THE STATE OR ORGANISATIONAL POLICY REQUIREMENT WITHIN THE DEFINITION OF CRIMES AGAINST HUMANITY IN THE ROME STATUTE: AN APPRAISAL OF THE EMERGING JURISPRUDENCE AND THE IMPLEMENTATION PRACTICE BY ICC STATES PARTIES

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ABSTRACT

Challenges to the jurisdiction of the International Criminal Court (ICC) in the Kenya Situation have brought out exciting but difficult questions on the exact scope of crimes against humanity. Defence lawyers have challenged the jurisdiction of the ICC on the grounds that the post-electoral violence in Kenya did not constitute crimes against humanity. This issue has not only divided the Prosecution and the defence, but also the judges of the Pre-Trial Chamber in the Kenya Situation and leading scholars on the law of crimes against humanity. The main bone of contention, which will form the subject of this brief, has been a specific contextual element in the ICC Statute definition, namely the requirement of a State or organisation behind a policy to commit crimes against humanity.

The first part of this brief will give an appraisal on the emerging jurisprudence on the concept of an organisation pursuing a policy to commit crimes against humanity. Indeed, especially with the reference to the term 'organisational', the Rome Statute introduced a novel and extremely cryptic element to the definition of crimes against humanity. While no one disputes that State actors are the perpetrators *par excellence* of crimes against humanity and the notion of a 'policy' has been given content by jurisprudence of the ICTY, the question to what entities the term 'organisational' exactly refers, is subject to a lively and controversial debate. The disagreement on the issue between the judges of the Pre-Trial Chamber II in the Kenya Situation has been emblematic for this debate. In both the Decision to Authorise an Investigation and the Decision on the Confirmation of Charges, the majority of the judges took a progressive and functional approach to the concept of 'organisation', thereby concluding that the post-electoral violence in Kenya could *prima facie* amount to crimes against humanity. For the majority, the formal nature of a group and the level of its organisation should not be the defining criterion. Instead, in the view of the majority, a distinction should be drawn on whether a group has the capability to perform acts that infringe on basic human values. In his Dissenting Opinion, Judge Kaul argued for a narrower standard of 'State-like' organisations. This brief will outline and critically assess the two divergent views on the concept of 'organisation' for the purposes of crimes against humanity. Both the strengths and weaknesses of the two views will be discussed and evaluated and their respective impact on the legitimacy of the ICC will be considered.

In the second part of this brief, it will be assessed if ICC States Parties, which bear the primary obligation to prosecute and adjudicate international crimes under the Rome Statute system, have implemented the State or organisational policy element in their domestic legislation. The implementation practice has been very fragmented. Given the contested status of the State or

organisational policy element under customary international law, many States Parties have chosen not to implement the State or organisational policy requirement.

I. INTRODUCTION

Recently it appears that crimes against humanity are becoming the new 'ideal' crime of international criminal justice, especially in the new context of wanting the International Criminal Court (ICC) to deal with crimes committed during the 'Arab Spring' and other situations of crackdown of political opposition, for instance in cases of post-electoral violence (Kenya, 2007, Cote d'Ivoire, 2011). Prosecutions for crimes against humanity seem to have quickly emerged as central to the ability of the ICC to fulfill its mandate. Indeed, as of this writing, crimes against humanity have been charged in seven out of eight situations currently before the Court. Furthermore, in 3 situations (*Situation in the Republic of Kenya, Situation in Libya and the Situation in Cote d'Ivoire*) that have been referred to the ICC, solely crimes against humanity have been prosecuted. Likewise, in situations where there has not yet been a referral to the ICC, there have been calls to prosecute the particular crimes as crimes against humanity. For example, on the 14th of January 2013, 57 States called for a referral of the crimes committed in Syria to the ICC.[1] On numerous occasions, the Commission on Inquiry on Syria has characterised the crimes committed in Syria as crimes against humanity.[2] Similarly, grave human rights abuses committed in numerous other countries have been categorised as crimes against humanity, such as the crimes committed by the *Boko Haram* Islamist group in Nigeria[3]; the crimes committed by drug cartels in Mexico[4] and the crimes committed by State and non-State actors during the Colombian conflict.[5]

The rise in popularity of crimes against humanity is in stark contrast with the ambiguity of the same concept. Indeed, there remain difficult questions about the exact scope and the boundaries of crimes

[1] See M. HOLVOET, 'Cinquante-sept pays demandent au Conseil de Sécurité de l'ONU de saisir la CPI pour enquêter sur les
[2] See the most recent report of the Commission of Inquiry on Syria: Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 4 June 2013. Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-23-58_en.pdf
[3] ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2012, November 2012, 20-21 available at http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf
[4] T. SPENCER, 'A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War' *Vanderbilt Journal of Transnational Law* 2012, pp. 609-614.
[5] ICC, Office of the Prosecutor, Situation in Colombia, Interim Report, November 2012, available at : http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf

against humanity, and thus the role of International Criminal Law in general.[6] This is mainly due to the fact that, unlike the crime of genocide, which has a widely accepted definition in the 1948 Genocide Convention, or war crimes, which are codified in a number of treaties, such as, *inter alia,* the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, there is no single treaty addressing crimes against humanity. Various definitions of crimes against humanity and its contextual and other elements have been developed and used in different national, internationalised and international contexts over the years.

