9 and 12.

40 *Ibid*., para. 7.

41 *Ibid*., para. 12.

42 *Ibid*., paras. 13 and 42.

43 Pre-Trial Chamber I, Decision on the confirmation of charges ('*Katanga and Chui* Confirmation of Charges'), 30 September 2008, ICC-01/04-01/07-717, para. 408 (http://www.legal-tools.org/doc/67a9ec/).

until the middle of 2003".[44] Special mention is made in the decision to the killing of about 1,200 civilians in the village of Nyankunde.[45] The military attacks were directed against the civilian population of predominantly Hema ethnicity of the region Ituri[46] and were committed "pursuant to a common policy and an organized common plan" which aimed at, *inter alia*, specifically targeting the Hema civilians, in the context of a larger campaign of reprisals, and destroying Bogoro in order to ensure control over the route to Bunia.[47] Moreover, Pre-Trial Chamber I found that the Bogoro attack also occurred in context of an armed conflict taking place in Ituri from August 2002 until May 2003 that involved a number of local armed groups and the forces of at least one State.[48] Accordingly, both *Germain Katanga* and *Mathieu Ngudjolo Chui* were committed to trial for having committed crimes against humanity and war crimes.[49]

The third case emanates from the situation in the Central African Republic ('CAR') which was referred to the Court by that State itself. *Jean-Pierre Bemba Gombo* was charged with criminal responsibility for the commission of crimes committed by elements of his militia 'Mouvement de Libération du Congo' ('MLC') during the period of 25 October 2002 until 15 March 2003 at different localities in the CAR. In its decision on the confirmation of charges, Pre-Trial Chamber II found substantial grounds to believe that crimes had taken place in the context of a protracted confrontation between, on the one hand, the national armed forces loyal to former CAR President, Ange-Félix Patassé, assisted by MLC combatants commonly referred to as 'Banyamulenge', and, on the other, a rebel movement led by former Chief of Staff of the CAR national armed forces, François Bozizé. Other foreign armed groups were also believed to be involved in the conflict. The MLC contingent, of which *Jean-Pierre Bemba Gombo* was purportedly the commander-in-chief, was sent to the CAR in response to a call from Ange-Félix Patassé who was facing a

44 *Ibid*., paras. 409−411 and 416.

45 *Ibid*., para. 409, footnote 535.

46 *Ibid*., para. 411.

47 *Ibid*., para. 413.

48 *Ibid*., paras. 239−241.

49 *Mathieu Ngudjolo Chui* was later acquitted by Trial Chamber II as it could not be established beyond reasonable doubt that he was the commander of the armed group he was associated with at the material time, see Trial Chamber II, *Jugement rendu en application de l'Article 74 du Statut*, 18 December 2012, ICC-01/04-02/12-3 (http://www.legal-tools.org/doc/120cd8/).

coup by François Bozizé. *Jean-Pierre Bemba Gombo* was committed to trial for his criminal responsibility, as military commander, for crimes against humanity and war crimes.[50]

Finally, the fourth case stems from the situation in Sudan/Darfur, which was referred to the Court by Security Council resolution 1593(2005). A case was brought against the current President of Sudan, *Omar Hassan Ahmad Al Bashir*, for his alleged responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups inhabiting the Darfur region.[51] The alleged crimes took place over five years, from April 2003 to 14 July 2008, affecting hundreds of thousands of civilians. In the first warrant of arrest for *Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I found reasonable grounds to believe that, as President, he had used the State apparatus, involving the Sudanese army and police forces, national intelligence and security services, the humanitarian aid commission and the allied Janjaweed militia group, to conduct a counter-insurgency campaign against several armed groups in the Darfur region. The campaign was believed to have as its aim the unlawful attack on the Fur, Masalit and Zaghawa civilian population of Darfur perceived to be close to armed groups opposing the government of Sudan in the ongoing armed conflict.[52] The attacks, conducted against a great number of villages and towns across large areas of Darfur,[53] were regularly introduced by air

[50] *Bemba* Confirmation of Charges, see *supra* note 17.

[51] *Bashir* Arrest Warrant 2009, see *supra* note 18; Pre-Trial Chamber I, Second Decision on the Prosecution's Application for a Warrant of Arrest ('*Bashir* Arrest Warrant 2010'), 12 July 2010, ICC-02/05-01/09-94 (http://www.legal-tools.org/doc/50fbab/). Prior to that, Pre-Trial Chamber I had issued warrants of arrest against *Ahmad Muhammad Harun ('Harun')* and *Ali Muhammad Ali Abd-Al-Rahman ('Kushayb')*. That case overlaps, to a great extent, with the facts of the case against the current President *Omar Hassan Ahmad Al Bashir*, but is more limited in its temporal scope, see Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute ('*Harun and Kushayb* Arrest Warrant'), 27 April 2007, ICC-02/05-01/07-1-Corr (http://www.legal-tools.org/doc/e2469d/).

[52] *Ibid*., paras. 55, 62−70, 76−78, and 83.

[53] Note was taken of the reported attacks against the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West-Darfur (August/September and December 2003); the towns of Shattaya and Kailek in South Darfur (February/March 2004); between 89 to 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram locality in South Darfur (between November 2005 and September 2006); the town of Muhajeriya in the Yasin locality in South Darfur (8 October 2007); the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns

plane bombings followed by a wide line formation of attackers in tens or hundreds of vehicles and camels.[54] The localities concerned were pillaged and means of survival in the area, including food, shelter, crops, livestock, wells and water pumps, were destroyed.[55] Thousands of civilians are believed to have been killed[56] tortured,[57] raped,[58] and up to 2.7 million civilians from the Fur, Masalit and Zaghawa groups forcibly transferred into inhospitable terrain where some have died as a result of thirst, starvation and disease.[59]

3.3.2. The Early Interpretation

The above cases can be said to have laid down the foundations regarding the appropriate interpretation and application of Article 7 of the Statute. Some of the legal determinations made therein remain uncontested and are systematically applied in different situations and cases. As already explained above, the centrepiece of the Court's enquiry is the existence of the widespread or systematic "attack", without which the crimes remain ordinary crimes.[60] As also described above, the Statute assists with a definition in Article 7(2)(a) of the Statute for the component "attack", but remains silent as to the terms "widespread" and "systematic". As will be

in the Kulbus lovality in West Darfur (January/February 2008); and Shegeg Karo and al-Ain areas in North Darfur (May 2008).

54 *Bashir* Arrest Warrant 2009, para. 85, see *supra* note 18.

55 *Ibid*., paras. 77 and 91.

56 *Ibid*., paras. 94 and 97. See also *Bashir* Arrest Warrant 2010, footnotes 32 and 33, *supra* note 51.

57 *Ibid*., *Bashir* Arrest Warrant 2009, para. 104.

58 *Ibid*., para. 108.

59 *Ibid*., para. 100. On 12 July 2010, the Chamber issued a second warrant of arrest concluding that the crime of genocide had been fulfilled by killing, causing serious bodily harm and deliberately inflicting on the Fur, Masalit and Zaghawa groups conditions of life calculated to bring about their physical destruction in whole or in part, see *Bashir* Arrest Warrant 2010, *supra* note 51.

60 As was later acknowledged in the *Mbarushimana* case, see *Mbarushimana* Confirmation of Charges, para. 244, *supra* note 19 ("Acts such as those charged by the Prosecution under Article 7 of the Statute only qualify as crimes against humanity, pursuant to Article 7(1) of the Statute, when 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'"); see similarly in the *Mudacumura* case, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58 of the Statute ('*Mudacumura* Arrest Warrant'), 13 July 2012, ICC-01/04-01/12-1-Red, para. 22 (http://www.legal-tools.org/doc/ecfae0/).

shown, in these cases, the Court further elicited the meaning of those qualifiers.

3.3.2.1. The "Attack"

The Judges regularly embraced the definitional specification of "attack directed against any civilian population" in Article 7(2)(a) of the Statute, but went further to concretize its meaning to the extent needed for the determination of the first cases. The "attack" as a "course of conduct" has been described largely as a "campaign or operation carried out against civilians" that, as prescribed by the Elements of Crimes, does not need to carry the features of a military attack.[61] The notions of 'campaign' or 'operation' seem to imply a certain degree of magnitude, continuity and linkage between individual acts. However, in light of the facts of the first cases, these notions have not been further elaborated upon. The "attack" is further characterized by two cumulative elements.

The "multiple commission of acts and the attack being pursuant to or in furtherance of a State or organizational policy to commit such attack" are statutory components that assist in identifying the "attack" as such.[62] The Court devoted some effort in giving those two distinct conditions appropriate meaning and effect. It is thus clear that the Court did not dispose of those conditions or consider them redundant or otherwise subsumed. At first, the "course of conduct" is conditioned upon the existence of "multiple commission of acts". In the *Bemba* case, Pre-Trial Chamber II understood this condition to mean "that more than a few isolated incidents or acts as referred to in Article 7(1) of the Statute have occurred".[63] To support a finding of this kind, consideration was given to the commission of the specific generic acts listed under Article 7(1) of the Statute.[64]

---

61 *Bemba* Confirmation of Charges, para. 75, see *supra* note 17. This definition was later endorsed by, *e.g.*, *Katanga* Judgment, para. 1101, see *supra* note 17; Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda ('*Ntaganda* Confirmation of Charges'), 11 June 2014, ICC-01/04-02/06-309, paras. 22−23 (http://www.legal-tools.org/doc/5686c6/); and *Gbagbo* Confirmation of Charges, para. 209, see *supra* note 18.

62 *Ibid*., *Bemba* Confirmation of Charges, para. 80. This seems to also be the starting point for *Katanga and Chui* Confirmation of Charges, para. 393, see *supra* note 43.

63 *Ibid*., *Bemba* Confirmation of Charges, para. 81.

64 *Ibid*., paras. 92 and 108. As an aside, it is noteworthy that in a later case, the Court may have considered as relevant all types of acts committed during an operation, including

Given the scale and duration of the military operations carried out against the civilian population in the first cases, this sub-element of Article 7(2)(a) of the Statute equally did not attract much attention.

For an "attack" to be qualified as such under the Statute, it is not sufficient to identify a multiplicity of violent acts. It is also not sufficient that they occur in the course of a 'campaign' or 'operation'. Rather, the acts of violence, which give the "course of conduct" its identity, must be linked or brought together by way of a "policy". This requirement is expressed in the element "pursuant to or in furtherance of a State or organizational policy to commit such attack" in Article 7(2)(a) of the Statute.[65] The legal pronouncements of the Court on this particular condition in the early case law are brief and, compared to later decisions, underdeveloped. To start with, no judicial clarification is given with respect to the two notions "pursuant to or in furtherance of" and what the difference is between either of them, if any. As regards the legal requirement of a "policy", Pre-Trial Chamber II in the *Bemba* case simply suggested that the policy "implies that the attack follows a regular pattern"[66] and need not be formalized.[67] And, the same Chamber added that any attack "which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion".[68] This latter finding is borrowed from a decision of Pre-Trial Chamber I in the *Katanga/Ngudjolo* case, which added to the above that the policy involves the use of "public or private resources".[69] As we will see below, the factor of the organized nature of the crimes or the pattern in which they occur is also used to evidence the existence of 'systematicity'. Thus, from an *evidentiary* point of view, the

what could be considered only as war crimes, see *Ntaganda* Confirmation of Charges, paras. 25−30, *supra* note 61.

