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Greetings to you all. My name is Horejah Bala-Gaye. I am a trial lawyer in the Prosecution Division of the Office of the Prosecutor of the Intentional Criminal Court, the ICC. It is my great pleasure to discuss the topic of crimes against humanity pursuant to article 7 of the Rome Statute, in my personal capacity.

I will introduce the notion of crimes against humanity and then highlight a few key issues before I provide an overview of the contextual elements that transform ordinary national crimes into the international crime of crimes against humanity. Then, in separate lectures, I will provide very brief introductory remarks to each of the specific underlying acts listed in article 7(1) of the Rome Statute.

So, crimes against humanity is one of four international crimes within the ICC's subject matter jurisdiction. The other international crimes are war crimes, genocide and, very soon, aggression. While war crimes and genocide derived from international instruments - so, that is the Geneva Conventions and the two Additional Protocols as well as the Genocide Convention- crimes against humanity are largely rooted in international human rights law which focuses on the protection of civilians or individuals against abuses that are usually committed by state institutions. That is why, for example, in 1991 the International Law [Commission], the ILC had a Draft Code of Crimes which used the label "systematic or mass violations of human rights" to refer to crimes against humanity. Therefore, crimes against humanity are an avenue to prosecute the individuals who commit violations of certain international human rights norms, when they occur as part of a widespread or systematic attack directed against a civilian population. So, it is that broader context that determines ordinary crimes into international crimes.

Crimes against humanity are similar to genocide in that [they may both occur] during peacetime. However, crimes against humanity cover a wider scope of conduct or underlying acts than genocide. Unlike war crimes, which may be committed though an isolated or singular crimes during armed conflict, crimes against humanity require that each crime charged was committed as part of a widespread or systematic attack directed against a civilian population. When crimes against humanity are committed in the context of an armed conflict, there can be substantial overlap between crimes against humanity and war crimes. So, for example,

specific rapes that are committed during an armed conflict may be charged as both war crimes and crimes against humanity.

So, where does the notion of crimes against humanity come from? In 1915, the term 'crimes against humanity' was used as political and diplomatic condemnation to refer to the atrocities committed against the Armenian population in the Ottoman empire. However, it was only considered as a legal concept and prosecuted for the first time under the jurisdiction of the International Military Tribunal, the IMT, which began prosecutions in 1945 of the major officials who committed crimes during World War II. So, crimes against humanity under article 6(c) of the Charter of the IMT at Nuremberg was limited in scope in that it required an armed conflict nexus [for the specific crimes], while persecution required a nexus to another crime within the Tribunal's jurisdiction. The Allied Control Council Law No. 10, which established the legal bases in Germany to prosecute German war criminals and other similar offenders, other than those that were dealt with by the IMT, was broader in scope because it neither required an explicit armed conflict nexus nor did it require an additional nexus to other crimes for the crime of persecution. Crimes against humanity in relation to World War II [were also charged in national courts], as evidenced by cases such as the *Eichmann* trial in Jerusalem in 1961 and the Klaus Barbie trial in France in 1984.

The *ad hoc* international criminal tribunals, which applied customary international law, included crimes against humanity within their subject matter jurisdiction. So, article 5 of the ICTY Statute, the Yugoslavia Tribunal, required an armed conflict nexus for crimes against humanity while persecution was the only underlying act that included a discriminatory intent. Conversely, article 3 of the ICTR Statute, the Rwanda Tribunal, did not require an armed conflict nexus for crimes against humanity, but required a discriminatory intent for all crimes. In practice, the ICTY and ICTR appeals chambers confirmed that crimes against humanity under customary international law neither required a nexus to an armed conflict, nor a discriminatory intent for specific crimes other than the crime of persecution. Article 2 of the SCSL Statute, the Sierra Leone Tribunal, included an expanded list of specific sexual crimes for crimes against humanity, but it omitted the ICTY's armed conflict nexus requirement, as well as the ICTR's discriminatory intent provision for all specific crimes. Article 5 of the ECCC Statute, the Cambodia Tribunal, did not require an armed conflict nexus for crimes against humanity.

In terms of the drafting history of article 7 of the Rome Statute, [since crimes against humanity were not enshrined in a single international instrument], the drafters had to develop a new and clear definition by using customary international law and case law from the *ad hoc* tribunals to develop and codify the legal concept of crimes against humanity. The Rome Statute adopted a definition of crimes against humanity that differs from the various definitions in the statutes of the *ad hoc* tribunals. So, under the Rome Statute, the armed conflict nexus was eliminated; the discriminatory intent requirement for all underlying acts was eliminated and only maintained for persecution; the widespread or systematic nature of the attack is disjunctive; and a new element of state or organizational policy was included within the Rome Statute definition.

The contextual or *chapeau* elements of crimes against humanity, pursuant to articles 7(1) and 7(2) (a) of the Rome Statute, are the legal elements that mark the criteria to differentiate crimes against humanity from ordinary crimes. They're also the most complicated aspect of the provision. This desire for a clear distinction between domestic and international crimes is a recurrent [concern throughout determining] the purpose, the definition, and interpretation of crimes against humanity. In particular, whether a broad or narrow understanding of the scope of crimes against humanity and the interpretation of specific legal elements, such as the multiple commission of acts or widespread or systematic attack.

