Crimes Against Humanity in the Modern Age

*By Leila Nadya Sadat**

Despite the promises made after World War II to eliminate the commission of atrocities, crimes against humanity persist with horrifying ubiquity. Yet the absence of a consistent definition and uniform interpretation of crimes against humanity has made it difficult to establish the theory underlying such crimes and to prosecute them in particular cases. In the 1990s, several ad hoc international criminal tribunals were established to respond to the commission of atrocity crimes,[1] including crimes against humanity, in specific regions of the world in conflict. Building on this legacy, in 1998 a new institution—the International Criminal Court (ICC)—was established to take up the task of defining crimes against humanity and other atrocity crimes and preventing and punishing their commission.

Over the next few years, the ad hoc tribunals will complete their mandates. It is widely assumed that the ICC will then be the world's only functioning international criminal jurisdiction. Given the centrality of charges of crimes against humanity to the successful prosecution of atrocity crimes, the ICC's treatment of crimes against humanity will therefore be critically important. Moreover, because the ICC is a *permanent* court with the capacity to intervene in ongoing situations (even prior to the outbreak of conflict in some cases), the Court's prosecutions of crimes against humanity may assume a preventive role at the ICC that similar prosecutions could never have assumed at the ad hoc tribunals. Because crimes against humanity may be prosecuted in peacetime, they may serve as the predicate for ICC intervention *before* war and its accompanying atrocities completely overwhelm a civilian population. Indeed, crimes against humanity prosecutions have quickly emerged as central to the ability of the ICC to fulfill its mandate. As of this writing, crimes against humanity have been charged in all seven of the situations currently being prosecuted at the Court. Moreover, in the Kenya, Libya, and Côte d'Ivoire situations, crimes against humanity currently provide the only possible basis for

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[1] David Scheffer, *Genocide and Atrocity Crimes*, *in* 1 Genocide Studies and Prevention 229, 238–39 (2006). This article uses David Scheffer's helpful terminology of *atrocity crime* as applying to crimes against humanity, war crimes, and genocide.

the Court's jurisdiction *ratione materiae*.[2] But is the ICC equal to the task? Its early jurisprudence raises some serious concerns.

The picture emerging from the Court's pretrial chambers reveals divergent views among the judges about the correct interpretation of Article 7 of the Rome Statute on crimes against humanity, particularly Article 7's requirement that crimes against humanity be committed pursuant to a "State or organizational policy."[3] While some opinions involve long and thoughtful discussions of the Statute as well as the customary international law of crimes against humanity, others are inexplicably terse, providing virtually no guidance on important and open-ended questions of interpretation. Moreover, several opinions proffer unconventional readings or unduly restrictive interpretations of Article 7. Although the Statute exhorts the judges to construe definitions of crimes "strictly,"[4] with any doubt accruing to the benefit of the accused, some opinions of the Court's pretrial chambers exceed this requirement by introducing limitations on crimes against humanity not found in, or required by, the Statute, the Elements of Crimes, or customary international law. The conflict regarding Article 7's proper scope of application is most evident in the dissenting and majority opinions in Pre-trial Chamber II's decision to approve the ICC prosecutor's request to open an investigation into the post-election violence in Kenya.[5] Indeed, couched in the legalese of the Kenya case is nothing less than a struggle to shape the future jurisdiction and direction of the Court.

The dissent in the Kenya case penned by the Court's former second vice president, Judge Hans-Peter Kaul, has attracted much positive scholarly attention and continues to resonate at the Court.[6] Several scholars have either implicitly or explicitly aligned themselves with Judge Kaul, referring positively to his focus on the "historic context of the adoption of crimes against humanity,"[7] his "careful reasoning," and his "methodological transparency."[8] While acknowledging the importance of the dissent, this article finds the majority view closer to the text, context, and understanding of crimes against humanity in modern international criminal law.

[2] The recent ICC intervention in Libya is a case in point. As the humanitarian situation began to deteriorate, the Security Council on February 26, 2011, quickly and decisively referred the situation to the ICC for investigation. SC Res. 1970 (Feb. 26, 2011). At that time no armed conflict was taking place, but the assertion was that the Gaddafi regime was committing human rights abuses sufficiently widespread or systematic to constitute crimes against humanity under the ICC Statute. *Id.* Resolution 1970 was followed by Security Council Resolution 1973 authorizing the use of force. SC Res. 1973 (Mar. 17, 2011). On June 27, 2011, Pre-trial Chamber I issued arrest warrants against Libyan leader Muammar Gaddafi, his son Saif Al Islam Gaddafi, and Libyan head of intelligence Abdullah Al Sanousi, alleging they had committed crimes against humanity. No war crimes were charged. Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Warrants of Arrest (June 27, 2011). ICC materials, including information on its situations and cases, are available online at the Court's website, http://www.icc-cpi.int.

[3] Article 7(2)(a) provides: " '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[.]" Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 [hereinafter Rome Statute].

[4] Rome Statute, *supra* note 3, Art. 22(2).

[5] *See infra* notes 202–215 and accompanying text.

[6] *See, e.g.*, Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC* Kenya *Decision*, 23 LEIDEN J. INT'L L. 855 (2010); Charles C. Jalloh, *Situation in the Republic of Kenya*, 105 AJIL 540 (2011); William A. Schabas, *Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes*, 23 LEIDEN J. INT'L L. 847 (2010). *But see* Darryl Robinson, *Essence of Crimes Against Humanity Raised by Challenges at ICC*, EJIL: TALK!, Sept. 27, 2011, *at* http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/#more-3782.

[7] Schabas, *supra* note 6, at 852.

[8] Kress, *supra* note 6, at 862.

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.[9] 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 Rome Statute could potentially undermine both the legitimacy and universality of the Statute itself. In particular, Judge Kaul's conclusion that "amorphous tribal groups"[10] 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.[11] By the same token, Kaul's position would sharply limit the scope of prosecution of crimes against humanity at the ICC,[12] which could affect the Court's utility as a tool for punishing and preventing atrocity crimes. Although the dissent raises legitimate concerns about the Court's capacity to absorb the cases being sent to it, and about the wisdom of the prosecutor's overall strategy, reshaping the technical requirements of the Court's substantive law in order to protect its workload or to correct a perception of prosecutorial overreaching is the wrong solution.

This article presents a comprehensive empirical assessment of the work of the ad hoc international criminal tribunals and the ICC in regard to crimes against humanity. It analyzes the indictment practice at three of the ad hoc tribunals as well as the conviction rates on all counts to determine how often, and to what effect, charges of crimes against humanity are being entered in particular cases.[13] This empirical analysis, which is summarized in Table 6, below, and a survey of the ICC's early situations inform my construction of a new understanding of crimes against humanity in modern international criminal law. The article suggests that the charge of crimes against humanity has emerged from the shadow of Nuremberg as a contemporary antidote to widespread or systematic human rights violations against civilian populations in today's world.

The article explores the phenomenon of crimes against humanity (part I), briefly describes crimes against humanity prosecutions at three of the ad hoc international criminal tribunals

[9] *See* Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya [hereinafter Article 15 Decision], Diss. Op. Kaul, J., para. 18 (Mar. 31, 2010) [hereinafter Kaul Kenya Dissent].

[10] *Id.*, para. 46.

[11] I thank Charles Jalloh for this insight about the potential Eurocentrism of Kaul's position. Also helpful in this context is David Luban's suggestion that crimes against humanity occur in environments of "politics gone cancerous." If so, then the post-election violence in Kenya that led to ICC intervention appears to fit closely in the post-Nuremberg conceptualization of crimes against humanity as not necessarily resulting from the organized policies that Kaul envisions. *See* David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L. L. 85 (2004).

[12] The prosecutorial limitation implicit in Judge Kaul's dissent brings to mind the way in which genocide prosecutions were limited at the International Criminal Tribunal for the Former Yugoslavia (ICTY), *see infra* notes 39–42 and accompanying text.

[13] Because the quantitative analysis is insufficient to a full understanding, a qualitative narrative is included in part III.

(part II),[14] and addresses the codification of crimes against humanity in the ICC Statute (part III). It demonstrates that crimes against humanity prosecutions have been central to the success of the ad hoc tribunals, both quantitatively and qualitatively, in order to capture key social harms; to address discriminatory and persecutory campaigns that cannot "qualify" as genocide; to avoid lengthy and unproductive discussions about whether a conflict is international or non-international in nature by eliminating armed conflict as an element of the crime; and to provide broad protection for civilians against the depredations of states or organizations whose policy it is to attack them. Part IV surveys the ICC's crimes against humanity jurisprudence to date; and, finally, part V takes up the difficult questions of law and fact posed by the prosecutor's decision to open an investigation into the Kenyan situation. The article concludes by offering an analysis and critique of the ICC's early case law in an effort to formulate a theory of crimes against humanity that implements the Court's mandate to prevent and punish "unimaginable atrocities that deeply shock the conscience of humanity."[15]

I. CRIMES AGAINST HUMANITY AS A PERSISTENT PHENOMENON

The concept of crimes against humanity emerged as positive law in the Charter of the Nuremberg (and subsequently Tokyo) Tribunal in response to the Allies' need to criminalize the Nazis' commission of massive human rights abuses against civilians, not only in countries invaded or occupied by Germany but also against German citizens.[16] Crimes against humanity were later incorporated in the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) during the 1990s, and subsequently the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the ICC.

[14] Data was collected for the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Panels in East Timor (Special Panels), but not included in this article because of a paucity of cases at the ECCC (for the moment) and difficulties of comparison for the work of the Special Panels. The data from the ECCC and Special Panels support the findings of this article.

[15] Rome Statute, *supra* note 3, pmbl., para. 2.

[16] References to crimes against humanity are present in nineteenth century French writings, *see, e.g.*, ALEXIS DE TOCQUEVILLE, 1 DE LA DÉMOCRATIE EN AMÉRIQUE 478 (Flammarion 1981) (1835) (suggesting slavery violated the "laws of humanity"); and the concept of crimes against humanity is also reflected in the Martens Clause (named after Russian delegate Fyodor Martens) in the preambles of the 1899 and 1907 Hague Conventions: "[I]n cases not included in the Regulations adopted by [the High Contracting Parties], populations and belligerents remain under the protection and empire of the principles of international law, as they result from . . . the laws of humanity." Convention (IV) respecting the Laws and Customs of War on Land, and its annex: Regulations concerning the Laws and Customs of War on Land, Preamble, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, 2280, *reprinted in* 2 AJIL Supp. 90, 92 (1908). References to crimes against humanity emerged in the twentieth century as a weak condemnation of the 1919 massacres of Armenians. *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 86–111 (2011). The 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established at the Paris Preliminary Peace Conference, also frequently cited violations of the "laws of humanity," "dictates of humanity," and "principles of humanity" as giving rise to criminal liability for the instigators of World War I. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 32 PAMPHLET SERIES OF THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 4 (1919), *as reprinted in* 14 AJIL 95 (1920). At Nuremberg they were defined in Article 6(c) of the London Charter. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6(c), Aug. 8, 1945, 82 UNTS 279.

Codification of crimes against humanity outside the international criminal tribunals languished following World War II.[17] The failure of the international community to adopt a comprehensive and specialized international instrument aimed at preventing and punishing crimes against humanity since Nuremberg is disappointing, and has made it difficult to apply crimes against humanity charges in both national and international courts. A separate effort led by this author—the Crimes Against Humanity Initiative[18]—has endeavored to address this gap by elaborating a comprehensive international convention for the prevention and punishment of crimes against humanity. That project is discussed elsewhere.[19] Meanwhile, as the international community hesitates regarding the need for a comprehensive convention on crimes against humanity, recent studies of victimization suggest that widespread or systematic violations of human rights remain a mainstay of despotic regimes, and that attacks upon civilians by government and rebel forces remain a frequent weapon of war.[20] Instances of atrocities that have been alleged to be crimes against humanity have been found in every hemisphere and region of the world in the past sixty years. These include the killing fields of Cambodia;[21] ethnic cleansing in the former Yugoslavia;[22] abduction, sexual violation, mutilations, and torture in Sierra Leone,[23] the Democratic Republic of the Congo (DRC),[24] and Uganda;[25] forced disappearances in Latin America;[26] attacks upon civilians by both Israel and Hamas in the Israeli/Palestinian conflict;[27] apartheid in South

[17] *See, e.g.,* M. Cherif Bassiouni, "*Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

[18] The Crimes Against Humanity Initiative is an ongoing project of the Whitney R. Harris World Law Institute involving the study of crimes against humanity, the drafting and elaboration of a proposed convention on crimes against humanity, and support for efforts to adopt it. The effort is guided by an international steering committee and supported by an international advisory council. *See* Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative, *at* http://crimesagainsthumanity.wustl.edu.

[19] FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2011). The proposed convention was published in French and English in August 2010. Spanish, Arabic, and Russian translations are also available at http://law.wustl.edu/harris/crimesagainst humanity.

[20] *See, e.g.*, THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2010); Javier Solana, *A Secure Europe in a Better World: European Security Strategy*, at 5 (2003), *at* http://www.iss.europa.eu/uploads/media/solanae.pdf (European Council report stating that "[s]ince 1990, almost 4 million people have died in wars, 90% of them civilians"); *see also* DAVID E. HOGAN & JONATHAN L. BURSTEIN, DISASTER MEDICINE 322 (2007).

[21] *See* Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC (July 26, 2010) (convicting Duch of, among other offenses, crimes against humanity for persecution on political grounds); *see also* Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 ILSA J. INT'L & COMP. L. 705 (1996–97).

[22] *See* Prosecutor v. Brđanin, Case No. IT-99-36-A (Apr. 3, 2007); Prosecutor v. Simić, Case No. IT-95-9A (Nov. 28, 2006); Jordan J. Paust, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1993–1994). The decisions and other materials concerning the ICTY are available on the Tribunal's website, http://www.icty.org.

[23] *See* Prosecutor v. Sesay (RUF case), Case No. SCSL-04-15-A (Oct. 26, 2009); Prosecutor v. Brima (AFRC case), Case No. SCSL-04-16-A (Feb. 22, 2008).

[24] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Confirmation of the Charges (Sept. 30, 2008) (charging defendants with, among other offenses, murder, rape, and sexual slavery as crimes against humanity).

[25] Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest (Sept. 27, 2005).

[26] *See, e.g.,* Kathryn Sikkink, *From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights*, 50 LATIN AM. POL. & SOC'Y 1, 1–29 (2008) (regarding forced disappearances in Argentina); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 3, 633–59 (2000).

[27] *See, e.g.*, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48 (Sept. 15, 2009); Report of the High Commissioner for Human Rights on the Occupied Palestinian Territories,

Africa;[28] and attacks upon civilians in East Timor.[29] Each of these situations has resulted in some combination of death, displacement, torture, sexual violence, and other inhumane acts against civilians. Each has been severe enough to warrant international intervention: International tribunals have been established, national courts or truth commissions have been convened in conjunction with international civil society, or international observers have issued reports alleging the commission of crimes against humanity.[30] Sadly, these represent just a few examples.

In most modern conflicts, civilian deaths far exceed those of combatants.[31] Moreover, the brutality of attacks upon civilians often sickens even the most hardened observers: Women are raped and either killed or forced to become sexual slaves or bush wives;[32] body parts are hacked off and the victims forced to eat them;[33] children are abducted, forced to kill family members, and then to fight as child soldiers;[34] political dissidents are disappeared, imprisoned, tortured, and murdered;[35] individuals are targeted because of their actual or apparent connection to the "wrong" group, whether it be ethnicity, religion, social class, or political beliefs.[36] If committed during armed conflict these atrocities may be deemed war crimes—but not if they occur in peacetime. Moreover, virtually none of these crimes can be prosecuted as genocide. Relying on the writings of prominent academics,[37] international courts and tribunals have narrowly interpreted the treaty definition of genocide. As a result, charges have been successfully applied only

UN Doc. A/HRC/13/54 (Mar. 15, 2010), Jeroen Gunning, *Peace with Hamas? The Transforming Potential of Political Participation*, 80 INT'L AFF. 2, 233–55 (2004). *But see* Israel Ministry of Foreign Affairs, *The Operation in Gaza, 27 December 2008–18 January 2009: Factual and Legal Aspects* (July 29, 2009), *at* http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf (contradicting the findings of the UN fact-finding mission). For a description of the controversy over the UN Report, see Richard Rosen, *Goldstone Reconsidered*, 21 J. TRANSNAT'L L. & POL'Y. 35 (2011).

[28] James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 3, 409–32 (2006).

[29] Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726-S/2000/59 (2000).

[30] *See, e.g.,* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60 (2005); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/S-17/2/Add.1 (2011); Report of the International Commission of Inquiry on Libya (Advance Unedited Version), UN Doc. A/HRC/19/68 (2012).

[31] *See, e.g.*, Alexander B. Downes, *Restraint or Propellant? Democracy and Civilian Fatalities in Interstate Wars*, 51 J. CONFLICT RESOL. 872, 873 (2007).

[32] *See, e.g.*, CHARLOTTE LINDSEY, INTERNATIONAL COMMITTEE OF THE RED CROSS, WOMEN FACING WAR 52 (2001), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0798_women _facing_war.pdf.

[33] Testimony of Kristin Kalla, Chief Programme Officer, ICC Trust Fund for Victims, to the ICC Assembly of States Parties (Dec. 8, 2010) (on file with author).

[34] *See, e.g.*, Michael G. Wessells, *Review: Children, Armed Conflict, and Peace*, 35 J. PEACE RES. 635, 639 (1998).