65 "It is the existence of a policy that unites otherwise unrelated inhumane acts, so that it may be said that in the aggregate they collectively form an 'attack'", see Herman von Hebel and Darryl Robinson, 1999, p. 97, *supra* note 11.

66 *Bemba* Confirmation of Charges, para. 81, see *supra* note 17.

67 *Ibid*., para. 81; see also *Katanga and Chui* Confirmation of Charges, para. 396, *supra* note 43 ("The policy need not be explicitly defined by the organisational group"). This finding is later endorsed also by other Chambers, such as in the *Laurent Gbagbo* case, *Gbagbo* Confirmation of Charges, para. 215, see *supra* note 18.

68 *Ibid*., *Bemba* Confirmation of Charges, see *supra* note 17. This finding is later endorsed in, *e.g.*, the *Kenyatta* case, see *Muthaura et al*. Confirmation of Charges, para. 111, *supra* note 20; and the *Laurent Gbagbo* case, see *ibid*., *Gbagbo* Confirmation of Charges.

69 *Katanga and Chui* Confirmation of Charges, para. 396, see *supra* note 43.

Court simply accepts that the "policy" can be inferred from the existence of a regular pattern/organized nature of the crimes[70] without proposing a definition or dissecting the relationship between the "policy" and the related 'systematic' requirement.[71] Chambers seem to follow the logic: "If the acts of violence follow a regular pattern, there must be a policy behind it". Pre-Trial Chamber II in the *Bemba* case, for example, relied on factors such as threatening civilians, conducting house-to-house searches, intruding into houses, and looting goods to infer such a "policy".[72] By using language pertaining to the 'systematic' prong of the Article 7(1) definition, the early case law seems to meld the two concepts[73] and indeed offers little clarity as to which meaning the Statute foresees for both distinct terms.[74]

As regards the authors of such a "policy", Pre-Trial Chambers have laconically referred to "groups of persons who govern a specific territory or […] any organization with the capability to commit a widespread or systematic attack against a civilian population".[75] The reference to the organization's 'governance' of a specific territory introduces a somewhat high threshold and is reminiscent of the discussion on the existence of

[70] See, *e.g.*, *Bemba* Confirmation of Charges, para. 115, *supra* note 17. It is also noted that in the decision concerning the issuance of the first warrant of arrest in the *Bashir* case, the existence of the "policy" is accepted without any further explanation, see *Bashir* Arrest Warrant 2009, paras. 76 and 83, *supra* note 18.

[71] Indeed, as was highlighted later in the *Laurent Gbagbo* case, "evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under Article 7(1) and 7(2)(a) of the Statute", *Gbagbo* Confirmation of Charges, para. 216, see *supra* note 18.

[72] *Bemba* Confirmation of Charges, para. 115, see *supra* note 17.

[73] See, *e.g.*, Pre-Trial Chamber I in the *Harun/Kushayb* case, which infers conversely the systematicity from the existence of a "policy", *Harun and Kushayb* Arrest Warrant, *supra* note 51, para. 62.

[74] Some clarity is later offered in the *Katanga* judgment, in which Trial Chamber II articulates that the "policy" implies "*un projet préétabli ou un plan à cet effet*", a pre-established design or plan, to attack the civilian population, the details of which may be readily identifiable only in retrospect, once the attack has unfolded, see *Katanga* Judgment, paras. 1109−1110, *supra* note 17.

[75] *Bemba* Confirmation of Charges, para. 81, see *supra* note 17. The same interpretation is to be found in *Katanga and Chui* Confirmation of Charges, para. 396, see *supra* note 43. Reference was made later to these holdings in the *Laurent Gbagbo* case, see *Gbagbo* Confirmation of Charges, para. 217, *supra* note 18.

'organized armed groups'.[76] Indeed, the Judges' interpretation of the law appears to have been influenced by the facts of the cases before them. Moreover, no particular differentiation is made between the policy of a "State" and that of an "organization". In fact, in the *Bashir* case, Pre-Trial Chamber I, when issuing the first warrant of arrest, simply refers to the "Government of Sudan policy", without further contemplating the fact that the Sudanese conflict party included also allied militia groups, which are clearly not part of the State structure.[77] Likewise, the attribution of the policy to the State or organization is also not further discussed. Again, the shortcomings of the early jurisprudence may be explained by the fact that the cases simply did not raise any particular interpretative difficulties for the Judges. It may also have helped that the cases involved charges of crimes against humanity and war crimes the latter of which necessitated the presence of 'organized armed groups' within the meaning of Article 8(2)(f) of the Statute. The basic elaboration of the Judges on this point was sufficient for the purposes of the early cases: there was simply no doubt that the LRA, FNI/FRPI, the MLC or the Sudanese governmental forces fulfilled the statutory requirement of an "organization"/"State" within the meaning of Article 7(2)(a) of the Statute.

From a legal point of view, the most uncontroversial requirement in the early jurisprudence of the Court is the target group of crimes against humanity. Contrary to what Article 7(2)(a) of the Statute announces, the constitutive features of the victimized group are not further set out. Chambers have underscored that the "attack" must have as its primary object the civilian population.[78] This collective entity has been construed to include "all persons who are civilians as opposed to members of armed forces and other legitimate combatants" of "any nationality, ethnicity or

[76] See, *e.g.*, *ibid*., *Katanga and Chui* Confirmation of Charges, para. 239. However, Pre-Trial Chamber II in the *Bemba* case did not discuss the element of 'control over the territory', see *ibid*., *Bemba* Confirmation of Charges, paras. 233−234.

[77] *Bashir* Arrest Warrant 2009, paras. 55, 83, see *supra* note 18. It is not suggested here that the involvement of private entities negates the existence of a State policy. Rather, it must be assumed that Pre-Trial Chamber I saw no need to qualify this element for the purpose of the issuance of the warrant of arrest. This question became relevant again in the context of the *Laurent Gbagbo* case (see section 3.5.).

[78] *Bemba* Confirmation of Charges, para. 76, see *supra* note 17 ("the civilian population must be the primary object of the attack and not just an incidental victim of the attack"). This was later endorsed by *Katanga* Judgment, para. 1104, see *supra* note 17.

other distinguishing features".[79] All the Prosecutor must demonstrate is that the "attack" was not directed against only "a limited and randomly selected group of individuals"; he or she must not provide evidence that the entire population of a geographical area was affected.[80] In the *Katanga* judgment,[81] Trial Chamber II would later add that the presence of non-civilians within the population does not deprive the collectivity of its protection as civilian.[82]

One last point: in the first cases, the "attack" was presented as consisting of a series of assaults or 'contextual attacks' against the civilian population that took place over a prolonged period of time and in various locations. The events, for which the suspect would be held accountable, formed only part of those assaults or 'contextual attacks'. This helped the Court to understand the contextual environment in which the charged incidents took place and eased the determination of "attack" and, subsequently, that of "widespread". This kind of case presentation also conformed to the reading of Article 7(1) of the Statute that considers the specific acts, the charged incidents, to be "part of" the "attack", suggesting that there may be more acts than those charged that formed the overall "attack". As would be later pronounced by Pre-Trial Chamber II in the *Ntaganda* case, "the Prosecutor is free to present further additional acts to

[79] *Ibid*., paras. 76 and 78; *Katanga and Chui* Confirmation of Charges, para. 399, see *supra* note 43; Pre-Trial Chamber I in the *Bashir* case seems to exclude in addition those individuals "who, despite not being members of the said armed groups, were assisting any of them in such a way to amount to taking part in the hostilities", see *Bashir* Arrest Warrant 2009, para. 92, *supra* note 18. This jurisprudence was followed later, *e.g.*, in the *Kenyatta* case, see *Muthaura et al*. Confirmation of Charges, para. 110, *supra* note 20; and in the *Laurent Gbagbo* case, see *Gbagbo* Confirmation of Charges, para. 209, *supra* note 18. For a critical appraisal, see Leila N. Sadat, "Crimes Against Humanity in the Modern Age", in *American Journal of International Law*, 2013, vol. 107, p. 360.

[80] *Bemba* Confirmation of Charges, para. 77, see *supra* note 17.

[81] With the decision dated 21 November 2012, the Trial Chamber II severed the charges against the two accused, *Germain Katanga* and *Mathieu Ngudjolo Chui*, and announced to render its judgment against *Mathieu Ngudjolo Chui* on 18 December 2012, see Trial Chamber II, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, 21 November 2012, ICC-01/04-01/07-3319 (http://www.legal-tools.org/doc/51ded0/) .

[82] *Katanga* Judgment, para. 1105, para. 1105, see *supra* note 17 ("Il convient de souligner que, conformément à la jurisprudence des tribunaux *ad hoc* fondée sur l'article 50 du Protocole additionnel I aux Conventions de Genève du 12 août 1949, la population ainsi prise pour cible doit être essentiellement composée de civils, la présence en son sein de personnes ne l'étant pas n'ayant dès lors aucune incidence sur sa qualification de population civile.").

the ones charged, with a view to demonstrating that an 'attack' within the meaning of Articles 7(1) and 7(2)(a) of the Statute took place".[83]

3.3.2.2. "Widespread" or "Systematic"

According to the Statute, the mere existence of the "attack" within the meaning of Article 7(2)(a) of the Statute, does not yet satisfy all contextual elements of crimes against humanity. The "attack" must be further qualified as either "widespread" or "systematic". These two qualifiers are used disjunctively in Article 7(1) of the Statute[84] and come into play, in a second step, once the "attack" has been established. Interestingly, the Statute remains silent as to their exact meaning and has left it to the Judges to construe them.[85] But most importantly, the two qualifiers seem to correlate with the two conditions in Article 7(2)(a) of the Statute that define the "attack": "widespread" relates to the "multiple commission of acts" and "systematic" relates to "State or organizational policy". Considering that the Statute foresees a conjunctive application of the two conditions in Article 7(2)(a) of the Statute, but a disjunctive application of the two qualifiers in Article 7(1) of the Statute, it is of particular interest to trace whether these notions simply overlap in meaning and how they relate to each other.

"Widespread" is seen to connote "the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[86] The "widespread" nature of the attack has been related to either the large size of the affected geographical area or the large number of victims, ex-

83 *Ntaganda* Confirmation of Charges, para. 23, see *supra* note 61.

84 See *Bemba* Confirmation of Charges, para. 82, *supra* note 17; *Katanga and Chui* Confirmation of Charges, para. 412, see *supra* note 43.

85 "Agreement was quickly reached among most delegations that such issues should not be addressed in the Elements and should be left to the evolving jurisprudence", see Darryl Robinson, "The Elements of Crimes Against Humanity", in Roy Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Evidence*, Transnational Pub, 2001, p. 78.

86 *Bemba* Confirmation of Charges, para. 83, see *supra* note 17. This finding was later endorsed in the *Laurent Gbagbo* case, see *Gbagbo* Confirmation of Charges, para. 222, *supra* note 18.

cluding isolated acts.[87] One may argue that this qualifier imports a quantitative assessment of the attack beyond the mere "multiple commission of acts".[88] Indeed, in a demonstration of this element, Pre-Trial Chamber I in the *Katanga/Ngudjolo* and *Bashir* cases, for example, draws upon the large number of victims.[89]

The term "systematic" has been understood to mean "an organized plan in furtherance of a common policy which follows a regular pattern and results in a continuous commission of acts" or a "pattern or crimes" which reflects the "non-accidental repetition of similar criminal conduct on a regular basis".[90] It "pertains to the organized nature of the acts of violence and to the improbability of their random occurrence".[91] One may argue that this qualifier imports a qualitative assessment of the "attack". In a demonstration of this element, Pre-Trial Chamber I in the *Katanga/Ngudjolo* case draws upon the pattern of the crimes and the "common policy and an organized plan".[92] Later in the *Bashir* case, the same Cham-

[87] *Katanga and Chui* Confirmation of Charges, para. 395, see *supra* note 43; *Harun and Kushayb* Arrest Warrant, para. 62, see *supra* note 51; *ibid*., *Bemba* Confirmation of Charges, para. 83; *Bashir* Arrest Warrant 2009, para. 81, see *supra* note 18.

