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Case Matrix Network

Crimes Against Humanity

Investigation and Fact-Finding
Case Analysis

International Criminal Law Guidelines

CMN ICJ Toolkits

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The Case Matrix Network ('CMN') provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for violations of core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy ('CILRAP'), which is an international non-profit organisation, registered in Belgium.

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NORWEGIAN MINISTRY OF FOREIGN AFFAIRS

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1. Introduction

1. Introduction

Crimes against humanity is a complex and emotive crime. While crimes against humanity are perpetrated against a specific population, international treaties have long considered such offences to have an international character, transformed into a collective offence against the shared dignity of peoples and the broader international community. The concept of crimes against humanity is applied in several fields of international law, to establish individual criminal responsibility of perpetrators within international humanitarian law ('IHL') and international criminal law ('ICL') and to establish state responsibility in international human rights law ('IHRL').

The attribution of crimes against humanity emerged in response to the massacre of Armenian population by Turkey in 1915, through a joint declaration by France, Great Britain and Russia, which described the massacre as a 'crime against humanity and civilisation'.[1] It was then considered as a violation of the laws of humanity in the International War Crimes Commission, [2] following the conclusion of the First World War, and as means to capture crimes committed by a government against its own citizens in the Nuremburg Charter and trials before the International Military Tribunal.[3] More recently, international criminal tribunals have applied crimes against humanity as an international crime – as seen in the International Criminal Tribunal for the Former Yugoslavia ('ICTY'),[4] International Criminal Tribunal for Rwanda ('ICTR'),[5] Special Court for Sierra Leone ('SCSL'),[6] Extraordinary Chambers in the Court of Cambodia ('ECCC')[7] and the International Criminal Court ('ICC')[8] – as well as a human rights violations before regional human rights courts.[9] Within national jurisdictions, crimes against humanity have been adjudicated on using humanitarian law, human rights law and criminal law.

As an *international crime*, crimes against humanity consist of two parts – the underlying acts of murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or severe deprivation of physical liberty, torture, rape and other sexual offences, persecution, enforced disappearance, apartheid and other inhumane acts - and a contextual part. International criminal law requires proof that one or more underlying acts took place

1 Joint Declaration of France, Great Britain and Russia, 29 May 1915.

2 See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948).

3 See, for example, the International Military Tribunal Judgments. See also Roger Clark, 'Crimes against Humanity' in G. Ginsburgs and V. N. Kudriavstscv (eds.), *The Nuremberg Trial and International Law* (Dordrecht, Boston and London, 1990).

4 ICTY Statute, established by Security Council Resolution 827, 25 May 1993, Art. 5.

5 ICTR Statute, established by Security Council Resolution 955, 8 November 2004, Art. 3.

6 Special Court for Sierra Leone, established by the Agreement between the United Nations and the Government of Sierra Leone and SCSL Statute, adopted on 16 January 2002, Art. 2.

7 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of the Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 5.

8 ICC Statute, adopted on 17 July 1998, Art. 7.

9 European Court of Human Rights has adjudicated on crimes against humanity, using customary international law and through the application of alternate offences that are proscribed within its Statute. For example, see ECHR, *Korbely v. Hungary, Grand Chamber*, Judgment, Application no. 9174/02, 19 September 2008; ECHR, *Kolk and Kislyiy v. Estonia*, Fourth Section, Decision as to the Admissibility, Applications nos. 23052/04 and 24018/04, 17 January 2006; IACtHR, *Almonacid Arellano et al v. Chile*, Preliminary objections, Merits, Reparations and Costs, 26 September 2006.

within the context of a widespread or systematic attack on a civilian population. The underlying acts become a crime against humanity by 'being embedded'[10] in this contextual requirement.

Contextual requirements of crimes against humanity		One or more underlying acts:
Attack: *a course of conduct involving the multiple commission of acts*		• Murder • Extermination • Enslavement; • Deportation or forcible transfer of population; • Imprisonment or severe deprivation of physical liberty; • Torture; • Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, any other form of sexual violence of comparable gravity; • Persecution; • Enforced disappearance; • Apartheid; • Other inhumane acts
Policy: *pursuant to or in furtherance of a State or organizational policy*		
Object of the attack: *directed against any civilian population*		
Character of the attack: *widespread [OR] systematic*		
Nexus: as part of	+	
Mens rea: *with knowledge of the attack*		

Table 1: Crimes against humanity according to the ICC Statute (contextual requirements and underlying acts).

The effective investigation, prosecution and adjudication of crimes against humanity can challenge practitioners due to its legal and factual complexity. Practitioners who turn to international legal instruments and their case law will be confronted with several definitions of crimes against humanity[11] alongside vigorous doctrinal and normative debate on the interpretation of these definitions. Practitioners working on national procedures may also need to adapt these findings to the definitions found under their national laws, while those seeking to engage the ICC through its preliminary examination will need to apply their factual findings to the legal requirements of the ICC Statute.

The guidelines address these challenges by focusing on the most complex part: the contextual requirements of crimes against humanity. It clearly explains the legal requirements of crimes against humanity and provides extracts of international case law and publicist commentary that address these legal requirements.

1.1. Purpose

These guidelines have been prepared for national criminal justice practitioners who wish to familiarise themselves with the definition of crimes against humanity under international criminal law. It focuses on the contextual elements of crimes against humanity, not its seven underlying acts, according to the definition of crimes against humanity found in the ICC

10 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 880.

11 See Table 2 for a comparative chart of the distinct components of crimes against humanity under each of these international treaties.

Statute.[12] The purpose and methodology of the guidelines are particularly relevant for human rights practitioners, who may be more familiar with the definition and jurisprudence of regional human rights mechanisms such as the Inter-American Court of Human Rights, or for practitioners who engage with national adjudicatory practices on crimes against humanity and who may wish to understand the conceptual structure and application of crimes against humanity as an international crime.

As such, the purpose of the text is to enable practitioners to:

- Recognise the legal requirements of crimes against humanity under the ICC Statute;
- Identify key interpretive issues and trends, using international case law and leading international publicists;
- Access the relevant paragraphs of international judgments that address the legal requirements of crimes against humanity;
- Compare the legal classifications of crimes against humanity under international legal instruments.

1.2. Methodology

The guidelines are a compilation of emblematic international case law and publicist commentary on the contextual elements of crimes against humanity. Quotations of international case law and publicist commentaries that demonstrate interpretive developments, trends and divergences of crimes against humanity are selected.[13]. They are organised according to the legal requirements of the contextual elements of crimes against humanity of ICC Art. 7, using the Legal Requirements Framework for Core International Crimes and Modes of Liability ('Legal Requirements Framework').

1.2.1. The Legal Requirements Framework

The Legal Requirements Framework is a structure to aid the interpretation and analysis of the crimes and modes of liability found within the ICC Statute and its Elements of Crimes ('EoC')[14], a subsidiary legal source of the ICC.[15]. It is the same methodological structure that underpins the Case Matrix[16] and the Core International Crimes Database ('CICD').[17] The Legal Requirements Framework helps to understand two fundamental dimensions of unlawful behaviour under international criminal law.

First, it helps to understand the structure of international crimes and liabilities: the context of the crime/s and their underlying act/s (see Table 1) and the distinct criminal liabilities. These

12 Murder; extermination; enslavement; deportation or forcible transfer; imprisonment; torture; sexual violence; persecution; enforced disappearance; apartheid; other inhumane acts.

13 As the purpose of the Guideline is to provide a succinct overview of the definition and application of crimes against humanity, it is necessary to restrict the choice of cases and publicist writings. All cases and publicist materials are up to date at the time of publishing.

14 Elements of Crimes, Official Records of the Assembly of States Parties to the ICC Statute of the International Criminal Court, First session, New York, 3-10 September 2002.

15 ICC Statute, Art. 21(a).

16 See the ICC Case Matrix page of the CMN website and Morten Bergsmo (ed), *Active Complementarity: Legal Information Transfer*, TOAEP, Beijing, 2011.

17 See the CMN ICJ Toolkits Project Blog.

are referred to as the *legal requirements*. Second it helps to define the composition of each legal requirement: these are described as elements of the legal requirement.

Contextual requirements, underlying acts and liabilities each consist of two essential elements:

Material elements (*actus reus*) — **of each crime and mode of liability, such as the conduct, consequences and circumstances, which are objective in their nature; and**

Mental elements (*mens rea*) — **which require subjective proof of intent and knowledge[16] for the respective material elements**

Together, the material and mental elements help to establish the structure of prohibited acts as well as criminal behaviour defined by the ICC Statute.[19]

Contextual requirement	Underlying act	Liability
Material elements (*actus reus*)	Material elements (*actus reus*)	Material elements (*actus reus*)
Mental elements (*mens rea*)	Mental elements (*mens rea*)	Mental elements (*mens rea*)

Table 2: Criminal behaviour in international criminal law.

Under the ICC Statute, each of the current crimes – genocide, crimes against humanity and war crimes – are further defined within the EoC.[20] However, the EoC does not apply the *mens rea* of ICC Art. 30 to each element: instead, it limits its assessment of the mental elements to the specific mens rea of selected elements of crimes. Moreover, the general introduction of the EoC declares that ICC Art. 30 should apply as a "default rule."[21]

Equally the liabilities – described in ICC Art. 25 and ICC Art. 28 – do not have an equivalent subsidiary source that breaks them down into the material and mental elements, despite the relative complexity of some indirect liabilities such as common purpose, command or superior responsibility. To address these gaps, the Legal Requirements Framework adapts the logic of the EoC and applies it to mental elements under ICC Art. 30 and the modes of liability under ICC Art. 25 and ICC Art. 28. Thus, the Legal Requirements Framework provides a complete structure through which to identify the elements or legal requirements of all the crimes, underlying acts, *mens rea* and modes of liabilities that currently fall under the jurisdiction of ICC.

This provides a clear and consistent framework to interpret the crimes and liabilities in the ICC Statute, which can guide any prosecutor, defence attorney or judge in the evaluation of

18 ICC Statute, Art. 30, requires that each material element is committed with intent and knowledge.

19 The Legal Requirements Framework also provides guidance on the typology and standard of evidence for the crimes and modes of liability of the ICC Statute. This builds on the evidentiary guidelines of the ICC, known as the Means of Proof, a document that was created following empirical analysis of the jurisprudence of the international Tribunals and other legal sources. The purpose of the Means of Proof is to define a common standard and typology of the evidence that has been used for adjudication of core international crimes and modes of liability. For another introduction, see Sangkul Kim, "The Anatomy of the Means of Proof Digest" in Bergsmo, *Active Complementarity*, pp. 197-222, *supra* nota 16.

20 Its modes of liability – ICC Art.25 and ICC Art.28 – do not have an equivalent subsidiary legal source that help to define the distinct elements that comprise the modes of liability.

21 "As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge", Elements of Crimes, para. 2 of General introduction.

available evidence, development of legal arguments and legal analyses.[22]

The Legal Requirements Framework also provides an analytical framework from which to organise the hundreds of decisions and judgments of international criminal tribunals. By applying the Legal Requirements Framework to international criminal law jurisprudence it is possible to identify relevant paragraphs of multiple judgments and decisions, to develop digests of the elements of crime for each crime, underlying act or mode of liability.[23] Information is sought for its elucidation of the definition and scope of a specific crime or mode of liability. It is then analysed for relevance or repetition of earlier jurisprudence. Finally, once review procedures are complete, the compiled text can be translated to different languages.

1.2.2. The contextual elements of crimes against humanity in the ICC Statute

Contextual definition of crimes against humanity	
ICC Art. 7(1)	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
Contextual elements of crimes against humanity	
EoC	[Material element] The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
	[Mental element] The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.
Additional interpretative assistance	
ICC Art. 7(2)(a)	"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
EoC	The acts need not constitute a military attack; A "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population. [...] 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. The 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. 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

Under the ICC Statute, the contextual elements of crimes against humanity are elaborated in three sources: ICC Art. 7(1), ICC Art. 7(2)(a) and the EoC (see Table 3). Article 7(1) provides the contextual definition of crimes against humanity. Both ICC Art. 7(2)(a) and the EoC provide additional interpretive assistance to specific components of this definition. Finally, the EoC describes the contextual elements found in ICC Art. 7(1), by breaking the provision into

22 This in turn can contribute towards more efficient and equal trials.

23 See CMN, International Criminal Law Guidelines: Command Responsibility, 2nd ed., November 2016 and CMN, *International Criminal Law Guidelines: Sexual and Gender-Based Violence Crimes*, expected February 2017; *International Means of Proof Charts: Sexual and Gender-Based Violence Crimes*, expercted February 2017.

its material element and its mental element.

The breadth of sources complicates the application and interpretation of the contextual definition of crimes against humanity. However, the Legal Requirements Framework provides a framework in which to organise the different sources into a coherent and logical structure, which reflects the ICC definition of crimes against humanity as well as evolving international jurisprudence.

1.2.3. The Legal Requirements Framework of crimes against humanity

Using the Legal Requirements Framework, five legal requirements of crimes against humanity can be identified, in addition to the policy component (see Table 3), from ICC Art. 7(1) and 7(2)(a) and the EoC. The legal requirements are also confirmed by evolving jurisprudence.[24]

Legal requirements: components	ICC Art. 7(1)	ICC Art. 7(2)(a)	EoC
Attack			
a course of conduct involving the multiple commission of acts	*X*	*(X)*	The acts need not constitute a military attack.
Policy			
pursuant to or in furtherance of a State or organizational policy		*X*	A "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population. (A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. 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.)
Object of the attack			
directed against any civilian population	*X*		
Character of the attack			
widespread [OR] systematic	*X*		
Nexus			
as part of	*X*		

24 Analysis of ICC case law demonstrates that legal analysis of the contextual elements of crimes against humanity continues to follow five core legal requirements, in what can be considered a continued customary international law definition of crimes against humanity, in addition to the "policy component" which can be characterised as a statutory requirement through its reference in Art.7(2)(a).

Mens rea			
with knowledge of the attack	X		The 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. 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.

Table 3: The legal requirements of crimes against humanity according to the ICC Statute and its EoC, based on the Legal Requirements Framework.

Attack

The existence of an "attack" is the first component of the contextual definition of crimes against humanity. It forms the core criminal conduct and is elaborated in both ICC Art. 7(1), ICC Art. 7(2)(a) and the EoC:

ICC Art. 7(1)	**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**
ICC Art. 7(2)(a)	**A course of conduct involving the multiple commission of acts referred to in paragraph 1**
EoC	**The acts need not constitute a military attack**

Through ICC Art. 7(2)(a) and the EoC, two dimensions of the character of an attack can be identified:

Course of conduct involving the multiple commission of acts

This has been described as a "campaign or operation carried out against the civilian population".[25] Two specific criteria emerge: first is a threshold of "multiplicity" of acts. This is intended to exclude single or isolated acts, or aggregated isolated incidents from the definition of crimes against humanity. However, a single act can also considered to satisfy this criteria, where large-scale commission of underlying acts occurred and where all other contextual legal requirements were met.[26]

Absence of a requirement of an armed conflict

The EoC clarifies that attacks can occur in times of peace and does not need to take place in or as part of an armed conflict. An attack is "distinct and independent from the concept of 'armed conflict'".[27] This ensures that "large scale atrocities committed by governments against their own populations"[28] can be classified as crimes against humanity.

25 ICC, *Bemba*, PTC 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, Case No. ICC-01/05- 01/08-424, 15 June 2009, para. 75. *See also* ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1101.

26 See e.g. ICC, *Gbagbo*, AC, Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, Case No. ICC-02/11-01/11-534, 9 October 2013, para. 12. Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes against Humanity", in *Duke Journal of Comparative and International Law*, vol. 10, 2000, p. 316, Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 891

27 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 54; see also, ICTY, *Prlić et al.*, TC III, Judgement (Volume 1 of 6), Case No. IT-04-74-T, 29 May 2013, para. 35

28 Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference", in *American Journal of International Law*, vol. 93, 1999, p. 46.

In addition, international jurisprudence confirms an additional and related dimension:

Conduct of hostilities

An attack need not form part of an armed conflict and can be distinct or separate from a military attack. However, it does not exclude military attacks from a crime against humanity, where the relevant conditions are met. It is important to note that an attack can also occur during the conduct of hostilities and still be classified as a crime against humanity: "In practice, the attack could outlast, precede, or run parallel to the armed conflict, without necessarily being a part of it".[29]

Policy: a state or organisational policy

Introduced in ICC Art. 7(2) and elaborated upon in the EoC the "policy" component is perhaps the more controversial issue in the contextual definition of crimes against humanity under the ICC Statute. It is introduced to clarify the definition of "an attack directed against any civilian population" and establishes that States and organisations as entities that may pursue such a policy. Accordingly, the policy component is closely linked to structure and evidence required to establish these components and serves to ensure that isolated or random acts are excluded. However, due to the breadth of jurisprudence and publicist commentary on the issue it is separated into an additional component.