So, pursuant to article 7(1) of the Rome Statute, crimes against humanity referred to any of the underlying acts or specific crimes when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. This consists of four main cumulative legal requirements:

- firstly, the existence of an attack directed against any civilian population;
- second, [the widespread] or systematic nature of the attack;
- third, the nexus requirement that acts are committed as part of the attack; and fourth, knowledge of the attack.

Article 7(2)(a) of the Statute refers to three requirements that demonstrate the existence of an attack directed against a civilian population:

- first, it requires a course of conduct involving the multiple commission of acts referred to in article 7(1);
- second, directed against any civilian population;
- and third, committed pursuant to or in furtherance of a state or organizational policy to commit such an attack.

So, the elements of crimes clarify that the attack need not be a military attack. The scope of the attack is broader because it refers to a campaign or operation carried out against a civilian population. The requirement that the acts form part of a course of conduct describes a series or overall flow of events as opposed to a mere aggregate of random attacks. It is designed to exclude single or isolated acts. The multiple commission of acts means: more than a few, several or many, as interpreted by the ICC chambers. As such, the concept of multiple clearly differs from widespread.

Despite this low quantitative threshold, the scale and magnitude of what constitutes an attack is sometimes a controversial issue. The ICC judges have held that besides the commission of the acts, no additional requirement should be proven to demonstrate the existence of an attack. Unlike the broader scope of acts that could sometimes form the attack at the *ad hoc* tribunals, the ICC judges appear to increasingly favor an interpretation that limits such acts to the specific underlying acts of crimes against humanity that are listed in article 7(1). This would exclude, for example, war crimes only acts, such as pillaging, from the multiplicity of acts that may constitute an attack. At the trial phase, this has been the view of Trial Chamber III, in the *Bemba* case as well as the minority opinion of Judge van den Wyngaert in the *Katanga and Ngudjolo* case. However, the Bemba trial chamber explained that this limitation is without prejudice to considering the other acts for other purposes, such as determining whether the attack was directed against the civilian population or was committed pursuant to or in furtherance of a State or organizational policy to commit the attack. It is important to underscore that the number of specific crimes that may be charged as crimes against humanity is distinct from the multiple commission of acts that demonstrate an attack. So, for example, murder as a crime against humanity may be based on a single act of murder that is part of the multiple commission of acts other than murder in article 7(1), which constitute the attack. The multiple commission of acts refers to the multiplicity of acts, rather than incidents. So, under article 7(2)(a), a single incident may include the multiple commission of criminal acts and therefore qualify as an attack directed against a civilian population on its own.

So, the requirement that the course of conduct must be directed against any civilian population. Article 50 of Additional Protocol-I provides the customary international law definition of civilian population, which refers to persons who are not members of armed forces. Moreover, the term civilian population denotes a collective, as opposed to individual civilians. Therefore, the presence of non-civilians within a civilian population does not deprive the population of its civilian character. In such a case, the factors that are relevant to deter-

mining whether the attack was directed against a civilian population include, for instance, the means and methods used in the course of the attack - for example, attacks in the homes of people or at hospitals; the status of the victims and their numbers; the discriminatory nature of the attack- so, for example, whether is based on gender, political or racial grounds; and the nature of the crimes committed in its course, for instance sexual crimes. In case of doubt as to whether a person is a civilian, that person shall be considered a civilian. The objective is to protect civilian populations. The civilian population must be the primary as opposed to the incidental target of the attack, but this does not mean that the entire population in a particular area should have been attacked. Rather, it means that civilians [were attacked in numbers or in a manner sufficient to satisfy a chamber] that the attack was directed against the civilian population, as opposed to a limited and randomly selected number of individuals.

The term 'any civilian population' means that it is not limited to populations that are defined by common nationality, ethnicity, or other distinguishing features. Despite the requirement that the attack be directed against a civilian population, it is essential to know that there is no requirement that individual victims of crimes against humanity be civilians, they may include persons hors de combat even though it is well-settled that such persons are not civilians.

So, the course of conduct involving a multiplicity of acts must be committed pursuant to or in furtherance of a state or organizational policy to commit such an attack. This was not a legal element at the *ad hoc* tribunals as I mentioned earlier. However, it was discussed in various judgments and considered to be of evidential value. Its inclusion as a legal requirement within the ICCs legal framework has led to different judicial interpretations and considerable scholarly debate. This requirement pre-supposes the existence of either a State or an organization.

I will focus on the concept of organization, because it is the more problematic notion. It raises a number of questions which revolve around the types of organizations or groups of persons that may fall under the ICC's jurisdiction for crimes against humanity, such as, should the normative focus be on defining the characteristics of the organization? If yes, should the organization be state like, quasi-state, or is a broader concept more suitable? On the other hand, or additionally, should the organization's ability to carry out serious crimes be the yardstick, considering the increasing role of non-state actors in committing mass crimes? These approaches have policy implications for the scope and application of the Court's jurisdiction over crimes against humanity.