[88] Pre-Trial Chamber II later added in the *Kenya* situation that this assessment "is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'", see *Kenya* Authorization of Investigation, para. 95, *supra* note 17. This finding was quoted in the decision authorizing the commencement of the investigation into the situation in *Côte d'Ivoire*, *Côte d'Ivoire* Authorisation of Investigation, para. 53, *supra* note 9.

[89] See *Katanga and Chui* Confirmation of Charges, paras. 408−410, see *supra* note 43; and *Bashir* Arrest Warrant 2009, para. 83, see *supra* note 18.

[90] *Katanga and Chui* Confirmation of Charges, para. 397, see *supra* note 43; *ibid*., *Bashir* Arrest Warrant 2009, para. 81. Pre-Trial Chamber II in the *Bemba* case did not provide an interpretation of this notion as it enquired only into the "widespread" nature of the attack in the case. This jurisprudence was followed later, *e.g.*, in the decision authorising the commencement of the investigation into the situation in Kenya, see Kenya Authorization of Investigation, para. 96, *supra* note 17; and in the *Katanga* case, see *Katanga* Judgment, para. 1123, *supra* note 17.

[91] *Ibid*., *Bashir* Arrest Warrant 2009, para. 81. See also previously in *Harun and Kushayb* Arrest Warrant, para. 62, *supra* note 51. This definition was later also used by, *e.g.*, *Gbagbo* Confirmation of Charges, para. 223, see *supra* note 18.

[92] *Katanga and Chui* Confirmation of Charges, para. 413, see *supra* note 43. Indeed, in the *Harun/Kushayb* case, Pre-Trial Chamber I states: "The Chamber is also of the view that the existence of a State or organizational policy is an element from which the systematic nature of an attack may be inferred", see *ibid*., *Harun and Kushayb* Arrest Warrant, para. 62.

ber refrains from taking into account the "policy", but refers to the five-year duration of the attack, as well as its co-ordination on the ground and the involvement of a considerable amount of military equipment.[93] The above examples regarding the application of the law further evidence that the Court in the early years, in building the tandem 'systematic/policy', has not yet clearly carved out the content of those notions so as to facilitate an appropriate examination of the law.

The ambiguity discernible in the notional determinations continued in attempts to clarify the interrelation of Articles 7(2)(a) and 7(1) of the Statute. The Chamber that first put the conditions in Article 7(2)(a) of the Statute and the qualifiers in Article 7(1) of the Statute in context was Pre-Trial Chamber I in the *Katanga/Ngudjolo* case. Having first acknowledged the requisite fulfilment of an "attack", the Chamber, in defining the notion "widespread", draws upon the "policy" requirement in Article 7(2)(a) of the Statute and suggests that the latter "ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organized and follow a regular pattern".[94] By the same token, in the context of determining the notion "systematic", it introduces the requirement of "multiplicity of victims"[95] and holds that the latter "ensures that the attack involve[s] a multiplicity of victims of one of the acts referred to in Article 7(1) of the Statute".[96] These explanations are somewhat surprising. In a seemingly 'unitary approach', the Chamber takes into consideration all factors laid out in Article 7(1) and (2)(a) of the Statute at an equal level and combines them crossways. In doing so, the Chamber appears to turn the disjunctive wording in Article 7(1) of the Statute into a cumulative formulation requiring that the "attack" be eventually both "widespread" *and* "systematic".[97] This, however, is contrary to the explicit wording of the Statute. It also contradicts the reported agreement of the negotiators to encapsulate in Article 7(2)(a) of the Statute a low, and in Article 7(1) of the Statute a

93 *Bashir* Arrest Warrant 2009, para. 85, see *supra* note 18.

94 *Katanga and Chui* Confirmation of Charges, para. 396, see *supra* note 43.

95 It is assumed that in this context the Chamber sought to draw upon the component of "multiple commission of acts" within the meaning of Article 7(2)(a) of the Statute.

96 *Katanga and Chui* Confirmation of Charges, para. 398, see *supra* note 43.

97 Critically seen by Sadat, 2013, p. 359, see *supra* note 79. See also on this point William Schabas, "Article 7", in William Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 149.

high threshold test.[98] The undifferentiated application of Articles 7(1) and 7(2)(a) of the Statute was therefore misleading. Besides, having already accepted the Article 7(2)(a) conditions of "multiple commission"/"State or organizational policy" when identifying the "attack" at the lower level – prior to its qualification as "widespread" or "systematic" – cumulatively, their re-assessment was not necessary.

Pre-Trial Chamber II in the *Bemba* case follows a clearer structure in adopting a 'two-step approach', dissociating the discussion about the Article 7(1) conditions from the one regarding the qualifiers in Article 7(2)(a) of the Statute.[99] It enquires first into the "attack", which is contingent upon the fulfilment of the cumulative conditions of Article 7(2)(a) of the Statute, and only thereafter, in a second step, examines the higher-levelled disjunctive qualifiers of "widespread" or "systematic". At that second stage, no reference to the Article 7(2)(a) conditions is possible as the Article 7(2)(a) conditions do not reach the threshold of the Article 7(1) qualifiers. In conclusion, a "widespread" or "systematic" attack will regularly embrace the cumulative requirements of Article 7(2)(a) of the Statute at a lower level.

Many of the above key findings and definitions have retained their relevance and have found their way into the Court's jurisprudence on crimes against humanity. Indeed, some have proven to be sufficiently precise and flexible so as to be applied in a variety of cases up until today. But, the ostensible consolidation in the Court's jurisprudence is also accompanied by ambiguities and vague conceptions. The notions in Article 7(2)(a) of the Statute are underdeveloped, at times used interchangeably;

---

98 "The result is a conjunctive, but low-threshold, test which must be met before establishing one of the disjunctive, but more onerous, requirements of 'widespread' or 'systematic'. See Herman von Hebel and Darryl Robinson, 1999, pp. 96−97, *supra* note 11.

99 Pre-Trial Chamber I in the *Bashir* case also presented its analysis in this fashion, see *Bashir* Arrest Warrant 2009, paras. 83−85, *supra* note 18. The same approach was later adopted by Trial Chamber II in the *Katanga* case, see *Katanga* Judgment, paras. 1097, 1098, *supra* note 17:

> La première étape de ce raisonnement a trait à l'analyse de *l'existence* d'une attaque […]. La deuxième étape porte sur la *caractérisation* de l'attaque, en particulier, sur la question de savoir si celle-ci était généralisée ou systématique. Cette démarche, essentielle pour établir l'existence d'un crime contre l'humanité, ne devrait, en principe, intervenir que si la première étape a été concluante.

and Pre-Trial Chamber I in the *Laurent Gbagbo* case, *Gbagbo* Confirmation of Charges, para. 207, see *supra* note 18.

the crucial relationship between Article 7(2)(a) and 7(1) of the Statute remains obscure. It was therefore perhaps to be expected that in the following situation in which the Court intervened, the Court would struggle over a component of the contextual element that up until the end of 2009 was deemed the least problematic element of crimes against humanity.

3.4. The Kenya Situation: What is an "Organization" Within the Meaning of Article 7(2)(a) of the Statute?

By the end of 2009, the long-standing *acquis* on crimes against humanity was challenged unexpectedly. The impetus came from the first-ever Article 15 *proprio motu* initiative of the Prosecutor to commence an investigation into the situation in the Republic of Kenya. Absent any referral from a State Party or the Security Council, former Prosecutor Luis Moreno Ocampo had approached Pre-Trial Chamber II with the request to authorize such an investigation. On 31 March 2010, Pre-Trial Chamber II confirmed, by majority, that there was a "reasonable basis to proceed" with the investigation. To this end, it reviewed, on the basis of Article 15(4) of the Statute, the Prosecutor's assessment of the Article 53(1)(a) to (c) criteria, which also included a provisional assessment of the crimes both in terms of law and fact.[100] It confined the authorization to only the investigation of crimes against humanity[101] and limited *ratione temporis* the incidents to be investigated.[102] The Prosecutor commenced the investigation thereafter.

3.4.1. The Facts

The facts were the following: presidential elections were held in the Republic of Kenya in late December 2007. Soon after the announcement of the election results on 27 December 2007, the perceived rigging of elections sparked violence that lasted from 27 December 2007 to 28 February

[100] *Kenya* Authorization of Investigation, paras. 36−39, 71, see *supra* note 17.

[101] As a consequence, if the Prosecutor discovered information during the investigation that demonstrated the existence of other crimes, the Prosecutor would have been obliged to come back to the Pre-Trial Chamber and request anew authorization to investigate those crimes. *Ibid*., paras. 208−209.

[102] The Chamber took issue with the Prosecutor's "ambiguous" determination of the temporal scope of the situation, and limited the crimes to be investigated from the time the Statute entered into force *vis-à-vis* the Republic of Kenya until the moment that the Prosecutor's request was lodged. The authorization did not extend to prospective crimes. This temporal delimitation gives the situation a clearly defined temporal scope, *ibid*., paras. 204−207.

2008 and ultimately included six out of eight provinces of the country. The Majority of Pre-Trial Chamber II acknowledged instances of spontaneous or opportunistic crimes after the announcement of the election results, but considered a number of incidents to have been "planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties" as well as members of the police.[103] Those incidents "differed from one region to another, depending on the respective ethnical composition and other region-specific dynamics".[104] Nevertheless, the Chamber believed that some incidents fell into the following three categories of "attacks": (i) the initial violence was attributed to the group of supporters of the 'Orange Democratic Movement' ('ODM') who directed their attacks against perceived supporters of the 'Party of National Unity' ('PNU') supporters.[105] These acts of violence were alleged to have been orchestrated by ODM politicians, businessmen and Kalenjin leaders;[106] (ii) retaliatory attacks by those previously attacked against those who were believed to be responsible for the initial violence.[107] These attacks were allegedly directed by Kikuyu leaders, businessmen and PNU politicians;[108] and (iii) violent acts committed by the police, including the use of "excessive force, partiality or collaboration with the attackers, and deliberate inaction by the police".[109] The organized nature of these attacks was inferred from a series of reported meetings, inflammatory rhetoric and propaganda, and the "strategy and method employed" in some of the attacks.[110] The violence in Kenya resulted in about 1,133 to 1,220 people being killed, about 3,561 being injured and between 268,330 to 350,000 persons being forcibly displaced.[111] According to the Prosecutor, the perpetrators were ordi-

[103] *Ibid*., para. 117.

[104] *Ibid*., para. 103.

[105] *Ibid*., para. 104.

[106] *Ibid*., para. 123.

[107] *Ibid*., para. 105.

[108] *Ibid*., para. 127.

[109] *Ibid*., para. 106.

[110] *Ibid*., paras. 118−122 and 124−126.