Due to a lack of consensus on the fundamental normative underpinnings of crimes against humanity, a number of important questions concerning the definition of crimes against humanity remain unresolved,[7] which makes the notion of crimes against humanity vulnerable to challenges of being vague, over-inclusive and thereby in violation of the fundamental criminal law principle of *nullum crimen sine lege.*[8]

The primary challenge in defining crimes against humanity is to identify the precise elements that distinguish these offences from crimes subject exclusively to national laws.[9] The contextual elements of crimes against humanity, requiring that the underlying crimes are committed as part of a widespread or systematic attack against a civilian population pursuant to a State or organisational policy, mostly ensure the distinction between crimes against humanity and domestic crimes.[10] It is essential to identify the exact contours of the definition of crimes against humanity, because the label of crimes against humanity gives rise to a number of important legal consequences. First, unlike most domestic crimes, crimes against humanity are generally considered outside the purview of statutes of limitations.[11] Second, the immunities that often shield State representatives from criminal responsibility are not available for crimes against humanity, at least when trials are held

[6] D. ROBINSON, 'Essence of Crimes against Humanity raised by challenges at the ICC' *EJIL:Talk!, Blog of the European Journal of International Law*, 27 September 2011, available at http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/

[7] M. DE GUZMAN, 'Crimes Against Humanity' in W.A. SCHABAS, N. BERNAZ, *Routledge Handbook of International Criminal Law*, London/New York, Routledge, 2011, 127.

[8] J. NILSSON, 'Crimes Against Humanity' in A. CASSESE, *The Oxford Companion to International Criminal Justice*, New York, Oxford University Press, 2009, 287.

[9] M. DE GUZMAN, 'Crimes Against Humanity' in B.S. BROWN (ed.), *Research Handbook in International Criminal Law*, Northampton, Edward Elgar Publishing, 2011, 64.

[10] E. VAN SLIEDREGT, 'AJIL Symposium. The Humaneness-side of Humanity – CAH's Modern Meaning', *Opinio Iuris Blog*, 23 July 2012, available at : http://opiniojuris.org/2013/07/23/ajil-symposium-the-humaneness-side-of-humanity-cahs-modern-meaning/.

[11] Two conventions exist on this question, although neither is widely ratified: 1) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted 26 November 1968; 754 UNTS 73; 2) European Convention on the Non-applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, 25 January 1974, Europe. TS No. 82.

before international criminal tribunals.[12] Third, although the concept of universal jurisdiction – the theory that certain crimes are subject to the jurisdiction of all States – remains controversial, proponents of universal jurisdiction invariably include crimes against humanity within its scope.[13] This means, for example, that while murder can generally only be tried in a court with a jurisdictional link to the act, a murder committed as a crime against humanity can arguably be tried in any criminal court in the world.[14] Finally, the prohibition of crimes against humanity is a *jus cogens* norm of international law, which means that derogation is not permitted under any circumstances. As a result of this status, some authorities assert that States have an international law obligation either to prosecute perpetrators of crimes against humanity or to extradite them to States intending to pursue prosecutions.[15] In light of these very serious legal consequences of designating an offense a crime against humanity, as well as the heightened moral condemnation the label entails, the importance of clarifying the exact contours of crimes against humanity cannot be underestimated.

This brief focuses on one contextual element of crimes against humanity in particular, namely the requirement under Article 7(2)(a) ICC Statute that the widespread or systematic attack directed against any civilian population should be carried out '*pursuant to or in furtherance of a State or organisational policy to commit such attack*'. Especially with the reference to the term 'organisational', the Rome Statute introduced a novel and extremely cryptic element to the definition of crimes against humanity.

In the first part of this brief (II), the way the ICC so far has interpreted the concept of 'organisational' will be discussed. In its Decision on the Authorisation of an Investigation and its Decision on the Confirmation of Charges, the majority of the judges of Pre-Trial Chamber II in the Kenya Situation took a progressive and functional approach to the concept of 'organisation', thereby concluding that post-electoral violence in Kenya could *prima facie* amount to crimes against humanity. For the majority, the formal nature of a group and the level of its organisation should not be the defining criterion. Instead, in the view of the majority, a distinction should be drawn on whether a group has

[12] ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium*), Judgment of 14 February 2002, para. 61 (holding that Congo's incumbent Minister of Foreign Affairs was immune from prosecution for crimes against humanity in Belgian court, but stating that he could prosecuted by an international court with jurisdiction).