ICC Art. 7(1)	-
ICC Art. 7(2)(a)	**Pursuant to or in furtherance of a State or organizational policy to commit such attack**
EoC	**A "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population** **[...] 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.**

Qualities of the entity: State or organisation

ICC Art. 7(2) confirms that entities other than States can perpetrate crimes against humanity, where the attack is pursuant to or in furtherance of a policy. While States may traditionally be the entities in possession of institutional capacity and resources to organise an attack against a civilian population, large scale attacks against civilians have moved outside the domain of governments. The ICC Statute and its jurisprudence recognises this fact, while its jurisprudence has considered that the organisation posseses a structure or mechanism that is sufficient to promote or encourage the attack as well as efficient enough to ensure the coordination necessary to carry out such an attack.

29 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 54; see also, ICTY, *Prlić et al.*, TC III, Judgement (Volume 1 of 6), Case No. IT-04-74-T, 29 May 2013, para. 35

Qualities of the policy
The EoC considers that a policy may be inferred from a deliberate failure to act by a State or organisation. However, it specifies that the deliberate failure must be a consciously taken to encourage the attack, and that it cannot be inferred only from the absence of any action by the State or organisation.

International jurisprudence has also asserted that there is no requirement for the existence of a formalised policy nor for any demonstration of motive or purpose of such policy. It has also confirmed that the existence of a policy can be inferred from factual circumstances, such as planning, directing or organising an attack, or the use of public or private resources.

Object of the attack: any civilian population

The second component defines the object against which the attack is directed against – which is "any civilian population". It is defined in ICC Art. 7(1):

ICC Art. 7(1)	**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**
ICC Art. 7(2)(a)	-
EoC	-

Certain characteristics of the civilian population have been adjudicated upon, which help to clarify the dimensions of this component:

Civilian population: those involved in hostilities
Firstly, while any civilian population must be the target of any attack, international jurisprudence has confirmed that there is no requirement that individual victims must be civilians.

Absence of a discriminatory requirement against the civilian population on the basis nationality, ethnicity, citizenship, statelessness
Equally, there is no requirement that the "civilian population" have any common identity such nationality, ethnicity, religion or other similar common identity, nor that they are targeted due to that identity. This is an important distinction from the Statutes of the ICTR and SCSL which did impose a requirement for the attack to be based on discrimination against the shared identity of specific groups.

Civilian populations as a primary target
While the attack must target any civilian population, it is not exclusive to civilians. The presence of non-civilians within the targeted population would not deprive that population or area of its civilian character.

Character: Widespread or systematic

The character of the attack is set out in ICC Art. 7(1) and provides a further fundamental dimension of the material requirement, which serves to exclude small scale, random or isolated acts from the classification of crimes against humanity:

ICC Art. 7(1)	**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**
ICC Art. 7(2)(a)	-
EoC	-

It is a disjunctive requirement that requires that the either is either widespread or systematic. International jurisprudence has avoided adopting categorical thresholds and instead determining the character of the attack on the basis of the factual circumstances.

Widespread attack
Notwithstanding, a *widespread attack* is generally accepted as an accumulation of underlying acts over a period of time, where the scale of the attack may be large with a high number of victims.

Systematic attack
A *systematic attack* may be determined by factors such as the organised nature, or regular patters of the acts of violence that would be quite in contrast to random occurrence of violence.

Nexus: as part of

Sourced in ICC Art. 7(1) the nexus requirement seeks to ensure that the underlying acts charged under Art. 7(1)(a) to (k) are perpetrated "as part of" a widespread or systematic attack against civilian population. This is intended to exclude any crimes that are unrelated to the attack.

ICC Art. 7(1)	**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**
ICC Art. 7(2)(a)	-
EoC	-

Mens rea: knowledge of the attack

The mental element of crimes against humanity is found in ICC Art. 7(1) and is elaborated upon in the EoC as the second contextual element of crimes against humanity:

ICC Art. 7(1)	**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**
ICC Art. 7(2)(a)	-

EoC	**The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.** **The 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. 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.**

While ICC Art. 7(2) requires that the accused had knowledge of the attach, the mental element of crimes against humanity, found in the EoC is disjunctive element, requiring either that the accused knew that the conduct was part of the attack – or – that they intended in to be part of the attack.

The EoC also provides interpretive assistance on the limitations of proof for the mental element, as follows:

- Knowledge of all characteristics of the attack is not required;
- Knowledge of the precise details of the plan or policy of the State or organisation is not required;
- In an emerging attack, the intent clause is satisfied where the perpetrator intended to further an attack.

1.2.4. Crimes against humanity in key international legal instruments

Several international or internationalised criminal tribunals have adopted legal classifications of crimes against humanity that are substantively different from one another and from the ICC Statute. The Legal Requirements Framework provides a comparative axis through which to catalogue the different classifications of crimes against humanity. Comparison is restricted to the legal classifications of crimes against humanity applied by the international criminal tribunals cited in the Guidelines (see Table 2). Other international provisions can be found in Annex 1. Understanding the differences in legal classification can help to understand the different interpretive challenges of the tribunals.

The **ICTY Statute (1993)** requires that crimes against humanity be committed in armed conflict[30] but does not codify the character as widespread or systematic, nor does it include the policy component or the *mens rea* requirement:

30 See ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 249 where this requirement was considered a jurisdictional requirement rather than part of the character of the crime.

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes *when committed in armed conflict, whether international or internal in character*, and directed against any civilian population.[31]

In contrast, the **ICTR Statute (1994)** dissociates the crime with the existence of armed conflict. The Statute also omits the policy component and the *mens rea* requirement. However, it imposes additional components to the object of the attack by requiring that the civilian population be attacked on specific discriminatory grounds:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on *national, political, ethnic, racial or religious grounds*.[32]

The **SCSL Statute (2002)** largely replicates the ICC Statute but omits the policy component and *mens rea* requirement:

> The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population.[33]

31 ICTY Statute, Art. 5 (emphasis added).
32 ICTR Statute, Art. 3 (emphasis added)..
33 SCSL Statute, Art. 2.

Crimes against humanity / Legal requirements	ICC Art. 7	ICTY Art. 5	ICTR Art. 3	SCSL Art. 2
Attack	*attack*	*when committed in armed conflict, whether international or internal in character*	*attack*	*attack*
Policy	*pursuant to or in furtherance of a State or organisational policy*	-	-	-
Object of the attack	*directed against any civilian population*	*directed against any civilian population*	*attack against any civilian population on national, political, ethnic, racial or religious grounds*	*against any civilian population on national, political, ethnic, racial or religious grounds*
Character of the attack	*widespread or systematic*	-	*widespread or systematic*	*widespread or systematic*
Nexus	*as part of*	*when committed in armed conflict*	*as part of*	*as part of*
Mens rea	*with knowledge of the attack*	-	-	-

Table 4: Comparative chart of the requirements of crimes against humanity under key international legal instruments.

1.3. Structure

Section 1 establishes the purpose, methodology and structure adopted in these guidelines. It also includes a glossary of key terms.

Sections 2 to 7 provide a guide to the international case law and publicist commentary on crimes against humanity. Quotations from international(ised) criminal tribunals and courts and publicists demonstrate the interpretation of the material and mental elements of crimes against humanity. The methodology is explained in Section 1.3.

Section 8 includes the index of the international cases and publicists, which have been cited.

Annex 1 provides other relevant provisions on crimes against humanity found in international legal instruments.

Sections 2 to 7 are organised according to the following stylistic and formal constraints:

International case law

Quotations are chronologically ordered in order to understand how the jurisprudence has evolved for each of the legal requirements (and components) of crimes against humanity.

Each quotation is introduced briefly and identified by the tribunal, the case name (in *italics* and **bold**), and the chamber that issued the decision. The introductory 'filler' text will also indicate the legal issue that is addressed or the relevance of the quotation.

The tribunal is first referenced with its full name and then by its popular in all subsequent references, where a popular case name exists. In the first reference, the popular case name will appear in brackets after the full case name.

Publicists

Selected quotations of leading publicists are included as the concluding sub-sections, including comments and analyses on the jurisprudential evolution of the legal requirements and their components. They are therefore ordered chronologically according to the decision or Judgment discussed by the publicist, rather than the date of the publication. Each quote is introduced using the last name of the author (underlined).

Hyperlinks to the ICC Legal Tools Database

The vast majority of documents, including the cases, are hyperlinked to the specific legal document, recorded in the ICC Legal Tools Database, through the footnote reference. Thus, readers using an electronic version can access the entire Judgment or decision whenever they have an internet connection.

Footnotes: international case law

Decisions or Judgments are fully referenced within the footnotes: including the institution acronym, the last name of the accused (*in italics*), the acronym of Chamber, the type of decision or Judgment, the case number, the date it was issued and the paragraph number.

If there is more than one accused person, only the surname of the first accused will be written, followed by the expression '*et al.*' Where the case law quotation includes footnotes, they will be indicated. This is a discretionary practice: those references that were deemed of little relevance have been removed and acknowledged as such. When two successive quotations come from the same decision, the second footnote will not contain all the details of the decision or Judgment - except for the paragraph number – but will instead use the term ibid (*in italics*). The term ibid refers to the first decision or Judgment cited in the previous footnote.

Footnotes: publicists

Footnotes contained within the publicist quotation will appear in the text but the footnote number is adjusted to the numbering system of the Guidelines. The content of the footnote (including the style for the references) has also been adjusted. The last footnote of each publicist quotation gives the full reference. If a publicist text is quoted more than once in one section, the next reference will refer to the supra note where the entire reference is provided. When it was deemed that a part of the text in the original footnote was of little use for the reader, the elision will be indicated by an ellipsis in square brackets […]. When it was deemed that the footnote within the publicist quote was of little use for the reader, the omission will be indicated.

1.4. Glossary of key terms and acronyms

AC: Appeals Chamber.

Actus reus: material element of a criminal offence.

***Ad hoc* tribunals:** the two tribunals established by the United Nations Security Council to prosecute persons responsible for committing international crimes in the Former Yugoslavia since 1991 and in Rwanda in 1994. They are also referred in this publication as the ICTY and the ICTR.

Case Matrix Digests: one part of the ICC Case Matrix, a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases.

Circumstantial evidence: a fact that can be used to infer another fact.

Core International Crimes Database ('CICD'): is an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) Elements of Crimes; (iii) Modes of Liability and (iii) Means of Proof.

De facto: in fact, whether by right or not; actual.

De jure: according to law.

ECCC: Extraordinary Chambers in the Courts of Cambodia.

Elements: see legal requirements.

ICC: International Criminal Court.

ICC Pre-Trial Chamber ('PTC'): the first chamber of the ICC, which decides on issues preceding the trial.

ICTR: International Criminal Tribunal for Rwanda.

ICTY: International Criminal Tribunal for the former Yugoslavia.

International(ised) criminal courts and tribunals: term used to refer to international criminal courts and tribunals and to courts and tribunal with an international feature. This term encompasses inter *alia* the ECCC, the Iraqi Special Tribunal and the SCSL.

International case law: international criminal jurisprudence.

Legal requirements: elements (including the material and mental elements) that need to be proven to find an accused guilty of a crime.

Material facts: facts that need to be proven in order to fulfil all the legal requirements of a crime.

Mens rea: mental element of a crime.

Publicists: scholars.

SCSL: Special Court for Sierra Leone.

TC: Trial Chamber.

Underlying acts: acts or offences that are perpetrated within the context of genocide, crimes against humanity or war crimes. There are eleven underlying acts of crimes against humanity: (1) murder; (2) extermination; (3) enslavement; (4) deportation or forcible transfer of population; (5) imprisonment or severe deprivation of physical liberty; (6) torture; (7) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, any other form of sexual violence of comparable gravity; (8) persecution; (9) enforced disappearance; (10) apartheid; (11) other inhumane acts.

2

2. Attack

2.1. Conduct of Hostilities

2.2. Absence of a requirement of an armed conflict

2.3. Course of conduct

2. Attack

2.1. Conduct of Hostilities

International Case Law

According to the ICTY Trial Chamber in ***Kupreškić et al.***:

> [I]n international law there is no justification for attacks on civilians carried out either by virtue of the tu quoque principle (i.e. the argument whereby the fact that the adversary is committing similar crimes offers a valid defence to a belligerent's crimes) or on the strength of the principle of reprisals.[34]

The ICTY Trial Chamber in ***Kunarac et al.*** had stated that:

> In the context of a crime against humanity, 'attack' is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention.[35]

The ICTY Trial Chamber in ***Perišić*** also noted that:

> An 'attack' may be defined as a course of conduct involving the commission of acts of violence [...]The attack may precede, outlast or continue during the armed conflict and need not be part of it.[36]

2.2. Absence of a requirement of an armed conflict

International Case Law

The ICTY Appeals Chamber in ***Tadić*** clarified that crimes against humanity may also be committed in peace-time:

> [U]nder customary international law these crimes [crimes against humanity] may also be committed in times of peace.[37]

34 ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 765.

35 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, paras. 416 and 417.

36 ICTY, *Perišić*, TC I, Judgement, Case No. IT-04-81-T, 6 September 2011, para. 82; see also ICTY, *Gotovina et al.*, TC I, Judgement (Volume II of II), Case No. IT-06-90-T, 15 April 2011, para. 1702; ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 327; see also, ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 86.

37 ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 113. Reiterated in ICTY, *Đorđević*, TC II, Public Judgment with Confidential Annex (Volume II of II), Case No. IT-05-87/1-T, 23 February 2011, para. 1587; affirming, see, ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 251; see also: ICTY, *Gotovina et al.*, TC I, Judgement (Volume I of II), Case No. IT-06-90-T, 15 April 2011, para. 1700; ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 86.

The same Chamber also considered that the existence of an armed conflict under the ICTY Statute was nothing more than a "jurisdictional requirement":

> The Appeals Chamber would also agree with the Prosecution that the words 'committed in armed conflict' in Article 5 of the Statute require nothing more than the *existence* of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not 'a substantive element of the *mens rea* of crimes against humanity' (i.e., not a legal ingredient of the subjective element of the crime).[38]

Subsequently, the ICTY Trial Chamber in ***Krnojelac*** found that:

> The concept of 'attack' is distinct and independent from the concept of 'armed conflict'. In practice, the attack could outlast, precede, or run parallel to the armed conflict, without necessarily being a part of it.[39]

The ICTY Trial Chamber in ***Kunarac et al.*** expanded this distinction:

> The term 'attack' in the context of a crime against humanity carries a slightly different meaning than in the laws of war.[40] In the context of a crime against humanity, 'attack' is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.[41]

The ICTY Appeals Chamber in ***Kunarac et al.*** continued to reject the permissibility of legitimate reprisal attacks against a civilian population:

> [I]t is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.[42]

The SCSL Trial Chamber in ***Taylor*** clarified that the concept of an 'attack' is:

> not limited to the use of armed force but may encompass any mistreatment of any civilian population. 'Attack' is a concept different from that of 'armed conflict' and need not be part of it.[43]

38 ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 249 (footnotes omitted).

39 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 54; see also, ICTY, *Prlić et al.*, TC III, Judgement (Volume 1 of 6), Case No. IT-04-74-T, 29 May 2013, para. 35

40 Art 49(1) of Additional Protocol I to the Geneva Conventions of 12 Aug 1949, for example, defines "attacks" as "acts of violence against the adversary, whether in offence or in defence."

41 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 416.

42 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 87, affirming ICTY, *Stanišić et al.*, TC II, Judgment (Volume 1 of 3), Case No. IT-08-91-T, 27 March 2013, para. 24.

43 SCSL, *Taylor*, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012, para. 506 (footnotes omitted).

The ICC Trial Chamber in ***Bemba*** reinforced the definition of the EoC declaring that:

> The attack need not constitute a 'military' attack.[44] Rather, an 'attack' within the meaning of Article 7 refers to a 'campaign or operation carried out against the civilian population'.[45,46]

Publicists

Robinson has considered the drafting history of the provision, remarking that:

> A significant number of delegations had strenuously argued that there must be an armed conflict, and emphasized that this was required in the Nuremberg and Tokyo Charters and, more recently, in the ICTY Statute. However, a clear majority of delegations were adamant that there was no such requirement in customary law. These delegations pointed to the absence of such requirement in Allied Control Council Law no. 10, the ICTR Statute, and other relevant instruments, the commentary of experts and indeed, the jurisprudence of the ICTY itself. In the final compromise on article 7, the majority view prevailed, an outcome which was essential to the utility of article 7. Had a requirement of armed conflict been included, crimes against humanity would have been largely redundant, since most of all the conduct involved would already have been covered as war crimes.[47]

Regarding the absence of an armed conflict, Robinson elaborates that:

> [C]rimes against humanity can occur not only during armed conflict but also during times of peace or civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large scale atrocities committed by governments against their own populations.[48]

Dinstein considered the role of the ICTY in enabling this development:

> In the case law, the ICTY contributed to the trend cutting the umbilical cord of crimes against humanity to armed conflict, despite the fact that in its own proceedings (given the language of the 1993 Statute) it could not sever the bond to armed conflict altogether.[49]

44 Elements of Crimes, Introduction to Article 7, para. 3. See also ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 75; and ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1101.