[35] James D. Seymour, *Indices of Political Imprisonment*, 1 UNIVERSAL HUM. RTS. 99, 101 (1979); *see generally* Neil J. Mitchell & James M. McCormick, *Economic and Political Explanations of Human Rights Violations*, 4 WORLD POL. 476 (1988); *see* Amnesty International, *Amnesty International Report 2011: The State of the World's Human Rights*, 2011 (reporting on political dissidents).

[36] *See, e.g.*, Prosecutor v. Lukić, Case No. IT-98-32/1-T (July 20, 2009), *aff'd.* Appeals Chamber (Dec. 4, 2012). For a moving and comprehensive survey of modern atrocity crimes, see DAVID SCHEFFER, ALL THE MISSING SOULS (2012) (discussing the author's service as the first U.S. ambassador for war crimes issues).

[37] Antonio Cassese, Claus Kress, and William Schabas are often cited in this regard. *See, e.g.*, Gregory H. Stanton, *Why the World Needs an International Convention on Crimes Against Humanity*, *in* FORGING A CONVENTION, *supra* note 19, at 345, 353; Antonio Cassese, *Is Genocidal Policy a Requirement for the Crime of Genocide*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 128, 130 n.4 (Paola Gaeta ed., 2009) (noting that Gil, Greenawalt, Kress, Schabas, and Vest support including an element of policy in the definition of the crime of genocide).

in a handful of cases in which overwhelming proof existed that the perpetrators intended to destroy, in whole or in part, a group of persons because of their identification (by the perpetrators) with a particular ethnic, racial, religious, or national group.[38] Arguments urging a relaxation of these high standards have been almost uniformly rejected by international courts and tribunals,[39] notably by the ICTY, which, with the exception of the massacre at Srebrenica,[40] found the ethnic cleansing campaign in the former Yugoslavia to be a case of crimes against humanity, even though more than two hundred thousand deaths, fifty thousand rapes, and over two million displacements resulted from Serb attacks on Bosnian Muslims.[41] The International Court of Justice (ICJ) aligned itself with this jurisprudence in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, declining to interpret the Convention more liberally in a case involving state, as opposed to individual, criminal responsibility.[42]

II. The Central Importance of Crimes Against Humanity Charges to the Work of the Ad Hoc International Criminal Tribunals

Following the Nuremberg and Tokyo trials, crimes against humanity were recognized as a category of offenses under international law by the General Assembly and the International Law Commission (ILC),[43] but, as noted, no specialized convention on crimes against

[38] *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-A, para. 45 (July 5, 2001) (requiring specific intent for genocide).

[39] Although the General Assembly characterized ethnic cleansing in Bosnia and Herzegovina as genocide, GA Res. 47/121, pmbl., para. 10 (Dec. 18, 1992) ("concerned about [actions] . . . . in pursuit of the abhorrent policy of 'ethnic cleansing', which is a form of genocide"), and the European Court of Human Rights found in *Jorgic v. Germany*, 2007-III Eur. Ct. H.R. 1, para. 108, that "the applicant's acts, which he committed in the course of the ethnic cleansing . . . . could reasonably be regarded as falling within the ambit of the offence of genocide," the ICTY and the International Court of Justice (ICJ) have declined to find that ethnic cleansing is a form of genocide. *See, e.g.,* Prosecutor v. Krstić, Case No. IT-98-33-T, para. 580 (Aug. 2, 2001) ("The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group."); *see also infra* note 42.

[40] *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-A (Apr. 19, 2004); Prosecutor v. Popović, Case No. IT-05-88 (June 10, 2010).

[41] *See, e.g.*, Prosecutor v. Karadžić, Case. No. IT-95-5/18-1, 98 bis Oral Decision (June 28, 2012), *reported in* ICTY Press Release, Tribunal Dismisses Karadžić Motion for Acquittal on 10 of 11 Counts of the Indictment (June 28, 2012) (entering an oral acquittal on Count 1 of the indictment charging genocide at the close of the prosecution's case, noting that although it heard evidence of culpable acts systematically directed against Bosnian Muslims or Bosnian Croats in the municipalities and of repetition of discriminatory acts and derogatory language, the nature, scale, and context of these culpable acts did not reach the level from which a reasonable trier of fact could infer that they were committed with genocidal intent).

[42] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 ICJ Rep. 43 (Feb. 27). For a critique of the Court's jurisprudence, see Antonio Cassese, *A Judicial Massacre*, Guardian, Feb. 27, 2007, *at* http://www.guardian.co.uk/commentisfree/2007/feb/27/the judicialmassacreofsrebr. For a discussion of the interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277, see, for example, Robert Cryer, Håkan Friman, Darryl Robinson & Elizabeth Wilmshurst, International Criminal Law and Procedure 169–73 (2007); *see also* Stanton, *supra* note 37, at 352 ("the framers bound the definition of genocide . . . so that proving genocide becomes difficult after the fact and nearly impossible while genocide is being committed"); Gareth Evans, *Crimes Against Humanity and the Responsibility to Protect, in* Forging a Convention, *supra* note 19, at 3 (characterizing attempts to expand the definition of genocide as "a lost cause").

[43] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Res. 95(1) (Dec. 11, 1946); J. Spiropoulos (Special Rapporteur), Formulation of Nürnberg Principles, UN Doc.

humanity was ever elaborated.[44] Instead, the Genocide Convention was adopted to memorialize and prevent the kind of explicit racial and religious extermination campaign undertaken by the Third Reich, which had been condemned as crimes against humanity by the judgment of the International Military Tribunal (IMT) at Nuremberg.[45] The ILC took up the question of crimes against humanity as part of its work on the *Draft Code of Crimes Against the Peace and Security of Mankind*, which was finalized in 1996 but never adopted.[46] A handful of national jurisdictions incorporated crimes against humanity in one form or another in their domestic legal systems, the best known of which were Canada, Israel, and France.[47] But it was not until the establishment of the ICTY and ICTR in the 1990s that crimes against humanity were recodified as a tool of suppression in an international instrument. Both of those tribunals, and subsequently the SCSL, the ECCC, and the Special Panels for East Timor (Special Panels), contain crimes against humanity as a category of offense,[48] and their prosecutors charge it extensively. In fact, one expert has labeled the ad hoc tribunals "crimes against humanity courts,"[49] insofar as the crimes against humanity charges in each of them, if not predominant, at least represent a significant proportion of the charges. The charges also captured some of the particular patterns of victimization such as ethnic cleansing or sexual slavery, and the crimes against humanity counts were sometimes more successful than war crimes charges and almost always more successful than genocide cases. As William Schabas has observed: "If the statutes of the three tribunals [ICTY, ICTR, and SCSL] only contemplated crimes against humanity

A/CN.4/22 (Apr. 12, 1950), *reprinted in* 1950-II Y.B. INT'L L. COMM'N 181, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_22.pdf.

[44] *See supra* notes 17–19 and accompanying text.

[45] *International Military Tribunal (Nuremberg), Judgment and Sentences,* 41 AJIL 172 (1947); *see also* Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again,* 32 COLUM. J. TRANSNAT'L L. 289, 303–11 (1994).

[46] Report of the International Law Commission on the Work of Its Forty-Eighth Session, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), *reprinted in* 1996-II Y.B. INT'L L. COMM'N 17, 45, *available at* http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1996_v2_p2_e.pdf [hereinafter 1996 Draft Code of Crimes]; *see* BASSIOUNI, *supra* note 16, at 171–83 (describing the ILC's efforts); Roger S. Clark, *History of Efforts to Codify Crimes Against Humanity: From the Charter of Nuremberg to the Statute of Rome, in* FORGING A CONVENTION, *supra* note 19, at 8.

[47] Canada adopted the Crimes Against Humanity and War Crimes Act, 2000, ch. 24, to implement the ICC Statute, but cases were brought prior to 1998 under earlier legislation. *See, e.g.*, R v. Finta, [1994] 1 S.C.R. 701; Mugesera v. Canada, [2005] 2 S.C.R. 100. Crimes against humanity were incorporated in Israel through the Nazis and Nazi Collaborators (Punishment) Law of 1950. *See, e.g.*, Att'y Gen. of Israel v. Eichmann, 36 ILR 5 (Dist. Ct. Jerusalem 1961), *aff.* 36 ILR 277 (Isr. Sup. Ct. 1962); Att. Gen. of Israel v. Demjanjuk, Trial Judgment, (Isr. Dist. Ct. Jerusalem Apr. 18, 1988); Appeals Judgment, (Isr. Sup. Ct. July 29, 1993) Demjanjuk v. State of Israel, Isr. SC 221 (1993). Before March 1, 1994, crimes against humanity were incorporated in France's legal system through the French law of Dec. 26, 1964, by reference to the Nuremberg Principles. *See, e.g.*, Public Prosecutor v. Barbie, Trial Judgment, Cour d'assises du Rhône (July 4, 1987) (Fr.); *see also* Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L.151 (2010). France amended its legislation after ratification of the ICC Statute.

[48] Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 5, SC Res. 827, annex (May 25, 1993) [hereinafter ICTY Statute]; International Criminal Tribunal for Rwanda, Art. 3, SC Res. 955, annex (Nov. 6, 1994) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, Art. 2, *see* SC Res. 1315 (Aug. 14, 2000) [hereinafter SCSL Statute]; UN Transitional Administration in East Timor, On the Organization of Courts in East Timor, sec. 9, UN Doc. UNTAET/REG/2001/25, Annex I (Sept. 14, 2001) [hereinafter East Timor Statute]; 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, Art. 9 (June 6, 2003), *see* GA Res. 57/228 (Dec. 18, 2002) [hereinafter ECCC Statute].

[49] Göran Sluiter, *"Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals*, in FORGING A CONVENTION, *supra* note 19, at 103.

within their subject-matter jurisdiction, this would change little in terms of their operations, except to reduce the length of trials and the legal debates about arcane subjects."[50]

The International Criminal Tribunal for the Former Yugoslavia

The ICTY was established by the Security Council in 1993 to respond to reports of mass atrocities committed in Croatia and Bosnia and Herzegovina. The first international criminal tribunal established since the creation of the Nuremberg and Tokyo tribunals, the ICTY has indicted 161[51] persons for their roles in violent conflicts that took place in the former Yugoslavia in the 1990s. The ICTY's jurisdiction encompasses two articles on war crimes (Article 2 on grave breaches; Article 3 on other violations of the laws and customs of war), one on genocide (Article 4), and one on crimes against humanity (Article 5). Article 5 contains a provision linking the crime—as was the case at Nuremberg—to armed conflict, providing:

> 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:
>
> (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.[52]

The text of Article 5 is loosely based upon Article 6(c) of the Nuremberg Charter, but with the important additions of imprisonment, rape, and torture to the list of illegal acts. In considering the importance of crimes against humanity charges before the ICC, it is useful to look at both the quantitative and qualitative uses of this category of offenses before the ICTY.

As shown in Table 1, during the nearly twenty years of the ICTY's existence its prosecutors charged 939 counts of war crimes,[53] 670 counts of crimes against humanity, and forty counts of genocide. Thus, crimes against humanity represent 40.6 percent of all indicted offenses

[50] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS 185–86 (2006). This is an overstatement—charges of war crimes are more useful than charges of crimes against humanity in certain types of atrocity crime situations—but contains an important grain of truth.

[51] The figure of 161 indicted persons is derived from the figures on the ICTY website. In the case of the *Haradinaj* matter, which involved two trials of three defendants, it reconciles the data from both trials.

[52] ICTY Statute, *supra* note 48, Art. 5.

[53] War crimes, as stated in the text, include charges under Article 2 ("Grave breaches of the Geneva Conventions of 1949") and Article 3 ("Violations of the laws or customs of war") of the ICTY Statute.

TABLE 1
CRIMES AGAINST HUMANITY CHARGES AT THE ICTY[55]

	Indicted Persons	Crimes Against Humanity Counts		Genocide Counts[56]		War Crimes Counts	
		INDICTED	CONVICTED	INDICTED	CONVICTED	INDICTED	CONVICTED
Concluded							
Sentenced[57]	47	172	93	11	1	316	160
Pleaded Guilty	20	79	46	7	0	90	41
Acquitted	17	103	0	0	0	130	0
Subtotal	**84**	**354**	**139**	**18**	**1**	**536**	**201**
Ongoing or Terminated							
On Appeal	14	71	41	10	4	15	14
Pre-trial/Trial	14	91		4		141	
Charges Withdrawn	20	36		0		82	
Referral (Rule 11 bis)	13	51		2		51	
Died Before Transfer	10	35		1		57	
Died After Transfer	6	32		5		57	
Fugitive	0	0		0		0	
Total	**161**	**670**	**180**	**40**	**5**	**939**	**215**

while genocide charges account for only 2.4 percent. War crimes charges constitute the remaining 56.9 percent.[54]

Of the 161 persons indicted, sixteen died before or during proceedings, the prosecution withdrew charges in twenty cases,[58] and thirteen cases were transferred to domestic jurisdictions (pursuant to Rule 11 bis of the ICTY Rules of Procedure and Evidence). Currently, fourteen defendants are facing proceedings at the trial[59] stage, and fourteen accused have appealed. Effectively, this reduces the number of completed cases to eighty-four and the number of charges that have been finally adjudicated by the ICTY to 354 crimes against humanity charges, eighteen genocide charges, and 536 war crimes charges.[60] These convictions include

[54] Of the 939 counts of war crimes, 208 counts (representing 22 percent of the total) stemmed from only four cases: eighty-nine counts in the *Delalić* case ("*Čelebići Camp*"), fifty-seven in the quashed *Haradinaj I* case, forty in the triple indictment against former Federal Republic of Yugoslavia president Slobodan Milošević, and twenty-two in the *Tadić* case. The Milošević indictment contained the highest number of crimes against humanity charges (twenty-four); Brahimaj, Balaj, and Haradinaj were indicted with the second most (eighteen each); and Goran Jelisić was indicted with the third most (fifteen). Twenty-seven accused—or more than 16 percent of all indictees—were charged solely with war crimes (accounting for 209 counts); two defendants (Milan Kovačvić and Simo Drljaća) were charged solely with genocide; and three defendants (Dragan Nikolić, Dragan Papić, and Miroslav Deronjić) were charged solely with crimes against humanity (accounting for six counts).

[55] Indictment data is from operative (or last amended) indictment, compiled as of February 2013.

[56] Genocide includes genocide-related offenses under Article 4 of the ICTY Statute, that is, complicity in genocide and conspiracy to commit genocide.

[57] Of the forty-seven sentenced persons, six were sentenced by the trial chamber without appeal, and the remaining forty-one were sentenced on appeal by the appeals chamber.

[58] Eleven of the twenty withdrawn indictments are from one case (*Mejakić*).

[59] Seven cases are at trial: Jadranko Prlić et al., Vojislav Šešelj, Jovica Stanišić and Franko Simatović, Mićo Stanišić and Stojan Župljanin, Radovan Karadžić, Goran Hadžić, and Ratko Mladić.

[60] The proportion of crimes against humanity, genocide, and war crimes counts among indictments for which proceedings have concluded are only slightly different than the proportion of each of those counts among all 161 indictments. For all proceedings, crimes against humanity charges represent 40.6 percent of charges in the indictments, genocide represents 2.4 percent of charges, and war crimes represent 57 percent. Fourteen defendants are

findings of guilt for 139 counts of crimes against humanity, one count of genocide, and 201 counts of war crimes. In other words, crimes against humanity constituted 40.7 percent of all convictions, genocide fewer than one percent, and war crimes 58.9 percent. Conviction success rates were roughly even for both the crimes against humanity charges (39.3 percent) and war crimes charges (37.5 percent). The genocide counts failed dramatically.

The ICTY prosecutors' emphasis on war crimes charges suggests that they viewed their role as imposing, after the fact, limits on the methods and means of the conflict in the former Yugoslavia.[61] The high number of war crimes counts is unsurprising, insofar as all sides violated the laws and customs of war by attacking civilian objects,[62] establishing detention centers and camps in which inhumane treatment was the rule rather than the exception,[63] and using terror as a weapon of war.[64] Yet the war crimes counts failed to fully capture the social harm suffered by the victims, and, in particular, could not fully encompass the negative roles that ethnicity, religion, and sexual violence played in the conflict. To address this, many indictments (and Rule 61 proceedings)[65] included genocide counts. However, in case after case genocide counts resulted in acquittals at the ICTY;[66] instead, it was largely the crimes against humanity counts alleging persecution based on ethnic origin that captured this particularly grievous dimension of the conflict.

One difficulty that ICTY prosecutors faced was the necessity of establishing to a legal certainty whether the conflict was properly characterized as international or noninternational. The ICTY Appeals Chamber had held that Article 2's grave breaches provisions only applied in cases of international armed conflict, creating a major hurdle to the application of that article in charging a given accused.[67] (It is likely that similar difficulties will arise in the application

currently appealing the judgment or sentence entered against them; their convictions will not become final until the appeals chamber renders its judgment.

[61] Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AJIL 78, 81–82 (1994).

[62] *Brđanin*, *supra* note 22; Prosecutor v. Jokić, Case No. IT-01-42/1-A (Aug. 30, 2005).

[63] Prosecutor v. Kvocka, Case No. IT-98-30/1-T (Nov. 2, 2001).

[64] *See, e.g.*, Prosecutor v. Galić, Case No. IT-98-29-I (Mar. 26, 1999). It might be possible that the war crimes counts are higher because of the presence of two articles in the ICTY Statute on war crimes versus only one article on crimes against humanity. However, because the same charging patterns appear at the SCSL and ICC in terms of the predominance of war crimes counts during armed conflict, there does not appear to be a basis for concluding that the war crimes counts at the ICTY are inflated.