[13] See for example N. ROHT-ARRIAZA, M. FERNANDO, 'Universal Jurisdiction' in B.S. BROWN (ed.), *Research Handbook in International Criminal Law*, Northampton, Edward Elgar Publishing, 2011, 360; P. AKHAVAN, 'The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute' in L. N. SADAT (Ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge, Cambridge University Press, 2011, 29; M. C. BASSIOUNI, *Crimes against Humanity. Historical Evolution and Contemporary Application*, Cambridge, Cambridge University Press, 2011, 293. It needs to be stressed however that States have a right to exercise universal jurisdiction for crimes against humanity, but no obligation exists.

[14] M. DE GUZMAN, 'Crimes Against Humanity' in B.S. BROWN (ed.), *Research Handbook in International Criminal Law*, Northampton, Edward Elgar Publishing, 2011, 64.

[15] M.C. BASSIOUNI, *Crimes Against Humanity in International Criminal Law*, The Hague, Kluwer Law International, 1999, 224.

the capability to perform acts which infringe on basic human values. In his Dissenting Opinion, Judge Kaul argued for a much narrower standard of 'State-like' organisations. As a conclusion, it will be asserted that while both interpretations of the organisational concept have their merits, they also have considerable flaws. It is the hope of the author that the Appeals Chamber will provide more clarification on the nature, type and characteristics of organisations capable of orchestrating a policy to commit crimes against humanity in the years to come, because the stakes are high. The way the concept of organisation is defined will determine the scope of judicial intervention of the ICC. If the 'liberal' approach by the majority is followed, the Court can probably justify judicial intervention in all sorts of conflict zones and define them as crimes against humanity. If one sticks with the narrower concept of organisation of Judge Kaul as a 'State-like' entity, then the court's authority is significantly more limited.[16]

In the second part of this brief (III), it will be assessed if ICC States Parties, which bear the primary obligation to prosecute and adjudicate international crimes under the Rome Statute system, have implemented the State or organisational policy element in their domestic legislation. The implementation practice has been very fragmented. Given the contested status of the State or organisational policy element under customary international law, many States Parties have chosen not to implement the State or organisational policy requirement. This divergence between the ICC definition and domestic definitions on crimes against humanity should not be deplored however, because it can create a form of 'shared responsibility' between domestic courts and the ICC. ICC States Parties that have not implemented the State or organisational policy requirement can prosecute and adjudicate a wide variety of serious crimes under the rubric of crimes against humanity, as long as it established that they were committed pursuant to a widespread or systematic attack against a civilian population. In the same vein, ICC States Parties that have implemented the State or organisational policy element, could prosecute and adjudicate a wide range of serious crimes as crimes against humanity, by interpreting the requirement as a minimalist threshold excluding random action. In this perspective, given the ICC's limited resources, a somewhat stricter interpretation of the State or organisational policy requirement to be applied by the ICC in its jurisprudence seems justifiable, in order to limit ICC interventions only to clear-cut situations, excluding borderline cases about which there is much dispute.

[16] J.D. OHLIN, 'Organizational Plans' *Lieber Code Blog*, 16 June 2012, available at: http://www.liebercode.org/2012/06/organizational-plans.html.

II. The Interpretation of the Concept of Organisation in the Emerging Jurisprudence of the ICC

A. The Definition of the Majority: A Progressive and Functional Approach

When focusing on the concept of organisation, the majority of the judges of Pre-Trial Chamber II into the Situation in the Republic of Kenya quickly concluded that this concept encompasses non-state entities. The Pre-Trial Chamber held that the 'formal nature of a group and the level of its organisation should not be the defining criterion'. Instead, in the opinion of the majority, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.[17]

Subsequently, the majority elaborated criteria for the Court to determine whether an entity could be qualified as an organisation under the Rome Statute. More specifically, these criteria could include : (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 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. The majority clarifies that, while these considerations may assist the Pre-Trial Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.[18]

This broad and liberal interpretation of the majority is supported by a considerable part of the scholarly literature. The interpretation by the majority is seen as a natural evolution of the concept of crimes against humanity in a world where not only State organisations or State-like organisations but also non-state actors such as terrorist organisations and political parties can orchestrate attacks against a civilian population. For these observers, the definition of the majority also reflects the reality of international criminal justice today, as the crimes which allegedly took place in the DRC, Uganda, Central African Republic and which are currently being investigated and prosecuted by the ICC prosecutor, were not committed pursuant to a policy of a State or State-like organisation.

[17] ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya, 31 March 2010, para. 90; This interpretation was again endorsed by the majority in it Decision on the Confirmation of Charges, see ICC*, The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 33.

[18] ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya, 31 March 2010, para. 93.