45 ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 75. See also ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1101.

46 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 149. See also ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 80.

47 Darryl Robinson, "The Elements of Crimes against Humanity" in Roy S. Lee and Hakan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 62.

48 Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference", in *American Journal of International Law*, vol. 93, 1999, p. 46.

49 Yoram Dinstein, "Case Analysis: Crimes against Humanity after Tadić", in *Leiden Journal of International Law*, vol. 13, no. 2, 2000, p. 386.

2.3. Course of conduct

International Case Law

The ICTY Trial Chamber in ***Tadić*** sought to establish that the attack be part of a wider course of conduct:

> The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5 [on crimes against humanity], that they be 'directed against any civilian population', ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.[50]

The ICTR Trial Chamber in ***Kayishema et al.*** declared that multiple underlying acts could take place within any one attack:

> The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.[51]

The ICC Pre-Trial Chamber in ***Bemba*** summarised the character of the term 'attack':

> [T]he term refers to a campaign or operation carried out against the civilian population, the appropriate terminology used in ICC Art.7 (2) (a) being a 'course of conduct'.[52] The commission of the acts referred to in ICC Art.7 (1) of the Statute constitute the 'attack' itself and, beside the commission of the acts, no additional requirement for the existence of an 'attack' should be proven.[53]

The SCSL Trial Chamber in ***Taylor*** also observed that:

> An 'attack' may be defined as a campaign, operation or course of conduct.[54]

The ICC Trial Chamber in ***Katanga*** has separated the meaning of a "course of conduct" embedded in the concept of an attack, and the requirements that this attack be widespread or systematic:

> [T]he proof required to establish the existence of an attack cannot be confused with the proof required to demonstrate the widespread nature of the attack [...]This first step consists of proving only that the course of conduct involved the multiple commission of acts referred to in article 7(1). In this connection, where established that it involved such multiple commission of acts, a single event may well constitute an attack within the meaning of article 7(2)(a), provided that the other elements of that article are met.[55]

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50 ICTY, *Tadić*, TC, Decision on the Form of the Indictment, Case No. IT-94-1-T, 14 November 1995, para. 11; see also ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 86; ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 327; ICTY, *Gotovina et al.*, TC I, Judgement (Volume II of II), Case No. IT-06-90-T, 15 April 2011, para. 1702; ICTY, *Perišić*,, TC I, Judgement, Case No. IT-04-81-T, 6 September 2011, para. 82.

51 ICTR, *Kayishema et al.*, TC II, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 122.

52 Rodney Dixon, "Article 7" in Otto Triffterer (ed.), *Commentary on the ICC Statute of the International Criminal Court - Observer's Notes, Article by Article*, (2nd ed.), Nomos Verlag, 2008, p. 175.

53 ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 75 (some footnotes omitted).

54 SCSL, *Taylor*, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012, para. 506 (footnotes omitted). See also ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 415.

55 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1101 (footnotes omitted).

The ICC Trial Chamber in ***Bemba*** has asserted that a course of conduct cannot be an aggregation of random acts:

> The requirement that the acts form part of a 'course of conduct' shows that the provision is not designed to capture single isolated acts,[56] but 'describes a series or overall flow of events as opposed to a mere aggregate of random acts'.[57,58]

It also went on clarify that:

> [A]s specified in the Statute and the EoC,[59] the 'course of conduct' must involve the 'multiple commission of acts' referred to in Article 7(1). In the Chamber's view, this indicates a quantitative threshold requiring 'more than a few', 'several' or 'many' acts.[60] The number of the individual types of acts referred to in Article 7(1) is, however, irrelevant provided that each of the acts fall within the course of conduct and cumulatively satisfy the required quantitative threshold.[61,62]

Publicists

Cryer et. al. explain that, in the context of crimes against humanity:

> The term 'attack' is not used in the same sense as in the law of war crimes. An 'attack' need not involve the use of armed force, and can encompass mistreatment of the civilian population.[63] It refers to the broader course of conduct, involving prohibited acts, which the acts of the accused form part.[64]

As to the nature of the acts constituting the attack, Cryer et al. point out that:

> The acts of the accused need not be of the same type as other acts committed during the attack. For example, if a group launches a killing campaign, and a person commits sexual violence in the execution of that campaign, the person is guilty of the crime against humanity of sexual violence. It is irrelevant whether the State or organization encouraged sexual violence, since the necessary contextual element is already satisfied because of the attack based on killing'.[65]

As to the quantity of acts required within an attack, Chesterman writes that:

> [T]he ICC Statute defines 'attack' as 'a course of conduct involving the multiple commission of [proscribed] acts [...]'.[66]

56 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1101. See also ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 644.

57 ICC, *Gbagbo*, PTC I, Decision on the confirmation of charges against Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, 12 June 2014, para. 209.

58 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 149.

59 Elements of Crimes, Introduction to Art. 7, para. 3.

60 ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 81, referring to "more than a few".

61 See, similarly, ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, paras. 96 and 100; and ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 550. See also Section III(G)(3)

62 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 150.

63 Elements of Crimes, Introduction to Art. 7, para. 3; ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 86; ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 581; SCSL, *Taylor*, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012, para. 506.

64 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 235.

65 *Ibid.*, p. 244.

66 ICC Statute, Art. 7(2)(a).

> Nevertheless, it would be unwise to require multiple acts before one act may be found. For example, it is possible that a single act of extermination might be committed on such a scale as to amount to a 'widespread or systematic attack', which constitutes a crime against humanity'. It would be perverse to hold that such an attack amounts to a crime against humanity only upon proof of additional acts.[67]

In an *amicus curiae* concerning the ICC Pre-Trial Chamber decision to adjourn the confirmation hearing in the case concerning *Gbagbo*, Robinson et al. submitted that:

> The most literal meaning of the term 'multiple' is 'more than one'; it also commonly connotes 'several'. In case law it has been interpreted as meaning 'more than a few'.[68] The phrase 'course of conduct' does not import any scale beyond this threshold. The phrase 'course of conduct' was expressly drawn from the *Tadić* decision,[69] which introduced the phrase as a contrast to 'one particular act'[70].[71]

Similarly, Werle and Jessberger explain that:

> The 'attack' element describes a course of conduct involving the commission of acts of violence. An act becomes a criminally relevant course of conduct when it is intended to violate the protected human rights of a civilian population. According to Article 7(2)(a) of the ICC Statute, such a course of conduct must include the 'multiple commission' of acts listed in Article 7(1) of the Statute. Multiple commission is a lesser requirement than 'widespread attack'. It is present both if the same act is committed many times and if different acts are committed. The perpetrator does not need to act repeatedly him or herself. A single act of intentional killings can constitute a crime against humanity if the single act fits within the overall context[72].[73]

In an *amicus curiae* submitted to the ICC Pre-Trial Chamber in *Gbagbo*, Robinson et al. warned against mixing the character of the attack (i.e. widespread) with the requirement that an 'attack' consists of multiple acts:

> The Impugned Decision, and the certified question, are based on an incorrect understanding of the *scale* required for an 'attack' under Article 7(2)(a). In both the Impugned Decision and the decision granting leave to appeal, the Majority repeats the conclusion that '*none of the incidents, taken on their own, could establish the existence of such an 'attack*' [...].
>
> To appreciate the legal standard entailed by the Majority's conclusion, one must consider the four incidents on which the Prosecution concentrated its case and brought direct evidence. One of the incidents allegedly involved 41 murders, 35 assaults and 15 rapes of non-combatants. Another incident allegedly involved the killing of over 80 persons, including by burning

67 Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes against Humanity", in *Duke Journal of Comparative and International Law*, vol. 10, 2000, p. 316 (some footnotes omitted).

68 See e.g. ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para 81: "The legal requisite of "multiple commission of acts" means that more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred".

69 Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court" in Roy S. Lee (ed.), *The International Criminal Court: The Making of the ICC Statute*, Kluwer, 1999, p. 95-97.

70 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para 644.

71 ICC, *Gbagbo*, AC, Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, Case No. ICC-02/11-01/11-534, 9 October 2013, para. 11.

72 Making this explicit, see ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 649: 'Clearly, a single act by a perpetrator taken within the context of widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. [T]hus, "[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror and persecution'."

73 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 891 (some footnotes omitted).

> people alive, and raping at least 17 women. The premise that *none* of these incidents rose to the level required for an 'attack' reflects a misapprehension of the scale required for ICC Art. 7(2)(a), which merely requires 'multiple' acts. In particular, the Majority appears to be injecting the requirement of 'widespread' into the concept of 'attack'.
>
> Any further evaluation of scale, beyond the simple requirement of 'multiple' commission of acts, must be conducted under the 'widespread or systematic' test.
>
> In order to avoid a contradiction between ICC Art.7(1) and Art.7(2)(a), the term 'multiple' must entail a threshold significantly lower than the term 'widespread'. Otherwise, the disjunctive nature of the 'widespread or systematic' test would be negated.[74]

On the issue of whether a single act could qualify as an attack, Werle and Jessberger say:

> It is unclear whether a single act may constitute an attack within the meaning of Article 7(1) of the ICC Statute if it leads to a large number of injuries. These include, for example, acts such as dropping an atom bomb or –borrowing from the events of 11 September 2001- flying an airplane into a nuclear power or a skyscraper. The answer is yes. The examples show that even a one-time act can harm individual rights on a scale that affects the international community. The object and purpose of the norm alone argue that such cases should be considered attacks within the meaning of the definition. The legal definition of the element in Article 7(2)(a) allows no other conclusion. The many violations of very personal rights permit this to be defined as 'multiple commission'.[75]

In the opinion of Robinson et al.:

> A single incident can qualify as an 'attack directed against a civilian population'. Under Article 7(2)(a), a single incident can certainly include the multiple commission of prohibited acts. This also conforms to ordinary usage: one violent attack killing dozens of non-combatants would fall literally and archetypically within the understanding of an attack against a civilian population. Jurisprudence also confirms that a single incident can qualify as a 'widespread' attack, thereby a fortiori satisfying the requirements for an attack.[76,77]

In this respect, Cassese added that:

> [C]rimes against humanity are distinguishable from war crimes against individuals, on the basis that they must be widespread or demonstrate a systematic character. It is nevertheless clear that in certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above. An *isolated act*, however—i.e. an atrocity, which did not occur within such a context—cannot. Once again [...] as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. Thus a single act, for example an

74 ICC, *Gbagbo*, AC, Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, Case No. ICC-02/11-01/11-534, 9 October 2013, paras. 7-10 (footnotes omitted).

75 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 893 (footnotes omitted).

76 See e.g. ICTY, *Blagojević et al.*, TC I, Judgement, Case No. IT-02-60-T, 17 January 2005, para. 545: 'A crime may be widespread by the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'; see also Yearbook of the International Law Commission 1996, Volume II, part 2, Report of the Commission to the General Assembly on the work of its forty-eight session, p. 47. For an example of a case confirming that each one of single 'incidents' can constitute an 'attack' in crimes against humanity, see ICTY, *Milutinović et al.*, TC III, Judgement (Volume 3 of 4), Case No. IT-05-87-T, 26 February 2009, paras. 1181, 1184, 1189, 1194 and 1201.

77 ICC, *Gbagbo*, AC, Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, Case No. ICC-02/11-01/11-534, 9 October 2013, para. 12.

> act of denouncing a Jewish neighbour to the Nazi authorities—if committed against a background of widespread persecution—could amount to a crime against humanity…[78]

In contrast, deGuzman remains unconvinced:

> [T]he ICC Statute adds some new ambiguities. In particular, the second paragraph's definition of '[a]ttack directed against any civilian population' adds the requirement that there must be a 'multiple commission of acts.' The intent was to ensure that isolated atrocities are excluded from the definition. It is unclear, however, what is meant by the term 'act.' Does this mean that the single 'act' of detonating a nuclear bomb that kills thousands would not be considered 'multiple acts?' Or would each resulting murder be considered an 'act?[79]

78 Antonio Cassese, "Crimes against Humanity", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), T*he Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 367 (footnotes omitted, emphasis in the original).

79 Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, p. 354 (footnotes omitted).

3

3. A State or organisational policy inferred from the totality of the circumstances

3.1. Debate within the ICTY/R regarding the status of 'policy'

3.2. Policy as a formal component of crimes against humanity before the ICC

3.3. Qualities of the policy

3.4. Qualities of the entity – state or organisation

3. A State or organisational policy inferred from the totality of the circumstances

3.1. Debate within the ICTY/R regarding the status of 'policy'

International Case Law

Although the ICTY Statute does not contain a formal policy requirement, the Trial Chamber in ***Tadić*** considered it to possess a traditional or customary status:

> [T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts.[80]

The ICTY Trial Chamber in ***Kunarac et al.*** remarked that:

> [T]here has been some difference of approach in the jurisprudence of the ICTY and ICTR, and in that of other courts, as well as in the history of the drafting of international instruments, as to whether a policy element is required under existing customary law. The Trial Chamber does not have to decide that point because even if there is such a requirement, it has been fulfilled in this case.[81]

The ICTY Trial Chamber in ***Kupreškić et al.*** expressed its doubts on whether the existence of a policy was a formal requirement:

> With regard to the 'form of governmental, organisational or group policy' which is to direct the acts in question, the Trial Chamber has noted that although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a *requirement*, as such, for crimes against humanity. In any case, it appears that such a policy need not be explicitly formulated, nor need it be the policy of a State[82].[83]

The ICTY Appeals Chamber in ***Kunarac et al.*** considered that the requirement of a policy did not have the status of customary international law, while accepting that the existence of a policy may constitute evidence of a systematic attack:

> Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they

80 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 653 (some footnotes omitted)
81 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 432 (footnotes omitted).
82 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 653.
83 ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, paras. 551.

> were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[84]

The ICTY Trial Chamber in ***Naletilić et al.*** followed a similar approach:

> While it was held that the acts must be undertaken 'in furtherance of a policy', other Trial Chambers applied a more liberal view. The Appeals Chamber has clarified that the existence of a policy or plan may serve as evidence in establishing that an attack was directed against a civilian population and that it was widespread or systematic. It does not however constitute a separate and additional legal element of the crime as it is neither enshrined in the Statute of the Tribunal nor a requirement under customary law.[85]

Publicists

Jalloh summarises the interpretive developments of the ICTY through three crucial cases: *Tadić, Kupreškić et al.* and *Kunarac et al.*:

> [The ICTY Statute] does not include an explicit policy requirement in its definition of crimes against humanity. However, the early jurisprudence of that court adopted the view that such a policy was an implicit element of crimes against humanity under customary international law. In the seminal first case, *Tadić*, the ICTY Trial Chamber found in 1997 that customary international law did require that crimes against humanity be committed pursuant to a policy but that the policy was not required to originate from the State.[86]
>
> [...] The trial court in the *Kupreškić* case [...] held that even though crimes against humanity necessarily implied the existence of a policy, it was probably more of a useful threshold to be considered rather than a requirement of crimes against humanity as such.
>
> [Nevertheless, the *Tadić* assessment that the policy requirement was implicit and necessary under customary international law] was emphatically rejected by the Appeals Chamber of the ICTY in the *Kunarac* Judgment of 2002. The appeals court held that a review of the status of the State or organizational policy requirement under customary international law overwhelmingly supported the conclusion that neither State action nor a policy of any kind

84 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 98 (footnotes omitted); the ICTY Appeals Chamber reaffirmed this conclusion and also applied it to the crime of genocide in ICTY, *Krstić*, AC, Judgement, Case No. IT-98-33-A, 19 April 2004, para. 225; see also ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, paras. 181-182.