[65] Rule 61 of the ICTY Rules of Procedure and Evidence permits the Tribunal to hold an evidentiary hearing on an indictment if an accused cannot be brought before the Tribunal after a warrant has been issued. Following the hearing, the trial chamber may issue an "international arrest warrant" if it finds "reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment." Rules of Procedure and Evidence, Rule 61(c), (d), UN Doc. IT/32/Rev.4Y (2012) [hereinafter ICTY RPE]. When the ICTY was first established, it had difficulty apprehending its indictees; therefore, Rule 61 proceedings were held to publicize the cases against them, presumably to improve chances of their apprehension and to preserve the evidence against them. Although there was initial enthusiasm for the procedure, some criticism of it, as well as improved arrest records obviating its use, caused the ICTY to stop using Article 61. *See, e.g.*, Mark Thieroff & Edward A. Amley Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231 (1998).

[66] *See, e.g.*, *Brđanin*, *supra* note 22, para. 448 (appeals chamber finding that the intent to destroy the groups in part, as opposed to the intent to forcibly displace them, is not the only reasonable inference that may be drawn); *see also* William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 52–53 (2001–2002) (calling Srebrenica an "exceptional case").

[67] *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras. 81–84 (October 2, 1995).

of Article 8 of the ICC Statute.) In contrast, the distinction between international and noninternational armed conflicts is irrelevant to crimes against humanity.[68] Thus, in *Prosecutor v. Kupreškić*, the prosecution withdrew charges under Article 2 from an indictment and successfully substituted crimes against humanity charges,[69] arguing that these changes were necessitated by newly acquired evidence and a better understanding of the underlying criminal conduct. The prosecution noted that while the Article 2 allegations would have required proof of the international character of the armed conflict in question, the crimes against humanity charges did not, resulting in a more expeditious trial without prejudice to the defendants. The trial chamber agreed and accepted the amended indictment.

The ICTY appeals and trial chambers rendered important decisions regarding the parameters of crimes against humanity, in reliance on customary international law. Thus, the *Tadić* case held—departing from the Nuremberg precedent—that no armed conflict nexus was required for crimes against humanity prosecutions as a matter of customary international law. The decision also rejected the notion that crimes against humanity cases generally require the prosecutor to establish "discriminatory intent" on the part of the accused, thereby abandoning French case law to the contrary[70] and severing the link between crimes against humanity and genocide.[71] (The discriminatory intent element resurfaced, however, in proving persecution as a crime against humanity.)[72] Although a requirement that the crimes be widespread or systematic was not included in Article 5, the Tribunal read this element into the Statute, finding that "proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime."[73] These and other decisions rested upon both an interpretation of the ICTY Statute and findings of the scope and application of crimes against humanity in customary international law. Indeed, the report of the secretary-general supporting the establishment of the tribunal underscored that it should "apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[74]

Important subsequent decisions rejected the contention that proving a crime against humanity required the prosecution to establish that the accused had acted pursuant to a plan or policy to commit such crimes.[75] These rulings departed from some national case law[76] and

[68] *Id.*, paras. 76, 78.

[69] Prosecutor v. Kupreškić, Case No. IT-95-16, Indictment (Nov. 10, 1995); *Id.*, Amended Indictment (Feb. 9, 1998).

[70] Prosecutor v. Tadić, Case No. IT-94-1-A, paras. 283, 305 (July 15, 1999).

[71] *Tadić* held that discriminatory intent is not required to establish a crime against humanity, although the secretary-general's report establishing the ICTY indicated that it was an element of the offense. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, para. 48, UN Doc. S/25704 (May 3, 1993).

[72] *See infra* note 121 and accompanying text.

[73] Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, para. 98 (June 12, 2002).

[74] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, *supra* note 71, para. 34.

[75] *See, e.g.,* Guénaël Mettraux, *Crimes Against Humanity and the Question of a "Policy" Element, in* FORGING A CONVENTION, *supra* note 19, at 167–69.

[76] *See, e.g.,* Sadat, *Nuremberg*, *supra* note 45, at 303–11 (discussing the need for a "common plan" in French case law).

generated scholarly debate.[77] In *Prosecutor v. Kunarac*, the appeals chamber held that "neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan.'" According to the appeals chamber, "[t]here 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."[78] The absence of a policy requirement in the ICTY Statute is to be contrasted with the presence of that requirement at the ICC, a point discussed further below.

The ICTY also addressed the "civilian population" requirement in several cases. The civilian population requirement has created jurisprudential headaches and has been criticized.[79] If the focus is upon a "population," the term appears redundant, duplicating the "widespread or systematic" element. If the focus is upon the "civilian" nature of the population, the question is what is meant by that term.[80] The ICTY took up the issue, first in *Tadić* and later in *Martić*,[81] holding that "civilian" in the ICTY statute incorporated the meaning found in Protocol I, Article 50(1); namely, persons who are not members of the armed forces.[82] This definition presumably excludes individuals engaged in organized armed resistance to an invader.[83] At the same time, the ICTY appeals chamber has noted that nothing in Article 5 requires every victim of a crime against humanity to be a civilian if the attack as a whole targeted a civilian "population," meaning that persons *hors de combat* are included within the protected class.[84]

The International Criminal Tribunal for Rwanda

As shown in Table 2, prosecutors at the ICTR also charged crimes against humanity extensively. Established by the Security Council in 1994 following the Rwandan genocide, the jurisdiction *ratione materiae* of the ICTR Statute includes genocide (Article 2), crimes against humanity (Article 3), and war crimes in noninternational armed conflict (Article 4).[85] The definition of crimes against humanity in Article 3 omits the "armed conflict" requirement of the ICTY statute, but includes a proviso that the crimes must be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[86] In contrast to the practice at the ICTY, genocide was alleged and

[77] *See, e.g.*, BASSIOUNI, *supra* note 16, at 14–19 (supporting the inclusion of a policy element). *But see* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L. J. 237, 270 (2002) (disputing the existence of a policy element); *see generally* RICHARD STEINBERG, ASSESSING THE LEGACY OF THE ICTY (2011).

[78] *Kunarac*, *supra* note 73. The appeals chamber noted that there was some "debate" in the jurisprudence of the Tribunal on the question whether a policy or plan constitutes an element of crimes against humanity. *Id.*, para. 98 n.114. The *Kunarac* appeals chamber decision effectively ended the debate.

[79] Kai Ambos, *Crimes Against Humanity and the International Criminal Court*, *in* FORGING A CONVENTION, *supra* note 19, at 279.

[80] *See, e.g.*, Egon Schwelb, *Crimes Against Humanity,* 1946 BRIT. Y.B. INT'L 178.

[81] *See* Prosecutor v. Tadić, Case No. IT-94-1-T (May 7, 1997); *see also* Prosecutor v. Martić, Case No. IT-95-11-T, paras. 50–56 (June 12, 2007).

[82] Prosecutor v. Martić, Case No. ICTY-IT-95-11-A, para. 297 (Oct. 8, 2008).

[83] The ICTY did not follow the French jurisprudence on this point. *See* Sadat, *Nuremberg*, *supra* note 45.

[84] *Martić,* Case No. ICTY-IT-95-11-A, para. 306.

[85] ICTR Statute, *supra* note 48, Arts. 2–4.

[86] *Id.*, Art. 3.

TABLE 2
CRIMES AGAINST HUMANITY CHARGES AT THE ICTR[88]

	Indicted Persons	Crimes Against Humanity Counts		Genocide Counts		War Crimes Counts	
		INDICTED	CONVICTED	INDICTED	CONVICTED	INDICTED	CONVICTED
Concluded							
Sentenced	39	129	63	113	52	50	10
Pleaded Guilty	8	18	11	16	7	2	0
Acquitted	10	25	0	28	0	10	0
Subtotal	**57**	**172**	**74**	**157**	**59**	**62**	**10**
Ongoing or Terminated							
On Appeal[89]	16	65	28	54	23	21	15
Pre-trial/Trial	0	0		0		0	
Charges Withdrawn	2	4		4		2	
Transferred	4	9		9		0	
Died Before Trial	1	1		3		0	
Died During Trial	1	2		4		1	
At Large	9	29		23		13	
Total	**90[90]**	**282**	**102**	**254**	**82**	**99**	**25**

proven early and often at the ICTR; additionally, ICTR prosecutors extensively—even predominantly—charged crimes against humanity. The crimes against humanity and genocide counts together constituted nearly eighty-five percent of the total counts brought against all accused at the ICTR.[87]

As shown in Table 2, ninety persons were indicted by the ICTR, charged with 282 counts of crimes against humanity (44.4 percent of total counts); 254 counts of genocide (40 percent); and ninety-nine counts of war crimes (15.6 percent).[91] Fifty-seven defendants were convicted on seventy-four counts of crimes against humanity, fifty-nine counts of genocide, and ten war crimes counts.[92] The crimes against humanity counts had a conviction rate of forty-three percent, compared to 37.6 percent for genocide and 16.1 percent for war crimes.

The ICTR was both qualitatively and quantitatively a "crimes against humanity court," particularly if one regards genocide as an acute form of crimes against humanity. While the conviction rate on crimes against humanity in the ICTR is similar to that of the ICTY, the war crimes conviction rate is considerably lower (16.1 percent versus 37.5 percent). Until 2003, all accused of war crimes counts at the ICTR were acquitted, largely because the trial chambers either found that they did not fall within the proper category of perpetrators (that is, they were noncombatants),[93] or because the nexus between the acts of the accused and the armed conflict had not been established.[94] Beginning in 2003, fewer war crimes counts were brought[95] and conviction success rates improved considerably.[96] In its early case law, and particularly the *Akayesu* decision, the ICTR took up the challenge of interpreting the chapeau elements of Article 3 of its Statute, defining terms such as "widespread" and "systematic" as it brought to life

[87] Following the decision of the Security Council to remove Carla del Ponte as ICTR Chief Prosecutor and appoint a separate chief prosecutor for the ICTR in 2003, SC Res. 1503 (Aug. 28, 2003), a noticeable shift in

text that had largely languished since the judgment at Nuremberg.[97] Like the ICTY, the ICTR initially adopted the position that a policy element was a necessary requirement of a crime against humanity,[98] a finding that was later reversed.[99]

At the Rwanda Tribunal, prosecutors often brought crimes against humanity charges alleging extermination or persecution in addition to genocide. Because cumulative charging is permitted, both offenses went to trial and decisions were returned on each count. For example, in the *Media Case, Prosecutor v. Nahimana*, the three accused played a role either in the broadcast of hate speech or its dissemination in the press. Each was found guilty of genocide, direct and public incitement to commit genocide, as well as persecution and extermination as crimes against humanity. The appeals chamber found:

> [C]umulative convictions for genocide and crimes against humanity are permissible on the basis of the same acts, as each has a materially distinct element from the other, namely, on the one hand, "the intent to destroy, in whole or in part, a national, ethnical, racial or

indictment practice occurred: War crimes were charged more sparingly (only 19 percent of post-2003 indictments included war crimes) and the average number of crimes against humanity charged per indictment was halved (from 3.92 per indictment to 1.79).

[88] Indictment data is from operative (or last amended) indictment, and is current as of January 2013.

[89] Conviction data for cases on appeal is from the trial chamber.

[90] This number excludes two persons charged with false testimony and contempt of the tribunal (no crimes against humanity, genocide, or war crimes counts were charged).

[91] From 1995 to 2003, the prosecution charged an average of 3.92 counts of crimes against humanity per indictment; during the same period, no indictment was amended to remove such a charge. After 2003, the average dropped by fifty-four percent to 1.79 counts of crimes against humanity per indictment. Moreover, after 2003, nine out of thirty (thirty percent) of the initial indictments were amended to reduce the number of charges for crimes against humanity. Six out of thirty (twenty percent) of the initial indictments were also amended to add crimes against humanity charge(s). The frequency of war crimes charges exhibits a similar decline after 2003. From 1995 to 2003, forty-one out of fifty-five (74.5 percent) indictments charged war crimes. After 2003, only one in ten initial indictments included war crimes, and only seven out of thirty-six (19.4 percent) ultimately included war crimes charges; seven indictments were amended to remove the war crimes counts completely. The smallest degree of change was seen for genocide charges, which were reduced from a pre-2003 rate of approximately 3.12 counts per indictment to a post-2003 rate of 2.32 counts per indictment. Like crimes against humanity and war crimes, genocide counts were more routinely withdrawn after 2003. Twelve out of thirty-two (37.5 percent) indictments were amended to reduce the number of genocide charges, a practice consistent with the Tribunal's emphasis on completing its work more quickly in line with the completion strategy set out by the Security Council. Four out of thirty-two (12.5 percent) indictments were also amended to add genocide charge(s).

[92] Ten defendants were acquitted on all counts.

[93] *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, paras. 599–644 (Sept. 2, 1998) (holding that it was not proven beyond a reasonable doubt that the acts perpetrated by Akayesu were committed in conjunction with an armed conflict or that he was a member of the armed forces).

[94] *See, e.g.,* Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, paras. 557–58 (May 26, 2003) For a good discussion, see generally EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 324–25 (2008).

[95] *See supra* note 91.

[96] The change in charging practice coincided with the appointment of Hassan Jallow to replace Carla del Ponte as the new prosecutor for the Rwanda Tribunal. In addition, the appeals chamber reversed, for the first time, an accused's acquittal for violations of common Article 3 and Additional Protocol II, charged under Article 4 of the ICTR Statute. *Rutuganda*, paras. 583–85, 589.

[97] In the first judgment delivered at the ICTR, the trial chamber held that crimes against humanity must be committed as part of a "widespread or systematic attack." In further defining systematicity, it held that "it 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 must however be some kind of preconceived plan or policy." *Akayesu*, para. 580.

[98] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, para. 78 (June 7, 2001).

[99] *See supra* notes 75–78 and accompanying text.

religious group," and on the other, "a widespread or systematic attack against a civilian population."[100]

The Special Court for Sierra Leone

The SCSL was established in 2002 to bring to justice those "most responsible" for the atrocities committed in that country after November 30, 1996.[101] With the conviction[102] and sentencing[103] of Charles Taylor in 2012, the SCSL has completed all of its trials and all but one of its appeals. The SCSL indicted a total of thirteen individuals, three of whom died during the proceedings. This small number arguably does not reflect the magnitude of the court's work. One hundred eighty-two charges of crimes against humanity and war crimes were brought against ten accused, and those convicted typically received heavy sentences.

The definition of crimes against humanity at the SCSL differs from the ICTY, ICTR, and ICC definitions. Adopted nearly a decade after the ICTY and ICTR statutes, the SCSL statute includes an expanded list of crimes involving sexual violence (rape, sexual slavery, forced prostitution, forced pregnancy, and "any other form of sexual violence"),[104] and omits both the armed conflict requirement and the "discriminatory intent" provisions found in the ICTY statute.[105] Moreover, the SCSL statute includes no "State or organizational policy" requirement even though it was adopted four years *after* the negotiation of the Rome Statute.

Given the nature of the Sierra Leone conflict, involving armed groups of diverse ethnicities struggling for power and control, as well as the commission of terrible atrocities against the civilian population of the country, one would expect a pattern similar to that observed at the ICTY in terms of the balance between war crimes and crimes against humanity prosecutions at the SCSL. Although the sample size (four cases) is too small to draw significant conclusions, the same pattern is observable. As shown in Table 3, SCSL prosecutors charged more war crimes (105 or 57.7 percent) than crimes against humanity (seventy-seven or 42.3 percent), but both were important to their indictments. In the cases that went to trial, conviction rates for crimes against humanity were higher than conviction rates on the war crimes charges; both were much higher than the conviction rates at the ICTY and the ICTR, possibly because so few individuals were charged. The conviction rate for crimes against humanity was 75.5 percent, and for war crimes charges 79.4 percent.[106]

[100] Prosecutor v. Nahimana, Case No. ICTR-99-52-A, para. 1029 (Nov. 28, 2007); *see* H. Ron Davidson, *The International Criminal Tribunal for Rwanda's Decision in* Prosecutor v. Ferdinand Nahimana, et al.: *The Past, Present and Future of International Incitement Law*, 17 LEIDEN J. INT'L L. 505 (2004). More recently, the Tribunal found cumulative convictions permissible for crimes against humanity, genocide, and war crimes in a fifteen-hundred-page decision in the *Butare* case, the first to convict a woman of genocide. Prosecutor v. Nyramasuhuko, Case No. ICTR-98-42-T (June 24, 2011).

[101] SCSL Statute, *supra* note 48, Arts. 1(1), 2.

[102] Press Release, Outreach and Public Affairs Office, Special Court for Sierra Leone, Charles Taylor Sentenced to 50 Years in Prison (May 30, 2012), *at* http://www.sc-sl.org/LinkClick.aspx?fileticket=wMFT32KRyiY=&tabid=53.

[103] Prosecutor v. Taylor, Case No. SCSL-03-01-T (May 18, 2012).

[104] SCSL Statute, *supra* note 48, Art. 2(g).

[105] *See supra* note 86 and accompanying text.

[106] Genocide was not included in the SCSL Statute.