Restrict the definition of crimes against humanity to such kind of organisations might therefore lead to impunity for gross violations of human rights and create loopholes.[19]

However, the definition of the majority is not flawless. Its broad definition of the concept of the organisation seems to be based on a human rights-law based interpretation in order to satisfy the greatest number of victims.[20] However, international criminal courts and tribunals need to interpret the law in accordance with the principle of legality, which requires the law to be 'clear, accessible and predictable'.[21] The legality principle is expressly codified in the ICC Statute, partly in reaction to the far-reaching interpretation of crimes by the *ad hoc* tribunals.[22] It contains (i) the principle of strict construction of crimes, (ii) the prohibition of analogy, and (iii) the mandate to interpret the definition of a crime in favor of the suspect or accused in case of ambiguity.[23] It can rightfully be submitted that International Criminal Law cannot adhere to the strict legality doctrine absolutely. Some vagueness is inevitable to avoid 'excessive rigidity and to keep pace with changing circumstances'.[24] However, the principle of strict construction also requires that a judicial interpretation is reasonably foreseeable and it mandates judges to give content to the text. If the broad definition of the majority is uncritically followed in the future jurisprudence of the Court, many organisations could be considered as having committed crimes against humanity and questions may arise as to the conformity of the majority's interpretation ('any organisation that has the capability to perform acts that infringe on basic human values') with the principle of strict construction. Indeed, as DeGuzman has correctly observed, is not any organisation capable to perform acts that infringe on basic human values?[25] The majority definition may have the result that 'crimes against humanity' has become a term for all organised

[19] See M. DI FILIPPO, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' *European Journal of International Law,* 2008, 567; M. HALLING, 'Push the Envelope –Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' *Leiden Journal of International Law* 2010, 833; L.N. SADAT, 'Emerging from the Shadow of Nuremberg: Crimes against Humanity in the Modern Age", *Washington University in St. Louis Legal Studies Research Pape*r 2012, 84-92; G. WERLE, B. BURGHARDT, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' *Journal of International Criminal Justice* 2012, 1167; Y. JUROVICS, 'Article 7. Crimes contre l'humanité' in J. FERNANDEZ, X. PACREAU (dir.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Paris, Pedone, 464. C. C. JALLOH, 'What Makes a Crime Against Humanity A Crime Against Humanity' *American University International Law Review* 2013, 416-417.

[20] See D. ROBINSON, 'The Identity Crisis of International Criminal Law' *Leiden Journal of International Law* 2008, 933-946 ; P. PINTO SOARES, 'Tangling Human Rights and International Criminal Law : The Practice of International Tribunals and the Call for Rationalized Legal Pluralism' *Criminal Law Forum* 2012, 163 ; L. GROVER, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court *European Journal for International Law* 2010, 550-551; C. KRESS, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' *Leiden Journal of International Law* 2010, 861.

[21] H. FRIMAN, 'Trying Cases at the International Criminal Tribunals in the Absence of the Accused' in S. DARCY, J. POWDERLY (Eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford, Oxford University Press, 2010, 332-333.

[22] W. A. SCHABAS, *Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2011, 215.

[23] Art. 22(2) ICC Statute.

[24] App. No. 14307/88, *Kokkinakis v. Greece*, ECHR (1994) Series A. No. 260-A, para. 52.

[25] M. DE GUZMAN, 'Crimes Against Humanity' in W.A. SCHABAS, N. BERNAZ, *Routledge Handbook of International Criminal Law*, London/New York, Routledge, 2011, 131.

acts that are not random. What prevents us then, as Schabas has also suggested in a somewhat provocative sense, to prosecute for example those involved in the riots in London in 2011 for crimes against humanity?[26]

If the definition adopted by the majority is followed by the ICC in its future jurisprudence, a large number of organisations could be considered to have committed crimes against humanity and could become the subject of proceedings before the ICC. It does not seem that it is the function of the ICC nor does it have the ability. The definition of the majority could therefore jeopardise the legitimacy of the Court. Indeed, an interpretation of the concept of organisation that is too liberal expands the boundaries of crimes against humanity in such a way that it would require the Court to intervene in many situations. In this perspective, the victims' expectations that the international community will intervene to render justice on their behalf would be heightened. But if the hopes of the victims are then dashed because of the absence of ICC intervention due to the limited logistical and material resources of the Court, the legitimacy of the ICC could be seriously damaged.[27]

B. The Definition of Judge Kaul: a more Rigid Approach to the Concept of Organisation

In a virulent and well-reasoned Dissenting Opinion, Judge Hans-Peter Kaul criticised the interpretation adopted by the majority for being too broad, thereby concluding that the ICC has no jurisdiction *ratione materiae* in the Kenya Situation. By denouncing the 'banalisation' of crimes against humanity, the Dissent argues that any organisation within the meaning of Article 7(2)(a) of the ICC Statute should 'partake of some characteristics specific to the State', such as the following: (i) a collectivity of persons; (ii) which was established and acts for a common purpose; (iii) over a prolonged period of time; (iv) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (v) with the capacity to impose the policy on its members and to sanction them; and (vi) which has the capacity and means available to attack any civilian population on a large scale.'[28]

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[26] W. A. SCHABAS, 'London Riots: Were They Crimes Against Humanity?' 15 August 2011, available at http://humanrightsdoctorate.blogspot.be/2011/08/london-riots-were-they-crimes-against.html.