[111] *Ibid*., para. 131. The Chamber also noted that the displaced population fell to 150,671 persons as of 21 April 2008 and 138,428 persons as of 13 May 2008, see *ibid*., para. 159.

nary civilians, "gangs of young men armed with traditional weapons" who were believed to be associated with the two main political parties.[112]

Unlike in the situations previously discussed, the crimes are not carried out by armed groups and do not occur in the context of an ongoing armed conflict. The protagonists in the conflict are different groups of individuals across the country, who make their appearance as a group only during the material time and are believed to interact on a horizontal level. The reason for their various appearances lies in the power struggle within the tiers of the political elite that has flared up in the aftermath of an intense election period. Both political sides seek to resolve the situation to their advantage by, *inter alia*, resorting to violent means. The general political situation is unstable and paralyzed; society is deeply divided. Law enforcement agencies do not perform their functions in an orderly fashion. Information indicates that they are overwhelmed by the situation on the ground, or they are seen to either take part in the violence or induce an environment of criminality and lawlessness.

As regards the legal discussion that followed, only one issue became a bone of contention between the Judges of the Pre-Trial Chamber. It concerned the construction of the notion 'organizational policy' and, in particular, the concept of "organization" within the meaning of Article 7(2)(a) of the Statute. This was due to the fact that the notion "organization" as interpreted by the Pre-Trial Chambers in the early cases was not suitable to cover this scenario. Indeed, the chaotic and dynamic situation on the ground did not allow for the easy identification of a "group of persons who govern a specific territory". But then, what qualifies as an "organization" within the meaning of Article 7(2)(a) of the Statute? The question of whether the facts of the situation, as presented by the Prosecutor at the time, fulfilled all the legal requirements pursuant to Article 7 of the Statute was also a topic of controversy leading finally to a dissenting opinion in these proceedings.

3.4.2. The Majority's Decision of 31 March 2010

With regard to the interpretation of the contextual elements, the Majority of Pre-Trial Chamber II follows to a great extent the definitions as estab-

[112] Office of the Prosecutor, Request for Authorization of an Investigation Pursuant to Article 15, 26 November 2009, ICC-01/09-3, paras. 74, 83 and 86 (http://www.legal-tools.org/doc/c63dcc/).

lished in earlier rulings of the Court. However, with the allegation that both political sides had formed an "organization", particular attention was paid to determining this concept in legal terms. The Majority began its analysis by noting that the Statute does not provide any criteria for the determination of an "organization" within the meaning of Article 7(2)(a) of the Statute. What was clear to the Judges of the Majority was that the Statute, by including the term "organization", did not exclude non-State actors.[113] Rather, in their view, "organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population".[114] The decisive part of their ruling is captured in the following:

> Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.[115]

The Chamber conceded that this determination can only be made on a case-by-case basis and offered a non-exhaustive list of factors that may assist in such a determination:

> (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[116]

The Majority opted for a flexible approach, making the existence of an "organization" dependent on its capability "to infringe basic human values". It was perhaps the accentuation of the human rights component in

[113] *Kenya* Authorization of Investigation, para. 92, see *supra* note 17.

[114] *Ibid*.

[115] *Ibid*., para. 90 (footnote omitted).

[116] *Ibid*., para. 93 (footnotes omitted).

this formula that triggered controversy within the Chamber. The organization's capacity to commit an "attack directed against any civilian population" was not the starting point, but rather any violation of basic human rights. But, the question must be posed: are not crimes against humanity the most serious and grave form of human rights violations?

3.4.3. The Dissenting Opinion

The dissenting member of the Chamber, Judge Hans-Peter Kaul, agreed with the Majority's assumption that an "organization" is an entity different from a "State". Like his colleagues, he considered that the "organization" can be any "private entity (a non-State actor) which is not an organ of a State or acting on behalf of a State".[117] While all Judges therefore agreed on what an "organization" is *not*, the question of defining its contours proved to be more difficult and brought about the divide. Judge Kaul responded to the Majority's proposition of the "organization" as follows:

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

[117] Dissenting Opinion of Judge Hans-Peter Kaul, annexed to Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ('Dissenting Judge Kaul *Kenya* Authorization of Investigation'), 31 March 2010, ICC-01/09-19-Corr, p. 107, para. 45 (http://www.legal-tools.org/doc/f0caaf/).

> groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of Article 7(2)(a) of the Statute. To give a concrete example, violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of Article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.
>
> In this respect, the general argument that any kind of non-state actors may be qualified as an 'organization' within the meaning of Article 7(2)(a) of the Statute on the grounds that it "has the capability to perform acts which infringe on basic human values" without any further specification seems unconvincing to me. In fact this approach may expand the concept of crimes against humanity to any infringement of human rights. I am convinced that a distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community as a whole.[118]

Given Judge Kaul's clarification that the "organization" is *different* from a State, some words must be devoted to his proposition that it be nevertheless 'State-like'. His conception of a 'State-like organization' is best understood when read with his further elaboration on the *raison d'être* of crimes against humanity. Perhaps the most telling consideration in this context is his emphasis on the particular threat for the civilian population that, in the past, typically emanated from the criminal policy that the State adopted, involving various segments of the State apparatus. It was not so much the large-scale commission of crimes, but the existence of an '(inhumane) policy' that called for the intervention of the international community. He found this particular threat to be exemplified in historic precedents, such as the crimes committed by Nazi Germany, the

[118] *Ibid*., pp. 110−112, paras. 51−53 (footnotes omitted).

'killing fields' of the Khmer Rouge, the 1988 mass poisoning of Kurds in Halabja and the horrendous mass crimes committed in Rwanda and the former Yugoslavia. He subjected the actions of non-State actors to the same standard. In his words:

> The Statute […] further accommodates new scenarios of threats which may equally shake the very foundations of the international community and deeply shock the conscience of humanity. Such policy may also be adopted and implemented by private entities. However, it follows from the above that the private entity must have the means and resources available to reach the gravity of systemic injustice in which parts of the civilian population find themselves.[119]

Hence, according to Judge Kaul, the "organization" would come under the purview of the ICC Prosecutor if it implemented a policy that constituted such an extraordinary threat of 'systemic injustice' for the civilian population – as opposed to any human rights violations – that the intervention of the international community became imperative. In this sense he considered the "organization" to be 'State-like'.

Judge Kaul also contradicted the Majority in its analysis of the factual narrative which has been summarized above. Disagreeing with the Majority's categorization of the violence, he concluded, in essence, that there were several centres of violence erupting at different times and for different reasons.[120] According to him, the perpetrators were not organized in one "organization" that met "the prerequisites of structure, membership, duration and means to attack the civilian population". He also found no support for the existence of a "policy" that could have unified the different acts of violence into one attack, as suggested by the Majority. Judge Kaul also rejected the allegation of the existence of a State policy involving law enforcement agencies and the military. His summary of the situation is captured in this verdict: "In total, the overall picture is charac-

[119] *Ibid*., p. 118, para. 66.

[120] "Albeit the motives of the perpetrators are not decisive and may vary, it nevertheless sheds light on the question of the existence of a possible policy", see *ibid*., p. 159, para. 148. This idea was later reiterated in the *Laurent Gbagbo* case, see *Gbagbo* Confirmation of Charges, para. 214, see *supra* note 18 ("The Chamber observes that neither the Statute nor the Elements of Crimes include a certain rationale or motivations of the policy as a requirement of the definition. Establishing the underlying motive may, however, be useful for the detection of common features and links between acts.").

terized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies".[121]

Reading the main decision and the dissent, one cannot help but notice that the two approaches share common ground in law. Both sides differ in their proposal of the generic formula that seeks to capture the essence of the "organization". But, both agree that the overall generic definition cannot be applied without the help of certain factors. In this regard, it is somewhat astonishing that both sides of the debate, in an effort to delineate the contours of such an entity, chose similar factors that would, taken altogether, demonstrate the existence of the "organization" according to their respective definition. Upon closer inspection, the factors they would look for would give the group a more formal and structured shape. It seems that they are in agreement that only a somewhat structured entity is able to implement the policy of the "organization" in the first place. Factors such as the structure of the group,[122] the means and resources at its disposal to carry out an "attack",[123] as opposed to human rights violations, and an aspect of duration,[124] are important aspects both sides pay heed to. The reference to responsible command and hierarchical structures is not an attempt to introduce through the back door a link to the armed conflict,[125] but simply highlights that the "organization" would qualify under the Statute with respect to the commission of both war crimes and crimes against humanity, signalling the threat that emanates from such entities. As a consequence, it seems that while the Judges in their actual assessment apply similar factors, the objective they set would lead them to different results: should the capability of the "organization" meet the threshold of human rights violations or should it rather reach the level of

[121] *Ibid*., Dissenting Judge Kaul *Kenya* Authorization of Investigation, pp. 160−162, paras. 149−153.

[122] The Majority proposes to consider "whether the group is under responsible command, or has an established hierarchy". The dissenting Judge equally considers factors of responsible command or the adoption of "certain degree of hierarchical structure", including some sort of policy level (see respective quotations above).

[123] Both, the Majority and the dissenting Judge agree that the organization must possess the necessary means to carry out a widespread or systematic attack against the civilian population (see respective quotations above).

[124] The Majority refers in its list of factors to "whether the group exercises control over part of the territory of a State", which could be argued involves the aspect of duration. Likewise, the dissenting Judge would consider whether the organization existed for a prolonged period of time (see respective quotations above).

[125] This argument is put forth by Sadat, 2013, pp. 370−371, *supra* note 79.

the most serious forms of human rights violations, namely international crimes? The Majority adopted an all-inclusive approach, putting crimes against humanity on par with human rights violations. The dissenting Judge, on the other hand, raised the question of a possible demarcation line, contemplating the further consequences in case an overly generous approach was adopted:

> There is, in my view, a demarcation line between crimes against humanity pursuant to Article 7 of the Statute, and crimes under national law. There is, for example, such a demarcation line between murder as a crime against humanity pursuant to Article 7(l)(a) of the Statute and murder under the national law of the Republic of Kenya. It is my considered view that the existing demarcation line between those crimes must not be marginalized or downgraded, even in an incremental way. I also opine that the distinction between those crimes must not be blurred.
>
> Furthermore, it is my considered view that this would not be in the interest of criminal justice in general and international criminal justice in particular. It is neither appropriate nor possible to examine and explain in this opinion all the potential negative implications and risks of a gradual downscaling of crimes against humanity towards serious ordinary crimes. As a Judge of the ICC, I feel, however, duty-bound to point at least to the following: such an approach might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute. It would broaden the scope of possible ICC intervention almost indefinitely. This might turn the ICC, which is fully dependent on State cooperation, in a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility. Taken into consideration the limited financial and material means of the institution, it might be unable to tackle all the situations which could fall under its jurisdiction with the consequence that the selection of the situations under actual investigation might be quite arbitrary to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification.[126]

[126] Dissenting Judge Kaul Kenya Authorization of Investigation, p. 88, paras. 9−10, see *supra* note 117.

The above conflict of opinion continued to permeate the two cases emanating from the Kenya situation and the two positions remained apart. The response of outside observers mirrored by and large the divide within the Chamber.[127] An old discussion revived whether to abandon altogether the "policy" requirement, inextricably linked with the State or "organization", in line with the jurisprudence of the *ad hoc* tribunals.[128] Bound by the dictate of article 21(1)(a) of the Statute, this was never an option for the Court. For this would mean abandoning a requirement that was purposefully included in the statutory definition, and which ensured acceptance of the Statute by States.[129] Quite to the contrary, as will be shown in the following section, discussion at the Court would now centre on the difficulties in proving the existence of a "policy" and a Trial Chamber proposing a new formula of the concept of "organization" within the meaning of Article 7(2)(a) of the Statute.