TABLE 3
CRIMES AGAINST HUMANITY CHARGES AT THE SCSL[107]

	Indicted Persons	Crimes Against Humanity Counts		War Crimes Counts	
		INDICTED	CONVICTED	INDICTED	CONVICTED
Concluded					
Sentenced	8	49	37	63	50
Pleaded Guilty	0	0	0	0	0
Acquitted	0	0	0	0	0
Subtotal	**8**	**49**	**37**	**63**	**50**
Ongoing or Terminated					
On Appeal	1	5	5	6	6
Pre-trial/Trial	0	0		0	
Charges Withdrawn	0	0		0	
Transferred	0	0		0	
Died Before Trial	3	16		26	
Died During Trial	0	0		0	
Fugitive	1	7		10	
Total	**13**	**77**	**42**	**105**	**56**

Because the SCSL tried so few cases and was mandated by its statute to follow the jurisprudence of the ICTY and ICTR, an examination of its jurisprudence would add little to the foregoing analysis. That is not to say that the Special Court failed to make important contributions to the current understanding of crimes against humanity. Particularly notable was the appeals chamber judgment in *Brima*, recognizing the crime of "forced marriage" as a crime against humanity qualified under "other inhumane acts."[108]

III. CODIFICATION OF CRIMES AGAINST HUMANITY IN THE ROME STATUTE

Until the codification in Rome, there was no post-Nuremberg multilateral treaty definition of crimes against humanity.[109] Rather, different texts were adopted by states, the Security Council, and the ILC.[110] In the 1996 Preparatory Committee Report that took up the ILC's 1994 draft statute for the ICC, the view was expressed that perhaps the definition of crimes against humanity should await completion of work on the Draft Code of Crimes.[111] Determined to provide definitions of crimes and not just references to categories of crimes in the ICC

[107] Indictment data is from operative (or last amended) indictment.

[108] *Brima*, *supra* note 23, para. 202. This was the first case in which forced marriage was given independent legal qualification as a "situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim." *Id.*, para. 196. This case may prove important at the ECCC as it confronts the issue of forced marriages performed by the Khmer Rouge regime between nonconsenting men and women. *See* Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013, 1023–25 (2008).

[109] *See supra* notes 17–20 and accompanying text.

[110] *See supra* notes 16–19, 43–48 and accompanying text.

[111] REPORT OF THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, para. 83 (PROCEEDINGS OF THE PREPARATORY COMMITTEE DURING MARCH-APRIL AND AUGUST 1996), *reprinted in* M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 398 (1998) [hereinafter PREPARATORY COMMITTEE PROCEEDINGS].

Statute, however,[112] the Diplomatic Conference (and the Preparatory Committee before that) opted to define crimes against humanity for the first time in a multilateral treaty.

At the time the ICC Statute was negotiated in 1998, there was little in the way of usable precedent from the ad hoc tribunals. Those tribunals had decided very few cases; the SCSL had not yet even been established. Thus, the important experience of those tribunals—experience that developed as an outgrowth of and contribution to customary international law—was largely unavailable, with some important exceptions. The exceptions included lessons from the ICTR and ICTY about the importance of prosecuting sex and gender crimes,[113] early decisions from the *Tadić* case,[114] and the trial (but not the decision) in *Akayesu*.[115] The Rome conference—and the meetings of the Preparatory Committee prior to that—was an extensive multilateral negotiation, with many states proposing changes and amendments to the definition of crimes against humanity in earlier tribunal statutes.[116] At the same time, because the Rome Statute could potentially apply to nationals of nonparty states through referral of a situation by the Security Council, delegates were mindful of the need for the ICC Treaty to represent a codification of customary international law.[117]

In terms of chapeau or "context" elements,[118] the armed conflict nexus present in the ICTY statute corresponding to the Nuremberg and Tokyo Tribunals was eliminated. The discriminatory intent requirement, which had been present in the ICTR and later in the ECCC statute, was also discarded.[119] Finally, the Rome Statute employs the rubric "widespread *or* systematic" (as opposed to "*and* systematic"), following the provisions of the SCSL, ECCC, and ICTR statutes.[120] Additional acts were added: Like the SCSL's, the ICC Statute includes supplementary provisions on crimes of sexual violence (but adds the requirement that they must

[112] *See* Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 913–14 (2000); Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, para. 57, UN Doc. A/50/22 (1995) ("a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused.").

[113] *See generally* KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997).

[114] *See Tadić*, *supra* note 67, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995); *Tadić*, *supra* note 81.

[115] *Akayesu, supra* note 93.

[116] Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 391 (2000).

[117] *Id.* at 407–10; *see also* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, 26 (1999).

[118] The Elements of Crimes elaborated by the Preparatory Commission pursuant to Article 9 of the Statute refers to these as context elements as opposed to the "chapeau," the term more usually employed. *See* Rome Statute of the International Criminal Court, Elements of Crimes, Art. 7. Using the word "context" is consistent with the drafters' efforts to eliminate terminology pertaining to any particular legal system (and also accounts for the disappearance of the term "indictment" from the Statute). Nonetheless, this terminology can be somewhat confusing. *See, e.g.,* LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW 146–48 (2002).

[119] *Tadić*, *supra* note 81, paras. 650–52. The appeals chamber reversed this holding, *Tadić*, *supra* note 70, para. 305. The French delegation had advocated for this position, undoubtedly relying on France's own jurisprudence after World War II. Darryl Robinson, *The Elements of Crimes Against Humanity*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 63 (Roy S. Lee ed., 2001). This linkage is reinserted, however, in the definition of persecution under Article 7(1)(h).

[120] *See* Machteld Boot, Rodney Dixon & Christopher K. Hall, *Article 7: Crimes Against Humanity, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 117, 123 (Otto Triffterer ed.,

be of "comparable gravity" to the other crimes involving sexual violence set forth in Article 7(1)(g)); expands considerably the ambit of persecution in Article 7(1)(h) beyond the narrow grounds of ethnic, racial, religious, political, and national found in the ICTR and ECCC statutes;[121] and includes forced disappearance of persons and the crime of apartheid as specific predicate acts. The Diplomatic Conference rejected appeals from some governments to add economic and environmental crimes, preferring the list to include only crimes already found in other international instruments or clearly understood to be predicate acts of crimes against humanity under customary international law.[122]

Article 7 of the Rome Statute sets out four preconditions that must be satisfied in a prosecution for crimes against humanity. These preconditions are (1) the commission of the crime as part of a "widespread or systematic attack;"[123] (2) against a civilian population;[124] (3) with knowledge of the attack [directed against any civilian population];[125] (4) and involving "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[126]

Each of these elements has antecedents in the statutes or case law of the ad hoc international criminal tribunals or national courts. They are noncontroversial with the exception of the "State or organizational policy" element.[127] This element had appeared as one of many possible criteria to be used to distinguish crimes against humanity from ordinary crimes in discussions of crimes against humanity during the meetings of the ICC Preparatory Committee in 1996;[128] however, the element was not included in the Zutphen Inter-sessional Draft of

1999). The French text of the ICTR Statute used "and," but this was viewed as a drafting error by the Tribunal. *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, para. 579 n.144 (Sept. 2, 1998).

[121] The Rome Statute prohibits "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognised as impermissible under international law . . . ." This expansive language is followed by a proviso that the persecution must be "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court," meaning that persecution is only prosecutable when accompanied by war or other acts of violence. Antonio Cassese, *Crimes Against Humanity, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 376 (A. Cassese, P. Gaeta & J. Jones eds., 2001) argues that this limitation is not required by customary international law, yet it follows the practice of the ad hoc tribunals. *See* Ken Roberts, *The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia,* LEIDEN J. INT'L L. 623, 632 (2002); *see also* Prosecutor v. Kupreškić, Case No. IT-95-16-T, paras. 573–81 (Jan. 14, 2000).

[122] Author's notes from the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome (June 15–July 17, 1998) (on file with author); *see also* Bureau: Discussion Paper Regarding Part 2, UN Doc. A/CONF.183/C.1/L.53 (July 6, 1998) (see discussion regarding paragraph 1), *reprinted in* 3 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT: OFFICIAL RECORDS 204 (2002); Cuba: Proposal Regarding Article 5, UN Doc. A/CONF.183/C.1/L.17 (June 23, 1998), *reprinted in* 3 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT: OFFICIAL RECORDS 240 (2002).

[123] Rome Statute, *supra* note 3, Art. 7(1).

[124] *Id.* Some delegations supported deletion of the words "civilian population" during the Rome Conference as too restrictive, but this traditional limit on the ambit of crimes against humanity remained.

[125] *Id.*

[126] *Id.*, Art. 7(2)(a).

[127] Darryl Robinson, *Developments In International Criminal Law: Defining "Crimes Against Humanity" at the Rome Conference*, 93 AJIL 43, 47–51 (1999). The "multiple acts" element does not have a textual analog in earlier texts, but would seem to be included in the language "widespread or systematic," necessarily implying harm beyond an isolated single event.

[128] PREPARATORY COMMITTEE PROCEEDINGS, *supra* note 111, paras. 82–102. As late as 1997, France submitted a proposed definition that did not contain a policy element but instead focused on the systematic/widespread

1998, even as a bracketed provision.[129] Nor was it included in the draft that was sent to the Diplomatic Conference in Rome.[130] The "State or organizational policy" element appeared for the first time in a Bureau Discussion Paper released on July 6, 1998, in the final weeks of the Diplomatic Conference.[131]

According to participants in the negotiations, proponents argued that "the existence of a policy . . . unites otherwise unrelated inhumane acts, so that it may be said that in the aggregate they collectively form an 'attack.'"[132] The policy element was conceived as "a flexible test, of a lower threshold than the term 'systematic,' which was understood as a much more rigorous test."[133] It was designed to break a deadlock between members of the Like-Minded Group of States[134] who preferred the rubric "widespread *or* systematic," and states wishing to use the formula "widespread *and* systematic." Given the different versions of crimes against humanity in national laws and the statutes of the ad hoc international criminal tribunals, it was unclear which formulation more closely approximated customary international law at the time.[135] Eventually, the principle settled upon was "to exclude isolated and random acts, and ordinary crimes under national law, from the ambit of crimes against humanity."[136]

The addition of the policy element attracted "sustained criticism from non-governmental organizations" which argued that it modified the definition of crimes against humanity under customary international law.[137] References to the requirement of a "common plan" existed in the French jurisprudence interpreting Article 6(c) of the Nuremberg Charter[138] and in a handful of decisions rendered under Control Council Law No. 10.[139] However, no subsequent ad hoc tribunal statute had included a similar element; the ICTY, the SCSL, and the ICTR ultimately rejected it,[140] as did other cases under Control Council Law No. 10; and the French

nature of crimes against humanity, noting "The term 'crimes against humanity' means any of the [acts]/[crimes] listed below, committed [systematically [and]/[or] on a broad scale]/[in the context of a systematic [and]/[or] widespread attack] [on a large scale] against [any]/[a] civilian population group [, and inspired by political, philosophical, racial, ethnic or religious motives or any other arbitrarily defined motive]." Proposal for a Definition of Crimes Against Humanity Submitted by the Delegation of France, UN Doc. A/AC.249/1997/WG.1/DP.4 (Feb. 19, 1997) (alterations in original).

[129] Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13 (1998).

[130] Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1 (Apr. 14, 1998) [hereinafter April Draft Statute].

[131] Bureau: Discussion Paper Regarding Part 2, *supra* note 123. For discussion of the Rome negotiations on crimes against humanity, see WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT 142–43 (2011).

[132] Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in* THE MAKING OF THE ROME STATUTE 97 (Roy S. Lee ed., 1999).

[133] *Id.*

[134] The Like-Minded Group of States emerged during the negotiation of the Rome Statute as a sixty-member set, committed to the establishment of the ICC, that tended to act in concert during the Statute's negotiation. *See, e.g.*, Sadat & Carden, *The New International Criminal Court: An Uneasy Revolution*, *supra* note 116.

[135] von Hebel & Robinson, *supra* note 132, at 94–95; *see also* Robinson, *supra* note 127.

[136] Boot et al., *supra* note 120, at 123 ("State or organizational policy is a necessary component of the widespread or systematic attack on the civilian population. It constitutes a basis for ensuring that random or isolated acts are excluded from the scope of crimes against humanity." *Id.* at 127).

[137] von Hebel & Robinson, *supra* note 132, at 96.

[138] This requirement was articulated in the *Barbie* case and followed in subsequent decisions. Fédération Nationale des Déportées v. Barbie, Cass. Crim., June 3, 1988, JCP 1988 II 21, 149 (Fr.) (report of Counselor Angevin), *translated in* 100 ILR 330 (1995).

[139] Mettraux, *supra* note 75, at 162–66.

[140] *See supra* notes 77–78 and accompanying text; *supra* notes 98–99 and accompanying text.

position is questionable as a matter of textual interpretation.[141] Most observers have concluded that its addition to the Rome Statute was to ensure that "the acts of individuals alone, which are isolated, uncoordinated, and haphazard be excluded,"[142] and was not intended to mark a departure from customary international law.[143]

The meaning of the term "organizational" in Article 7(2)(a) is even less clear. There were discussions at Rome to the effect that the term was intended (at least) to address actions taken by various nonstate entities in a case involving a state's disintegration into component parts, such as the former Yugoslavia, as well as situations in which no clear central authority exists, including attacks on civilians by nonstate actors.[144] Although Cherif Bassiouni has often insisted that the policy must be attributable to a state, many observers of and participants in the Rome Conference disagree. As a leading contemporaneous commentary observed:

> Clearly, the policy need not be one of a State. It can also be an organizational policy. Non-state actors, or private individuals, who exercise *de facto* power can constitute the entity behind the policy. This provision in the article reflects the contemporary position on this point.[145]

The justifications for this choice on the policy element are clear. As French Advocate General Dontenwille argued before the French Court of Cassation in the *Barbie* case more than a decade prior to the adoption of the Rome Statute:

> I ask the question whether the notion of a State system or State ideology of which so much has been spoken is not rather too restrictive.
>
> Are there not forces and organizations whose powers might be greater and whose actions might be more extensive than those of certain countries represented institutionally at the United Nations? Care is required because other methods of total abuse of the human condition could equal in horror, albeit from other aspects, those of which we have just spoken. Certain forms of international terrorism are surely in the process of giving us just an example.[146]

[141] Sadat, *Nuremberg*, *supra* note 45, at 361–63. *But see* BASSIOUNI, *supra* note 16, at 47 (noting that state policy is an "essential characteristic" of crimes against humanity). For a creative argument proposing amendment of the Rome Statute to delete the policy requirement, see Matt Halling, *Push the Envelope—Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 LEIDEN J. INT'L L. 827 (2010).

[142] Boot et al., supra note 120, at 159.

[143] *See also* Robinson, *supra* note 127, at 57–58 (noting that many of the detailed provisions of Article 7 were adopted out of a concern to avoid vagueness and to underscore the operation of the legality principle in the Rome Statute).

[144] Author's notes from the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome (June 15–July 17, 1998) (on file with author); *see also* Arsanjani, *supra* note 117, at 31 ("[I]t became clear that a short article on crimes against humanity modeled on the Statute of the Yugoslav Tribunal would be unacceptable to the majority of states. . . . Accordingly, crimes against humanity may be committed not only by or under the direction of state officials, but also by 'organizations.' ").

[145] Boot et al., *supra* note 120, at 159.

[146] Cass. Crim., Jan. 26, 1984, JCP 1984 II 20,197 (submission of French Advocate Dontenwille), *translated in* 78 ILR 125–48, 147, *reprinted in* PAUST, BASSIOUNI, SCHARF, SADAT, GURULÉ & ZAGARIS, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 762 (4th ed. 2013). This view did not prevail because the French Court of Cassation held that not only must the plan emanate from a state under Article 6(c), but it also must emanate from one practicing a "hegemonic political ideology." Cass. Crim., Dec. 20, 1985, JCP 1986 II 20,655. This, the court explained, was required by Article 6(c) of the Nuremberg Charter, which targeted only those working on behalf of the Axis powers and excluded by definition the nationals of other states. The decision was criticized in France, as it appears not only to have been an erroneous reading of Article 6(c), but additionally one that was motivated by the upcoming proceedings in the *Touvier* case, which involved accusations of crimes against humanity against a French, rather than a German, accused. *See also* Sadat, *Nuremberg*, *supra* note 45.

Following the Rome Conference, additional jurisprudence from the ICTY and ICTR was available to the Preparatory Commission charged with elaborating the ICC Statute's Elements of Crimes, although it is unclear how much those decisions influenced the drafters. During negotiations over the Elements, crimes against humanity—particularly the offense's contextual elements—emerged as some of the more controversial subjects of the Preparatory Commission's work.[147]

The Elements supply subsidiary aid to the Court in interpreting and applying Article 7. They emphasize the need to construe Article 7 "strictly," "taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole . . . ."[148]

Yet neither the Statute nor the Elements offer much assistance in the interpretation of Article 7, for they do not define "civilian population," "widespread" or "systematic" attacks, or "organization," and offer virtually no guidance as to the meaning of "policy to commit [an] attack." Thus, the job of definition, interpretation, and application of Article 7 falls by default to the ICC prosecutor in the first instance, and to the Court's judiciary upon review. This was by design: In the words of one observer "[m]ost delegations quickly agreed that this was too complex a subject and an evolving area in the law, better left for resolution in case-law."[149]

IV. The Importance of Crimes Against Humanity in the Work of the International Criminal Court

Part II of this article established that crimes against humanity charges have been an important prosecutorial tool at the ad hoc international criminal tribunals. They can be used to cover cases that might not be proven as genocide; cases taking place where no armed conflict was ongoing; and cases involving particularly heinous acts, especially (but not limited to) sexual- and gender-based violence and the crime of persecution. For example, the charge of persecution at the ICTY was critical to its ability to prosecute ethnic cleansing. Similarly, the SCSL charged crimes against humanity—in addition to war crimes charges—as a means of capturing some of the particular atrocity crimes committed during that conflict.