85 ICTY, *Naletilić et al.*, TC I, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 234 (citations omitted).

86 Referring to ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, paras. 654-655 (holding that customary international law has evolved to recognize that such policies may be pursued by non-government forces with de facto control over, or free movement within, a defined territory and that this could emanate from a governmental, organizational, or group policy.)

was required to establish crimes against humanity.[87] The decision has also been cited with approval by the sister ICTR[88].[89]

Jalloh continues to critique the reasoning of the ICTY Appeals Chamber in *Kunarac et al.*:

> [T]he ICTY appeals judges attempted to resolve the policy requirement debate definitively in the *Kunarac* case. In a simple footnote whose relatively short length belies the moral and legal ambition of its conclusion, the Appeals Chamber rejected the assertion that a plan or a policy was even a necessary element to consider in evaluating crimes against humanity under customary international law. In support of this assessment, the Tribunal cited ample case law from the national courts of the Netherlands, Canada, and Yugoslavia, as well as to the Nuremberg Tribunal, among other sources. However, the strength of these sources in supporting this assertion is open to serious doubt. A review of the case law cited in the *Kunarac* footnote, as well as the authorities that preceded that decision, appears to more reliably support the conclusion that the role of the policy requirement for crimes against humanity was never settled prior to that decision.
>
> Essentially, the judges in *Kunarac* waved the magic wand in an attempt to wish away the State or organizational policy requirement, perhaps because of the normative belief that such an approach was better for the more effective criminalization of gross human rights violations.
>
> Nevertheless, *Kunarac* has been extensively cited by the ICTY in support of the proposition that neither a plan nor a policy of any kind is required for a crime against humanity under customary international law. It immediately became the darling of international prosecutors for lifting a heavy evidentiary burden off their shoulders.[90]

3.2. Policy as a formal component of crimes against humanity before the ICC

International Case Law

Notwithstanding the doctrinal debate before the ICTY, ICC Art. 7(2) introduces a 'State or organisational policy' as a separate ingredient of the contextual legal requirements of crimes against humanity.

87 Referring to ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 98.

88 Referring, e.g., to ICTR, *Semanza*, AC, Judgement, Case No. ICTR-97-20-A, 20 May 2005, para. 269.

89 Charles Chernon Jalloh, "What Makes a Crime against Humanity Crime against Humanity", in *American University International Law Review*, vol. 28, no. 2, 2013, p. 386 and 398 (some footnotes omitted). For a detailed assessment of the impact of the Tadić case, see Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, p. 37: "The confusion surrounding the meaning of the policy element is perhaps most apparent in the Tadić decision. The Tadić trial court stated that policy is a required element of crimes against humanity. However, the court also noted that 'such a policy need not be formalized and can be deduced from the way in which the acts occur.' Most strikingly, the court stated that 'if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.' The court thus included a separate 'policy element' but stated that this element could be inferred from the existence of another element—the widespread or systematic attack. This decision leaves entirely unclear what is meant by the policy element. If either the widespread or systematic nature of the attack is sufficient to demonstrate the existence of a policy, the policy element is arguably redundant. This confusion is exacerbated when one considers the Tadić court's explanation of the meaning of 'widespread or systematic.' The court stated that the 'widespread or systematic' requirement is fulfilled by 'either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident. . . .' In explaining the meaning of systematic, the Court cited to the 1996 ILC Draft Code, which equates 'systematic' with 'plan or policy.' Perhaps recognizing the inconsistency in its reasoning, the Court ultimately justified its inclusion of the policy element not on legal grounds but on the finding that, despite doubts regarding the necessity of the policy element, 'the evidence in this case clearly establishes the existence of a policy'".

90 Charles Chernon Jalloh, "What Makes a Crime against Humanity Crime against Humanity", in *American University International Law Review*, vol. 28, no. 2, 2013, p. 399-401 (footnotes omitted). See also William A. Schabas, "State Policy as an Element of International Crimes", in *Journal of Criminal Law and Criminology*, vol. 98, no. 3, 2008, p. 959-960.

The ICC Pre-Trial Chamber in the ***Kenya Article 15 Decision*** acknowledged this, albeit by introducing a state or organisational policy as a distinct legal requirement:

> The Chamber observes that the following requirements can be distinguished: (i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack.[91]

The ICC Pre-Trial in the ***Gbagbo Confirmation of Charges Decision*** observed that:

> [T]he Chamber is of the view, consistent with the jurisprudence of the Court, that the concept of 'policy' and that of the 'systematic' nature of the attack under article 7(1) of the Statute both refer to a certain level of planning of the attack. In this sense, 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 (2)(a) of the Statute.[92]

The ICC Trial Chamber in ***Bemba*** referred to the EoC for guidance in relation to the concept of 'policy':

> [T]he EoC specify that the 'policy' requires the active promotion or encouragement of an attack against a civilian population by a State or organization.[93] In exceptional circumstances, such a policy may be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.[94] While it may be of evidential value, the Statute does not envisage any requirement of demonstrating a 'motive' or 'purpose' underlying the policy to attack the civilian population.[95]

Publicists

According to Sadat, the policy element in the text of ICC Art. 7(2) (a):

> was conceived as 'a flexible test, of a lower threshold than the term 'systematic,' which was understood as a much more rigorous test.' It was designed to break a deadlock between members of the Like-Minded Group of States who preferred the rubric 'widespread *or* systematic,' and states wishing to use the formula 'widespread and systematic'.[96]

91 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 79.

92 ICC, *Gbagbo*, PTC I, Decision on the confirmation of charges against Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, 12 June 2014, para. 216 (footnotes omitted).

93 Elements of Crimes, Introduction to Art. 7, para. 3. See also ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1108

94 Elements of Crimes, Introduction to Art. 7, footnote 6. See ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1108

95 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 159 (some footnotes omitted).

96 Leila Nadya Sadat, "Crimes against Humanity in the Modern Age" in *American Journal of International Law*, vol. 107, 2013, p. 353.

Sadat continues that the purpose of including the policy component in ICC Art. 7(2)(a) was:

> to reassure states that random or isolated acts would not be prosecuted at the ICC as crimes against humanity.[97]

Such reassurance was necessary during the Rome Conference because, as Cryer et al. put it:

> [T]here was strong opposition to an unqualified disjunctive 'widespread or systematic' test, on the grounds that it would incorrectly include widespread but unconnected crimes, such as a crime wave.[98]

3.3. Qualities of the policy

International Case Law

The ICTY Trial Chamber in ***Tadić*** noted that:

> [i]mportantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.[99]

This was adopted by the ICTY Trial Chamber in ***Blaškić***, which provided indicative factors to identify an inferred plan or policy, that:

> [...] need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events, inter alia:
>
> - the general historical circumstances and the overall political background against which the criminal acts are set;
> - the establishment and implementation of autonomous political structures at any level of authority in a given territory;
> - the general content of a political programme, as it appears in the writings and speeches of its authors;
> - media propaganda;
> - the establishment and implementation of autonomous military structures;
> - the mobilisation of armed forces;
> - temporally and geographically repeated and co-ordinated military offensives;
> - links between the military hierarchy and the political structure and its political programme;
> - alterations to the 'ethnic' composition of populations;
> - discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,...);

97 Leila Nadya Sadat, "Crimes against Humanity in the Modern Age" in *American Journal of International Law*, vol. 107, 2013, p. 377 (footnotes omitted).
98 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 237.
99 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 653.

- the scale of the acts of violence perpetrated - in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.[100]

The ICC Trial Chamber in ***Katanga*** stated that the term 'policy':

> refers essentially to the fact that a State or organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action. 'Policy' does not preclude a design adopted by a State or organization with regard to a certain population in a given geopolitical situation. The Chamber would emphasise, however, that the statutory framework does not require that a formal design exist, since explicitly advanced motivations are ultimately of little importance.[101]

Concerning the proof of the existence of such a policy, the ICC Trial Chamber in ***Katanga*** said:

> [I]t is important to underline that it is relatively rare, although cannot be wholly excluded, that a State or organisation seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established design or plan to that effect. In most cases, the existence of such a State or organisational policy can therefore be inferred by discernment of, *inter alia*, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilization orchestrated and coordinated by that State or organisation.[102]

The ICC Trial Chamber in ***Katanga*** also specified that a policy may crystallise over time:

> Furthermore, it is important to note that in the majority of situations amenable to the Court, some aspects of the policy pursued against a civilian population will only crystallise and develop as actions are set in train and undertaken by the perpetrators. The State or organisational policy may therefore become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only *in retrospect*, once the acts have been committed and in the light of the overall operation or course of conduct pursued. Otherwise stated, the State or organisational policy may be part of an ongoing process whose every aspect is not always predetermined before the operation or course of conduct pursued against the targeted civilian population has commenced or even once it has started.[103]

The ICC Pre-Trial Chambers in ***Bemba*** held that a plan need not be formalised but that it should follow a regular pattern, be planned, directed or organised:

> The requirement of 'a State or organizational policy' implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian

100 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 204 (footnotes omitted). See also ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 88.

101 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1108.

102 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1109.

103 *Ibid.*, para. 1110.

> population. The policy need not be formalised.[104] Indeed, an attack which is planned, directed or organized - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.[105]

The ICC Pre-Trial Chamber in the ***Gbagbo*** pursued this interpretation:

> [I]n accordance with the established jurisprudence of the Court, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy the policy criterion, and that there is no requirement that the policy be formally adopted.[106]

The ICC Trial Chamber in ***Bemba*** further developed the factors that may be taken into account to establish the existence of a policy:

> [T]he 'policy' need not be formalised and may be inferred from a variety of factors which, taken together, establish that a policy existed.[107] Such factors may include (i) that the attack was planned, directed or organized; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organizational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the State or the organization condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation[108].[109]

Publicists

Robinson identifies confusion in the early jurisprudence of the ICC with regard to the distinction between the systematic threshold of an attack and the policy element:

> A recurring problem in early ICC jurisprudence is to describe the policy element in the same terms as the 'systematic' threshold. For example, a pre-trial decision in the *Katanga* case states that the policy element requires the attack to be 'thoroughly organized', follow a regular pattern, and involve public or private resources.[110] But that standard is actually the 'systematic' test from Tribunal jurisprudence.[111] Not only is it the test for a different concept, but it is a somewhat outdated test from early jurisprudence. Nonetheless, other ICC decisions have repeated the 'thoroughly organized' standard[112].[113]

104 Citing ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 653.

105 ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 81 (some footnotes omitted).

106 ICC, *Gbagbo*, PTC I, Decision on the confirmation of charges against Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, 12 June 2014, paras. 215 (footnotes omitted).

107 The Chamber observes that during the drafting process of the Elements of Crimes, there was a proposal to include an explicit reference to the fact that a "policy may be inferred from the manner in which the acts occurred"; however, this was removed from the final version of the Elements of Crimes on the basis that it was considered unnecessary.

108 See ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 81; ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1109; ICC, *Ntaganda*, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Case No. ICC-01/04-02/06-309, 9 June 2014, paras. 19 to 21; ICC, *Gbagbo*, PTC I, Decision on the confirmation of charges against Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, 12 June 2014, para. 214; and ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, paras 87 to 88, referring to ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 204.

109 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 160 (some footnotes omitted).

110 ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008, para. 396.

111 See e.g. ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.

112 ICC, *Situation in Côte d'Ivoire*, PTC III, 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, Case No. ICC-02/11-14, 3 October 2011, para. 43; ICC, *Gbagbo*, PTC III, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Case No. ICC-02/11-01/11-9-Red, 20 November 2011, para. 37.

113 Darryl Robinson, "Crimes against Humanity: A Better Policy on 'Policy'" in *Queen's University Law Research Paper Series*, vol. 22, 2015, p. 10.

Robinson describes four features of the policy component:

> which have been consistently emphasized in the jurisprudence [...] First, the term 'policy' is not used in a bureaucratic sense: a policy may be *implicit*, need not be formalized, need not be stated expressly, and need not be defined precisely. Second, the requisite attributability to a state or organization is intermediate between two extremes: on the one hand, a policy *need not implicate the highest levels* of a state or organization, and on the other hand, the crimes cannot merely be the product of a few isolated members acting on their own. Third, a policy does not require active orchestration; it can be realized by *deliberate inaction* to encourage crimes where a state or organization has a duty to intervene. Fourth, and most importantly, a policy *may be inferred* from the manner in which the acts occur; in particular, by showing the improbability that the acts occurred randomly. These four features are mutually connected and consistent with the purpose of the element.[114]

As to the ways to prove the existence of a policy, Robinson et al. point out that:

> (a) Direct evidence of formal adoption of a policy is not required; a policy need not be formalized and can be inferred from the manner in which the acts occur. (b) It is not required that particular perpetrators were motivated by the policy; the policy can be deduced from objective patterns relating to the attack as a whole. (c) A policy need not be proven in relation to each particular incident; a chamber should examine the totality of the evidence to see if the requirements of Article 7 are met.[115]

3.4. Qualities of the entity – state or organisation

International Case Law

The ICTY Trial Chamber in ***Tadić*** considered the evolution of the entity responsible for any policy, from the exclusive domain of a State to other forces that may exert *de facto* authority:

> The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy 'because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nuremberg Charter]'. While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory.[116]

114 *Ibid.*, p. 15 (footnotes omitted).

115 ICC, *Gbagbo*, AC, Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, Case No. ICC-02/11-01/11-534, 9 October 2013, para. 4. This was a reaction to the Gbagbo Arrest Warrant decision where the ICC Pre-Trial Chamber seemed to add new legal ingredients to the concept of "policy", such as the adoption of a formal policy, and the importance of ulterior motives underlying the attack. For a general critique of such decision, see Darryl Robinson, "Crimes against Humanity: A Better Policy on 'Policy'" in *Queen's University Law Research Paper Series*, vol. 22, 2015, pp. 13-15.

116 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 654 (footnotes omitted).

The ICTY Trial Chamber in ***Kupreškić et al.*** considered different types of State engagement in a policy, while also accepting the status of *de facto* entities:

> The need for crimes against humanity to have been at least tolerated by a State, Government or entity is also stressed in national and international case-law. The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding *de facto* authority over a territory[117].[118]

The ICTY Trial Chamber in ***Blaškić*** also clarified that a State plan need not:

> necessarily be conceived at the highest level of the State machinery.[119]

The same judgment went on to consider the role of de facto powers such as criminal gangs:

> Trial Chambers I and II of both this Tribunal and the ICTR have constantly refused to characterise a crime against humanity as an 'act of criminal sovereignty'. To support the argument they relied *inter alia* upon the opinion of the ILC on the work of its 43rd session according to which individuals 'with *de facto* power or organized in criminal gangs' are just as capable as State leaders of implementing a large-scale policy of terror and committing mass acts of violence.[120]

The ICC Pre-Trial Chamber in ***Kenya Article 15 Decision*** also considered that lower levels of State machinery could adopt a policy to attach a civilian population:

> this policy' does not necessarily need to have been conceived 'at the highest level of the State machinery.'[121] Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy.[122]

In the same decision, the concept of an organisational unit was addressed:

> [T]he Statute is unclear as to the criteria pursuant to which a group may qualify as 'organization' for the purposes of article 7(2)(a) of the Statute. Whereas some have argued that only State-like organizations may qualify,[123] 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.[124]

117 The Court held in both *Barbie*, (French Court of Cassation (Criminal Chamber), 3 June 1988, 100 ILR331 at 336) and the *Touvier* (France, Court of Appeal of Paris, First Chamber of Accusation, 13 April 1992); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351), that crimes against humanity are acts performed in a systematic manner in the name of a State practising by those means a policy of ideological hegemony.

118 ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 552. See also Charles Chernon Jalloh, "What Makes a Crime against Humanity Crime against Humanity", in *American University International Law Review*, vol. 28, no. 2, 2013, p. 398

119 *Ibid.*, para. 205.

120 *Ibid.* (footnotes omitted).

121 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 205.

122 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 89.

123 See, e.g., William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 152; see also Cheriff Bassiouni, *Crimes Against Humanity in International Criminal Law*, (2nd ed.), Kluwer Law International, 1999, pp. 244-245.

124 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 90.

Turning to non-State actors, the ICC Pre-Trial Chamber in the ***Kenya Article 15 Decision*** held that:

> [H]ad the drafters of the [ICC] Statute intended to exclude non-State actors from the term 'organization', they would not have included this term in article 7(2)(a) of the Statute. The Chamber thus determines that 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. [125]

Furthermore, the same Pre-Trial Chamber considered the indicative criteria that may help determine whether an organisation could qualify for the purpose of ICC Art. 7:

> [T]he Chamber may take into account a number of considerations, inter alia: (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. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.[126]

Publicists

Judge Hans Peter-Kaul issued a dissenting opinion to the *Kenya Article 15 Decision* which sought to restrict the types of organisations capable of pursuing a policy. In rejecting the dissenting opinion, Sadat considers that:

> Judge Kaul relies on the Nuremberg precedent to underscore his conclusion that only states or quasi-state-like organizations following criminal policies may commit crimes against humanity.[127] However heretical it may seem to question this invocation of the Nuremberg precedent, his historical approach does not accurately describe the modern law of crimes against humanity, which has developed since Nuremberg as a matter of customary international law through the work of national courts and the ad hoc international criminal tribunals. For the ICC to depart from the customary international law understanding of crimes against humanity in a manner neither required by, nor implicit in, the text of Article 7 of the ICC Statute could potentially undermine both the legitimacy and universality of the Statute itself. In particular, Judge Kaul's conclusion that 'amorphous tribal groups'' cannot-as a matter of law-formulate the kind of 'policies' that may engender the commission of crimes against humanity would arguably result in an under-inclusive conception of crimes against humanity that fails to encompass the diverse forms that such crimes can take, especially outside the political landscape of Europe.[128]

125 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 92 (footnotes omitted);

126 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para 93 (footnotes omitted); see also, ICC, *Ruto et al.*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-01/11-373, 23 January 2012, para. 185.