[27] ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 10; C. C. JALLOH, 'What Makes a Crime Against Humanity A Crime Against Humanity' *American University International Law Review* 2013, 419-420.

[28] ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 51. Judge Kaul reiterated his view on the concept of organization in the Decision on the Confirmation of Charges: ICC*, The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Dissenting Opinion of Judge Hans-Peter Kaul, 23 January 2012, paras. 8-13.

The definition offered by Judge Kaul reflects that of a party to a non-international armed conflict Article 1(1) of the Second Additional Protocol to the Geneva Conventions, except that the definition does not require an organisation to have control over a territory.[29]

The idea that any organisation should partake some characteristics of a State is supported by some renowned international criminal law scholars.[30] Organisations such as the Republika Srpska, the FARC, the Palestinian Authority and the Government of Taiwan have been given as examples of State-like actors.[31] This part of the literature refers to the origins of the concept of crimes against humanity, including the atrocities committed by the Nazi regime, and argues that the historical context of crimes against humanity cannot be overlooked. Over the decades, they argue, a principal rationale for prosecuting crimes against humanity as such has been the fact that such atrocities generally escape prosecution in the State that normally exercises jurisdiction, under the territorial or active personality principles, because of the State's own involvement or acquiescence. Crimes against humanity in particular were created so that such acts could be punished elsewhere so that impunity could be addressed effectively. We do not have the same problem of impunity with respect to non-State actors. At best, international law is mainly of assistance here in the area of mutual legal assistance. For example, there is little real utility in prosecuting terrorist organisations under the rubric of crimes against humanity, because States where the crimes are actually committed are willing and able to prosecute. Usually, States have difficulty apprehending the offenders. However, for this part of the literature, this problem should be addressed through international cooperation rather than prosecuting them for crimes against humanity.[32] It is argued that if any type of entity can be considered as an organisation for the purposes of crimes against humanity, the scope of these crimes could be extended to encompass any situation where mass atrocities haven taken place. In addition to the financial and logistical constraints and difficulties that the ICC would face, diluting the concept in this way may expand the range of possible situations within ICC jurisdiction, which undermines the message emphasised in the preamble and fundamental provisions of the Rome Statute, such as Article 17, that the ICC was intended to be a court of last, not first, resort that supplements, instead of supplants, national jurisdictions.[33]

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[29] C. KRESS, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' *Leiden Journal of International Law* 2010, 862.

[30] See M. C. BASSIOUNI, *Crimes against Humanity. Historical Evolution and Contemporary Application*, Cambridge, Cambridge University Press, 2011, 12-13; C. KRESS, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' *Leiden Journal of International Law* 2010, 855-873 ; W. A. SCHABAS, 'State Policy as an Element of International Crimes' *Journal of Criminal Law and Criminology* 2008, 953-982.

[31] W. A. SCHABAS, 'State Policy as an Element of International Crimes' *Journal of Criminal Law and Criminology* 2008, 972.

[32] W. A. SCHABAS, 'State Policy as an Element of International Crimes' *Journal of Criminal Law and Criminology* 2008, 974.

[33] C. C. JALLOH, 'International Decision: Situation in the Republic of Kenya No. ICC-01/09-19. Decision on the Authorization of an Investigation' *American Journal of International Law* 2011, 547.

The definition of organisation proposed by Judge Kaul has the advantage of being more in line with the principle of strict construction as corollary of the principle of legality. In comparison with the definition of the majority, the definition is both clearer and more predictable. However, it could also be argued that the proposed definition by the dissent is too rigid since it can severely limit the usefulness of the concept of crimes against humanity to respond to mass atrocities. In practice, the Dissenting Opinion seems to reintroduce, through the back door, the requirement that crimes against humanity have to be committed during an armed conflict. This requirement, imposed in 1946 by the judgment of the International Military Tribunal (IMT) at Nuremberg, had been abandoned by the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the drafters of the Rome Statute. However, in his Dissenting Opinion, Judge Kaul uses elements to define the concept of an organisation that are for a great part based on the definition of a party to a non-international armed conflict and, therefore, seem to have been written with the idea of a non-international armed conflict in mind. This revitalisation of the armed conflict requirement seems also to be foreshadowed by the Decision on the Authorisation of an Investigation into the Situation in Côte d'Ivoire.[34] In this Decision, Pre-Trial Chamber III noted the disagreement within the jurisprudence of the Court on the criteria required for a group to constitute an organisation for purposes of Article 7 of the Statute. For what is concerned the Côte d'Ivoire situation, the Chamber held that the pro-Ouattara forces fulfilled the criteria for an organised armed group as a party to a non-international armed conflict and so inevitably it qualifies as an organisation within the context of Article 7 of the Statute.[35]