Accordingly, one would expect crimes against humanity to emerge as a crucial tool at the ICC. In addition, because the ICC is a permanent court with the capacity to intervene in ongoing conflict situations—even prior to the outbreak of conflict in some cases—the charge of crimes against humanity assumes a preventive role at the ICC that it could not assume at

[147] Robinson, *supra* note 119, at 58.

[148] The Rome Statute of the International Criminal Court, Elements of Crimes, Article 7, provides:

> The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However 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 any 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.

A footnote observes that in exceptional circumstances, a policy may 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." *Id.* n.6.

[149] Robinson, *supra* note 119, at 78.

the ad hoc tribunals, given that jurisdiction over its commission attaches prior to the onset of war.[150]

These assumptions are borne out by a look at the ICC's work in its first few years. Crimes against humanity counts have been used to characterize the atrocities in all seven of the situations before the Court, as Table 4 demonstrates.[151] In addition, in the Côte d'Ivoire, Libya, and Kenya situations the crimes against humanity charges constituted the only basis upon which the Court was able to exercise its jurisdiction, due to the absence of an armed conflict sufficient to trigger the Court's war crimes jurisdiction and the implausibility of alleging genocide.[152] At the ICTY, only two accused[153] were charged solely with crimes against humanity, representing 1.2 percent of all defendants. Likewise, at the ICTR, two defendants[154] were charged solely with crimes against humanity, representing 2.2 percent of all accused. This suggests that the charge of crimes against humanity may develop at the ICC as an important tool of genocide prevention, helping to rein in situations exhibiting what David Scheffer refers to as "precursors of genocide"; that is, situations that may degrade into conflict or overwhelming levels of atrocity crimes.[155]

There are now eight situations before the ICC (CAR, Darfur, DRC, Kenya, Libya, Uganda, Mali, and Cote d'Ivoire),[158] in seven of which charges have been brought against thirty individuals, as shown by Table 5. These thirty persons have been charged with 137 counts of crimes against humanity (44.6 percent of total counts), three counts of genocide (0.1 percent), and 167 counts of war crimes (54.4 percent). One case (*Lubanga*) has progressed to judgment. Ten defendants are in pretrial or trial proceedings, twelve defendants are at large,[159] one has been acquitted, two have died, and charges were not confirmed against four suspects.

[150] This article makes only a modest claim regarding the possibility of prevention and deterrence, as the ICC's operations only commenced a few years ago. As of this writing (spring 2013), it is too early in ICC history to gather significant empirical evidence supporting a stronger claim. *See also* SCHEFFER, *supra* note 36, at 5–7.

[151] The situation in Mali was recently referred to the Court. *See* UN News Centre, ICC Prosecutor Opens Investigation into War Crimes in Mali (Jan. 16, 2013), *at* http://www.un.org/apps/news/story.asp?NewsID=43939#.UU-s6oO4YSs. As charges have yet to be brought, the Malian situation is not included in the data collected on the ICC.

[152] As of February 26, 2011, the date that the Security Council adopted Resolution 1970 ("Deploring the gross and systematic violations of human rights"), no armed conflict was present in Libya; the ICC arrest warrants issued on June 27, 2011, made reference only to crimes against humanity. Situation in the Libyan Arab Jamahiriya, *supra* note 2. Subsequently, the conflict escalated and was characterized as an armed conflict by the international community, but no further ICC action was taken, leaving crimes against humanity as the sole basis for ICC action at the present time. *See, e.g.*, SC Res. 1973 (Mar. 17, 2011) (referring to "parties to armed conflicts").

[153] Dragan Nikolić and Drajan Papić.

[154] Paul Bisingimana and Juvénal Rugambarara were charged with crimes against humanity only; one defendant, Callixte Kalimanzira, was charged with genocide only.

[155] SCHEFFER, *supra* note 36, at 266–70.

[156] Data acquired from confirmation of charges (when available) and arrest warrants.

[157] Charges were not confirmed against Bahar Idriss Abu Garda (Darfur, Sudan), Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Public Redacted Version– Confirmation of Charges (Feb. 8, 2010); Callixte Mbarushimana (DRC), Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Confirmation of Charges (Dec. 16, 2011); and Henry Kosgey and Mohammed Hussein Ali (Kenya), Prosecutor v. Kosgey, Case No. ICC-01/09-01/11, Confirmation of Charges (Jan. 23, 2012); Prosecutor v. Ali, Case No. ICC-01/09-02/11 (Jan. 23, 2012). The prosecution may subsequently request confirmation of the charges against these individuals if such a request is supported by additional evidence.

[158] See *All Situations* at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx.

[159] The twelve accused still at large are four defendants in the Uganda situation, two accused in the Libya situation (their whereabouts are known but they refuse to appear), four in the Darfur situation, and two from the DRC.

TABLE 4
CRIMES AGAINST HUMANITY CHARGES AT THE ICC[156]

	Charged Persons	Crimes Against Humanity Counts		Genocide Counts		War Crimes Counts	
		CHARGED	CONVICTED	CHARGED	CONVICTED	CHARGED	CONVICTED
Concluded							
Sentenced							
Pleaded Guilty							
Acquitted	1	3	0	0	0	7	0
Subtotal	**1**	**3**	**0**	**0**	**0**	**7**	**0**
Ongoing or Terminated							
On Appeal	1					2	1
At Pre-trial/Trial	10	29		0		16	
Charges Withdrawn	0						
Charges Not Confirmed[157]	4	13		0		11	
Transferred	0						
Died Before Trial	2	3		0		3	
Died During Trial	0						
At Large	12	89		3		128	
Total	**30**	**137**		**3**		**167**	**1**

TABLE 5
ICC SITUATION SUMMARY TABLE

Situation	COUNTS CHARGED			
	Total	Crimes Against Humanity	Genocide	War Crimes
Uganda	86	29	0	57
DRC	54	14	0	40
CAR	5	2	0	3
Darfur, Sudan	124	54	3	67
Kenya	24	24	0	0
Libya	6	6	0	0
Côte d'Ivoire	8	8	0	0
Total	**307**	**137**	**3**	**167**

Crimes Against Humanity During Armed Conflict: The Situations in Uganda, the Democratic Republic of the Congo, and the Central African Republic

The situations in Uganda, the DRC, and the CAR involve conflicts among rebel groups and between rebel groups and government forces. The crimes against humanity charges account for 29.9 percent of the total charges against the accused, and war crimes charges account for 70.1 percent. This data resembles the pattern exhibited in the SCSL and the ICTY.

The situation in Uganda. Ugandan President Yoweri Museveni referred the "situation concerning the Lord's Resistance Army (LRA)," in December, 2003.[160] The LRA is an armed group led by Joseph Kony that since 2002 had brutalized the civilian inhabitants of Northern

[160] ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (2004).

Uganda.[161] After more than a year of investigation, the prosecutor sought and obtained arrest warrants for five LRA suspects, including Joseph Kony, charging those accused with war crimes and crimes against humanity.[162]

The Ugandan cases have not advanced to a stage where they are instructive for the purposes of this article, as no confirmation hearings have been held. Four suspects are at large, one has been confirmed deceased, and another is presumed deceased.[163] The prosecutor's charging pattern qualifies many acts as both crimes against humanity and war crimes but uses either war crimes charges or crimes against humanity charges alone to address specific offenses under the laws of war or harm to civilians suffering LRA attacks and, in particular, sexual- and gender-based violence and enslavement.[164]

The situation in the Democratic Republic of the Congo.[165] Whereas the fighting in Uganda was relatively isolated geographically and largely involved the depredations of one armed group against civilians, the situation in the DRC involves a widespread armed conflict with multiple factions both within and outside of the country.[166] Prosecutions in this situation have advanced further than the other cases before the Court, with arrest warrants issued against six suspects, four of whom have been apprehended. Three individuals were charged only with war crimes (Thomas Lubanga Dyilo, who was recently convicted, and Bosco Ntaganda and Sylvestre Mudacumura, who are currently at large).[167] However, in the case brought against Germain Katanga and Ngudjolo Chui,[168] and the case against Callixte Mbarushimana, crimes against humanity were alleged, generally in parallel with conduct also qualified by the prosecution as war crimes.

The cases against Katanga[169] and Chui[170] were joined[171] and confirmed by Pre-trial

[161] In accepting Uganda's "self-referral" the prosecutor notified Ugandan authorities that he would interpret the scope of the referral "consistently with the Rome Statute," and would therefore analyze crimes in Northern Uganda "by whomever committed." Letter from Luis Moreno Ocampo, Chief Prosecutor, to President Philippe Kirsch (June 17, 2004). Charges have not been brought against any government officials, however, although allegations of war crimes and torture have been made against them. *See, e.g.,* Human Rights Watch, *State of Pain: Torture in Uganda* (2004) (alleging cases of torture and arbitrary detention), *at* http://www.hrw.org/sites/default/files/reports/uganda0304.pdf; Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,* 99 AJIL 403, 403–04 (2005); *see also* International Crisis Group, *Building a Comprehensive Peace Strategy for Northern Uganda* (Africa Briefing No. 27, 2005), *at* http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/B027-building-a-comprehensive-peace-strategy-for-northern-uganda.aspx.

[162] Prosecutor v. Kony, Case No. ICC-02/02-01/05 (July 8, 2005) (warrants of arrest for Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya).

[163] The ICC, *see Situation in Uganda*, lists only Raska Lukwiya as deceased, but Vincent Otti is also widely assumed to be deceased. *Otti "Executed by Uganda Rebels,"* BBC NEWS (Dec. 21, 2007), *at* http://news.bbc.co.uk/2/hi/africa/7156284.stm; *Vincent Otti*, THE HAGUE JUSTICE PORTAL (2011), *at* http://www.haguejusticeportal.net/index.php?id=8194 .

[164] Conversely, the war crimes charges are important for offenses such as enlisting and using child soldiers.

[165] Letter from Luis Moreno Ocampo, *supra* note 161.

[166] Accordingly, the DRC referral is broader than the Ugandan referral.

[167] Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, 22 CRIM. L.F. 311 (2011).

[168] *Katanga*, *supra* note 24, para. 25.

[169] *Id.*, Warrant of Arrest (July 2, 2007); *Democratic Republic of the Congo: Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, *at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx.

[170] Prosecutor v. Chui, Case No. ICC-01/04-01/07, Warrant of Arrest (July 6, 2007).

[171] *Katanga*, *supra* note 24, Joinder of Cases Against Germain Katanga and Mathieu Ngudjolo Chui (March 10, 2008).

Chamber I, which set the case for trial.[172] The lengthy *Katanga* confirmation decision was the ICC's first major decision on the application of Article 7.[173] To find the elements of crimes against humanity, *Katanga* relied heavily on the jurisprudence of the ad hoc tribunals but diverged in three particulars. First, the chamber seemed to cumulate all the elements of "widespread," "systematic," and "organizational policy," holding:

> [I]n the context of a widespread attack, the requirement of an organizational policy pursuant to Article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources.[174]

The chamber's opinion that the attack be "thoroughly organized" is curious; no authority is cited in support of this language, although it is reminiscent of the test for systematicity set out in the *Akayesu* judgment.[175] Yet the chamber's decision implies that all attacks must be widespread *and* systematic, a reading that is contrary to Article 7's text.[176] Nor does the chamber proffer any policy reasons supporting a view that would seem to exclude cases otherwise falling within the ambit of Article 7. For example, if a leader wished to terrorize a population into submission by engaging in massive acts of violence that followed no discernible pattern, these acts could presumably be qualified as crimes against humanity if sufficiently widespread and carried out pursuant to a policy to commit them. The ILC's 1991 Draft Code of Crimes, cited by the chamber to support its analysis of "State or organizational policy," is clear that "[e]ither one of these aspects—systematic or mass-scale—in any of the acts enumerated in the draft article is enough for the offence to have taken place."[177]

As for the meaning of "policy," Pre-trial Chamber I wrote:

> Such a policy may be made either 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 population. The policy need not be explicitly defined by the organizational group. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.[178]

[172] *Katanga, supra* note 24. On September 26, 2008, Pre-trial Chamber I sent the case to trial, confirming all but three counts in the arrest warrants. On December 18, 2012, Chui was acquitted on all counts and released from ICC detention. The Prosecutor has appealed the verdict. *See* ICC Press Release, ICC Released Mathieu Ngudjolo Chui from Custody Following His Acquittal (Dec. 21, 2012).

[173] The *Katanga* confirmation decision is interesting for a variety of reasons, notably its rejection of the kinds of liability theories prevalent at the ad hoc tribunals as well as the idea of cumulative charging at an early stage of the case *before* either the prosecution or defense has proffered its evidence. This feature of ICC pretrial practice may be protective of the accused, who will have fewer charges to respond to and a more narrow scope of criminal responsibility to worry about. However, it requires the prosecution to attempt to determine at an early stage which charges and theories of liability will likely be accepted by the Court.

[174] *Katanga*, *supra* note 24, para. 396.

[175] *See supra* note 97.

[176] This formulation was most recently reiterated by Pre-trial Chamber III in the decision pursuant to Article 15 authorizing the investigation in Côte d'Ivoire. *See* Situation in Côte d'Ivoire, *infra* note 228, para. 43.

[177] Draft Code of Crimes Against the Peace and Security of Mankind, Art. 21, cmt., para. 3, *in* Report of the International Law Commission on the Work of Its Forty-Third Session, UN GAOR, 46th Sess., Supp. No. 10, UN Doc. A/46/10 (1991).

[178] *Katanga*, *supra* note 24, para. 396. In *Katanga*, *id.* at 127 n.507, the chamber cites in support the commentary to the 1991 *Draft Code of Crimes Against the Peace and Security of Mankind, supra* note 177, Art. 21, cmt. 5, language to the effect that the organization can be "private individuals with de facto power or organized in criminal gangs

Finally, *Katanga* tangentially addressed the meaning of "civilian population," which had been left undefined by the Rome Statute and the Elements. 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."[179] The chamber 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."[180] However, the issue of group identity was not relevant to the case and is not a legal requirement of crimes against humanity, except insofar as the prosecution may be charging the crime of persecution. This dictum suggesting that the relevance of group identity is necessary to the establishment of a civilian "population" has found its way into later confirmation decisions of the Court.[181]

The third DRC case advancing beyond the arrest warrant phase targeted Callixte Mbarushimana, who was charged with war crimes and crimes against humanity, including the crime against humanity of persecution. On December 16, 2011, a majority of Pre-trial Chamber I, Presiding Judge Monageng dissenting, declined to confirm the charges against him.[182] Admittedly, the case against the accused was unusual: The prosecution alleged that he formed part of a common plan that had for its essential (criminal) purpose ordering the *Forces Démocratiques pour la libération du Rwanda* (FDLR) to create a humanitarian crisis in the DRC by committing atrocities against civilians in order to further the political goals of the FDLR. The prosecution did not accuse him of ordering the atrocities directly, however. Rather, he allegedly furthered the criminal campaign by orchestrating a press offensive to hide the FDLR's activities from the watchful eyes of the international community, thereby enabling the FDLR to continue and conceal its activities. The chamber found substantial grounds to believe that the FDLR had *intentionally* committed terrible atrocities upon civilians in the Kivu province of the

or groups," along with several somewhat inapposite ICTR and ICTY decisions cited without explanation. Although the use of ICTR and ICTY jurisprudence is appropriate in many cases it does not seem so here, insofar as those tribunals initially suggested that crimes against humanity required a policy element but eventually reversed that position. For example, *Prosecutor v. Semanza* held that "although the existence of a plan or policy may be useful to establish that an attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element." Prosecutor v. Semanza, Case No. ICTR-97-20-A, para. 269 (May 20, 2005). The ICC cites not this case but rather *Akayesu*, decided quite some time earlier, for the proposition that there must have been some preconceived plan or policy, even if not formally adopted. *Akayesu*, *supra* note 93, para. 580. This authority is only of limited persuasive value given its own rejection by the ICTR in subsequent cases, such as *Semanza*; the same is true at the ICTY. In the Kenya confirmation decisions, discussed *infra* notes 211–215 and accompanying text, Pre-trial Chamber II addressed this seeming anomaly.

[179] Robinson, *supra* note 119, at 78.

[180] *Katanga, supra* note 24, para. 399. *Katanga* cites to the *Tadić* Trial Judgment to support this statement, but *Tadić* was making a different point, to wit, that the word "any" civilian population means 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." *Tadić, supra* note 81, para. 635. The language in *Katanga*, which in fact does not follow *Tadić*, leads one instead to believe that an issue thought to have been settled—the irrelevance of group identity to the commission of crimes against humanity—is in fact unsettled or potentially relevant. In this author's view, it was dictum unnecessary to the decision of the case, and phrased in a manner that could lead to confusion.

[181] *See, e.g.,* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Confirmation of Charges Pursuant to Article 61(7)(a) and (6) of the Rome Statute, para. 110 (Jan. 23, 2012).

[182] *Mbarushimana*, *supra* note 157.