127 See ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, Diss. Op. Kaul, J., para. 18.

128 Leila Nadya Sadat, "Crimes against Humanity in the Modern Age" in *American Journal of International Law*, vol. 107, 2013, p. 336.

Chaitidou considers that the dissenting opinion supports the inclusion of non-State organisations, but only where stringent criteria could be met:

> [T]he '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'.[129]

Chaitidou continues to look for criteria of a non-state organisational structure common to the judgment and the dissent:

> both agree that the overall generic definition cannot be applied without the help of certain factors. [...] 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,[130] the means and resources at its disposal to carry out an 'attack',[131] as opposed to human rights violations, and an aspect of duration,[132] 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, 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.[133]

129 Eleni Chaitidou, "The ICC Case Law on the Contextual Elements of Crimes Against Humanity" in Morten Bergsmo and Song Tianying (eds.), *On the Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, 2014, p. 80.

130 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.

131 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.

132 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.

133 Eleni Chaitidou, "The ICC Case Law on the Contextual Elements of Crimes Against Humanity" in Morten Bergsmo and Song Tianying (eds.), *On the Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, 2014, p. 80-81.

4

4. Object of the attack: 'directed against any civilian population'

4.1. Civilian population: those involved in hostilities

4.2. Absence of the requirement of a discriminatory motive in the common legal requirements

4.3. Civilian population: nationality, ethnicity, citizenship, statelessness

4. Object of the attack: 'directed against any civilian population'

International Case Law

At the ICTR Trial Chamber in ***Semanza*** observed that:

> A civilian population must be the primary object of the attack. [...] The term 'population' does not require that crimes against humanity be directed against the entire population of a geographic territory or area. The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.[134]

The ICTY Trial Chamber in ***Galić*** considered quantitative factors of the civilian population under attack:

> There is no requirement that the entire population of the area in which the attack is taking place must be subjected to that attack.[135] It is sufficient to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way as to compel the conclusion that the attack was in fact directed against a civilian 'population,' rather than against a small and randomly selected number of individuals[136].[137]

The ICC Pre-Trial Chamber in the ***Kenya Article 15 Decision*** observed that:

> The Chamber need not be satisfied that the entire civilian population of the geographical area in question was being targeted. However, the civilian population must be the primary object of the attack in question and cannot merely be an incidental victim.[138]

The ICTY Trial Chamber in ***Gotovina et al.*** specified:

> Directed against' indicates that it is the civilian population which is the primary object of the attack. The attack does not have to be directed against the civilian population of the entire area relevant to the indictment. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Trial Chamber that the attack was in fact directed against a civilian 'population', rather than against a limited and randomly selected number of individuals.[139]

134 ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 330.
135 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 90.
136 *Ibid.*, para. 90.
137 ICTY, *Galić*, TC I, Judgement and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 143.
138 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 82.
139 ICTY, *Gotovina et al.*, TC I, Judgement (Volume II of II), Case No. IT-06-90-T, 15 April 2011, para. 1704; see also, ICTY, *Tolimir*, TC II, Judgement, Case No. IT-05-88/2-T, 12 December 2012, para. 694; ICTY, *Stanišić et al.*, TC II, Judgment (Volume 1 of 3), Case No. IT-08-91-T, 27 March 2013, para. 25.

The ICC Trial Chamber in ***Katanga*** elaborated on the indicative criteria that may determine whether the civilian population was the primary object of the attack, including:

> The civilian population must be the primary target and not the incidental victim of the attack. In order to determine whether the attack may be said to have been so directed, [one must] consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[140]
>
> [T]he Prosecution must therefore prove that the attack was not directed against a limited group of randomly selected persons. However, to such end, it suffices for the Prosecution to establish [...] that the civilians were targeted during the attack in sufficient number or in such a manner that the attack was effectively directed against the civilian population, without it being necessary for the Prosecution to prove that the entire population of a geographic area was targeted at the time of the attack.[141]

Publicists

Werle and Jessberger point out that:

> Crimes against humanity are directed against a civilian population as such, not merely an individual [...] This does not mean, however, that the entire population of a state of territory must be affected by the attack. Rather this criterion emphasizes the collective nature of the crime, thus ruling out attacks against individuals and isolated acts of violence.[142]

Cryer et al. explain that:

> Crime, even on a 'widespread' basis – for example, a crime wave, or anarchy following a natural disaster – does not by itself constitute a crime against humanity. The random acts of individuals are not sufficient; some thread of connection between acts is needed so that they can accurately be described collectively as an *attack directed* against a civilian population.[143]

Robinson links the concept of attack with the policy element that the ICC Statute introduces in ICC Art. 7(2)(a):

> The plain meaning of the phrase '*attack directed against any civilian population*' also implies an element of planning or direction (the 'policy element').[144]

140 Citing ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 91.

141 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, paras. 1103-1105 (some footnotes omitted); see also, ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 154.

142 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 882.

143 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 237 (emphasis in the original).

144 Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" in *American Journal of International Law*, vol. 93, 1999, p. 48 (emphasis in the original).

4.1. Civilian population: those involved in hostilities

International Case Law

In considering the role of civilians who engage in acts of resistance, the ICTY Trial Chamber in the ***Vukovar Hospital Rule 61 Decision*** held that:

> Although according to the terms of Article 5 of the Statute of this Tribunal [...] combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council Resolution 780, noted, 'it seems obvious that Article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms. [...] Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose'[145].[146]

The ICTY Trial Chamber in ***Tadić*** considered individuals who engage in acts of resistance alongside active combatants or combatants *hors de combat*:

> Despite the limitations inherent in the use of these various sources, from Common Article 3 [of the 1949 Geneva Conventions] to the Barbie case, a wide definition of civilian population, as supported by these sources, is justified. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity. As noted by Trial Chamber I of the International Tribunal in its Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in *The Prosecutor v. Mile Mksić, Miroslav Radić, and Veselin Šljivančanin [Vukovar Rule 61 Decision]* [...] although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity. In the context of that case patients in a hospital, either civilians or resistance fighters who had laid down their arms, were considered victims of crimes against humanity.[147]

Turning to the protection of combatants as part of a civilian population, the ICTY Trial Chamber in ***Kupreškić et al.*** said that:

> It would seem that a wide definition of 'civilian' and 'population' is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes. However, faced with the explicit limitation laid down in Article 5, the Trial Chamber holds that a broad interpretation should nevertheless be placed on the word 'civilians', the more so because the limitation in Article 5 constitutes a departure from customary international law.

145 Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), S/1994/674, (hereinafter the "Final Report of the Commission of Experts") para. 78.

146 ICTY, *Mrksić et al.*, TC I, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, 3 April 1996, para. 29.

147 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 643 (footnotes omitted).

The ICTR Trial Chamber in ***Kayishema*** disregarded the presence of non-civilians, asserting that:

> [T]he targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population.[148]

Considering the presence of combatants within a civilian population, the same Trial Chamber in ***Kupreškić et al.*** considered that:

> [...] the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.[149]

The ICTY Trial Chamber in ***Blaškić*** considered that the situation of a victim at the time of the attack to prevail over the status that they may hold, as former combatants, combatants no longer bearing arms or combatants hors de combat:

> do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants – regardless of whether they wore wear uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.[150]

The ICTR Trial Chamber in ***Kunarac et al.*** observed that:

> Individually, a person shall be considered to be a civilian for as long as there is a doubt as to his or her status. As a group, the civilian population shall never be attacked as such...[151]

The ICTY Trial Chamber in ***Galić*** elaborated on the civilian status of different groups who may have participated in hostilities in some form:

> A population may qualify as 'civilian' even if non-civilians are among it, as long as the population is predominantly civilian.[152] The definition of a 'civilian' is expansive and includes individuals who at one time performed acts of resistance, as well as persons hors de combat when the crime was perpetrated[153].[154]

148 ICTR, *Kayishema et al.*, TC II, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 128.

149 ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, paras. 547-549.

150 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, paras. 214.

151 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 426; see also ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 180.

152 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 56; ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 425; ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 638.

153 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 56; ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, paras. 547-549; ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 214; ICTY, *Jelisić*, TC I, Judgement, Case No. IT-95-10-T, 14 December 1999, para. 54.

154 ICTY, *Galić*, TC I, Judgement and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 143.

The SCSL Trial Chamber in ***Brima et al.*** pursued a more restrictive approach:

> [T]he term 'civilian' must be more narrowly defined in order to ensure a distinction in an armed conflict between civilians and combatants no longer participating in hostilities. The fact that the persons are *hors de combat* during the commission of a crime, does not render them 'civilian' or part of the 'civilian population' for the purposes of Article 2 of the Statute.
>
> This distinction is particularly important in a case where the Prosecution alleges that crimes against humanity were committed in a situation of armed conflict.[155]

The ICTY Appeals Chamber in ***Martić*** categorically rejected the requirement that individual victims must be civilians:

> [T]he authorities cited by the Trial Chamber in order to exclude persons *hors de combat* from the victims of crimes against humanity (as opposed to the category of persons who may be object of the attack according to the chapeau of Article 5) are misleading. There is nothing in the text of Article 5 of the [ICTY] Statute, or previous authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians.[156]

International tribunals have turned to international humanitarian law for interpretive guidance, but have reached different conclusions. The ICTY Trial Chamber in ***Krajišnik*** considered that GC Common Art. 3 afforded a broad definition of a civilian population:

> Common Article 3 of the Geneva Conventions is also a source of guidance on the meaning of 'civilian population' for the purposes of crimes against humanity. This provision reflects 'elementary considerations of humanity' applicable under customary international law to any armed conflict. It sets out a minimum level of protection for 'persons taking no active part in the hostilities'. In conformity with the case law on this point, the Chamber understands that 'civilian population', for the purposes of crimes against humanity, includes not only civilians narrowly defined, but also persons who are not taking active part in the hostilities.[157]

Referring to API Art. 43 and 50, as well as GC II Art. 4(3) the ICTY Trial Chamber in ***Tolimir*** sought to exclude combatants in any form:

> members of armed forces and members of militias or volunteer corps forming part of such armed forces are 'combatants' and cannot claim civilian status;[158] nor can a member of an armed organisation be accorded civilian status merely because he or she is not armed or in combat at the relevant time. Finally, it is settled that persons *hors de combat* are not considered civilians.[159]

The ICC Trial Chambers in ***Katanga*** also adopted the API Art. 50 definition of a civilian population in the context of crimes against humanity but with little clarity:

> The expression 'civilian population' denotes civilians as opposed to 'members of armed forces and other legitimate combatants'. As such, the Chamber endorses the definition of 'civilian' provided by article 50(1) of Additional Protocol I and that of 'civilian population' pro-

155 SCSL, *Brima et al.*, TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007, para. 209.
156 ICTY, *Martić*, AC, Judgement, Case No. IT-95-11-A, 8 October 2008, paras. 306-307 (citations omitted).
157 ICTY, *Krajišnik*, TC I, Judgement, Case No. IT-00-39-T, 27 September 2006, para. 706(c) (footnotes omitted).
158 ICTY, *Kordić et al.*, AC, Judgement, Case No. IT-95-14/2-A, 17 December 2004, para. 50. See also ICTY, *Blaškić*, AC, Judgement, Case No. IT-95-14-A, 29 July 2004, para 113.
159 ICTY, *Tolimir*, TC II, Judgement, Case No. IT-05-88/2-T, 12 December 2012, paras. 695-696 (some footnotes omitted).

> vided by article 50(2) of Protocol I, namely '[t]he civilian population comprises all persons who are civilians'.[160]

Publicists

On the definition of term 'civilian population' under international humanitarian law, Dinstein writes:

> Because the terms "civilian" and "civilian population" are terms of art in international humanitarian law, it is appropriate for the terms to find their meanings within the context of both international and non-international armed conflict. On the basis of this analysis, it will be possible to find a meaning more appropriate to situations where there is no armed conflict.[…]It is thus convenient to distinguish between three situations: (a) international armed conflict; (b) non-international armed conflict; and (c) no armed conflict.
>
> a. *International armed conflict*. In the context of an international armed conflict, a 'civilian' is defined in the Geneva Conventions and Additional Protocol I as a person who is not a member of the armed forces of any party to the conflict.' This definition reflects the clarity of the term 'civilian' within international humanitarian law, as applicable to international armed conflicts.
>
> b. *Non-international armed conflict*. In the context of a non-international armed conflict, a 'civilian' is a person who is not taking a direct part or who has ceased to take part in hostilities. This definition reflects the different usage of the term 'armed forces' in Additional Protocol II and 'civilians' are drawn instead from the category of persons to whom the fundamental guarantees apply. This category of civilians would exclude, for example, active members of non-state armed forces and police who take part in actions against a civilian population.
>
> c. *No armed conflict*. Where there is no armed conflict within the meaning of the Geneva Conventions and their protocols, it is necessary to extrapolate from the preceding two situations. It would be inappropriate to adopt the definition used in international armed conflict, since that definition is significant primarily because of the complementary nature of war crimes and crimes against humanity. The more appropriate definition parallels the category of persons to whom the fundamental guarantees of Additional Protocol II apply. Thus, where there is no armed conflict, a civilian is a person who is not taking a direct part in or who has ceased to take part in the relevant hostilities. This category of civilians will exclude, for example, police who take part in actions against a civilian population.[161]

DeGuzman considers the ambiguity of determining civilians in non-international armed conflicts, particularly regarding informal armed groups:

> The lines between combatants and noncombatants become particularly murky in internal conflicts where the warring factions are not under the control of governments. In the conflicts in the former Yugoslavia and Rwanda, for example, large networks of persons not formally enlisted in any army were actively involved in the conflict. Can such persons be victims of crimes against humanity?

160 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, paras. 1102-1103 (some footnotes omitted). See also ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 152

161 Yoram Dinstein, "Case Analysis: Crimes against Humanity after *Tadić*", in *Leiden Journal of International Law*, vol. 13, no. 2, 2000, pp. 322-323, 324-325.

> The Commission of Experts established by the Security Council to investigate violations of international humanitarian law in the former Yugoslavia, noted that the 'civilian targets' element of crimes against humanity:
>
> 'should not lead to any quick conclusions concerning people who at one particular point in time did bear arms [...] A head of family who [...] tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm [...] the distinction between improvised self-defence and actual military defence may be subtle, but none the less important. This is no less so when the legitimate authorities in the area—as part and parcel of an overall plan of destruction— had previously been given an ultimatum to arm all the local defence guards.'[162]
>
> The definition of 'civilian' as an element of crimes against humanity thus remains somewhat ambiguous.[163]

Sadat summarises the interpretation of the interpretation of 'civilian population' in the ICC judgments on *Katanga* and *Bemba* as well as the ICTY Judgment on *Martić*:

> Some delegations at Rome sought to include a provision 'that the presence of combatants does not remove a population's 'civilian' character.' Others had noted that the 'law on the status of combatants as victims of crimes against humanity [was developing], and ... that all persons are 'civilian' when there is no armed conflict.' The chamber [in *Katanga*] did not address these open questions, but held that article 7 of the Statute affords rights and protections to 'any civilian population' regardless of their nationality, ethnicity or other distinguishing feature.'[164][...]The *Bemba* chamber decision also examined the contextual EoC against humanity. It largely follows *Katanga* but narrowed the meaning of 'civilian population' by holding that 'according to the [sic] well-established principle of international humanitarian law, '[t]he civilian population [...] comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.' The decision omits any discussion of (or citation to) *Martić*[165] particularly its holding regarding the status of individuals who are *hors de combat*. It is therefore unclear whether the ICC will follow *Martić* on this question.[166]

Werle and Jessberger reject the identification of civilians according to their formal status:

> [A]nyone who is not part of the organized power using force should be considered a civilian. What is crucial is not formal status, such as membership in specific military forces or units, but the person's actual role at the time of the commission of the crime. This includes members of the military forces or other armed groups who laid down arms or have otherwise been rendered *hors de combat*, commensurate with the idea behind Common Article 3 of the Geneva Conventions. The same is true in international armed conflicts for soldiers no longer participating in hostilities or for prisoners of war, who are specifically protected by international humanitarian law.[167]

162 Referring to Final Report of the Commission of Experts Pursuant to Security Council Resolution 780, U.N. SCOR, 49th Sess., Annex, para. 78, U.N. Doc. S/1994/674 (1994).