3.5. After Kenya: Search for an Appropriate Interpretation of the Contextual Elements of Crimes Against Humanity

As explained at the beginning, the juridical debate in the *Kenya* situation on the boundaries of Article 7 of the Statute opened a wider discussion on and a more stringent application of Article 7 of the Statute. Three exemplary case studies will illustrate the problems encountered.

---

[127] Claus Kress, "On the Outer Limits of Crimes Against Humanity: the Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision", in *Leiden Journal of International Law*, 2010, vol. 23, p. 855 *et seq*.; William Schabas, "Prosecuting Dr Strangelove, Goldfinger and the Joker at the International Criminal Court: Closing the Loopholes", in *Leiden Journal of International Law*, vol. 23, 2010, p. 847 *et seq*.; Gerhard Werle and Boris Burghardt, "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?", in *Journal of International Criminal Justice*, 2012, vol. 10, p. 1151 *et seq*.; Charles Jalloh, "Situation in the Republic of Kenya", in *American Journal of International Law*, 2011, vol. 105, p. 540 *et seq;* Darryl Robinson, "Essence of Crimes against Humanity Raised by Challenges at ICC", in EJIL Talk! Blog, 27 September 2011, available at www.ejiltalk.org.

[128] Arguing for it, Matt Halling, "Push the Envelope – Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity", in *Leiden Journal of International Law*, 2010, vol. 23, p. 827 *et seq*. Arguing against it, Katrin Gierhake, "Zum Erfordernis eines 'ausgedehnten oder systematischen Angriffs gegen die Zivilbevölkerung' als Merkmal der Verbrechen gegen die Menschlichkeit", ZIS 11/2010, p. 676 *et seq*., available at www-zis-online.com; Kai Ambos, "Crimes Against Humanity and the ICC", in Leila N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, pp. 285−286.

[129] "Moreover, explicit recognition of this policy element was essential to the compromise on crimes against humanity", see Herman von Hebel and Darryl Robinson, 1999, pp. 96−97, *supra* note 11.

3.5.1. The Mbarushimana and Mudacumura Cases: No Evidence of a "Policy"

In the *Callixte Mbarushimana* and *Sylvestre Mudacumuara* cases it was the "policy" requirement that caught the Chambers' attention. Both cases stem from the DRC situation. They share great similarities in terms of the factual narrative, but were presented separately by the Prosecutor. Eventually, in the *Mbarushimana* case, Pre-Trial Chamber I declined to confirm the charges of crimes against humanity,[130] and in the *Mudacumura* case, Pre-Trial Chamber II declined to issue a warrant of arrest[131] for those crimes. The two cases are presented in what follows.

Callixte Mbarushimana was charged for having contributed "in any other way" to the commission of crimes against humanity and war crimes by the 'Forces Démocratiques pour la Liberation du Rwanda' ('FDLR') in a number of attacks[132] in the Kivu provinces of the DRC from about 20 January to 31 December 2009. The FDLR, a hierarchically structured armed group,[133] allegedly launched in January 2009, "a campaign aimed at attacking the civilian population and creating a 'humanitarian catastrophe' in the Kivu provinces"[134] in order to primarily "extort concessions of political power for the FDLR from the DRC and Rwandan government in exchange for ceasing to commit crimes against civilians".[135] The attacks against the civilian population had been ordered purportedly by the FDLR leadership, including *Mudacumura*.[136] *Mbarushimana* was believed to have been associated with the FDLR since at least 2004[137] and to have

130 *Mbarushimana* Confirmation of Charges, see *supra* note 19.

131 *Mudacumura* Arrest Warrant, see *supra* note 60.

132 The Chamber took as basis for its analysis the incidents in Remeka (late January and late February 2009); Busheke (late January 2009); Kipopo (12−13 February 2009); Mianga (12 April 2009); Luofo and Kasiki (18 April 2009); Busurungi and neighbouring villages (28 April 2009 and 9−10 May 2009); Manje (20−21 July 2009); a village in Masisi territory (second half of 2009); Ruvundi October 2009); Mutakato (2−3 December 2009); Kahole (6 December 2009); Pinga (12 and 14 February 2009); Miriki (February 2009); Malembe (11−16 August and 15 September 2009), see *Mbarushimana* Confirmation of Charges, fn. 565, see *supra* note 19.

133 *Ibid*., *Mbarushimana* Confirmation of Charges, paras. 104−106.

134 *Ibid*., para. 6.

135 *Ibid*., para. 243.

136 Office of the Prosecutor, Document Containing the Charges, 15 July 2011, ICC-01/04-01/10-311-AnxA-Red, para. 111 (http://www.legal-tools.org/doc/5d47ff/).

137 *Mbarushimana* Confirmation of Charges, para. 2, see *supra* note 19.

held several positions within the group, lastly as the FDLR's first Vice President *ad interim* in 2010.[138] His contribution to the crimes laid in issuing press releases on behalf of the FDLR organization in the aftermath of operations and engaging in international negotiations, thus "[transforming] the FDLR's crimes on the ground into political capital".[139]

Likewise, a warrant of arrest for *Mudacumura* had been sought by the Prosecutor for his alleged criminal responsibility in the commission of war crimes and crimes against humanity committed by the FDLR in the Kivu provinces between 20 January 2009 and the end of September 2010. *Mudacumura* was believed to have issued an order "to create 'a chaotic situation in Congo' by way of a 'humanitarian catastrophe'",[140] in which "[c]ivilians were killed, abducted, raped, subjected to cruel treatment or mutilated and homes were destroyed" and which "also caused population displacement".[141]

In the view of both Pre-Trial Chambers, the cardinal point was whether the FDLR order to "create a humanitarian catastrophe" existed from which the "policy" to attack the civilian population could be inferred. Accordingly, both Chambers embarked on an assessment of this order's evidentiary validity. On the basis of the evidence presented, however, both Chambers denied such an allegation.

In the *Mbarushimana* case, the Majority of Pre-Trial Chamber I highlighted the inconsistencies in the evidence in relation to the existence of the FDLR order as alleged by the Prosecutor and, consequently, denied the existence of a "policy".[142] But as this case involved both allegations of crimes against humanity and war crimes, the Chamber went further to enquire into whether any of its findings relating to the commission of war crimes could be of assistance in determining the existence of Article 7 crimes.[143] The Chamber's findings on war crimes encompassed five at-

[138] *Ibid*., para. 5.

[139] *Ibid*., para. 8.

[140] *Ibid*., para. 25.

[141] *Ibid*.

[142] *Ibid*., paras. 263, 266−267. Upon examination of the entirety of the evidence, the dissenting Judge arrived at a different result. In particular, she did not attach so much importance to the inconsistencies contained in the evidence, but asked that they be resolved at trial, see Dissenting Opinion of Judge Sanji Mmasenono Monageng, annexed to the decision of the Chamber, pp. 152 −160.

[143] The Majority of the Chamber nevertheless did not confirm any of the charges as (i) it was not convinced, having rejected the policy of attacking the civilian population, that the

tacks (out of twenty-five originally alleged by the Prosecutor) during which crimes, involving civilians, had been committed. However, the Majority of the Chamber remained unconvinced that those five attacks "scattered over a 6 month period"[144] evidenced the existence of a policy,[145] not even that they were part of a "course of conduct".[146] This latter statement is somewhat opaque as it appears that the Majority Judges moved away from the discussion on the "policy" and now questioned the very existence of the entry requirement of a "course of conduct" within the meaning of Article 7(2)(a) of the Statute. Putting an emphasis on the fact that (only) five attacks occurred over a period of six months could be misunderstood as introducing some kind of quantitative benchmark for accepting an overall "attack" that must be exceeded in order to reach the low threshold of Article 7(2)(a) of the Statute. But perhaps the Majority simply suggested that the five attacks it looked into did not display any signs of coherence and continuity which would qualify them as one 'campaign' or 'operation'.[147] Or perhaps they meant to say that *in the absence* of a "policy" to attack the civilian population, which would otherwise link the attacks "scattered" over a period of six months, the five attacks remain apart and cannot be viewed as forming a coherent and interrelated course of action. Be it as it may, the Chamber's Majority then continued its analysis regarding the objective of those five attacks and concluded that they were of retaliatory nature in which both military objectives and, as the case may be, individual civilians not taking part in the hostilities were tar-

FDLR leadership constituted a group acting with a common purpose featuring an element of criminality; and (ii) that *Mbarushimana* provided any contribution to the commission of such crimes, "even less a significant one" within the meaning of Article 25(3)(d) of the Statute, see *ibid*., *Mbarushimana* Confirmation of Charges, paras. 291−292.

144 *Ibid*., para. 265.

145 *Ibid*., para. 263.

146 "Indeed, although the Chamber has found substantial grounds to believe that acts amounting to war crimes were committed on 5 out of the 25 occasions alleged by the Prosecution, the evidence submitted is, nevertheless, insufficient for the Majority to be convinced, to the threshold of substantial grounds to believe, that such acts were part of a course of conduct amounting to an 'attack directed against the civilian population' within the meaning of Article 7 of the Statute" (footnote omitted), see *ibid*., para. 264.

147 Pre-Trial Chamber I would remark subsequently in the *Laurent Gbagbo* case: "[S]ince the course of conduct requires a certain 'pattern' of behaviour, evidence relevant to proving the degree of planning, direction or organisation by a group or organisation is also relevant to assessing the links and commonality of features between individual acts that demonstrate the existence of a 'course of conduct' within the meaning of Article 7(2)(a) of the Statute", *Gbagbo* Confirmation of Charges, para. 210, see *supra* note 18.

geted. In these particular circumstances, it concluded that it failed to see that those attacks formed "part of any larger organized campaign specifically designed to be directed against the civilian population".[148] The quotation encapsulates the Majority's concern that the civilian population was not the primary target of the attacks. Whether the remark of the "larger organised campaign" related to the legal requirement of the "course of conduct" or to the alleged "policy" is open to interpretation. It is difficult to follow the Majority Judges' argumentation as it amalgamates in its reasoning the different legal requirements of Article 7(2)(a) of the Statute. Moreover, it is also worth noting that apart from the alleged order, the Chamber did not look into the organized nature of the crimes as a potential indicator for accepting a "policy", as it had done on previous occasions.

Pre-Trial Chamber II in the *Mudacumura* case conducted the same analysis on the basis of an expanded evidentiary record[149] at the stage of issuing a warrant of arrest.[150] That Chamber accepted that the FDLR was an "organization" that was responsible for the commission of multiple acts affecting the civilian population.[151] Similar to Pre-Trial Chamber I, however, it rejected the allegation that a "policy" existed to attack the civilian population as such. It highlighted the contradictory nature of the evidence at hand and the fact that some attacks were of a retaliatory nature affecting, as the case may be, both military objectives and civilians not taking part in the armed hostilities.[152] As the Chamber summarized, the "failure to observe the principles of international humanitarian law does not in itself, particularly in the context of the circumstances of the present case as portrayed in the material submitted, reveal the existence of such policy".[153] Like Pre-Trial Chamber I, this Chamber also did not look into the organized nature of the crimes as a potential indicator for accepting a "policy", as it had done in previous cases.

The above two cases did not raise particular problems of law in respect of the requisite "policy" element, but highlight the necessity of establishing and the difficulty in proving an alleged "policy". They further

148 *Mbarushimana* Confirmation of Charges, para. 265, see *supra* note 19.

149 *Mudacumura* Arrest Warrant, para. 28, see *supra* note 60.