DRC,[183] but did not find that these attacks implied the existence of a "State or organizational policy" to attack the civilian population of the region,[184] a finding confirmed by the appeals chamber.[185]

The situation in the Central African Republic. One individual, Jean-Pierre Bemba Gombo, has been charged and brought to trial in this situation. Bemba is a Congolese national accused by the prosecutor of having led the forces of the *Mouvement de Libération du Congo* (MLC) in supporting CAR president Ange-Félix Patassé against rebel forces commanded by François Bozizé. The arrest warrant for Bemba accused him of being criminally responsible for war crimes and crimes against humanity. After three days of confirmation hearings, Pre-trial Chamber II issued a lengthy decision confirming some of the charges against Bemba[186] but declining to confirm others, finding them either cumulative or lacking in evidentiary support.[187]

The *Bemba* chamber decision also examined the contextual elements of crimes 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.'"[188] The decision omits any discussion of (or citation to) *Martić*,[189] particularly its holding regarding the status of individuals who are *hors de combat*.[190] It is therefore unclear whether the ICC will follow *Martić* on this question.

[183] *See, e.g.*, *id.*, paras. 145, 151.

[184] *Id.*, paras. 263, 265. Judge Monageng dissented, arguing that although the case against Mbarushimana is "not a conventional one," it would seem to present "'triable issues' deserving of the more rigorous fact finding that only a Trial Chamber can provide." *Id.*, para. 134.

[185] *Mbarushimana*, *supra* note 157, Appeal of the Prosecutor Against the Decision of Pre-trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges," paras. 41–46 (May 30, 2012).

[186] Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of Prosecutor Against Jean-Pierre Bemba-Gombo, paras. 72, 205 (June 15, 2009). Some commentators have suggested that the arrest warrant decision supports a more limited view of the "policy" element by the Court. *See* GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 302 n.86 (2d ed. 2009) (citing Prosecutor v. Bemba, Warrant of Arrest, para. 33 (June 10, 2008) ("the existence of a State or organizational policy is an element from which the systematic nature of an attack may be inferred")). But the decision contains no explanation of this statement and does not actually support much in the way of inference about the Court's thinking on this issue.

[187] For example, the chamber retained the murder and rape charges as crimes against humanity, but declined to confirm charges of torture as a cumulative charge that was "subsumed" by the count of rape. Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of Prosecutor Against Jean-Pierre Bemba-Gombo, paras. 72, 205. Likewise, the chamber confirmed three of the five war crimes counts (murder, rape, and pillaging), but declined to confirm charges of torture as a war crime on the grounds that the evidence of specific purpose was lacking. *Id.*, para 291. The chamber also declined to confirm the crime of outrages upon personal dignity, again on the basis that this count constituted "cumulative charging" because the "essence of the violation of the law underlying these facts is fully encompassed in the count of rape." *Id.*, para. 310. This finding of the chamber is debatable. Many of the acts identified involved rape; however, others were associated with but not necessarily constitutive of the crime of rape and indicated that the prosecutor endeavored to capture not only the rapes but also the accompanying degradation and public humiliation, which affected both the rape victims and those required to watch or participate.

[188] *Id.*, para 78.

[189] *See supra* notes 81–84 and accompanying text.

[190] *See supra* note 84 and accompanying text.

Genocide or Crimes Against Humanity? Referral of the Situation in Darfur by the Security Council

On September 18, 2004, responding to public concern about mass atrocities reportedly occurring in the Darfur region of Sudan, the Security Council established a Commission of Inquiry to investigate.[191] The Commission concluded that the Government of Sudan and the Janjaweed militias operating in Darfur[192] were responsible for serious violations of humanitarian law and human rights including "indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement . . . ."[193] The Commission found that these acts were conducted on a widespread and systematic basis, and could therefore constitute crimes against humanity, but did not amount to "a policy of genocide."[194] It recommended that the Security Council "immediately" refer the Darfur situation to the ICC,[195] which it did.[196]

The prosecutor's office opened an investigation and has now issued arrest warrants and/or summonses for seven individuals for fifty-four counts of crimes against humanity, three counts of genocide, and sixty-seven counts of war crimes, making this the most significant situation at the Court, as least in magnitude. The first arrest warrant charged State Minister for Humanitarian Affairs Ahmad Muhammad Harun and alleged Janjaweed leader Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), with war crimes and crimes against humanity.[197] The charging pattern is similar to that exhibited in the three "self-referral" cases discussed above, with crimes against humanity sometimes used independently of war crimes for elements of social harm such as persecution, and to provide an alternative theory of liability for many crimes such as murder, rape, and inhumane treatment. The war crimes counts, as in the earlier cases, encompass other elements of the attacks such as property destruction (including food stores and mosques) and pillaging, as well as attacks upon the civilian population. Three individuals were charged with war crimes only, each of whom appeared voluntarily, and one of whom (Abu-Garda) had his case dismissed. The two remaining cases involved attacks against UN peacekeepers.[198]

[191] Report of the International Commission of Inquiry on Darfur to the Secretary-General, at 2, UN Doc. S/2005/60 (Feb. 1, 2005).

[192] The Janjaweed are described in the report in paragraphs 98 to 126.

[193] *Id.* at 3.

[194] *Id.,* at 4. This language is troubling given that the Genocide Convention, *supra* note 42, makes no reference to "policy" in its text. As provided by the ICC's Elements of Crimes, Art. 6(a)(4), UN Doc. PCNICC/2000/1/Add.2 (2000) (genocide by killing), "The conduct [must take] place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." This, however, seems more of a "widespread or systematic" requirement than a policy element, and, in any event, has been criticized as it is not found in Article II of the Genocide Convention.

[195] Report of the International Commission of Inquiry on Darfur to the Secretary-General, *supra* note 191, para. 5.

[196] SC Res. 1593, para. 1 (Mar. 31, 2005). A Security Council referral was necessary to the Court's jurisdiction as Sudan is not a party to the Rome Statute.

[197] Some of the counts charge "murder of civilians" generally, such as counts 2, 3, 4, 5, 11, 12, 40, and 41; others allege "murder of men" (counts 22–30). Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrants of Arrest (Apr. 27, 2007).

[198] See the ICC's *Situations and Cases*, *at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

The most controversial warrant targeted Sudanese President Omar Hassan Ahmad Al Bashir and included counts of war crimes, crimes against humanity, and genocide, the first genocide charges alleged at the ICC in its ten-year history. Pre-trial Chamber I issued a first warrant on March 4, 2009, for seven counts of war crimes and crimes against humanity.[199] After a successful prosecutorial appeal, the chamber subsequently found reasonable grounds to believe that "Omar Al Bashir is criminally responsible . . . for charges of genocide."[200] Although the genocide charges largely track the crimes against humanity counts, a finding of genocide by the Court could be important in terms of public opinion and even state responsibility under the Genocide Convention. President al-Bashir has challenged the legality of the warrant against him and mustered African Union support by arguing that he has been singled out as an African leader for unfair—even discriminatory—treatment by the Court. The African Union recently reiterated its opposition to the ICC's practice of issuing arrest warrants for heads of state, raising the specter of continued debates about the appropriateness and effectiveness of the Court's intervention in Africa.[201]

Only Crimes Against Humanity?

Three situations currently before the Court—Kenya, Libya, and Côte d'Ivoire—involve cases in which only counts of crimes against humanity have been brought because they occurred outside the confines of armed conflict. Each of these situations raises interesting questions about the special role that charges of crimes against humanity may play at the ICC, in contrast to the ad hoc tribunals, and are discussed briefly below. Taken together, the three situations constitute 27.7 percent of the crimes against humanity charges levied at the ICC, and account for eleven of the Court's thirty accused, or more than one-third of the cases. They have also presented the greatest doctrinal difficulties for the Court in applying the concept of crimes against humanity in the absence of armed conflict, as part V of this article discusses. Each of the three situations is briefly summarized below.

The situation involving post-election violence in Kenya. Crimes against humanity were the only charges available to the ICC prosecutor in an effort to use his *proprio motu* powers to investigate the post-election violence that gripped Kenya from December 2007 to February 2008, following its presidential election.[202] In 2007, Kenya held closely contested national elections pitting incumbent president Mwai Kibaki of the Party of National Unity (PNU) against the main opposition candidate Raila Odinga of the Orange Democratic Movement (ODM).

[199] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 249 (March 4, 2009).

[200] *Id.*, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 43 (July 12, 2010).

[201] African Union Press Release, On the Decisions of Pre-trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of Sudan (Jan. 9, 2012), *at* http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf. The fourth case in the Sudan situation involved three individuals accused of attacks on African Union Peacekeepers. They received summonses to appear and did so; because all three cases involve only war crimes, they add little to this article. One of the cases was dismissed by Pre-Trial Chamber I. Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Confirmation of Charges (Feb. 8, 2010). On April 23, 2010, Pre-Trial Chamber I issued a decision rejecting the Prosecutor's application to appeal the decision. The other two are currently awaiting trial.

[202] Situation in the Republic of Kenya, Case No. ICC0-o1/09, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 26, 2009).

When Kenya's Electoral Commission declared that President Kibaki had been re-elected, the news triggered "violent demonstrations, and targeted attacks in several locations within Kenya."[203] The scale of the violence resulted in a "reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury."[204] The violence took place in six of the country's eight regions, including Nairobi, the Rift Valley, and the Nyanza and Western provinces,[205] and was often brutal (as reported by human rights groups, the Waki Commission, and described in the prosecution's application). It took place in waves during which "gangs of young men armed with traditional weapons" targeted specific groups from "other tribes perceived as political opponents. . . ."[206] There were attacks initiated by groups associated with both the ODM and the PNU, retaliatory attacks against opponents, and evidence of massacres and torture committed by the police.[207] During the initial phase of the violence, attacks appeared largely to target PNU supporters; subsequent attacks were directed at ethnic groups perceived to be affiliated with the ODM; and the police attacks appeared to have been directed towards ethnic communities perceived to be opposed to their own ethnic affiliation, or otherwise against gang members.[208]

The violence was investigated by an international commission of enquiry (the Waki Commission),[209] which turned over to the prosecution its collected documents and a sealed envelope containing a list of suspects that it had identified as those allegedly most responsible for the violence.[210] Pre-trial Chamber II, in its decision authorizing the opening of an investigation under Article 15 of the Statute, articulated its view as to the legal requirements for the "contextual elements" of crimes against humanity, including the "civilian population" requirement, the "State or organizational policy" requirement, and the "widespread or systematic" nature of the attack requirement. The chamber concluded that the relevant evidentiary and legal standard was set forth in Article 53, requiring a "reasonable basis to proceed," which was "the lowest evidentiary standard provided for in the Statute."[211] It found that "the Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed.'"[212] Judge Hans-Peter Kaul objected.[213] As discussed fully in part V below, because he did not agree that the contextual elements of crimes against humanity had been properly established, particularly as regards the notion of "State or organizational policy," he would not have authorized the prosecutor to proceed.

[203] *Id.*, para. 4.
[204] *Id.*, para. 56.
[205] *Id.*
[206] *Id.*, para. 74.
[207] Article 15 Decision, *supra* note 9, paras. 104–06.
[208] *Id.*, para. 114. There is little information on the police attacks and their organization in the opinion or the prosecutor's request for authorization. The evidence adduced suggests that the police attacks severely worsened the scope and gravity of the violence, and aggravated the attacks by rival groups.
[209] ICC Press Release, ICC, Waki Commission List of Names in the Hands of ICC Prosecutor (July 16, 2009).
[210] The prosecutor received this information on July 16, 2009, following meetings with the Kenyan government and futile efforts to establish a specially constituted tribunal to conduct proceedings in Kenya.
[211] Article 15 Decision, *supra* note 9, para. 27.
[212] *Id.*, para. 35.
[213] Kaul Kenya Dissent, *supra* note 9, para. 18.

The chamber followed prior ICC decisions on the contextual elements of crimes against humanity, reiterating that the "attack on the civilian population requirement" is not restricted to a "military" attack, but could be a "campaign or operation carried out against the civilian population."[214] It also followed *Katanga*'s objectionable dictum suggesting that the "potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity, or other distinguishing features."[215] The most important holding of the case, and the one that Judge Kaul took issue with, concerned the "State or organizational policy" element of the chapeau, which the majority found was satisfied by *either* a state or an organizational policy. This aspect of the decision, and Judge Kaul's dissent from it, are explored in detail in part V.

The prosecutor's investigations resulted in summonses for six individuals, three from each of the two parties comprising the current government—the Party of National Unity (PNU) and the Orange Democratic Movement (ODM). The three suspects affiliated with the ODM were charged in one case (Ruto, Kosgey, and Sang), and three others affiliated with the PNU in a second case (Muthaura, Kenyatta, and Ali). The Appeals Chamber rejected Kenya's challenge to admissibility[216] and confirmation hearings lasting several days were held before Pre-trial Chamber II.[217] Charges were confirmed against four of the six accused.[218] The confirmation decisions reprise the Court's earlier holdings but, perhaps in response to Judge Kaul's criticism in the earlier Kenya case, *Ruto* provides a particularly helpful explanation and analysis concerning which groups could satisfy the "organizational policy" requirement.[219] In *Ruto,* the chamber found that the accused had established a "Network of perpetrators belonging to the Kalenjin community" to implement a policy of attacks against PNU supporters, and that the Network included "eminent ODM political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders."[220] This Network, in the view of the majority, satisfied the criteria of Article 7.[221]

[214] Article 15 Decision, *supra* note 9, para. 80.

[215] *Id.*, para. 81.

[216] Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Appeal of the Republic of Kenya Against the Decision of Pre-trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011); *see also Muthaura*, *supra* note 181, Appeal of the Republic of Kenya Against the Decision of Pre-trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011).

[217] Reports of the confirmation hearings suggested that the accused ably defended themselves. *See, e.g., Confirmation of Charges Hearing in the Case of Ruto et al. Begins*, INTERNATIONAL CRIMINAL COURT: KENYA MONITOR (Sept. 1, 2011), *at* http://www.icckenya.org/2011/09/confirmation-of-charges-hearing-in-the-case-of-ruto-et-al-begins/; *Uhuru Kenyatta Defence Team Respond to ICC Prosecutor. Kenyatta Gives Live Evidence*, INTERNATIONAL CRIMINAL LAW BUREAU (Sept. 30, 2011), *at* http://www.internationallawbureau.com/index.php/uhuru-kenyatta-defence-team-respond-to-the-icc-prosecutor-kenyatta-gives-live-evidence/. They also suggested that support among Kenyans for the ICC's intervention appears quite strong. *See, e.g., Kenyans' Perceptions Towards ICC Process*, SYNOVATE (Aug. 2011), *at* http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Level%20of%20Support%20for%20the%20ICC%20process%20(August%202011).pdf.

[218] *Ruto*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012); *Muthaura*, *supra* note 182, Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute (Jan. 23, 2012).

[219] *Ruto*, *supra* note 216, paras. 184–208.

[220] *Id.*, para 182.

[221] Judge Kaul was unconvinced, arguing that the Network did not satisfy Article 7 and therefore the ICC lacked jurisdiction. *Id.*, Diss. Op. Kaul, J., para. 12. (Judge Kaul's dissent in *Muthaura* was similar, finding that the

Referral of the situation in Libya by the Security Council. On February 26, 2011, the Security Council adopted Resolution 1970, referring the Situation in Libya to the Court. Security Council action was required as Libya is not an ICC Party State.[222] The prosecutor submitted a request to Pre-trial Chamber I for arrest warrants against Muammar Gaddafi, Saif Al Islam Gaddafi, and Abdullah Al-Senussi for crimes against humanity (murder and persecution). Because no armed conflict existed at the time, and no allegations of genocide had been made, crimes against humanity were the only charges that could be levied against the accused. Arrest warrants were issued in short order[223] but, to date, remain unexecuted.[224] Because the arrest warrants target the leadership of a state, they do not raise the same "policy" questions as the Article 15 decision in the Kenya case. However, some criticism of the prosecutor's action based upon an alleged lack of "gravity" of the harm echo Judge Kaul's concern in the Kenyan situation that overusing charges of crimes against humanity could trivialize the charge.[225] As of this writing, two of the three accused are in the custody of the Libyan authorities who have refused to surrender them to the ICC;[226] Muammar Gaddafi, however, has been confirmed dead and the case against him closed.[227]

"No Peace, no war"—the situation in Côte d'Ivoire. On April 18, 2003, Côte d'Ivoire—which, like Libya, is not an ICC Party State—lodged a declaration with the ICC Registrar under Article 12(3) of the Statute accepting the jurisdiction of the Court for crimes committed in its territory since September 19, 2002.[228] The prosecutor subsequently applied to Pre-trial Chamber III for permission to open an investigation pursuant to Article 15 of the Statute. In describing the situation, the chamber noted that since a coup attempt in 2002 "which resulted

Mungiki was a criminal gang but not one falling within the meaning of "organization" in Article 7. *Muthaura, supra* note 181, Diss. Op. Kaul, J., paras. 15–21.) He reiterated his view that the Network was an "amorphous," ethnically driven group, opining that "members of a tribe [. . .] do not form a state-like 'organization', unless they meet additional prerequisites." *Ruto*, Diss. Op. Kaul, J., para. 12.

[222] SC Res. 1970 (Feb. 26, 2011). Unlike Resolution 1593 referring the Darfur situation, which was adopted by a vote of eleven to zero with four abstentions (Algeria, Brazil, China, and the United States), Security Council Press Release SC/8351, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (Mar. 31, 2005), *at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm, the vote on Resolution 1970 (Feb. 26, 2011) was unanimous. The Resolution's preamble noted that "widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity," and in paragraph 4 the Security Council referred the situation in Libya since February 15, 2011 to the Court.