163 Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, pp. 361-362 (some footnotes omitted).

164 Referring to ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008, para. 399.

165 ICTY, *Martić*, TC I, Judgement, Case No. IT-95-11-T, 12 June 2007, paras. 50-56, 297 and 306.

166 Leila Nadya Sadat, "Crimes against Humanity in the Modern Age" in *American Journal of International Law*, vol. 107, 2013, p. 360-361 (some footnotes omitted).

167 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 885.

Cryer et al. take a similar approach, referring to early ICTY judgments to determine a rational approach:

> The term '*civilian*' connotes crimes directed against non-combatants rather than combatants. [...][S]everal early Trial Chamber decisions interpreted the term 'civilian' to include all those no longer taking part in hostilities at the time the crimes were committed. This includes former combatants who had been decommissioned, as well as combatants places *hors des combat* [...] by being wounded or detained.[168] Examining these cases, it is possible to form a hypothesis that the 'civilian' reference serves a rational purpose, which is simply, to exclude *military actions against legitimate military objectives in accordance with international humanitarian law*.[169]

In an *amicus curiae* for the ECCC, Robinson, deGuzman, Jalloh and Cryer identify two approaches to the interpretation of civilians – a *status-based* approach – and a l*egitimate target* approach:

> There are two views on the interpretation of "civilian" in crimes against humanity. One may be called the "status-based" view, which excludes all members of any armed force. The other may be called the "legitimate target" view, which excludes attacks against lawful targets, ie. combatants of hostile parties to conflict. The "legitimate target" view properly reflects the principle of distinction, harmonizes crimes against humanity with humanitarian law, and fits with precedent including post-World War II cases. The "status-based" view arose in thinly-reasoned cases, lacks a rationale and has problematic effects. One such effect is that violence or persecution against members of one's own army would generally be neither a war crime (since they are not adverse parties) nor a crime against humanity. Thus it would arbitrarily deprive persons of the protection of international criminal law because of their occupation. While early ICTY cases followed the traditional "legitimate target" view, more recent ICTY cases departed without adequate analysis.[170]

4.2. Absence of the requirement of a discriminatory motive in the common legal requirements

International Case Law

The attack component of the common elements does not require a discriminatory motive. This is in distinction to the underlying act of persecution (ICC Art. 7(1)(h) which does. The ICTY Appeals Chamber in ***Tadić*** confirmed that crimes against humanity do not need to be committed on discriminatory grounds:

> It is interesting to note that the necessity for discriminatory intent was considered but eventually rejected by the International Law Commission in its Draft Code of Offences against the Peace and Security of Mankind.[171] Similarly, while the inclusion of a discriminatory intent

168 ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 582; ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 643; ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 180. Note that a current member of an armed force or organization remains a combatant even in moments when he or she is not armed or in combat, and thus may be lawfully attacked by an enemy party to the conflict. See, e.g., ICTY, *Blaškić*, AC, Judgement, Case No. IT-95-14-A, 29 July 2004, para. 114.

169 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 241-242 (emphasis in the original).

170 ECCC, Cases 003 and 004, International Co-Investigating Judges, Amicus Curiae Brief of Professors Robinson, deGuzman, Jalloh and Cryer on Crimes Against Humanity (Cases 003 and 004), Case No. 003/07-09-2009-ECCC-OCIJ, 17 May 2016, para. 2.

171 See for instance ILC 1996 Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 48th session May 6-July 26, 1996, UNGAOR 51st sess., supp. no. 10 (A/51/10), pp. 93-94.

> was mooted in the Preparatory Committee on the Establishment of an International Criminal Court PrepCom,[172] ICC Art.7 embodied the drafters' rejection of discriminatory intent.[173]

According to ICTR Trial Chamber in ***Bizimungu***, ***Ndindiliyimana***, ***Nzuwonemeye*** and ***Sagahutu*** (hereafter, 'Military II'):

> An attack against a civilian population means the perpetration against that population of a series of acts of violence or of the kind of mistreatment referred to in sub-paragraph (a) to (i).[174]

The ICC Pre-Trial Chamber in the ***Decision on the confirmation of charges against Katanga and Chui*** (hereafter, Katanga et al. Confirmation of Charges Decision), noted that:

> [T]he Statute affords rights and protections to 'any civilian population' regardless of their nationality, ethnicity or other distinguishing feature.[175]

The ICC Trial Chamber in ***Katanga*** clarified that:

> [W]here the commission of crimes against humanity is at issue, the nationality of the members of such a population, their ethnic group or any other distinguishing feature is immaterial to the protection that attaches to 'civilian' character[176].[177]

Publicists

Recalling the negotiations leading to the ICC Statute, Robinson writes:

> Another difficult issue in the negotiations was whether the definition should require a discriminatory motive, i.e., that the crime be committed on national, political, ethnic, racial or religious grounds. All participants agreed that the specific crime of *persecution* required a discriminatory motive (as discrimination is the essence of the crime of persecution), but the majority maintained that not all crimes against humanity required a discriminatory motive [...].
>
> The negotiations in Rome produced agreement that a discriminatory motive is not an ement required for all crimes against humanity. This approach avoids the imposition of an onerous and unnecessary burden on the prosecution.[178]

172 While some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory *animus*, others argued that "the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element". These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law as evidenced by the Yugoslav Tribunal's Statute. See the Summary of the Proceedings of the Preparatory Committee During the Period March 25-April 12, 1996, U.N. Doc. A/AC.249/1 (May 7, 1996), pp. 16-17.

173 ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 291 (some footnotes omitted).

174 ICTR, *Bizimungu et al.*, TC II, Judgement and Sentence, Case No: ICTR-00-56-T, 17 May 2011, para. 2087. Article 3 (a) to (i) of the ICTR Statute includes the underlying acts of crimes against humanity:. a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts.

175 ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008, para. 399 (footnotes omitted). See also ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 76.

176 Citing ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008, para. 399. See also ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 76; ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 635; ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 423; Rodney Dixon, "Article 7" in Otto Triffterer (ed.), *Commentary on the ICC Statute of the International Criminal Court - Observer's Notes, Article by Article* (2nd ed.), Nomos Verlag, 2008, p. 181.

177 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1103.

178 Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" in *American Journal of International Law*, vol. 93, 1999, p. 46.

In the words of deGuzman:

> Article 7, which was unanimously adopted in the Committee of the Whole, demonstrates a consensus among the overwhelming majority of states with respect to the EoC against humanity. Although the ICC definition binds only that institution, it also represents compelling evidence of the customary international law of crimes against humanity. Thus, the ICC definition may be viewed in some sense as 'settling' two long-disputed aspects of the definition. First, crimes against humanity no longer contain any nexus with armed conflict, whether internal or international. Second, there is no requirement that the inhumane acts constituting crimes against humanity other than 'persecutions' be perpetrated on discriminatory grounds or with discriminatory intent.[179]

However, Robinson regrets that some early ICC decisions seem to require the targeted civilian population not to be a limited and randomly selected group of individuals:

> [S]ome early ICC decisions have adopted a proposition that a 'civilian population' should not be a 'limited and randomly selected group of individuals'.[180] That proposition originated in ICTY jurisprudence [...].[181]

> Nonetheless, it is both unnecessary and undesirable to import this requirement into ICC jurisprudence. It is *unnecessary* because the policy element in Article 7(2)(a) already excludes crimes that are 'random' in the sense of being unprompted, unconnected ordinary crimes. It is *undesirable* because requiring that a population not be 'randomly selected' reintroduces disputes over *why* particular civilians were targeted. It is a road that eventually leads to concepts of discriminatory grounds, special intent or specific purpose. These are not appropriate in crimes against humanity.[182]

4.3. Civilian population: nationality, ethnicity, citizenship, statelessness

International Case Law

The ICTY Trial Chamber in ***Tadić*** stated that:

> The inclusion of the word 'any' makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.[183]

The ICTY Trial Chamber in ***Kunarac et al.*** held that:

179 Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, p. 353 (footnote omitted).

180 See e.g. ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, paras. 76–77 (distinguishing features, not randomly selected); ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 81 (must be distinguished by nationality, ethnicity or other distinguishing features).

181 See e.g., ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 90; ICTY, *Martić*, TC I, Judgement, Case No. IT-95-11-T, 12 June 2007, para. 49; ICTY, *Milutinović et al.*, TC III, Judgement (Volume 3 of 4), Case No. IT-05-87-T, 26 February 2009, para. 145.

182 Darryl Robinson, "Crimes against Humanity: A Better Policy on 'Policy'" in *Queen's University Law Research Paper Series*, vol. 22, 2015, p. 12 (some footnotes omitted).

183 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 635.

> The protection of Article 5 extends to 'any' civilian population including, if a state takes part in the attack, that state's population. It is therefore unnecessary to demonstrate that the victims are linked to any particular side of the conflict.[184]

The ICC Pre-Trial Chamber in the ***Côte d'Ivoire Article 15 Decision*** declared:

> The potential civilian victims of a crime under Article 7 of the Statute can be of any nationality or ethnicity, or they may possess other distinguishing features[185].[186]

The ICC Pre-Trial Chamber in ***Kenya Article 15 Decision*** further added that:

> [I]n making its assessment whether the attacks were directed against a civilian population, the Chamber takes into account the information relevant to the status of the victims, their ethnic or political affiliation as well as the methods used during the attacks.[187]

The ICC Pre-Trial Chamber in ***Kenyatta et al. Confirmation of Charges Decision*** (hereafter, '*Kenyatta et al. Confirmation of Charges*') observed that the civilian population could also be identified by political affiliation:

> In the view of the Chamber, the civilian population targeted can include a group defined by its (perceived) political affiliation.[188]

The ICC Trial Chamber in ***Katanga*** declared:

> [W]here the commission of crimes against humanity is at issue, the nationality of the members of such a population, their ethnic group or any other distinguishing feature is immaterial to the protection that attaches to 'civilian' character.[189]

Publicists

Cryer et al. single out the term 'any' as one of the central features of crimes against humanity under international criminal law:

> The word '*any*' highlights the central innovation and *raison d'être* of crimes, against humanity. The law of crimes against humanity not only protects enemy nationals, it also covers, for example, crimes by a State against its own subjects. The nationality or affiliation of the victim is irrelevant.[190]

184 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 423 (footnotes omitted).

185 Citing ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 76. Pre-Trial Chamber II, referred in this paragraph to ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008, para. 399.

186 ICC, *Situation in Côte d'Ivoire*, PTC III, 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, Case No. ICC-02/11-14, 3 October 2011, para. 32. See also ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008 , para. 399 and ICC, *Kenyatta et al.*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-02/11-382-Red, 23 January 2012, para. 110.

187 ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 108.

188 ICC, *Kenyatta et al.*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-02/11-382-Red, 23 January 2012, para. 110.

189 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1103 (footnotes omitted).

190 Robert Cryer et al. *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 240 (emphasis in the original, footnotes omitted).

5

5. Character: widespread or systematic

5.1. Widespread or systematic character

5.2. Widespread character

5.3. Systematic character

5.4. Connection to a policy in ICTY/R jurisprudence

5.5. Disjunctive character of widespread or systematic

5.6. Single acts

5. Character: widespread or systematic

5.1. Widespread or systematic character

International Case Law

The ***Blaškić*** Trial Chamber noted that:

> A crime against humanity is made special by the methods employed in its perpetration (the widespread character) or by the context in which these methods must be framed (the systematic character).[191]

The ICTY Appeals Chamber stated in ***Kunarac et al***. that:

> [T]he phrase 'widespread' refers to the large-scale nature of the attack and the number of victims, while the phrase 'systematic' refers to 'the organised nature of the acts of violence and the improbability of their random occurrence'.[192]

The ICTY Trial Chamber in ***Jelisić*** considered several general criteria that could demonstrate the widespread or systematic character of an attack:

> The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.[193]

The ICTY Trial Chamber in ***Blaškić*** sought to connect the scale of the victims targeted with a reliance on planning or organisation:

> [...] targeting a large number of victims generally relies on some form of planning or organisation [...].[194]

The ICTY Trial Chamber in ***Kunarac et al.*** declared:

> The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.[195]

191 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 201.

192 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 94 (footnotes omitted). See also ICTY, *Gotovina et al.*, TC I, Judgement (Volume II of II), Case No. IT-06-90-T, 15 April 2011, para. 1703.

193 ICTY, *Jelisić*, TC I, Judgement, Case No. IT-95-10-T, 14 December 1999, para. 53.

194 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 207.

195 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 430.

The ICTY Appeals Chamber in ***Kunarac et al.*** also considered different factors that may be taken into account to assess the widespread or systematic character of an attack:

> The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population.[196]

The ICC Trial Chamber in ***Katanga*** stated:

> The attack must be widespread or systematic, implying that the acts of violence are not spontaneous or isolated. An established line of authority holds that the adjective 'widespread' adverts to the large-scale nature of the attack and to the number of targeted persons, whereas the adjective 'systematic' reflects the organised nature of the acts of violence and the improbability of their random occurrence. It has also been consistently held that the 'systematic' character of the attack refers to the existence of 'patterns of crimes' reflected in the non-accidental repetition of similar criminal conduct on a regular basis.[197]

Publicists

Cryet et al. summarise the international case law on the criteria that may establish both a *widespread* as well as *systematic* character of an attack:

> The term 'widespread' has been defined in various ways, and generally connotes a 'large-scale nature of the attack and the number of victims'.[198] No specific numerical list has been set; the issue must be decided on the facts. While 'widespread' typically refers the cumulative effect of numerous inhumane acts, it could also be satisfied by a singular of exceptional magnitude.[199]
>
> The term 'systematic' has been defined in various ways. Early decisions set high thresholds: in *Akayesu*, it was defined as (1) thoroughly organized, (2) following a regular pattern, (3) on the basis of a common policy and (4) involving substantial public or private resources.[200] It is understandable to pose a significant threshold, especially given that non-widespread crimes should not lightly be labelled as a crime against humanity [...] In *Blaškić*, it was defined by reference to four factors: (1) a plan or objective, (2) large-scale or continuous commission of linked trim (3) significant resources, and (4) implication of high-level authorities.[201] Other cases refer more simply to 'pattern or methodical plan', 'organised nature of the acts' or 'organised pattern of conduct'[202].[203]

196 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 95.

197 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para.1123 (footnotes omitted).

198 Citing, inter alia, ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 206; ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 428; ICTR, *Nahimana et al.*, AC, Judgement, Case No. ICTR-99-52-A, 28 November 2007, para. 920; SCSL, *Taylor*, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012, para. 511.

199 ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 179; ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 206.

200 ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.

201 See e.g., ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 648; ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 429.

202 See e.g. ICTR, *Nahimana et al.*, AC, Judgement, Case No. ICTR-99-52-A, 28 November 2007, para. 920; SCSL, *Taylor*, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012, para. 511.

203 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 235.

Robinson considers the interplay between the characteristics of a widespread attack and a systematic one:

> The hallmarks [of a crime against humanity] are *atrocity* (the prohibited acts), *scale* and *associativity*. But the interplay of the last two hallmarks, which undergird the contextual elements, is more complex than most jurists realize. The obvious level is that there must be a high degree of *either scale* ('widespread') or *associativity* ('systematic'). The more subtle, less appreciated, level is that, for the law of crimes against humanity to make sense, there must also be some minimal degree of both scale and associativity to constitute an 'attack' on a civilian population.[204]

5.2. Widespread character

International Case Law

The ICTY Trial Chamber in ***Tadić*** considered a quantitative character of the term 'widespread' asserting that:

> [Widespread] refers to the number of victims.[205]

The ICTY Trial Chamber, in ***Blaškić*** expanded on this to include:

> [W]idespread' [...] acts committed on a 'large scale' [...] [and] 'directed at a multiplicity of victims.[206]

The Trial Chamber in ***Kunarac et al.*** defined this a little differently:

> [Widespread] connotes the large-scale nature of the attack and the number of its victims.[207]

The ICC Pre-Trial Chamber in the ***Côte d'Ivoire Article 15 Decision*** sought to develop indicative criteria of the widespread character of an attack:

> The term 'widespread' encompasses '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'. This element refers both to the largescale nature of the attack and the number of victims. The assessment is not exclusively quantitative or 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'. [208]

204 Darryl Robinson, "Crimes against Humanity: A Better Policy on 'Policy'" in *Queen's University Law Research Paper Series*, vol. 22, 2015, p. 8.
205 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 648.
206 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 206 (footnotes omitted).
207 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para.428; see also ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 57.
208 ICC, *Situation in Côte d'Ivoire*, PTC III, 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, Case No. ICC-02/11-14, 3 October 2011, para. 53.