150 Article 58 of the Statute.

151 *Mudacumura* Arrest Warrant, paras. 23−25, see *supra* note 60.

152 *Ibid*., para. 26.

153 *Ibid*.

illustrate the relationship between the "policy" and the remaining legal requirements in Article 7(2)(a) of the Statute. The "policy" to attack the civilian population cannot be assumed without more from the armed confrontation between armed groups affecting also civilians. Rather, as has been emphasized since the early case law of the Court, the civilian population must be the primary object of the "attack" and not just an incidental victim thereof.[154] The two cases also show that the enquiry into the "policy" is independent from that of an "organization". In fact, the existence of an "organization" that fulfils even the requirements of an organized armed group within the meaning of Article 8 of the Statute does not automatically imply the existence of a "policy". Also, the existence of an armed conflict has proven to be irrelevant in this context. However, the most interesting point was raised in the *Mbarushimana* decision insofar as the Chamber apparently conflated the discussion on the "policy" with that of the "attack". But this argumentation may be motivated by the actual definition of "attack" which is circular. Indeed, Article 7(2)(a) of the Statute suggests that the compound notion of "attack" is composed of several sub-elements which in concert give shape to the "attack". However, the sub-element "policy" itself is linked again with the term "attack", it in fact seeks to demonstrate: "Attack directed against any civilian population means […] policy to commit such attack".

3.5.2. The Gbagbo Case: Was There an "Attack"?

Doubts as to the existence of the "policy" element of crimes against humanity also surfaced in the *Laurent Gbagbo* case. The pre-trial phase of this case was longer compared to other cases before the Court, as the Judges, before rendering their final decision on the confirmation of charges, adjourned the confirmation of charges hearing requesting the Prosecutor to consider further investigating particular aspects which affected the entire case. The factual background of this case, as it was pleaded before the adjournment of the confirmation of charges hearing, is briefly summarized as follows: since 2002, Côte d'Ivoire has been divided in a government-controlled South and a rebel-controlled North.[155] Ongoing peace efforts culminated in presidential elections held in late October/November

[154] *Bemba* Confirmation of Charges, para. 76, see *supra* note 17.

[155] Office of the Prosecutor, *Document amendé de notification des charges*, 25 January 2013, ICC-02/11-01/11-357-Anx1-Red, para. 3 (http://www.legal-tools.org/doc/fd7407/).

2010. Soon after the elections, however, a power struggle broke out between the two candidates, the incumbent *Laurent Gbagbo* and his political rival Alassane Ouattara. Both took the oath of office and formed respective governments.[156] The Prosecutor alleged that immediately after these events, *Laurent Gbagbo* implemented a "policy" to retain power by all means, including through widespread and systematic attacks directed against the civilian population perceived to support his opponent Alassane Ouattara that lasted between 27 November 2010 and 8 May 2011.[157] The "policy" was purportedly implemented by 'pro-Gbagbo forces', a conglomerate involving different State structures, such as the army and the police, and private entities, including the youth militia and mercenaries.[158] The Prosecutor also averred that the implementation of the "policy" was discussed in a series of meetings.[159] The situation on the ground is further characterized by the presence of an Ouattara-loyal armed group named '*commando invisible*' in the capital Abidjan, which engaged in fighting with the Ivorian armed forces.[160] Thousands of people demonstrated in the streets of Abidjan, demanding that *Laurent Gbagbo* step down.[161] By the end of February 2011, the Prosecutor assessed that the situation had reached the level of an armed conflict, as Ouattara-loyal forces advanced from the North to the South, reaching the capital on 31 March 2011. As of this moment, the Ivorian army became weaker due to a significant number of defections, and *Laurent Gbagbo* supposedly turned to the youth militia members and mercenaries for support.[162] On 11 April 2011, the power struggle was decided in favour of Alassane Ouattara as forces loyal to

156 *Ibid*., para. 7.

157 *Ibid*., paras. 4, 9 and 13.

158 *Ibid*., para. 5. It is worth recalling that during the Article 15 process, the Prosecutor had argued that the crimes had been committed pursuant to a State policy. She changed her position when requesting the issuance of warrant of arrest. The then competent Pre-Trial Chamber III accepted this legal characterisation of the facts but noted that "at a later stage in the proceedings, it may be necessary for the Chamber to revisit the issue of whether the attack by the pro Gbagbo forces during the post-electoral violence (…) were committed pursuant to a state policy", see Pre-Trial Chamber III, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, ICC-02/11-01/11-9-Red, para. 48 (http://www.legal-tools.org/doc/36dcad/).

159 *Ibid*., paras. 39–41.

160 *Ibid*., para. 22.

161 *Ibid*., para. 8.

162 *Ibid*., para. 14.

him, together with the backing of the French *Opération Licorne*, arrested and put *Laurent Gbagbo* under house arrest.[163] The Prosecutor alleged that an estimate of more than 700 killings, 40 rapes, 520 arbitrary arrests, and 140 serious injuries are attributed to the activities of the pro-Gbagbo forces during that time throughout the country.[164] The victims, perceived pro-Ouattara supporters, were allegedly identified based on ethnic, religious or national grounds. Houses were marked and roadblocks erected to identify possible targets.[165] What is of importance for the current discussion is how the Prosecutor sought to demonstrate the existence of an "attack" within the meaning of Article 7(2)(a) of the Statute: four incidents, which were charged, and an additional 41 'contextual' incidents were presented as constituting this requirement.[166] With the exception of a few incidents taking place in the western part of the country, most of the incidents referred to occurred in the capital of Côte d'Ivoire, Abidjan. The Prosecutor also argued that the four charged incidents alone, in and of themselves, were sufficient to establish the existence of a widespread or systematic attack.[167]

The Majority of Pre-Trial Chamber I decided to adjourn the hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation,[168] in particular, with respect to the contextual element of 'organizational policy', affecting all charges against *Laurent Gbagbo*.[169] The Majority Judges were not yet satisfied that the evidence underpinning the factual allegations of the 45 contextual incidents constituting the "attack" was of sufficient probative value and specificity to allow the Chamber to reach the same conclusions as the Prosecutor. As a matter of guidance, the Chamber's Majority provided a cata-

[163] *Ibid*., para. 15.

[164] *Ibid*., paras. 13 and 20.

[165] *Ibid*., para. 21.

[166] *Ibid*., paras. 20, and 23−29.

[167] Office of the Prosecutor, Prosecution's submission on issues discussed during the Confirmation Hearing, 21 March 2013, ICC-02/11-01/11-420-Red, para. 30 (http://www.legal-tools.org/doc/fae772/).

[168] Article 61(7)(c)(i) of the Statute.

[169] Pre-Trial Chamber II, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute ('*Gbagbo* Adjourning Decision'), 3 June 2013, ICC-02/11-01/11-432 (http://www.legal-tools.org/doc/2682d8/); Pre-Trial Chamber II, Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, ICC-02/11-01/11-432-Anx-Corr (http://www.legal-tools.org/doc/9a3b94/).

logue of issues that the Prosecutor was free to take into account when considering the Chamber's request. Those issues concerned in particular the organizational structure of the "pro-Gbagbo forces", the "policy" allegedly adopted in meetings, information on the contextual incidents that would allow considering them as an expression of the policy, and the presence and activities of all armed groups opposing the 'pro-Gbagbo forces' at the material time. The adjournment decision was appealed and ultimately upheld by the Appeals Chamber.[170]

With this case, some further key findings have been added to the discussion of the contextual elements of crimes against humanity at the ICC. The first issue concerns the Pre-Trial Chamber's approach to consider *all* 'contextual' incidents, regardless of whether they were charged, to be, as a matter of law, part of the "facts and circumstances" of the case within the meaning of Article 74(2), second sentence, of the Statute[171] thus subjecting them to the relevant evidentiary threshold.[172] This can be interpreted as a consequence of the Appeals Chamber ruling in the *Kenya* cases, in which that Chamber considered the contextual elements of crimes against humanity to be part of the merits of the case, which by implication, requires meeting the evidentiary threshold applicable at the respective stage of the proceedings.[173] The dissenting Judge, on the other hand, argued that only the four charged incidents needed to be proven as the remaining 41 'contextual' incidents are "neither contextual elements nor underlying acts within the meaning of Article 7(1)(a) of the Statute.

[170] Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" ('*Gbagbo* Adjournment Appeal Decision'), 16 December 2013, ICC-02/11-01/11-572 (OA 5) (http://www.legal-tools.org/doc/1bffda/).

[171] "For example, the individual incidents alleged by the Prosecutor in support of her allegation that there was an 'attack directed against any civilian population' are part of the facts and circumstances for the purposes of Article 74(2) of the Statute and therefore must be proved to the requisite threshold of 'substantial grounds to believe'. This is especially so in this case in which the Prosecutor identifies particular incidents that *constitute* the attack against the civilian population. In other words, the incidents are 'facts' which 'support the [contextual] legal elements of the crime charged'", see *Gbagbo* Adjourning Decision, para. 21, *supra* note 169.

[172] "The standard by which the Chamber scrutinizes the evidence is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect", see *ibid*., para. 19.

[173] For example, *Muthaura and Kenyatta* Appeal Decision, paras. 33−36, see *supra* note 30.

They are not facts underlying the elements of crimes against humanity but […] merely serve to prove, together with all available evidence, the attack".[174] The Appeals Chamber did not follow this differentiation as it did not mirror the manner in which the context had been pleaded by the Prosecutor throughout the confirmation process. Also the attempt to qualify the 'contextual' incidents as "subsidiary facts" or alike was equally not followed.[175] Indeed, the Appeals Judges confirmed the relevance of *all* 45 contextual incidents for establishing the attack, as originally argued by the Prosecutor in the document containing the charges.[176]

The above classification of the contextual elements as part of the 'facts and circumstances' of the case has, naturally, significant consequences for the pleading of facts and the ensuing evidentiary discussion. Indeed, the presentation of a series of 'contextual' incidents begs the legitimate question of whether *all* incidents *must be proven* against the requisite applicable threshold, thereby imposing on the Prosecutor an exacting investigative exercise. The Majority of Pre-Trial Chamber I acknowledged this dilemma and explicated that in this particular case,

> the Prosecutor must establish to the requisite threshold that a *sufficient number of incidents* relevant to the establishment of the alleged 'attack' took place. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an 'attack' (emphasis added).[177]

What follows from this statement is that only a sufficient number of proven incidents, viewed as a whole, will demonstrate a 'campaign or operation' against the civilian population. Indeed, this is in line with earlier jurisprudence of the Court, insofar as the "attack" has always been demonstrated by a series of events which have been subjected to the req-

[174] Pre-Trial Chamber I, Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, ICC-02/11-01/11-432-Anx-Corr, para. 41.

[175] "The Appeals Chamber notes that [articles 67(1)(a) and 61(3) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations of the Court] do not distinguish between 'material facts' and 'subsidiary facts'", see *Gbagbo* Adjournment Appeal Decision, para. 37, *supra* note 170.

[176] "The Appeals Chamber notes that the factual allegations in question describe a series of separate events. Therefore, it is not immediately obvious that there is any distinction between the four Charged Incidents and the 41 Incidents in terms of their relevance to establishing an attack against a civilian population", *ibid*., para. 46.