If the term 'organisation' under Article 7(2)(a) of the Rome Statute is interpreted too narrowly, it will leave International Criminal Law unable to respond to many other situations where armed groups - although far from State or State-like organisations and not even necessarily involved in an armed conflict - are nevertheless capable of committing systematic or widespread attacks against a civilian population.[36]

[34] L. N. SADAT, 'Crimes Against Humanity in the Modern Age' *American Journal of International Law* 2013, 370-371.
[35] ICC, *Situation in the Republic of Côte d'Ivoire*, 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, 3 October 2011, para. 99.
[36] K. FORTIN, 'Some comments: the OTP's finding that there is a 'reasonable basis to believe' that Boko Haram has committed crimes against humanity in Nigeria', *Armed Groups and International Law Blog*, 29 November 2012, available at: http://armedgroups-internationallaw.org/2012/11/29/some-comments-the-otps-finding-that-there-is-a-reasonable-basis-to-believe-that-boko-haram-has-committed-crimes-against-humanity-in-nigeria/.

III. The Implementation of the State or Organisational Policy Requirement at the Domestic Level

As is widely known, the ICC is complementary to national jurisdictions. In other words, in the case of a positive conflict of jurisdiction between a state and the ICC, domestic courts in principle have primacy over the Court. As a consequence, the implementation of the ICC Statute by States Parties is of paramount importance for States to be able to exercise their primary role in future criminal investigations and prosecutions of the most serious crimes of international concern.[37] While States are encouraged to incorporate the substantive crime provisions in their national legislation, no obligation exists under the Rome Statute to do so.[38]

In carrying out the task of implementation of the definition of crimes against humanity, the ICC States Parties have taken differing approaches with regard the State or organisational policy requirement. States that have incorporated the Statute crimes by reference, have adopted the policy requirement, but those that have created their own offences have not. Whereas Malta, the Netherlands, the Republic of Korea, South Africa and the UK adopt a policy requirement, Belgium, Canada, Georgia, Germany and Australia[39] and Norway omit it.[40] For the latter countries, it would for example be theoretically possible to prosecute an individual person for murder as a crime against humanity if he/she detonates bombs in various cities.[41]

The differing approaches ICC State Parties have taken seem to be a reflection of the uncertain status of the State or organisational policy requirement under customary international law. Together with the Appeals Chamber of the ICTY in its *Kunarac* judgment[42], most international criminal lawyers are of the opinion that the State or organisational policy requirement is not an element of the definition of crimes against humanity under customary international law.[43] It is contended that the

[37] J. B. TERRACINO, 'National Implementation of ICC Crimes' *Journal of International Criminal Justice* 2007, 1-2.
[38] O. BEKOU, 'Crimes at Crossroads. Incorporating Crimes at the National Level' *Journal of International Criminal Justice* 2012, 678.
[39] For what is concerned the crimes of apartheid and enforced disappearances, the Australian Criminal Code contains however the State or organisational policy element.
[40] O. BEKOU, 'Crimes at Crossroads. Incorporating Crimes at the National Level' *Journal of International Criminal Justice* 2012, 685.
[41] M. J. VENTURA, J. SINGH, A. HAIGH, M. BERNHAUT, *International Criminal Law*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206702, 28.
[42] ICTY, *Prosecutor v Kunarac* (Appeals Chamber Judgment) IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 98.
[43] See for instance M. J. VENTURA, J. SINGH, A. HAIGH, M. BERNHAUT, *International Criminal Law*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206702, 28; C. STAHN, L. VAN DEN HERIK, 'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-The-Box?' in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, The Hague, Martinus Nijhoff Publishers, 2012, 59; D. HUNT, 'The International Criminal Court. High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' *Journal of International Criminal Justice* 2004, 64-65 ; L.N. SADAT, 'AJIL Symposium. Sadat Response to Robinson and