The ICC Trial Chamber in ***Bemba*** cited the *Kunarac et al.* definition before elaborating on the assessment process for determining the character of an attack:

> [T]hat the term 'widespread' connotes the large-scale nature of the attack and the large number of targeted persons,[209] and that such attack may be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[210] The Chamber notes that the assessment of whether the 'attack' is 'widespread' is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts.[211].[212]

Publicists

Notwithstanding the disjunctive nature of the requirement, Chesterman warns against precise definitions of what constitutes a *widespread* attack:

> It would be unhelpful to engage in the gruesome calculus of establishing a minimum number of victims necessary to make an attack 'widespread.' In *Akayesu*, ICTR Trial Chamber I cited the International Law Commission's ('ILC') commentary to its 1996 Draft Code of Crimes to the effect that 'widespread' may be defined as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.'[213] Similarly, Trial Chamber II in *Kayishema* understood 'widespread' to mean an attack 'directed against a multiplicity of victims'[214].[215]

However, Werle and Jessberger seek to elaborate the nature of a *widespread* attack:

> The criterion 'widespread' describes a quantitative element, which also allows conclusions to be drawn about the quality of the attack. The widespread nature of the attack can be inferred from its extension over a broad geographic area, but this is not necessary to satisfy the requirement. The widespread character of an attack can also be derived from the number of victims, as clarified in the International Law Commission's commentary on the corresponding article in the 1996 Draft Code.[216] International case law has followed this view[217].[218]

209 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1123.

210 ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 83.

211 ICC, *Gbagbo*, PTC I, Decision on the confirmation of charges against Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, 12 June 2014, para. 222. The Chamber notes that the purely quantitative requirement of "multiple commission of acts" above should not be conflated with the attack's "widespread" nature, either in scale or qualitatively. Otherwise, the disjunctive formulation of the "widespread or systematic" test – through which crimes against humanity can alternatively be committed - would be negated.

212 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 163.

213 ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.

214 ICTR, *Kayishema et al.*, TC II, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 123.

215 Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes against Humanity", in *Duke Journal of Comparative and International Law*, vol. 10, 2000, p.315 (some footnotes omitted).

216 See 1996 Draft Code, Commentary on Article 18, para. 4: 'The [...] alternative requires the inhumane acts be committed on a large scale meaning that the acts are directed against a multiplicity of victims'.

217 See e.g., ICC, *Katanga et al.*, PTC I, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, 30 September 2008, para. 395; ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 77; ICC, *Situation in Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010, para. 95; ICC, *Situation in Côte d'Ivoire*, PTC III, 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, Case No. ICC-02/11-14, 3 October 2011, para. 53; ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 94; ICTY, *Blaškić*, AC, Judgement, Case No. IT-95-14-A, 29 July 2004, para. 101; ICTY, *Kordić et al.*, AC, Judgement, Case No. IT-95-14/2-A, 17 December 2004, para. 94; ICTY, *Tolimir*, TC II, Judgement, Case No. IT-05-88/2-T, 12 December 2012, para. 698.

218 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, paras. 894 and 895 (some footnotes omitted).

5.3. Systematic character

International Case Law

The ICTR Trial Chamber in ***Akayesu*** considered that 'systematic' meant:

> [T]horoughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.[219]

The ICTY Trial Chamber in ***Kunarac et al.*** sought to provide indicative criteria of a systematic character of an attack:

> The adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence.[220] Patterns of crimes - that is the non- accidental repetition of similar criminal conduct on a regular basis - are a common expression of such systematic occurrence.[221]

The ICC Pre-Trial Chamber in the ***Kenyatta et al. Confirmation of Charges Decision*** declared that:

> [T]he precise identification of targets by the attackers is indicative of the planned and systematic nature of the violence.[222]

According to the SCSL Trial Chamber in ***Taylor***:

> The pattern of mistreatment shows that crimes were not isolated or random, but rather formed part of a continuous campaign directed against civilians in communities that the RUF controlled. This pattern of civilian mistreatment remained a feature of the RUF regime throughout the conflict, and resulted in large numbers of civilian being mistreated, through abductions, forced labour and sexual enslavement, in various towns and villages throughout Kailahun District.[223]

The ICC Pre-Trial Chamber in the ***Côte d'Ivoire Article 15 Decision*** sought to develop indicative criteria of a systematic attack:

> The term 'systematic' refers to the 'organised nature of the acts of violence and the improbability of their random occurrence'. An attack's systematic nature can 'often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis'.[224]

The ICTY Trial Chamber of ***Kordić and Čerkez*** considered political objectives as one factor of a systematic attack:

219 ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.
220 Citing ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 203.
221 ICTY, *Kunarac et al.*, TC II, Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 429 (some footnotes omitted).
222 ICC, *Kenyatta et al.*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-02/11-382-Red, 23 January 2012, para. 176.
223 SCSL, *Taylor*, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012, para. 553.
224 ICC, *Situation in Côte d'Ivoire*, PTC III, 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, Case No. ICC-02/11-14, 3 October 2011, para. 54 (footnotes omitted).

> It held that this requirement refers to the following four elements: (1) t*he existence of a political objective, that is, to destroy, persecute or weaken a community*; (2) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; (3) the preparation and use of significant public or private resources, whether military or other; (4) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan. Moreover, a crime may be widespread or committed on a large scale by the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'.[225]

5.4. Connection to a policy in ICTY/R jurisprudence

International Case Law

Without an explicit policy requirement, the ICTY and ICTR debated the status of the existence of a policy when establishing the systematic character of an attack.

The ICTR Trial Chamber in ***Akayesu*** sought to establish the relationship between the *systematic* character of an attack and the existence of a policy:

> [T]he concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.[226]

The ICTY Trial Chamber in ***Blaškić*** referred to the characteristics of 'policy' in the context of the systematic requirement:

> The systematic character refers to four elements which for the purposes of this case may be expressed as follows:
>
> - the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
> - the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
> - the preparation and use of significant public or private resources, whether military or other;
> - the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[227]

The ICTR Trial Chamber in ***Kayishema and Ruzindana*** (hereafter *Kayishema et al.*) adopted the same approach:

225 ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 179 (footnotes omitted) (emphasis added).
226 ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.
227 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 203.

> [...] A systematic attack means an attack carried out pursuant to a preconceived policy or plan. Either of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons.[228]

The ICTY Trial Chamber in ***Kordić and Čerkez*** considered that the existence of a policy may form part of the criteria for a systematic attack rather than an independent requirement:

> The Trial Chamber agrees that it is not appropriate to adopt a strict view in relation to the plan or policy requirement. In particular, it endorses the *Kupreškić* finding that 'although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a requirement, as such, for crimes against humanity.' In the Chamber's view, the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity.[229]

The ICTY Trial Chamber in ***Krnojelac*** considered a plan or policy to be a relevant factor in establishing the character of an attack:

> [S]atisfied that there is no requirement under customary international law that the acts of the accused person (or of those persons for whose acts he is criminally responsible) be connected to a policy or plan. Such a plan or policy may nevertheless be relevant to the requirement that the attack must be widespread or systematic and that the acts of the accused must be part of that attack.[230]

Publicists

Concerning the distinctions in meaning between the term 'systematic' and that of a policy, Robinson writes:

> The term 'systematic' requires a very high degree of organization or orchestration, and has been interpreted by the ICTR as meaning 'thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[231] In contrast, the term 'policy' is much more flexible; for example, in the *Tadić* opinion and Judgment, the ICTY noted that a policy need not be formalized'[232].[233]

5.5. Disjunctive character of widespread or systematic

International Case Law

The ICTY Trial Judgment in ***Blaškić*** clarified the disjunctive nature of this legal requirement:

> For inhumane acts to be characterised as crimes against humanity, it is sufficient that one of the conditions [i.e. widespread or systematic] be met. The fact still remains however, that in

228 ICTR, *Kayishema et al.*, TC II, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 123 (footnotes omitted).
229 ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 182.
230 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 58 (footnotes omitted).
231 ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.
232 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 653.
233 Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" in *American Journal of International Law*, vol. 93, 1999, pp. 50-51.

> practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation.[234]

The ICTY Trial Chamber in ***Kordić and Čerkez*** said that:

> [I]t is also generally accepted that the requirement that the occurrence of crimes be widespread or systematic is a disjunctive one.[235]
>
> [T]his requirement is intended to ensure that it is crimes of a collective nature that are penalised whereby [...] an individual is 'victimised not because of his individual attributes but rather because of his membership of a targeted civilian population'.[236]

The ICTY Appeals Chamber stated in ***Kunarac et al.***:

> The requirement that the attack be 'widespread' or 'systematic' comes in the alternative.[237] Once it is convinced that either requirement is met, the Trial Chamber is not obliged to consider whether the alternative qualifier is also satisfied'.[238]

The ICTR Trial Chamber in ***Semanza*** clarified its interpretation on the difference between the English and French text of the Statute:

> This Tribunal has consistently held that, in line with customary international law, the requirements of 'widespread' and 'systematic' should be read disjunctively in accordance with the English version of the Statute, rather than cumulatively in accordance with the French text.[239]

Publicists

DeGuzman focuses on the importance of the widespread or systematic requirement, in distinguishing the underlying acts from domestic crimes:

> This element distinguishes crimes against humanity from domestic crimes—it raises these crimes to the level of international concern subject to international jurisdiction. It is this element that turns these crimes into attacks against humanity rather than isolated violations of the rights of particular individuals.[240]

Werle and Jessberger reflect on the different views on whether the requirement should be conjunctive or disjunctive expressed during the negotiations of the ICC Statute:

234 ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 207.

235 ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 178; see also ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 427; see also ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 57; ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 97; ICTR, *Ntakirutimana et al.*, TC I, Judgement and Sentence, Cases No. ICTR-96-10 & ICTR-96-17-T, 21 February 2003, para. 804.

236 ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 178, citing ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 644.

237 See, e.g., ICTY, *Tadić*, AC, Judgement in Sentencing Appeals, Case No. IT-94-1, 26 January 2000, para. 248; and ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 648.

238 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 93.

239 ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 328.

240 Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, p. 375.

> At the negotiations on the ICC Statute, it was soon agreed that the criteria 'widespread' and 'systematic' would be included in the definition of the crime. However, there was disagreement over whether these two criteria should be alternative or cumulative. The group of 'like-minded states' advocated an alternative relationship. But a large number of the remaining delegations believed that the criteria had to be cumulative. In the end, an alternative linkage was accepted, but with the proviso that the definition 'attack on a civilian population' – including the policy element it contained – would be adopted into Article 7(2)(a).[241]

5.6. Single acts

International Case Law

The ICTY in the ***Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence in the case of Mrkšić, Radić and Šljivančanin*** (herafter, 'Vukovar Hospital') held that:

> Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above.[242]

The ICTY Trial Chamber in ***Kunarac et al.*** sought to clarify the requirement of widespread or systematic in relation to individual acts:

> The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.
>
> Only the attack, not the individual acts of the accused, must be 'widespread or systematic'. A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context:[243]
>
> For example, the act of denouncing a Jewish neighbour to the Nazi authorities – if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity. An *isolated act*, however, - i.e. an atrocity which did not occur within such a context – cannot.[244]

The ICTY Trial Chamber in ***Kordić and Čerkez*** considered cumulative acts or single acts as a *widespread* attack:

241 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, paras. 894 and 895 (some footnotes omitted).

242 ICTY, *Mrkšić et al.*, TC I, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, 3 April 1996, para. 30; see also, ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 649.

243 ICTY, *Kupreškić et al.*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 550; see also ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 649.

244 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, paras. 430 and 431.

> [A] crime may be widespread or committed on a large scale by the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'.[245]

The ICTY Trial Chamber in ***Đorđević*** further clarified the distinction between the character of the attack and the individual acts:

> This requirement [i.e. of widespread or systematic character] only applies to the attack itself, not to the individual acts of the accused.[246] Only the attack, not the accused's individual acts, must be widespread or systematic[247].[248]

245 ICTY, *Kordić et al.*, TC III, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 179, citing ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 206.

246 Referring to ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para 96; ICTY, *Kordić et al.*, AC, Judgement, Case No. IT-95-14/2-A, 17 December 2004, para 94.

247 Referring to ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 96; and ICTY, *Popović et al.*, TC II, Judgement (Volume 1), Case No. IT-05-88-T, 10 June 2010, para 756.

248 ICTY, *Đorđević*, TC II, Public Judgment with Confidential Annex Volume II of II, Case No. IT-05-87/1-T, 23 February 2011, para. 1590. See also, ICTY, *Tolimir*, TC II, Judgement, Case No. IT-05-88/2-T, 12 December 2012, para. 698.

6

6. Nexus between the acts of the perpetrator and the attack: 'as part of'

6. Nexus between the acts of the perpetrator and the attack: 'as part of'

International Case Law

The ICTR Trial Chamber in ***Kayishema et al.*** found that:

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. The Defence for Ruzindana submitted that to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack. This issue has been addressed by the ICTY where it was stated that the accused must have acted with knowledge of the broader context of the attack;[249] a view which conforms to the wording of the Statute of the International Criminal Court ('ICC') Article 7.[250]

The ICTY Trial Chamber in ***Kunarac et al.*** described the nexus requirement as twofold:

> [T]he commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.[251]

The same Chamber also considered the relationship between the underlying offences and the attack:

> The underlying offence does not need to constitute the attack but only to form a part of the attack or, as it was put by the Appeals Chamber, to 'comprise[s] part of a pattern of widespread and systematic crimes directed against a civilian population'.[252]

Issues of temporal and geographical nexus between the underlying acts and the attack where addressed in the ICTY Appeals Chamber in ***Kunarac et al.***:

> The acts of the accused must be part of the 'attack' against the civilian population, but they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime must not, however, be an isolated act. A crime would be regarded as an 'isolated act' when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[253]

As to the personal motives of the accused, the ICTY Appeals Chamber in the ***Kunarac et al.*** affirmed that:

249 ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 656.

250 ICTR, *Kayishema et al.*, TC II, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 133.

251 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 418 (footnotes omitted). This interpretation was supported by ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, in para. 100.

252 ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 417 (footnotes omitted).

253 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 100 (footnotes omitted).

> For criminal liability pursuant to Article 5 of the Statute to attack, 'the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.' Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[254]

According to the ICTY Trial Judgment in ***Krnojelac***:

> The acts of the accused need to be objectively part of the 'attack' against the civilian population, but need not be committed when that attack is at its height. These acts must not be isolated, but must form part of the attack. A crime committed several months after, or several kilometres away from, the main attack against the civilian population could still, if sufficiently connected, be part of that attack.[255]

According to the ICTY Trial Chamber in ***Naletilić and Martinović*** (hereafter, 'Naletilić et al.'):

> The acts of the accused must not be isolated but form part of the attack. This means that the act, by its nature or consequence, must objectively be a part of the attack.[256]

The ICTY Trial Chamber in ***Naletilić et al.*** followed a similar approach:

> The acts of the accused must not be isolated but form part of the attack. This means that the act, by its nature or consequence, must objectively be a part of the attack.[257]

The ICTR Trial Chamber in ***Semanza***, stated that:

> Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the [...] attack.[258]

The ICC Trial Chamber in ***Katanga*** recalled:

> [T]hat the individual act must be committed as part of a widespread or systematic attack. In determining whether an act within the ambit of article 7(1) of the Statute forms part of a widespread or systematic attack, the bench must, with due regard for the nature of the act at issue, the aims it pursues and the consequences it occasions, inquire as to whether it is part of the widespread or systematic attack, considered as a whole, and in respect of the various components of the attack (i.e. not only the policy but also, where relevant, the pattern of crimes, the type of victims, etc.).[259] Isolated acts that clearly differ in their nature, aims

254 *Ibid.*, para. 103 (footnotes omitted)..

255 ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 55 (footnotes omitted).

256 ICTY, *Naletilić et al.*, TC I, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 234; see also, ICTY, *Vasiljević*, TC II, Judgement, Case No. IT-98-32-T, 29 November 2002, para. 36; ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 329; and ICTY, *Krnojelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 58.

257 ICTY, *Naletilić et al.*, TC I, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 234 (citations omitted).

258 ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 326.

259 Citing ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 99; ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, paras. 271-272.