[177] *Gbagbo* Adjourning Decision, para. 23, see *supra* note 169. This was later acknowledged by the *Gbagbo* Adjournment Appeal Decision, para. 47, *ibid*.

uisite threshold. This flexible approach also assists in not conflating the context with the individual charged incidents. The Majority's interest in the 'contextual' incidents was perhaps also driven by the fact that, unlike in previous cases, the "attack", as portrayed by the Prosecutor, did not involve a sequence of large-scale military operations like, for example, in the *Bashir* case or assaults in the *Kenya* cases, which are in themselves compound events of a certain intensity over a prolonged period of time. Rather, as described in the Prosecutor's document containing the charges,[178] the incidents were smaller in scope[179] and occurring at times of unrest and political turmoil with the involvement of a high number of different actors affiliated with both conflict parties on the ground. Importantly, in situations where several groups act on the ground, the question of attributing the act of violence to the pertinent conflict party also becomes crucial.

As regards the Chamber's evidentiary expectations, the Majority drew a distinction between those incidents that formed the charges and those which were relevant for the context. It clarified:

> [I]n order to be considered relevant as proof of the contextual elements, the information needed may be less specific than what is needed for the crimes charged but is still required to be sufficiently probative and specific so as to support the existence of an 'attack' against a civilian population. The information needed must include, for example, details such as the identity of the perpetrators, or at least information as to the group they belonged to, as well as the identity of the victims, or at least information as to their real or perceived political, ethnic, religious or national allegiance(s).[180]

What can be distilled from these sentences is that the Chamber would accept less detailed information as long as it reveals in a generic fashion the groups to which the perpetrators and the victims belonged. In other words, not any violent act by whoever against whomever would suffice to evidence the Prosecutor's proposition that 'pro-Gbagbo forces' attacked ci-

[178] Reference is made to the Prosecutor's presentation of the 'contextual' incidents in the document containing the charges, see ICC-02/11-01/11-357-Anx1-Red, paras. 23−29, *supra* note 155.

[179] Apart from the charged incidents, the other incidents involved, *e.g.*, only one, two or nine victims. Other incidents involved "several" persons.

[180] *Gbagbo* Adjourning Decision, para. 22, see *supra* note 169.

vilians.[181] These allegations must be proven with evidence of sufficient probative value. Which types of evidence this would necessitate is a matter to be determined by the Chambers, but should not go so far as to establish an obligation upon the Prosecutor to gather evidence that would meet the standard of proving the incident as if it were charged.

Finally, some discussion arose as to whether the policy requirement related to the "attack" or to the incidents which constitute the "attack". This was grounded in the Majority Judges' statement that, on the basis of the evidence at hand, the incidents as described made it difficult to discern whether the "perpetrators acted pursuant to or in furtherance of a policy to attack a civilian population".[182] Indeed, the adjournment decision can be read to establish that the "policy" be proven for each incident.[183] However, the "policy" requirement in Article 7(2)(a) of the Statute relates to the "attack" and may be inferred from an overall assessment of all underlying incidents or assaults, taken together.[184] At the same time, however, one cannot deny that if the overall "attack" is committed pursuant to or in furtherance of a "policy", then the constituent elements of such an "attack", that is, a sufficient number of incidents, must be the expression of such a "policy". If none or only a few incidents are linked to the alleged "policy", how could the inference be reasonably made that the overall "attack" *is* pursuant to that "policy"? This becomes even more crucial, in case several groups are involved in an incident. For only those incidents can form the basis of the "attack" which were committed by those perpetrators associated with the alleged "policy". In other words, if two opposing conflict parties commit violent acts during a specific period of time in pursuance of their respective policies, it would be illogical to take into account

[181] "Moreover, many of these incidents are described in very summary fashion, making it difficult for the Chamber to determine whether the perpetrators acted pursuant to or in furtherance of a policy to attack a civilian population as required by Article 7(2)(a) of the Statute", *ibid*., para. 36.

[182] *Ibid*.

[183] *Ibid*., paras. 36 and 44; Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, ICC-02/11-01/11-432-Anx-Corr, paras. 47−48.

[184] See also paragraph 2 of the Introduction to Crimes Against Humanity in the Elements of Crimes which reads, in the relevant part: "[T]he last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization".

the entirety of violent acts, regardless of whether the crimes were committed by one side or the other.[185]

The Prosecutor considered the Chamber's request and reverted to the Chamber after having conducted further investigation. It is worth noting that in the amended document containing the charges, the Prosecutor sought to prove the existence of the "attack" on the basis of 39 incidents in Abidjan, including the four charged incidents, and added further information.[186] The pre-trial phase concluded with the confirmation of the charges against *Laurent Gbagbo*.[187] It seems that the initial evidentiary difficulties in the Prosecutor's case record were resolved eventually to the satisfaction of the Majority of the Chamber.[188]

3.5.3. The Katanga Case: A New Attempt to Define the "Organization"

The last case study of this overview is the 7 March 2014 *Katanga* judgment of Trial Chamber II[189] which is discussed only with respect to two

[185] A different appreciation was proposed by the *amici curiae* in this case who cited the following comparison: "One can be convinced of a 'forest' without evidence of the nature and location of particular 'trees'", see Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, 9 October 2013, ICC-02/11-01/11-534, para. 42 (http://www.legal-tools.org/doc/16ef11/). However, as explained above, the existence of a 'forest' as such is not at stake as the 'forest' in a conflict situation involving several actors is always further specified. What needs to be proven is that the 'forest' consisted predominantly of, *e.g.*, oak trees. Only if a sufficient number of oak trees are identifiable, can the 'forest' be overall assessed as an 'oak forest'.

[186] Office of the Prosecutor, *Document amendé de notification des charges*, 13 January 2014, ICC-02/11-01/11-592-Anx1, para. 56 (http://www.legal-tools.org/doc/11fec9/).

[187] *Gbagbo* Confirmation of Charges, see *supra* note 18.

[188] Judge van den Wyngaert dissented from the Majority decision but expressed disagreement with regard to the Majority's findings regarding the individual criminal responsibility of *Laurent Gbagbo*, see Dissenting Opinion of Judge van den Wyngaert, annexed to Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Anx (http://www.legal-tools.org/doc/f715a5/). With regard to the 'contextual' incidents, she confirmed that "[t]he several incidents supporting the crimes against humanity allegation are now better supported by evidence" but indicated that "the previously identified problem regarding reliance upon anonymous hearsay remains", see *ibid*., para. 2.

[189] On 7 March 2014, *Germain Katanga* was convicted by a Majority of two Judges of Trial Chamber II to 12 years imprisonment for having contributed "in any other way" to the crime of murder as crime against humanity and war crimes in the context of the attack on Bogoro village. He was acquitted of the charges involving rape and sexual slavery as

issues concerning the context of crimes against humanity.[190] In general, the Majority of Trial Chamber followed by and large the Court's jurisprudence in the early cases. One detail that catches the reader's attention is the Trial Chamber's factual analysis in relation to the "attack". Unlike Pre-Trial Chamber I, which, as set out above, assumed the existence of a 'widespread attack' consisting of many operations, including the Bogoro attack, throughout the region of Ituri in the period end of 2002 to mid-2003, the Trial Chamber reduced its factual examination of the "attack" to the 24 February 2003 Bogoro event only.[191] In so doing, the Trial Chamber accepted the Prosecutor's proposition that the charged incident, the Bogoro attack, alone would suffice to establish the overall "attack".[192] However, it did not go so far as to qualify the Bogoro attack as "widespread", but confirmed its "systematic" nature.[193] There is no impediment in law to rely on a single incident for the establishment of a "widespread or systematic attack" and, consequently, the Prosecutor may present the charged incident as actually constituting the "attack". But the single-day attack against Bogoro village also demonstrates that the threshold of Article 7(1) of the Statute is not as stringent as some may fear. In fact, the Court's authority to intervene in numerous situations may not be limited so much by the legal requirements of Article 7 of the Statute but it will be defined by the Prosecutor's exercise of prosecutorial discretion in the selection of events to be investigated which must be fair and transparent, lest it raises criticism.

But, the more noteworthy contribution of the Judges to the ongoing discussion on crimes against humanity at the Court was its attempt to delineate afresh in legal terms the contours of the "organization" within the

crimes against humanity and war crimes as well as the use of children under the age of 15 years to participate actively in hostilities as a war crime.

190 *Katanga* Judgment, see *supra* note 17; Minority Opinion of Judge Christine van den Wyngaert, 7 March 2014, ICC-01/04-01/07-3436-AnxI (http://www.legal-tools.org/doc/9b0c61/); Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte, 7 March 2014, ICC-01/04-01/07-3436-AnxII (http://www.legal-tools.org/doc/c815e4/). For a comprehensive analysis of the judgment, see Carsten Stahn, "Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment", in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 809−834.

191 *Ibid*., *Katanga* Judgment, para. 1133 *et seq*. However it took other attacks into consideration to infer, *e.g.*, the "policy", or the pattern of violence, see *ibid*., paras. 1151 and 1154.

192 *Ibid*., para. 1128.

193 *Ibid*., paras. 1157−1162.

meaning of Article 7(2)(a) of the Statute. This was done, despite the fact that the qualification of the respective organized armed group FRPI as an "organization" did not risk to be viewed differently – from a legal point of view – given the Court's long-standing jurisprudence in relation to similarly structured organizations.[194] Nevertheless, the Majority of Trial Chamber II undertook to further the discussion by integrating into their exegesis of the law the controversy that arose within Pre-Trial Chamber II in the context of the *Kenya* situation and by proposing a definition of their own. They clearly reject the requirement that the non-State actors possess 'quasi-State' structures or even a hierarchical set-up.[195] Their suggestion for an alternative definition is as follows:

> On peut ainsi se demander si le fait que l'organisation soit normativement rattachée à l'existence d'une attaque, au sens de l'article 7-2-a, est de nature à influer sur la définition des caractéristiques qu'elle doit présenter. Pour la Chambre, le rattachement du terme organisation à l'existence même de l'attaque, et non pas au caractère systématique ou généralisé de celle-ci, suppose que l'organisation dispose de ressources, de moyens et de capacités suffisantes pour permettre la réalisation de la ligne de conduite ou de l'opération impliquant la commission multiple d'actes visés à l'article 7-2-a du Statut. Il suffit donc qu'elle soit dotée d'un ensemble de structures ou de mécanismes, quels qu'ils soient, suffisamment efficaces pour assurer la coordination nécessaire à la réalisation d'une attaque dirigée contre une population civile. Ainsi,

[194] As a side, it is noted that the Prosecutor, in the latest Article 53(1) Report concerning the opening of the investigation in the Central African Republic II, assessed that the Séléka movement, an organized armed group within the meaning of Article 8 of the Statute, also satisfies the criteria of an "organization" within the meaning of Article 7 of the Statute:

> A responsible command, hierarchical structure, and the group's capability to coordinate and carry out a widespread and systematic attack, described above in the discussion of Séléka as an organized armed group for purposes of article 8 of the Statute, also satisfy many of the criteria mentioned above for establishing Séléka as an organization for the purposes of Article 7. The Pre-Trial Chambers have also identified a group's control over territory of a State as a factor that may assist in the determination of whether a group qualifies an organization within the meaning of Article 7(2)(a) of the Statute. In this regard it is notable that Séléka was already in control of almost half of the territory of the CAR by December 2012 […] (footnotes omitted).

See Office of the Prosecutor, Article 53(1) Report, 24 September 2014.

[195] *Katanga* Judgment, paras. 1120 and 1122, see *supra* note 17.