The ICC chambers have defined an organization as, for instance, "an organized body of people with a particular purpose" or "an association whether or not governed by institutions that sets itself specific objectives". The majority of ICC judges have interpreted an organization as a distinct concept from that of a state, due to the use of the disjunctive conjunction "or" - as in state or organization. This differs from the late Judge Kaul's view, that a state-like organization is required. His Honour was seriously concerned about the implications of a possibly infinite expansion of the ICC's jurisdiction, including a potentially unmanageable case load and an infringement on sovereignty of those states that more legitimately have jurisdiction.

However, the ICC judges have gone beyond that general definition of an organization and limited its understanding by [requiring that it is connected] to the very existence of the attack and not to its systematic or widespread nature. Meaning, that it pre-supposes that the organization has sufficient resources, means, and capacity to bring about the course of conduct or the operation involving the multiple commission of acts. It focuses on the fact that the organization has a set of structures or mechanism, whatever they may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian

population. Such an interpretation would include a private entity that is not necessarily endowed with a well-developed structure that could be described as quasi state, but nonetheless pursues and implements the objective of attacking a civilian population. Therefore, the ICC chambers have further circumscribed the general definition of an organization to limit it to organizations that have the capacity to commit mass crimes and therefore fall under the Court's jurisdiction for crimes against humanity.

Regarding the concept of policy, it has been interpreted as referring essentially to the fact that a state or organization intends to carry out an attack against the civilian population. The Elements of Crimes specify that this may be manifested in one of two ways. Either through the active promotion or encouragement of an attack against a civilian population, by a state or organization, or in exceptional circumstances it may be implemented by a deliberate failure to take action which is consciously aimed at encouraging such an attack. The motive or purpose underlying the policy to attack the civilian population may be of evidential value, but it is not a legal requirement. The inclusion of the policy element is generally regarded as a limitation aimed at excluding unconnected crimes from constituting part of an attack. The policy need not be formalized. It need not even be explicitly defined by the organization. It may be inferred from a variety of factors, which taken together establish that a policy existed. This includes the planned directed or organized nature of the attack; a recurrent pattern of violence; the use of public or private resources to further the policy; and the involvement of the state or organizational forces in the commission of crimes. It must be further demonstrated that the course of conduct was committed [pursuant to or in furtherance of] the state or organizational policy. This link between the course of conduct and the state or organizational policy excludes those acts that are perpetrated by isolated or uncoordinated individuals acting randomly on their own. It only requires that the offenses follow a regular pattern. The policy need not be proven in relation to each particular incident. This determination should be based on the totality of the evidence. So, there is no requirement that the perpetrators [are necessarily motivated] by the policy or that they themselves are members of the state or organization.

The attack must be widespread or systematic, which are disjunctive requirements. They serve as qualifiers to characterize the nature of the attack itself. The term 'systematic' refers to the organized nature of acts of violence and the improbability of their random occurrence. It considers the pattern of criminal acts. The term 'widespread' means the large-scale nature of the attack and the large number of targeted persons. Such an attack may be massive, frequent and [carried out collectively] with considerable seriousness and directed against a multiplicity of victims. So, this is neither an exclusively quantitative, nor geographical assessment. Instead, it requires a case specific determination of the facts. The purely quantitative requirement of multiple commission of acts should not be conflated with the attack's widespread nature. These are distinct concepts, bearing in mind that [the judges have interpreted] 'multiple' as referring to several or more than a few, which is its ordinary, plain English meaning. Moreover, it would render meaningless the notion of systematic attack as an alternative to widespread. However, some scholars have gone even further to argue that the combined effect of articles 7(1) and 7(2)(a) is to make the requirements of widespread and systematic cumulative.

The *ad hoc* jurisprudence has confirmed that a single incident can qualify as a widespread attack by satisfying the requirements of an attack. The underlying acts charged under article 7(1)(a) to 7(1)(k) must be committed as part of a widespread or systematic attack directed against any civilian population. Therefore, the acts may be committed prior to, during, or even after the attack. It requires an objective assessment that takes into account, in particular, the characteristics, the aims, the nature, and the consequences of the attack. Therefore,

isolated acts that clearly differ in their context and circumstances from other acts that occurred during the attack fall outside the scope of crimes against humanity.

Article 7 requires that the underlying acts that are charged should be committed with knowledge of the attack. Therefore, the perpetrator must be aware that a [widespread or systematic attack] directed against the civilian population is taking place and that his actions are part of that attack.

[Paragraph 2] of the introduction to article 7 in the Elements of Crimes, clarifies that the knowledge 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. Therefore, what is required is that the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against the civilian population. The Elements of Crimes further state that in the case of an emerging, widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack. Therefore, it requires an analysis of the mens rea requirement of the perpetrators of the crimes, as well as the knowledge of the accused depending on the mode of liability that is charged.

I hope that this has provided you with an introduction to crimes against humanity under article 7 of the Rome Statute.

I thank you very much for listening.