State or organisational policy was included in Article 7(2)(a) ICC Statute to make a compromise possible between States who wanted to prosecute all widespread or systematic attacks on a civilian population as crimes against humanity and those wanted to limit the Court's jurisdiction to crimes organised by a State or similar entity. Some States were afraid that, in the absence of the State or organisational policy requirement, isolated criminal conduct and other 'unfortunate' accidents during military operations could be prosecuted as crimes against humanity.[44] Most of the authors strive for the removal of the State or organisational policy element, either through an amendment of the Rome Statute[45] or through judicial creativity, by stretching the definition of the concept of an organisation.[46] A minority of scholars however asserts that under existing customary international law crimes against humanity do require a policy by a State or organisation. For these authors, the State or organisational policy element should be viewed as a valuable requirement that can assist the Court to do what is expected to: to catch the big fish rather than the sardines. In addition, the State or organisational policy element may inhibit institutional overreach[47], by for example requiring a policy by a State or a State-like organisation, as argued by Judge Kaul in his Dissenting Opinion. The fact itself that 122 State Parties have ratified the Rome Statute, containing Article 7(2)(a) ICC Statute, constitutes for these authors a weighty piece of evidence that the State or organisational policy element is at least crystallising as a requirement for defining crimes against humanity under customary international law.[48] With the closure of the *ad hoc* tribunals and hybrid courts and growing ratification of the ICC Statute, the statutory regime is likely to become the main framework of reference. This may ultimately create, it is maintained, a regression of customary international law.[49]

Whoever is right, it is clear that with the growing importance of domestic courts as international criminal law enforcers under the principle of complementarity, a great degree of 'fragmentation' or

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van Sliedregt, *Opinio Iuris Blog*, 23 July 2013, available at : http://opiniojuris.org/2013/07/23/ajil-symposium-sadat-response-to-robinson-and-van-sliedregt/

[44] D. HUNT, 'The International Criminal Court. High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' *Journal of International Criminal Justice* 2004, 64 ; C. C. JALLOH, 'What Makes a Crime Against Humanity A Crime Against Humanity' *American University International Law Review* 2013, 414.

[45] M. HALLING, 'Push the Envelope –Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity', *Leiden Journal of International Law* 2010, 827.

[46] L. VAN DEN HERIK, E. VAN SLIEDREGT, 'Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note', *Leiden Journal of International Law* 2010, 826; L. SADAT, 'Crimes Against Humanity in the Modern Age' *American Journal of International Law* 2013, 376.

[47] L. VAN DEN HERIK, E. VAN SLIEDREGT, 'Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note', *Leiden Journal of International Law* 2010, 826.

[48] C. KRESS, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' *Leiden Journal of International Law* 2010, 870; M. DE GUZMAN, 'Crimes against humanity' in W.A. SCHABAS, N. BERNAZ, *Routledge Handbook of International Criminal Law*, London/New York, Routledge, 2011, 126.

[49] C. STAHN, L. VAN DEN HERIK, 'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-The-Box?' in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, The Hague, Martinus Nijhoff Publishers, 2012, 59.

'differentiation' will persist with regards the State or organisational policy requirement. This 'fragmented' approach is in fact encouraged by the ICC Statute, by virtue of Article 10, which provides: 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.' Article 10 aimed to protect States by affirming that 'the inclusion or non-inclusion in the Statute of certain norms would not prejudice their positions on customary law status of such norms.'[50] As already mentioned, several States have omitted the State or organisational policy element in their internal legislation, arguing that it is not a requirement under customary international law.[51] Therefore, the question with regards the State or organisational policy requirement is not so much whether this 'fragmentation' can be halted, but rather whether this is a positive or a negative development. I argue that there may be some virtue in divergence, because it can create some kind of 'judicial burden sharing' between domestic courts and the ICC. The State or organisational policy is often criticised because it would have the effect of excluding from the scope of crimes against humanity a large number of crimes that could not be linked to any sort of State or organisational policy, which might result in impunity.[52] Yet, courts of States that have not implemented the State or organisational policy element, could serve as an 'impunity gap filler', by prosecuting and adjudicating widespread or systematic attacks against a civilian population under the rubric of crimes against humanity, without having to provide the evidence of a policy of a State or organisation to commit the underlying crimes of crimes against humanity. In the same vein, States that have implemented the State or organisational policy element, could prosecute a wide range of serious crimes as crimes against humanity, by interpreting the requirement 'as a minimalist threshold excluding random action.'[53] In this perspective, a somewhat stricter interpretation of the State or organisational policy requirement by the ICC in its jurisprudence, while being not necessarily as strict as the definition proffered on the concept of organisation by Judge Kaul, seems justifiable given the ICC's limited resources. Together with the requirements the principle of complementarity, the possibility of challenges to admissibility and jurisdiction, the gravity requirement and the discretion of the ICC Prosecutor, a fairly stringent interpretation of the State or organisational policy element could be useful to limit ICC interventions

[50] H. VON HEBEL, D. ROBINSON, 'Crimes within the Jurisdiction of the Court' in R.S. LEE (ed.), *The International Criminal Court : The Making of the Rome Statute*, The Hague, Martinus Nijhoff Publishers, 1999, 88.
[51] See for example the case of Norway. Comment by Ann-Ida Ostensen under W.A. SCHABAS, 'Crimes against Humanity in Norway?, 26 July 2011, available at: http://humanrightsdoctorate.blogspot.fr/2011/07/crimes-against-humanity-in-norway.html
[52] G. METTRAUX, 'Crimes Against Humanity and the Question of a 'Policy' Element' in L. N. SADAT (Ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge, Cambridge University Press, 2011, 153.
[53] R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure* Cambridge, Cambridge University Press, 2007, 198.