> comme cela a été indiqué précédemment, l'organisation concernée doit disposer des moyens suffisants pour favoriser ou encourager l'attaque sans qu'il y ait lieu d'exiger plus. En effet, il est loin d'être exclu, tout particulièrement dans le contexte des guerres asymétriques d'aujourd'hui, qu'une attaque dirigée contre une population civile puisse être aussi le fait d'une entité privée regroupant un ensemble de personnes poursuivant l'objectif d'attaquer une population civile, en d'autres termes d'un groupe ne disposant pas obligatoirement d'une structure élaborée, susceptible d'être qualifiée de quasi-étatique.
>
> Le fait que l'attaque doive par ailleurs être qualifiée de généralisée ou de systématique ne signifie pas, pour autant, que l'organisation qui la favorise ou l'encourage soit structurée d'une manière telle qu'elle présente les mêmes caractéristiques que celles d'un État. Pour la Chambre, ce qui compte avant tout ce sont, une nouvelle fois, les capacités d'action, de concertation et de coordination, autant d'éléments essentiels à ses yeux pour définir une organisation qui, en raison même des moyens et des ressources dont elle dispose comme de l'adhésion qu'elle suscite, permettront la réalisation de l'attaque.[196]

The Trial Chamber approaches the determination of "organization" from two angles. On the one hand, it gives weight to the placement of the "organization" in Article 7(2)(a) of the Statute, linking it to the existence of the "attack", but not to its qualification as "widespread" or "systematic". Mindful of the negotiation history of Article 7 of the Statute, this may be interpreted as the Chamber's intention not to subject the "organization" to an overly stringent test as the determination of the "attack" was to be analysed against a lower threshold than the determination of its qualifiers. On the other hand, associating the "organization" with the "attack" rather than the 'basic human values' test proposed by Pre-Trial Chamber II, the Trial Judges gave the impression to assess the quality of the "organization" against a higher threshold. When it comes to the description of the entity's features, the Judges proposed some generic criteria it would look into, such as the organization's capacities for action, mutual agreement and co-ordination as well as its membership and the means and resources

[196] *Ibid*., paras. 1119−1120.

at its disposal.[197] Those factors are even less defined and stringent than those proposed by Pre-Trial Chamber II. In the end, this all-inclusive conception of the "organization" does not draw any contours and allows all kinds of "organizations" to come under the purview of the Statute. Be that as it may, the facts of the case clearly exceeded the generic test of the Chamber, as the Ngiti militia, also called FRPI, constituted in the view of the Chamber an organized armed group under humanitarian law.[198]

3.6. Conclusions

This chapter presented a selection of issues concerning the interpretation and application of the contextual elements of crimes against humanity under Article 7 of the ICC Statute and the manner in which they have been addressed jurisprudentially. As the case law of the ICC suggests, the Court has yet to dissect some of the legal components of the context, weed out ambiguities, and provide its understanding on their interrelation. This is essential for the Court's future success in prosecuting those who bear the greatest responsibility for having committed crimes against humanity.

Despite the jurisprudential legacy of other international(ised) criminal tribunals, the Court still struggles over concretizing certain notions which are essential components of the contextual definition of crimes against humanity. For example, does the component of "course of conduct" already presuppose a certain linkage of the acts, as implied in the *Mbarushimana* case? If so, what is the difference between "course of conduct" and the "policy"? Does the determination of "organization" within the meaning of Article 7 of the ICC Statute require the fulfilment of some minimum conditions or shall it remain a concept to be affirmed only on a case-by-case basis? The early cases, such as the *Bemba* case and the *Katanga/Ngudjolo* case, the *Kenya* debate and Trial Chamber II's views in the *Katanga* judgment display three different perceptions on this point. What are the criteria according to which a "policy" is attributed to

[197] The Chambers argumentation to link the "organization" only with the "attack" within the meaning of Article 7(2)(a) of the Statute appears therefore, at first, peculiar as the "attack", which the "organization" co-ordinates, in the end must be either "widespread" or "systematic" within the meaning of Article 7(1) of the Statute. Inevitably, this may have consequences on the capacities, resources, means and membership of such an "organization". It also shows the interrelation of the components contained in Articles 7(1) and 7(2)(a) of the Statute which cannot be viewed in isolation.

[198] *Katanga* Judgment, paras. 1139−1141, see *supra* note 17.

the entity devising and implementing it? What is the meaning of and the interrelation between "policy" and "systematic"? Is it simply a matter of different thresholds or do they carry a different meaning? When can a Chamber infer from the existence of a recurrent pattern of behaviour the existence of a "policy" and when is this inference no longer sufficient? The *Bemba* and *Bashir* cases, on the one hand, and the *Mbarushimana* and *Mudacumura* cases, on the other hand, follow a different approach in their pertinent analysis of the facts.

But the discussion over the contextual elements of crimes against humanity involves more than delineating the individual boundaries of each component. The different components should not be assessed in isolation but must be appraised as components of an ensemble. Retaining a relatively low threshold for one or more components will inevitably have consequences for the entire construction of Article 7 of the Statute. At the same time, raising the bar too high has the potential of narrowing down the applicability of said provision. Where to strike the balance? The Court seems to favour a more elastic, inclusive interpretation of the law. Any fears that Article 7 of the Statute was framed too restrictively are unfounded. Indeed, the Court's approach is defendable as long as a demarcation line between crimes against humanity and ordinary crimes can be discerned. Another very important aspect pertains to the application of the law to the facts which must be sound and transparent. When assessing the facts of a case, due regard must also be paid to the historical, political and social circumstances existing at the time. The legal appreciation of the facts must correspond as much as possible to 'reality' on the ground.

Those who will apply Article 3 of the Proposed Convention will not be spared of the above questions. Indeed, unlike the ICC Statute, the Convention, if entered into force, will be interpreted and applied by a plethora of national judges, prosecutors, and counsel all around the world who may have a different understanding of the law and the *raison d'être* of crimes against humanity. Legal certainty about the concept as such and the different components of the definition will assist in the creation of a worldwide understanding of crimes against humanity and avoid, it is hoped, disputes over borderline cases. Any boundaries to the concept of crimes against humanity must stem from the *law*; the authority of national courts to intervene in a particular situation must be limited by the *legal* requirements of the definition. A supplementary text to the Convention, such as the Elements of Crimes to the ICC Statute, could be a tool to achieve such

clarity. But, most importantly, appropriate guidance could be found in the jurisprudence of the ICC which, it is hoped, will gradually grow and put the concept on a robust fundament.

FICHL Publication Series No. 18 (2014):

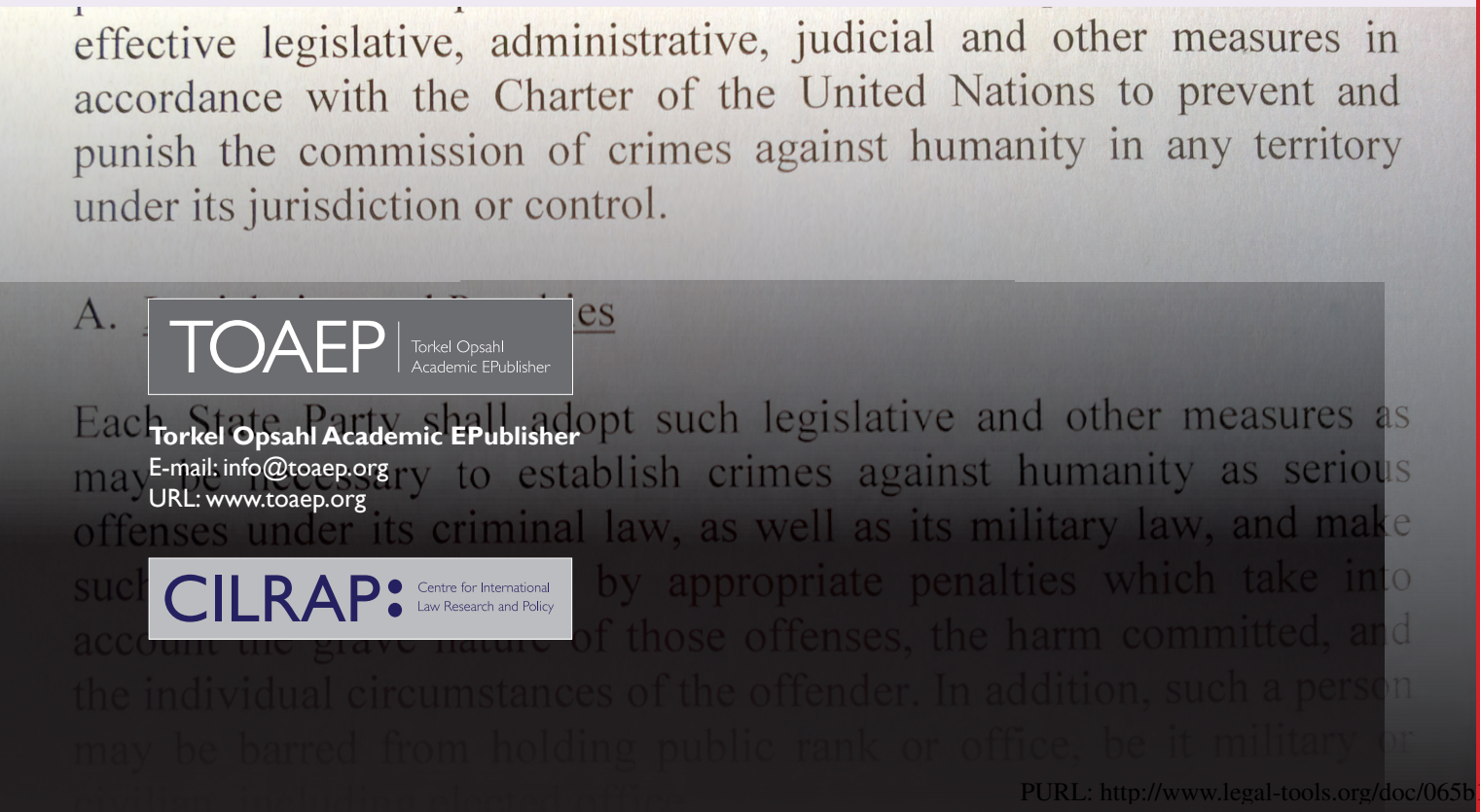
On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)

This anthology is about the need for and nature of a convention on crimes against humanity. It uses the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity as an important reference point. 16 authors discuss how such a convention may consolidate the definition of crimes against humanity, and develop measures for their prevention and punishment, decades after the conclusion of the Genocide Convention and Geneva Conventions. The authors include Leila N. Sadat, Eleni Chaitidou, Darryl Robinson, María Luisa Piqué, Travis Weber, Julie Pasch, Rhea Brathwaite, Christen Price, Rita Maxwell, Mary Kate Whalen, Ian Kennedy, SHANG Weiwei, ZHANG Yueyao and Tessa Bolton. It contains a preface by late Judge Hans-Peter Kaul and a foreword by Hans Corell.

The book is inspired by the rationale of crimes against humanity to protect against the most serious violations of fundamental individual rights, and its realization especially through domestic mechanisms. Such consciousness calls upon appropriate definition and use of contexual elements of the crime, effective jurisdiction for prevention and prosecution, and robust inter-State co-operation. The book considers individual State experiences in combating crimes against humanity. It underlines the importance of avoiding that the process to develop a new convention waters down the law of crimes against humanity or causes further polarisation between States in the area of international criminal law. It suggests that the scope of the obligation to prevent crimes against humanity will become a decisive question.

ISBN 978-82-93081-96-8



TOAEP Torkel Opsahl Academic EPublisher
Torkel Opsahl Academic EPublisher
E-mail: info@toaep.org
URL: www.toaep.org
CILRAP: Centre for International Law Research and Policy