> and consequences from other acts that form part of an attack, fall out with article 7(1) of the Statute.[260]

As to the notion of 'pursuant to or in furtherance of the State or organisational policy', the ICC Trial Chamber in ***Bemba*** added:

> It must further be demonstrated that the course of conduct was committed pursuant to or in furtherance of the State or organizational policy. As such, the course of conduct must reflect a link to the State or organizational policy, in order to exclude those acts which are perpetrated by isolated and uncoordinated individuals acting randomly on their own.[261] This is satisfied where a perpetrator deliberately acts to further the policy, but may also be satisfied by a perpetrator engaging in conduct envisaged by the policy, and with knowledge thereof. The Chamber notes that there is no requirement that the perpetrators necessarily be motivated by the policy, or that they themselves be members of the State or organization[262].[263]

The same Chamber also insisted that:

> In determining whether the requisite nexus exists, the Chamber makes an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act[264].[265]

Publicists

Cryer et al. remind that the acts of the accused must be distinguished from the broader attack and thus, the *mens rea* required to enter a conviction must be interpreted accordingly:

> The rigorous requirements relating to the attack must be distinguished from the requirements relating to the accused's conduct. With respect to the individual accused, all that is required is that the accused committed a prohibited act, that the act objectively falls within the broader attack, and that the accused was aware of this broader context.
>
> Only the attack, not the acts of the individual accused, needs to be widespread or systematic. A single act by the accused may constitute a crime against humanity if it forms part of the attack. [Exceptionally] the act of the accused may also in itself constitute the attack, if it is of great magnitude, for example, the use of a biological weapon against a civilian population. The accused need not be an architect of the attack, need not be involved in the formation of any policy, and need not be affiliated with any State or organization nor even share in the ideological goals of the attack, so long as there is a nexus between the conduct of the defendant and the attack.[266]

260 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1124.

261 See Rodney Dixon, "Article 7" in Otto Triffterer (ed.), *Commentary on the ICC Statute of the International Criminal Court - Observer's Notes, Article by Article*, Nomos Verlag, 2nd ed., 2008, p. 91.

262 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1115.

263 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 161 (some footnotes omitted).

264 ICC, *Bemba*, PTC 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, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 86, citing ICTR, *Kajelijeli*, TC II, Judgement and Sentence, Case No. ICTR-98-44A-T, 1 December 2003, para. 866; and ICTR, *Semanza*, TC III, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 326. See also ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1124.

265 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 165.

266 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 243-244.

7

7. Knowledge on the part of the accused that there is an attack against civilian population and that his act is part thereof

7.1. Cumulative character

7.2. Knowledge of the context/irrelevance of the motives of the accused

7. Knowledge on the part of the accused that there is an attack against civilian population and that his act is part thereof

7.1. Cumulative character

International Case Law

In describing the cumulative character of the requirement, the ICTY Appeals Chamber emphasised that the accused need to know details of the attack:

> Concerning the required *mens rea* for crimes against humanity, the Trial Chamber correctly held that the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known 'that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack'.[267] This requirement, as pointed out by the Trial Chamber, does not entail knowledge of the details of the attack.[268]

The ICTY Appeals Chamber in ***Kordić and Čerkez*** also described the cumulative character of the requirement:

> The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack.[269]

The ICC Trial Chamber in ***Katanga*** also sought to clarify the extent of knowledge of the attack or the policy required by the accused in order to establish guilt:

> [T]he Court's founding instruments require proof that the perpetrator of the act knowingly participated in the attack directed against a civilian population; such knowledge constitutes the foundation of a crime against humanity as it elucidates the responsibility of the perpetrator of the act within the context of the attack considered as a whole. However, that stipulation should not be interpreted as a requirement of proof that the perpetrator had knowledge of all of the characteristics of the attack or the precise details of the plan or policy of the State or organisation.[270]

The ICC Trial Chamber in ***Bemba*** turned to the EoC to emphasise this:

> Paragraph 2 of the Introduction to Article 7 of the EoC 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'. Rather, what is required is that '[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian popu-

267 Referring to ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 434.
268 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 102.
269 ICTY, *Kordić et al.*, AC, Judgement, Case No. IT-95-14/2-A, 17 December 2004, para. 99 (footnotes omitted).
270 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1125.

> lation'.[271] The EoC further state that "[i]n 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[272].[273]

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deGuzman considers the scope of knowledge that the perpetrator is required to have and its impact on case selection:

> The level of intent required for the crime will directly influence the prosecutor's selection of individuals for prosecution. For example, if commission of a crime against humanity requires individual awareness of the details of a policy, the prosecutor may be constrained to indict only members of the upper ranks of the command structure who were directly involved in developing the policy.[274]

Cassese emphasised that the accused is required to have knowledge of factual conditions or consequences rather than legal definitions of implications:

> [I]t should be noted that the requisite mental element need not imply that the offender be cognizant of the legal definitions or legal implications of crimes against humanity. It is sufficient for him to be aware of the *factual conditions* brought about by his conduct or of the likely *factual consequences* of his actions.[275]

Cryer et al. link the cumulative character of the *mens rea* requirement with the context of the attack as the features that distinguish the offences from war crimes or ordinary offences:

> [T]he accused must … be aware of the 'broader context in which his actions occur', namely, the attack directed against a civilian population. It is the context of a widespread or systematic attack against a civilian population that makes an act a crime against humanity, and hence knowledge of this context is necessary in order to make one culpable for a crime against humanity as opposed to an ordinary crime or a war crime. Tribunal cases indicate that awareness, wilful blindness, or knowingly taking the risk that one's act is part of an attack, will suffice.[276]

271 Elements of Crimes, Art. 7(1)(a), para. 3 and Art. 7(1)(g)-1, para. 4.

272 Elements of Crimes, Introduction to Art. 7, para. 2, Art. 7(1)(a), para. 3, and Art. 7(1)(g)-1, para. 4. The Chamber notes that the phrase "intended the conduct to be part of the attack", as an alternative to knowledge, was included in the provision to make clear that initial actors in an emerging crime against humanity which has not yet happened are also to be held responsible. See Darryl Robinson, "The Elements of Crimes against Humanity" in Roy S. Lee and Hakan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, page 73.

273 ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 167.

274 Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, p. 377.

275 Antonio Cassese, "Crimes against Humanity", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), T*he Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p.364-365.

276 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, pp. 243-244.

7.2. Knowledge of the context / irrelevance of the motives of the accused

International Case Law

The ICTY Appeals Chamber in ***Kunarac et al.*** noted that the perpetrator could act on purely personal motives:

> For criminal liability pursuant to Article 5 of the Statute, 'the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.'[277] Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[278]

The ICC Trial Chamber in ***Katanga*** considered that the accused need not share the motives of the broader policy:

> Nor is it required that the perpetrator of the act subscribed to the State or the organisation's criminal design, any more than it must be shown that the perpetrator deliberately intended his or her act to form part of the attack against the civilian population, even though the EoC mention this scenario. The perpetrator's motive is hence irrelevant to such proof and for his or her act to be characterised as a crime against humanity, it suffices to establish, in view of the context, knowledge of the particular fact that his or her act formed part of the attack.[279]

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Cassese considers two forms to establish guilt where no intent can be determined:

> [I]n those cases where no intent can be proved, it is necessary for the subjective element of crimes against humanity to take on one of the following forms:
>
> a) The awareness, in the agent, of the *possibility* of being or becoming instrumental in the execution of a governmental policy of inhumanity or of a systematic practice of atrocities. By way of illustration, one can mention the example of a person who, out of strictly personal motives, denounces to the military police of a State or de facto authority pursuing a policy of violence and terror another person belonging to a particular ethnic, racial, political, or religious group; in this case the denunciation is most likely to lead to brutal ill-treatment or the death of the person denounced. We would therefore be faced here with a case of advertent recklessness or *dolus eventualis*.
>
> b) The awareness of the possibility that one's actions are *likely* to result in the perpetration of atrocities. By way of example, one can mention another possible instance of *dolus eventualis*. This is the case of a military commander ordering the transportation, or of a

277 Referring to ICTY, *Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 433.
278 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 103; see, confirming, ICTY, *Šainović et al.*, AC, Judgement, Case No. IT-05-87-A, 23 January 2014, para. 271.
279 ICC, *Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 1125 (footnotes omitted).

> subordinate participating in such transportation, of hundreds of civilians to a detention camp where, given the living conditions and the attitude of the prison guards, the civilians are most likely to die of starvation or as a result of serious ill-treatment.[280]

Cryer et al. emphasise that the accused need not share the motives for the attack but that they are required to have knowledge of the context:

> [...] The perpetrator need not share in the purpose or goals of the overall attack. The mental requirement relates to knowledge of the context, not motive. After the Second World War, several cases dealt with instances where individuals had denounced others to the Nazi regime, for personal opportunistic reasons. Such persons were held liable for crimes against humanity, because, even though they acted out of personal motives, their actions were objectively part of the persecutory system, and they acted with knowledge of the system and the likely consequences.[281]

O'Keefe characterises this slightly differently, distinguishing the intent to commit the underlying acts from the contextual knowledge of the broader attack:

> The *mens rea* required for a crime against humanity is the intent to commit the specific act- be it murder, extermination, enslavement, etc – accompanied by knowledge of the attack on the civilian population and knowledge that the act comprises part of that attack. In this regard, while the chapeau to Article 7(1) of the ICC Statute requires simply 'knowledge of the attack', by which is meant the 'widespread or systematic attack directed against any civilian population', the EoC for article 7 of the Statute explains that this means that the perpetrator 'knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population'.[282] The Elements states this 'should not be interpreted as requiring proof that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization'; rather, it continues, '[i]n the case of an emerging widespread or systematic attack against a civilian population', the mental element for crimes against humanity 'is satisfied if the perpetrator intended to further such an attack'[283].[284]

In relation to the personal motives of the accused, O'Keefe adds:

> The accused need not share the purpose or goal behind the attack.[285] Indeed, the motives of the accused for taking part in the attack are irrelevant. A crime against humanity may be committed for purely personal reasons.[286] All that counts in terms of *mens rea* is that the accused intended to commit the impugned act and knew that it formed or intended that it form part of a widespread or systematic attack against a civilian population. That said, the fact that the accused committed the impugned act for motives purely personal may indicate a lack of awareness that the acts formed part of such an attack.[287]

280 Antonio Cassese, "Crimes against Humanity", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), T*he Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p.364-365.

281 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, pp. 243-244.

282 Elements of Crimes, Art.7, generally.

283 Elements of Crimes, Art.7, Introduction. See, similarly, ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 102.

284 Roger O'Keefe, *International Criminal Law*, Oxford University Press, 2015, pp. 144-145.

285 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 103.

286 ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, paras. 248 and 252; ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 103; ICTY, *Blaškić*, AC, Judgement, Case No. IT-95-14-A, 29 July 2004, para. 124.

287 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 103; ICTY, *Blaškić*, AC, Judgement, Case No. IT-95-14-A, 29 July 2004, para. 124; ICTY, *Kordić et al.*, AC, Judgement, Case No. IT-95-14/2-A, 17 December 2004, para. 99.

> It is similarly irrelevant whether the accused intends to direct the impugned act solely against its victim or victims, rather than against the civilian population against which the attack is directed. 'It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof'[288].[289]

Equally, deGuzman considers the perpetrators motives to be irrelevant:

> [T]he argument that culpability for a crime against humanity requires the perpetrator to act for certain motives—such as the desire to participate in a widespread or systematic attack—fails because the perpetrator's motives are irrelevant under international law to the commission of these crimes. This principle was articulated as early as the CCL No. 10 trials when the Supreme Court of the British zone stated: 'Le mobile d'un crime contre l'humanité est indifférent à l'incrimination. Il peut être entièrement d'ordre privé, il peut être bas comme il peut ne pas être bas' [The motive of a crime against humanity is irrelevant to incrimination. It can be of an entirely private nature; it can be an immoral motive or a moral one].[290]

288 ICTY, *Kunarac et al.*, AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para.103; ICTY, *Blaškić*, AC, Judgement, Case No. IT-95-14-A, 29 July 2004, para. 124.

289 Roger O'Keefe, *International Criminal Law*, Oxford University Press, 2015, p. 145.

290 Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity", in *Human Rights Quarterly*, vol. 22, 2000, pp. 388-389.

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8. Index of cases and publicists

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2. Attack

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4. Object of the attack: 'directed against any civilian population'

International Case Law

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Civilian population: those involved in hostilities

International Case Law

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Absence of the requirement of a discriminatory motive in the common legal requirements

International Case Law

ICTY, *Tadić*, AC, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 291.

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Civilian population: nationality, ethnicity, citizenship, statelessness

International Case Law

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5. Character: widespread or systematic

Widespread or systematic character

International Case Law

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Widespread character

International Case Law

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ICTY, *Tolimir*, TC II, Judgement, Case No. IT-05-88/2-T, 12 December 2012, para. 698.

Systematic character

International Case Law

ICTR, *Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 580.

ICTY, *Blaškić*, TC I, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 203.

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Connection to a policy in ICTY/R jurisprudence

International Case Law

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Disjunctive character of widespread or systematic

International Case Law

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Single acts

International Case Law

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6. Nexus between the acts of the perpetrator and the attack: 'as part of'

International Case Law

ICTY, *Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 656.

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7. Knowledge on the part of the accused that there is an attack against civilian population and that his act is part thereof

Cumulative character

International Case Law

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Knowledge of the context / irrelevance of the motives of the accused

International Case Law

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Annex I: Other international legal instruments

The **Hague Convention (II)** [the Martens Clause] recognised the international character of crimes against humanity, as a part of the laws of war:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[291]

After World War I, efforts to prosecute Turkish individuals for crimes against humanity occurred during the war were considered by the Paris Peace Conference of 1919 and enshrined in Article 230 of the **Treaty of Sèvres**:

> The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.
>
> The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.
>
> In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertales equally to recognise such tribunal.[292]

The **Charter of the International Military Tribunal ('IMT Charter')** included the underlying acts of crimes against humanity while maintaining the international character of the crime:

> Crimes against humanity – namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[293]

291 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Preamble.

292 The Treaty of Peace between the Allied and Associated Powers and Turkey, signed at Sèvres, 10 August 1920, Art. 230.

293 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, London, 8 August 1945, Art. 6.

Reproducing the text of the IMT Charter, the **Charter of the International Military Tribunal for Far East** considered crimes against humanity under the jurisdiction of the tribunal:

> Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[294]

Despite of the reference to the *political, racial or religious grounds*, International Military Tribunals' charters linked the commission of crimes against humanity to armed conflict. Consequently, the **Genocide Convention** distinguished between crimes against humanity and the crime of genocide by stating:

> The Contracting Parties confirm that genocide, whether committed *in time of peace or in time of war*, is a crime under international law which they undertake to prevent and to punish.[295] (Emphasis added)

The **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity** removed the link between crimes against humanity and armed conflict,[296] while removing any statutory limitations on the prosecution of crimes against humanity:

> Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations [...][297]

The **Statute of the Special Panels in East Timor** adopted the text of ICC Art.7(1) but omits the policy component of ICC Art.7(2):

> For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack[298]

294 International Military Tribunal for the Far East, charter dated January 19, 1946; amended charter dated April 26, 1946, Art.5(c).

295 *Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948*, Art.1.

296 As does the Convention on Apartheid (1968), which declares apartheid as an underlying act of crimes against humanity: "The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

297 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, Art.1(b).

298 Regulation No. 2000/15, On the Establishment of the Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor, 6 June 2000 ("*UNTAET Regulation No. 2000/15*"), Art.5(1).

The **Statute of the Extraordinary Chambers in the Courts of Cambodia** introduces additional components to the object of the attack by requiring that the civilian population be attacked on specific discriminatory grounds. The Statute reiterates the non-applicability of statute of limitations,[299] while omitting the policy component and *mens rea* requirement:

> Crimes against humanity, *which have no statute of limitations*, are any acts committed as part of a widespread or systematic attack directed against any civilian population, *on national, political, ethnical, racial or religious grounds*.[300]

The **Statute of the Iraq High Tribunal or Supreme Iraqi Criminal Tribunal** (formerly, Iraqi Special Tribunal, 2003) reproduces the text of ICC Art.7(1) but omits the definition of gender of ICC Art.7(3):

> For the purposes of this Statute, "crimes 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:
>
> [...]
>
> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal [...].[301]

Lastly, the **Draft Articles on Crimes Against Humanity** mirror ICC Art. 7 in its entirety.[302]

299 The ECCC is established to establish individual criminal responsibility for offences committed between 17 April 1975 to 6 January 1979, more than 35 years before the creation of the Chambers.

300 As a hybrid tribunal, the ECCC is founded under national law and is supported internationally through its agreement with the United Nations. See Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003.

301 Law of the Supreme Iraqi Criminal Tribunal, Resolution No. 10, Official Gazette of the Republic of Iraq, vol. 47, No. 4006, 18 October 2005, Art. 12.

302 Draft Article 3, ILC, Crimes against humanity, Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015, Sixty-seventh session, A/CN.4/L.853.

KH
Knowledge Hub

I-DOC
Investigation Documentation System

DOC F
Database on Open Case Files

CICD
Core International Crimes Database

CJAD
Cooperation and Judicial Assistance Database

CLICC
Commentary on the Law of the International Criminal Court

CM
Case Matrix

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