[223] *See, e.g.,* Situation in the Libyan Arab Jamahiriya, *supra* note 2, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi.

[224] Libya has challenged the admissibility of the case against Saif Al Islam Gaddafi, citing a national investigation and prosecution. *See* ICC Prosecutor Statement to the United Nations Security Council on the Situation in the Libyan Arab Jamahiriya, Pursuant to UNSCR 1970 (2011) (May 16, 2012), *at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/reports%20to%20the%20unsc/Pages/otpstatement160512.aspx.

[225] Kaul Kenya Dissent, *supra* note 9, para. 55.

[226] Saif Al Islam Gaddafi is being held in Libya, in accordance with a decision of the pre-trial chamber granting Libya the right to suspend his transfer to the ICC pending a decision on his admissibility challenge. Abdullah Al-Senussi was initially detained in Mauritania and later extradited to Libya. Because Libya did not formally challenge the admissibility of the case against Al-Senussi, Pre-trial Chamber I has found that Libya may not suspend his transfer to the Court and therefore is under an obligation to surrender him to the Court. Prosecutor v. Al-Senussi, Case No. ICC-01/11-01/11, Decision on the "Urgent Application on Behalf of Abdullah Al-Senussi for Pre-Trial Chamber to Order the Libyan Authorities to Comply with their Obligations and the Orders of the ICC" (Feb. 6, 2013).

[227] Muammar Gaddafi's death was confirmed by the ICC. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi (Nov. 22, 2011).

[228] Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute of the Authorisation of an Investigation into the Situation in Côte d'Ivoire, paras. 10–15 (Oct. 3, 2011).

in the *de facto* partition of [Côte d'Ivoire] into a northern zone controlled by the armed opposition (the *Forces Nouvelles*) and a southern zone controlled by President Laurent Koudou Gbagbo," the country existed in a situation of "no peace, no war," or "intermittent civil war."[229] This resulted in much loss of life and the commission of "atrocities attributable to both sides, including extrajudicial killings, massacres, enforced disappearances, and numerous incidents of torture."[230] The situation deteriorated when presidential elections were held, first on October 31, 2010, and subsequently on November 28, 2010.

In deciding to authorize an investigation, the chamber relied upon prior case law. With respect to crimes against humanity, the prosecution submitted that there was a reasonable basis to believe that not only pro-Gbagbo forces but also forces loyal to opponent Alassane D. Ouattara may have committed crimes against humanity. The chamber accepted the prosecutor's assertions as to the attack by pro-Gbagbo forces, finding that it was committed pursuant to a state policy[231] and was widespread and systematic.[232] Having addressed the contextual elements with respect to the pro-Gbagbo forces, the chamber found a reasonable basis to believe that murders,[233] acts of rape,[234] arbitrary arrest and detention,[235] forced disappearances, torture, and other inhumane acts had been committed during the period of post-election violence from November 28, 2010 onwards.[236] The chamber then turned to the acts of violence alleged to have been committed by pro-Ouattara forces. It noted that "there is disagreement within the jurisprudence of the Court on the criteria required for a group to constitute an organization for purposes of Article 7," but finessed the difficulty by concluding that the pro-Ouattara forces in this case would qualify in the eyes of both the majority and Judge Kaul as an organized armed group in a party to a noninternational armed conflict.[237] It also agreed that the attack was widespread and systematic, and involved murders, rapes, imprisonment, and other severe deprivations of physical liberty.[238] Subsequently, the authorization was expanded to crimes between 2002 and 2010.[239] On November 23, 2011, an arrest warrant alleging the commission of four counts of crimes against humanity was issued for Gbagbo,[240] who was turned over to the ICC

[229] *Id.*, para. 181.

[230] *Id.* (citing Human Rights Watch, "*My Heart Is Cut*," *Sexual Violence by Rebels and Pro-government Forces in Côte d'Ivoire* 17 (Aug. 2, 2007), *at* http://www.hrw.org/reports/2007/cdi0807/cdi0807web.pdf).

[231] Situation in the Republic of Cote d'Ivoire, *supra* note 228, para. 51.

[232] *Id.*, para. 62.

[233] *Id.,* para. 67.

[234] *Id.,* para. 72.

[235] *Id.,* para. 76.

[236] *Id.,* paras. 82, 86.

[237] *Id.,* para. 99.

[238] *Id.,* paras. 103–14. The chamber relied upon earlier cases to find *first*, that generally speaking, only crimes committed prior to the date the prosecutor files the request for authorization may be considered, but *second,* crimes committed after that time may be investigated if they, "at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes)." *Id.* paras. 177–79. Judge Silvia Fernandez de Gurmendi took issue both with the majority's "overall approach" to its Article 15 analysis and with the temporal scope of the authorized investigation. *Id.*, Sep. & Partially Diss. Op. Fernandez de Gurmendi, J., para. 9.

[239] Situation in the Republic of Côte d'Ivoire, *supra* note 228, para. 15.

[240] Even though the declaration of Côte d'Ivoire took effect from September 19, 2002, the chamber limited the temporal scope of the inquiry considerably. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Warrant of Arrest (Nov. 23, 2011).

on November 30, 2011, the first former head of state taken into custody by the Court. His wife, Simone Gbagbo, was targeted by a second arrest warrant one year later.[241]

V. Reframing Crimes Against Humanity at the ICC: The Majority and Dissenting Opinions in the Kenya Case

It is worth exploring more thoroughly the contours of the debate in the Kenya case between Judge Kaul and the majority regarding the scope and application of the "policy" element in Article 7. The debate over this element is treated separately from the narrative in part IV, as it represents the most significant contribution of the Court's early jurisprudence to the understanding of crimes against humanity at the ICC and raises difficult questions of international law and policy.

In its decision authorizing the prosecutor to proceed with an investigation, the ICC majority noted that the "policy requirement" was eventually abandoned by the ad hoc tribunals, but nonetheless "deem[ed] it useful and thus appropriate to consider their definition of the concept in earlier cases."[242] Referencing the ICTY trial chamber's opinion in *Blaškić*, the majority noted that the plan or policy to commit the attack may be inferred from the commission of "a series of events," and listed eleven possible contributory factors, including the establishment of military structures, mobilization of armed forces, the general content of a political program, alterations to the ethnic composition of populations, and discriminatory measures directed against particular groups.[243]

The majority also read "State" and "organizational" disjunctively, a view supported by the authentic texts of the Rome Statute in Arabic, English, French, Russian, and Spanish.[244] This, as well as the work of the ILC, led the majority to conclude that "the formal nature of a group and the level of its organization should not be the defining criterion."[245] Instead, "a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values[.]"[246] Thus, the organization need not be "state-like," and the policy need not have been conceived at the highest level of the state, such that "regional or even local organs of the State could satisfy the requirement of a State policy."[247]

Judge Kaul dissented, arguing that "the juxtaposition of the notions 'State' and 'organization' in Article 7(2)(a) of the Statute indicate that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics

[241] Prosecutor v. Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest (Feb. 29, 2012).

[242] Article 15 Decision, *supra* note 9, para. 86.

[243] *Id.*, para. 87 (citing Prosecutor v. Blaškić, Case No. IT-95-14-T, para. 205 (Mar. 3, 2000)).

[244] *Id.*, para. 90 n.82. The French text, for example, provides: "en application ou dans la poursuite de la politique d'un État ou d'une organisation ayant pour but une telle attaque." Rome Statute, *supra* note 3, Art. 7(2)(a).

[245] Article 15 Decision, *supra* note 9, para. 90.

[246] *Id.* The chamber quoted with approval language from M. Di Filippo to the effect that purely private criminal organizations could satisfy the "organizational policy" requirement. *See* M. Di Filippo, *Terrorist Crimes and International Cooperation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes,* 19 Eur. J. Int'l L. 533 (2008). Although others have criticized the majority's reliance on this particular article, this view is expressed by other commentators. The Triffterer commentary on Article 7, *supra* note 120, and the ILC take the same position. *Accord* Werle, *supra* note 186, at 301–02; Cryer et al., *supra* note 42, at 196–98; Robinson, *supra* note 127, at 50; Sadat, *Nuremberg*, *supra* note 45, at 342.

[247] Article 15 Decision, *supra* note 9, para. 89.

of a State,"[248] including a hierarchical structure with power over its members.[249] Finding that there was no "organization" satisfying these criteria in the Kenyan situation, he concluded:

> [l]ocal politicians, civic candidates or aspirants, councilors and business people meeting and allegedly financing the violence do not form an 'organization' with a certain degree of hierarchical structure acting over a prolonged period of time . . . Local politicians using criminal gangs for their own purposes is an indicator of a partnership of convenience for a passing occasion rather than an 'organization' established for a common purpose over a prolonged period of time. Further, opportunistic violence and acts of individuals . . . equally does not allude to an 'organization' characterized by structure and membership.[250]

In his view, the evidence adduced suggested "chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies," but not a crime against humanity.[251]

Judge Kaul rejected the ICC's use of ICTY case law and endeavored to link crimes against humanity in Article 7 to the Nuremberg historical experience.[252] His opinion evinces a preoccupation with not "marginalizing" or "downgrading" the notion of crimes against humanity,[253] and suggests that the majority's view may "infringe on State sovereignty," "broaden the scope of possible ICC intervention almost indefinitely," and "turn the ICC . . . [into] a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility."[254]

The majority and dissenting opinions offer very different views of the ICC's mandate. The majority focused principally upon the gravity of the harm, the brutality of the violence, its widespread and systematic nature, and the preliminary stage of the proceedings. Given the lack of precedent on this question, the majority looked to the resolution of similar questions before other international criminal tribunals and the work of the ILC on the topics of nonstate actors and crimes against humanity. The majority's guiding principle was faithfulness to the ICC's mandate to "protect human values." While not contesting the importance of human values, Judge Kaul rejected this approach, suggesting that a pure textual and historical exegesis could provide the appropriate test.

Several influential commentators have welcomed Judge Kaul's approach, and admittedly one can criticize the majority for adopting a broad definition of "organization" that will still require extensive case-by-case analysis.[255] Yet the dissent is faulty in several respects: It ignores

[248] Kaul Kenya Dissent, *supra* note 9, para. 52.

[249] *Id.*

[250] *Id.*, para. 82.

[251] *Id.*, para. 153.

[252] The dissent reads Article 21 of the Court's statute (on applicable law) more narrowly than the majority, particularly in regard to the use of case law from other tribunals. His view seems narrower than international law requires, as judicial decisions may be accorded subsidiary value in ascertaining rules of customary international law. *See* ICJ Statute, Art. 38(1)(d). Indeed, the ICC has often looked to the jurisprudence of the ICTY—for example, in the *Lubanga* confirmation decision regarding the definition of international armed conflict. *See*, *e.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, paras. 205–11 (Jan. 29, 2007) (adopting the overall control test).

[253] Kaul Kenya Dissent, *supra* note 9, para. 9.

[254] *Id.*, para. 10.

[255] *See supra* note 6 and authorities cited.

the work of the ILC (which had prepared the original draft of the ICC Statute as well as the Draft Code of Crimes); it is contrary to a substantial body of expert commentary on the meaning of Article 7; and it does not account for a substantial body of work suggesting that a policy element may be *one* way to distinguish between ordinary and international crimes—and thereby establish the basis for international jurisdiction—but is not the *only* way to do so. Indeed, international jurisdiction can be warranted on any of multiple grounds: because particular interests of the international community have been injured (*l'ordre public international*); because of the scale of the harm (gravity); or because the problem is one incapable of solution by individual states.[256] History may offer an understanding of the origins of crimes against humanity, but cannot properly serve as a comprehensive guide to its current application. Article 7 of the Rome Statute is quite different from Article 6(c) of the IMT statute, and Judge Kaul's picture of "chaos, anarchy, [and] a collapse of State authority" may be precisely the kind of situation in which the victims of atrocity crimes need the ICC to intervene.[257]

Recognizing this difficulty, Judge Kaul rested his interpretation on two additional pillars: reference to Article 22's admonition to construe definitions of crimes "strictly," with any benefit of the doubt accruing to the accused; and reference to principles of treaty interpretation found in the Vienna Convention on the Law of Treaties. Taking the second argument first, one section of the dissent suggests that the principles in the Vienna Convention support—indeed mandate—his position. Certainly, the Convention requires reference to the "ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose."[258] This much is noncontroversial. What is not clear is how the text of Article 7(2)(a) itself can resolve the issue of what the term "State or organizational" means. Indeed, despite observing in footnotes 52–53 that scholars do not agree upon the meaning, the dissent nonetheless abruptly concludes that the juxtaposition of the words "State" and "organization" in the same line indicates that the only organizations that may perpetrate crimes against humanity are those that "partake of some characteristics of a State."[259] This reading of the text is unsupported by the negotiating history and the subsequent history of Article 7, including the Elements of Crimes adopted for Article 7.[260]

Additionally, under the Vienna Convention, the text must be read with reference to the "object and purpose" of the Rome Statute. The dissent's reading of Article 7(2)(a) leads to a result inconsistent with other sections of Article 7 by effectively reinserting a link to armed

[256] *See, e.g.,* Sadat, *Nuremberg*, *supra* note 45; *see also* Cassese, *supra* note 121, at 357 ("[C]rimes of this category are characterised either by their seriousness and their savagery, or by their magnitude, or by the fact that they were part of a system designed to spread terror, or that they were a link in a deliberately-pursued policy against certain groups . . . .") (German equivalents of specific terms omitted) (citing Albrecht, Apr. 11, 1949, [Special Court of Cassation], NJ 1949, 425, at 747 (Neth.)).

[257] This may be especially the case insofar as war crimes jurisdiction would likely not attach in the absence of armed conflict.

[258] Vienna Convention on the Law of Treaties, Art. 31, *opened for signature* May 23, 1969, 1155 UNTS 331.

[259] Kaul Kenya Dissent, *supra* note 9, para. 51. Although this is an interesting argument, my research has not identified a single instance in which a provision involving two disjunctive terms was held by an international court or tribunal to mean that one modifies the other. *See, e.g.*, Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Jurisdiction & Admissibility, 1995 ICJ REP. 6, paras. 34–36 (Feb. 15) (interpreting an Arabic word disjunctively when to do otherwise would "deprive the phrase of its effect").

[260] Indeed, in each of the three contextual paragraphs and footnote 6 the words "State" and "organizational" refer to two separate and independent entities, and there is no indication that "State" modifies the word "organization." Elements of Crimes, *supra* note 119, Art. 7.

conflict that had been deleted by the Diplomatic Conference.[261] It also arguably undermines the broader purpose of the Statute's crimes against humanity provision mandating the protection of "civilian populations." Finally, given the absence of a clear textual answer, the Vienna Convention instructs us to examine "the preparatory work of the treaty and the circumstances of its conclusion."[262] As noted above, the policy element was added to the definition of Article 7 as an afterthought, intended to avoid the possibility of random or isolated acts coming within the ICC's jurisdiction.

The other pillar of Judge Kaul's argument—reliance on Article 22's admonition to construe definitions of crimes "strictly"—is equally problematic and underscores an interpretive challenge implicit in the Rome Statute generally. Because the Statute is the constitution of an international organization, a broadly purposive and teleological approach to many of its provisions is both necessary and appropriate.[263] As I have written elsewhere,

> The Rome Statute takes the form of an international treaty, but has the status of a constitution. Many of its provisions perform the function of international legislation, while others supply detailed procedural rules that address the Court's operation . . . teleological

[261] The dissent states at several junctures that the violence was insufficiently organized, requiring that the "organization" that perpetrates it must meet "prerequisites of structure, membership, duration, and means . . . ." Kaul Kenya Dissent, *supra* note 9, para. 150. This leitmotif of insufficient organization also informs the dissent's statement that groups having "quasi-state abilities" include those that are "(d) . . . under responsible command or adopted a certain degree of hierarchical structure," *id.*, para. 51, citing with approval the notion that "organized armed groups" are qualified as "organizations" for the purposes of crimes against humanity, *id.*, para. 51 & n.55. It would be difficult for groups that are not organized armed groups to fulfill Judge Kaul's requirements effectively linking crimes against humanity to the existence of an armed conflict in any given case. While the majority uses similar factors, it qualifies its list by noting that these factors "may assist" the chamber, but do not "constitute a rigid legal definition." Article 15 Decision, *supra* note 9, para. 93.

[262] Vienna Convention, *supra* note 258, Art. 32. The ICJ has frequently confirmed this rule of interpretation. *See, e.g.,* Territorial Dispute (Libya/Chad), 1994 ICJ REP. 21, para. 41 (Feb. 3) ("As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion."); *see also* Maritime Delimitation and Territorial Questions, *supra* note 259, para. 33 (quoting Libya/Chad); Oil Platforms (Iran v. U.S.), Preliminary Objections, 1996 ICJ REP. 806, paras. 28–31 (Dec. 12) (considering treaty signing and ratification circumstances in construing a clause as aspirational, rather than binding). For an explanation of the various methods of treaty interpretation, see Kasikili/Sedudu Island (Bots./Namib.), 1999 ICJ REP. 1045 (Dec. 13).