only to clear-cut situations, excluding borderline cases about which there is much dispute.[54]

IV. Conclusion

In the first part of this brief, an overview was given of the interpretation of the concept of organisation in the emerging jurisprudence of the ICC. How now can the judicial dispute with regards the notion of an organisation be solved? Some authors like Jalloh have argued that only a definition by an amendment to the notion of organisation by the Assembly of States Parties (ASP) of the ICC provide an acceptable solution. Jalloh argues that the decision on the content of the term 'organisation' is essentially a policy choice, which is unlikely to be addressed by the judiciary effectively and permanently. Jalloh maintains that the question of whether, for example, terrorist groups like Al Qaeda may fall under the notion of organisation and be prosecuted for crimes against humanity is a political question to be decided by the States. Furthermore, he asserts that it would be more democratic to let States define the notion of organisation, since, under the principle of complementarity, they have the primary responsibility to investigate and prosecute crimes against humanity.[55]

Even if a definition adopted by the ASP could be more legitimate, it does not seem that this proposal is very realistic. It would be one thing to find a State Party to propose an amendment, but it seems unlikely that the very high threshold of consensus, or two-thirds vote, required to pass an amendment under Article 121 ICC Statute will ever be met. In addition, the requirement of a State or organisational policy is one of those provisions in the Rome Statute that has been consciously left to the interpretation by the Court in order to make the Statute acceptable for the largest possible number of States.[56] Indeed, the job of definition, interpretation, and application of Article 7 ICC Statute falls to the ICC prosecutor in the first instance, and to the Court's judiciary upon review and this was by design.[57] In the words of one observer: '[m]ost delegations quickly agreed that this was

[54] G. WERLE, B. BURGHARDT, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' *Journal of International Criminal Justice* 2012, 1169. Sadat however argues that the interpretation of crimes against humanity is not the appropriate way to ensure judicial efficiency, see L. N. SADAT, 'Crimes Against Humanity in the Modern Age' *American Journal of International Law* 2013, 377.
[55] C. C. JALLOH, 'What Makes a Crime Against Humanity A Crime Against Humanity' *American University International Law Review* 2013, 435-439.
[56] D. HUNT, 'The International Criminal Court. High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' *Journal of International Criminal Justice* 2004, 64-65.
[57] L. N. SADAT, 'Crimes Against Humanity in the Modern Age' *American Journal of International Law* 2013, 355.

too complex a subject and an evolving area in the law, better left for resolution in case-law.'[58]

It will therefore be rather the ICC Appeals Chamber that will have to decide on the issue. It is essential that the Appeals Chamber provides more clarity on the nature, type and characteristics of organisations that are deemed able to carry out a policy that implements crimes against humanity. In this sense, it is hoped that the Appeals Chamber takes into consideration the Dissenting Opinion by Judge Kaul. It has been rightly argued that the criteria set out by the Dissenting Opinion may be considered as too rigid, since they may reintroduce by the back door the requirement that crimes against humanity have to be committed during an armed conflict. Indeed, the definition of the concept of organisation should maintain some flexibility, otherwise crimes against humanity may become too difficult to prove and lose their usefulness as the criminal law response to gross violations of human rights. However, the definition offered by Judge Kaul is still preferable as a reference point for the Appeals Chamber over the definition adopted by the majority, because it is more in line with the requirements of the principle of legality as a fundamental principle of International Criminal Law.

If a somewhat stringent interpretation were to be adopted by the ICC Appeals Chamber on not only the notion of organisation, but also the State and policy concepts, this should not directly be disapproved. Indeed, as discussed in the second part of this brief, because of the ICC's limited resources, a fairly strict interpretation of the State or organisational policy element could be welcomed as one of the ways to limit ICC interventions only to clear-cut situations. Under the Rome Statute system, States have the primary obligation to prosecute and adjudicate international crimes. Many ICC States Parties decided not to implement the State or organisational policy element, because of the uncertain status of the requirement under customary international law. Many States could therefore share a significant burden in the fight against impunity by prosecuting and adjudicating widespread or systematic attacks against a civilian population as crimes against humanity, without having to provide the evidence of a policy of a State or organisation to commit the underlying crimes of crimes against humanity. In the same vein, States that have implemented the State or organisational policy element, could prosecute and adjudicate a wide range of serious crimes as crimes against humanity, by interpreting the requirement as a minimalist threshold excluding random action.

[58] D. ROBINSON, 'The Elements of Crimes Against Humanity' in R.S. LEE (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley/New York, Transnational Publishers, 2001, 78.