[263] Other commentators have made this point as well, both about the Rome Statute in particular and international treaties that take constitutional forms generally. In 1986, Sir Gerald Fitzmaurice wrote "[The teleological approach] is a method of interpretation more especially connected with the general multilateral convention of the 'normative' . . . type . . . . [I]t is particularly with reference to this type of convention . . . that doubts have been felt as to the validity, or even practicability, of interpretation by that traditional method . . . of ascertaining the intentions of the parties." GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 341 (1986) (cross-reference omitted). More recently, Malcolm Shaw writes, "In the case of treaties that also operate as the constitutional documents of an international organisation, a more flexible method of interpretation would seem to be justified . . . ." MALCOLM N. SHAW, INTERNATIONAL LAW 842-43 (5th ed. 2003). Shaw references the teleological interpretation of the European Convention on Human Rights for which a "purpose-oriented method of interpretation was adopted." *Id.* at 844. Many now recognize that teleological interpretation is the norm for these types of treaties. *See, e.g.,* Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 442 (2003) ("There is also little doubt . . . that some of the new dispute settlers [the ICC, ICTY, and ICTR] are engaging in forms of constitutional discourse, including teleological interpretations of the treaties that they are charged with applying."); Sadat & Carden, *The New International Criminal Court, supra* note 116, at 395.

> methods should be applied to constitutive aspects and provisions representing foundational principles of the Rome Statute, while canons of strict construction are the appropriate guide to interpreting the "legislation within the Statute . . . ."[264]

Thus, embedded in the ICC's constitutional structure is a criminal code, the provisions of which must be interpreted with deference to the principle of legality in particular cases before the Court, and in accordance with Article 22's admonition not to create crimes by analogy. Article 22, however, sheds little light on the interpretative question before the ICC in this case, for even Judge Kaul does not appear to be suggesting that the majority is creating new crimes by analogy. Rather, he argues that it has misconstrued what the negotiators at Rome meant by the word "organization" in Article 7(2)(a) of the Statute. Given the complete silence of not only the Statute but also the Elements on this question, the Statute invites the judges to turn to customary international law pursuant to Article 21(b), and both the majority and dissent did so in construing the meaning of Article 7(2)(a). Indeed, the dissent arguably did so to an even greater degree than the majority, as the ordinary meaning of the words "organizational policy" suggests no limit on the kind of organization that could fulfill the statutory requirement. In a sense, the dissent manufactured an ambiguity by reference to historical context, which it then seeks to resolve strictly and in favor of the accused.[265]

Finally, it is worth raising a point that neither the dissent nor the majority explicitly addressed in the Kenya case: the relationship of Article 7 of the Rome Statute to customary international law. The dissent suggested that the ICC should ignore the jurisprudence of the ad hoc international criminal tribunals in interpreting Article 7.[266] Yet those tribunals were established to apply customary international law, and expressly based their authority and jurisprudence on crimes against humanity as a matter of customary international law. When Article 7 was codified, the question of the policy element had not been definitively settled by the ICTY and ICTR; accordingly, its inclusion was not inconsistent with those tribunals' jurisprudence, particularly if the policy element was intended only to exclude random and isolated acts from Article 7's ambit. It is true that the ICC Statute expressly endeavors to separate itself from customary international law, by means of limiting language in the chapeaux of all three crimes stating that the provisions are "for the purpose of this Statute."[267] Nonetheless, because the Statute applies to the nationals of nonstate parties (through the possibility of referral by the

[264] Leila Nadya Sadat, *The Legacy of the ICTY: The International Criminal Court*, 37 NEW ENG. L. REV. 1073, 1077–78 (2003) (noting that the same issues of interpretation have arisen with respect to the foundational treaties of the European Union and citing GEORGE A. BERMANN, WILLIAM J. DAVEY & ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 30 (1993)).

[265] However, even if ambiguity exists, it is not clear that the dissent is correct. The European Court of Human Rights has held that the principle of strict construction is satisfied when a judicial interpretation is "reasonably foreseeable" and is consistent with the essence of an offense. SW v. United Kingdom, Merits & Just Satisfaction, 335-B & 335-C Eur. Ct. H.R. (ser. A), paras. 34, 36 (1995). As Leena Grover contended in a recent article on treaty interpretation in international criminal law, "like domestic criminal law jurisdictions, international criminal law cannot adhere to the strict legality doctrine absolutely." Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L. L. 543, 555 (2010), *at* http://ejil.oxfordjournals.org/content/21/3/543.full.pdf+html. It is simply not possible to elevate strict construction over every other goal of the ICC Statute, including achieving substantive justice; rather, it is essential for judges to articulate sound and principled bases for their rulings so that the jurisprudence of the Court is predictable.

[266] *See supra* note 252 and accompanying text.

[267] Rome Statute, *supra* note 3, Arts. 6, 7(1), 8(2).

Security Council), having provisions in the ICC Statute that are not consistent with the customary international law of crimes against humanity is problematic. Indeed, one of the primary challenges posed by the accused in the Sudan and Libya situations is to the political legitimacy (and universal application) of the Statute's substantive norms. Moreover, despite the provisions of Article 10 of the Statute,[268] Article 7 is increasingly seen by international and national courts and tribunals, such as the ICTY, the European Court of Human Rights, the Inter-American Court of Human Rights, U.S. federal courts, and the UK House of Lords, as codifying the customary international law of crimes against humanity,[269] whether or not it did so at Rome.[270] Thus, for the ICC to retain its political—and perhaps its juridical—legitimacy it will be important for the Court to view Article 7 as part and parcel of the customary international law of crimes against humanity, not as separate and apart from that law.[271] It is true that the Rome Statute has not yet achieved universal ratification. However, because the Statute embodies *jus cogens* norms binding on all states, it is increasingly difficult to imagine that a customary international law norm of crimes against humanity can exist separate and apart from the international law norm of crimes against humanity embedded in the Rome Statute, although it is theoretically possible for that to occur. It is also worth noting that one can find very few examples of international courts and tribunals purposefully deciding to fragment international criminal law by opting for differing, rather than uniform, interpretation of their texts.[272] Jonathan Charney observed this phenomenon in his classic Hague Academy Lecture, noting that

[268] Article 10 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." For an analysis of Article 10's application, see SADAT, TRANSFORMATION, *supra* note 118, ch. 9. It has become apparent to the author, since this monograph was written, that Article 7 has become increasingly influential and representative of the customary international law of crimes against humanity, and has been accepted as such by a wide variety of international courts and tribunals. For that reason, it was also used as the basis of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity by the Steering Committee of the Crimes Against Humanity Initiative. FORGING A CONVENTION, *supra* note 19, at 359.

[269] *See, e.g.*, Korbely v. Hungary (Eur. Ct. H.R. Sept. 19, 2008) (Loucaides, J., dissenting) ("[O]ne may take the recent Rome Statute of the International Criminal Court as declaratory of the definition in international law of this crime."); Goiburú v. Paraguay, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 153, para. 82 (Sept. 22, 2006) (cited approvingly in González Medina v. Dominican Republic, Application, para. 104 (Inter-Am. Ct. H.R. May 2, 2010)) (confirming the status of forced disappearances as a crime against humanity due to its inclusion in Article 7 of the Rome Statute); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 767 (9th Cir. 2011) (citing Article 7, along with the ICTR and ICTY Statutes, as "customary international law, primarily defined through the international criminal tribunals at Nuremberg and elsewhere"); Wiwa v. Royal Dutch Petroleum Co., 626 F.Supp.2d 377, 384 (S.D.N.Y. 2009) (examining "the Rome Statute of the International Criminal Court, decisions of international tribunals interpreting customary international law norms, as well as reports and commentary issued by the United Nations, to determine that crimes against humanity is a norm that is 'customary, obligatory, and well-defined in international jurisprudence' "); R v. Evans *ex parte* Pinochet Ugarte (Q.B. Div'l Ct. 1998), *reprinted in* 38 ILM 68 (1999); R v. Bartle, *ex parte* Pinochet Ugarte (No. 3), [1999] UKHL 17, [2000] 1 A.C. 147 (H.L.) (appeal taken from Eng.) (citing Article 7 as evidence that charges against Pinochet were crimes against humanity).

[270] On the formation of customary international law, see *North Sea Continental Shelf* (F.R.G./Den; F.R.G./Neth.), 1969 ICJ REP. 3, para. 63 (Feb. 20).

[271] *See* Arsanjani, *supra* note 117, at 25 (one of the three underlying principles of the Rome Statute is that the statute should "remain within the realm of customary international law"); *see also* Robinson, *supra* note 127, at 55 ("The delegations participating in the Rome Conference agreed that the purpose of the deliberations on the definition of crimes was to identify existing customary international law and not to progressively develop the law."). *But cf.* Arsanjani, *supra* note 117, at 28 ("The statute prescribes a strict hierarchy among the rules of law to be applied by the court . . . . It must first apply the statute . . . . Second, the court must apply relevant 'applicable treaties and the principles and rules of international law . . . .' ").

[272] One example is the decision of the *Tadić* court to reject the test articulated by the ICJ for attribution of state responsibility.

TABLE 6
CHARGING PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS

COURT OR TRIBUNAL	PERCENTAGE OF TOTAL COUNTS CHARGED IN INDICTMENTS			CONVICTION RATES[277]		
	Genocide	Crimes Against Humanity	War Crimes	Genocide	Crimes Against Humanity	War Crimes
ICTY	2.4%	40.6%	56.9%	<1%	39.3%	37.5%
ICTR	40%	44.4%	15.6%	37.6%	43.0%	16.1%
SCSL	–	42.3%	57.7%	–	75.5%	79.4%
ICC	1.0%	44.6%	54.4%	*n/a*	0%	0%

many international courts and tribunals share a "coherent understanding" of the international law they have been charged with applying.[273]

VI. CONCLUSION

Discussions of crimes against humanity evoke Hitler's efforts to exterminate European Jewry: the evil of the "final solution;" the hell-on-earth of the extermination camps; the searing pain and drama of the Holocaust; the menace of a state that has become, as David Luban poignantly characterized it, a trap as opposed to a refuge for its people.[274] This is particularly the case in countries whose experience with crimes against humanity in their national courts is linked both contextually and jurisprudentially to the World War II experience. Yet as this article has demonstrated, using Nuremberg as the modern referent for crimes against humanity today ignores the mutation and evolution of atrocity crimes in the nearly seventy years since the IMT's judgment was pronounced. First, the prohibition on racial extermination that the Nuremberg judgment articulated is now codified in the Genocide Convention of 1948, which specifically condemns the intentional destruction of racial, religious, ethnic, and national groups.[275] While it may be questionable to do so, a general consensus has developed that genocide is the "crime of crimes," representing persecutory atrocities committed on the scale seen during World War II.[276] The commission of other widespread and systematic atrocities has been allocated to the residual category of crimes against humanity. In the author's opinion, this residual category—use of which is summarized in Table 6—is becoming increasingly valuable in providing a prosecutorial charging tool for sexual- and gender-based violence, ethnic cleansing, and persecution.

[273] Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals*, 271 RECUEIL DES COURS 101, 347 (1999).

[274] David J. Luban, Remarks, April Experts Meeting, The Crimes Against Humanity Initiative, St. Louis, MO (Apr. 13, 2009) (author's notes, on file with author); *see also* Luban, *supra* note 11.

[275] See supra note 42.

[276] *Akayesu*, *supra* note 93, Sentencing Decision; *see also* William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1716 (2006). It is technically possible for genocide to be committed on a smaller scale. The massacre at Srebrenica involved the death of "only" eight thousand—but took place in the context of a conflict that left more than two hundred thousand civilians dead. *See supra* note 41 and accompanying text.

[277] Data for the ICC includes the sentence in the *Lubanga* case and the acquittal of *Chui*. These numbers are obviously very small.

Second, as part II demonstrated and the work of the ad hoc tribunals and the ICC suggests, since World War II new variants of atrocity crimes have ravaged populations on different continents at different times. These new variants include widespread or systematic disappearances in Latin America, apartheid in South Africa, rape, torture, mutilation, and forced marriage in Sierra Leone, Uganda, and the DRC, and ethnic cleansing and persecutions in the former Yugoslavia. In each of these situations, the means used to perpetrate the crimes, the perpetrators of the crimes, and the nature of the acts themselves all differ considerably from the Nuremberg paradigm. Indeed, crimes against humanity today, at least if the situations before the ICC are any guide, are typically *not* driven by totalitarian states planning hegemonic domination but instead by internecine struggles for political power in which political groups and their armed followers target civilians in their bid for domination. These "amorphous" or "tribal" groups (in Judge Kaul's words) are capable of inflicting terrible violence and horrific suffering on civilians and undermining the human values the Court was established to protect.

Third, the ICC Statute cannot be viewed in isolation from the work of the ad hoc tribunals. While the Rome Statute (unlike the SCSL Statute) does not reference the statutes and jurisprudence of the ad hoc tribunals,[278] Article 21 explicitly permits the Court to apply customary international law to fill gaps in the Statute and the Elements of Crimes.[279] Due to the lack of definitional provisions in the text of Article 7 and the Elements, customary international law *must* provide a residual basis for the interpretation and application of crimes against humanity at the ICC. Indeed, it has become increasingly apparent that whether or not the Rome Statute definition was intended to represent a codification of customary international law (and there are arguments in both directions), it has become accepted as such, and must be read in light of other definitions of crimes against humanity which the jurisprudence of the ad hoc international criminal tribunals properly connects to customary international law.

Fourth, the category of crimes against humanity at the ICC performs a preventive function that it could not perform at any of the other tribunals simply by virtue of the fact that the ICC is a *permanent* Court whereas earlier international criminal tribunals have been, in all cases, established after the atrocities have already been committed. The ICC definition of crimes against humanity, with its requirement that the crimes be committed pursuant to a "State or organizational policy," adds another requirement to the definition that developed in the jurisprudence of the ad hoc tribunals. Yet the Court's need to rely on customary international law—the source of law from which Article 7 was derived—suggests that the ICC's jurisprudence should not depart extensively from the jurisprudence of those tribunals, nor does the text or drafting history of Article 7 support such a departure. (Notably, the Diplomatic Conference expressly retained the ILC formulation that the policy must be authored by a state *or* organization.[280]) The restrictive approach taken to crimes against humanity not only by the dissent in the Kenya case, but also by the pre-trial chambers in the *Katanga*, *Bemba*, and *Mbarushimana* confirmation decisions, is inconsistent with the text and legislative history of Article 7, and could arguably result in the fragmentation of international criminal law rather than its

[278] SCSL Statute, *supra* note 48, Arts. 15(1), 19(1), 20(3).
[279] Rome Statute, *supra* note 3, Art. 21(1)(b).
[280] *Accord* CRYER ET AL., *supra* note 42, at 198.

consolidation by the world's first permanent international criminal court.[281] As some scholars have suggested, the answer may be to align the jurisprudence of the ICC and the ad hoc tribunals with respect to application of the policy element, by interpreting that element "as a minimalist threshold excluding random action."[282]

Finally, it is useful to consider the practical implications of the pre-trial chambers' approach to crimes against humanity in the ICC Statute. Emphasizing the policy element—and adding new limiting elements to the chapeau of Article 7 such as the group identity and "thoroughly" organized criteria articulated in early decisions of the pre-trial chambers—may limit the scope and applicability of crimes against humanity so that it becomes, like genocide, a crime that is extraordinarily difficult to prove. This could substantially undermine the utility of crimes against humanity as a rubric to address mass atrocities. In particular, Judge Kaul's interpretation of the policy element is likely, as a practical matter, to reinsert the armed conflict requirement for crimes against humanity as the Côte d'Ivoire Article 15 decision foreshadows.[283] Yet this requirement—imposed in 1946 by the judgment at Nuremberg—was abandoned by the ICTY, the ICTR, the SCSL, and the Rome Statute. Concededly, even if the crimes against humanity counts were eliminated in several of the current situations before the Court, in many cases the ICC's war crimes jurisdiction would still remain. But as criticism of the narrow charges brought in *Lubanga* suggests,[284] a focus on war crimes may not capture the full horror of a particular situation. Indeed, the progress made during the past two decades at the ad hoc tribunals in bringing to the fore the terrible harm that sexual- and gender-based violence inflicts during modern conflicts often cannot be fully recognized in war crimes prosecutions. The ICC Statute specifically emphasizes the need to recognize crimes of sexual violence, and one of the great achievements of the Rome Statute was the explicit inclusion of these crimes in Article 7.[285] The same is true for persecution, which was expanded beyond the texts found in the statutes of the ad hoc tribunals. A teleological reading of the Statute that emphasizes its object and purpose cannot consider the policy element in isolation from other aspects of the text.

An historical approach to crimes against humanity admittedly gives the Court an easy and arguably principled way to effectuate a triage between potential mass atrocities that are included in, or omitted from, the rubric of crimes against humanity by requiring that the perpetrator-organization be either a state or "state-like." Yet the historical approach excludes situations of mass atrocities committed by other organizations, and ignores the evolution of the

[281] *See generally* Charney, *supra* note 273; *see also* Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2003); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002) (discussing the legitimacy of concerns over "institutions [using] international law to further new interests, especially those not predominant in traditional law"); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) (discussing, inter alia, how powerful states promote fragmentation to preserve their dominance and "to reduce their accountability both domestically and internationally").

[282] CRYER ET AL., *supra* note 42, at 198.

[283] *See* Kaul Kenya Dissent, *supra* note 9. Claus Kress has noted that under Kaul's view, the "contextual requirement of crimes against humanity . . . [must] amount to a 'threat to peace.'" Kress, *supra* note 6, at 865.

[284] *See, e.g.,* Victor Tsilonis, *Thomas Lubanga Dyilo: The Chronicle of a Case Foretold*, 3 INTELLECTUM 27 (2008); *see also*, Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L. L. 528, 569 (2011).

[285] *See generally* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217 (2000).

definition of crimes against humanity over the decades since the Nuremberg judgment. The majority in the Kenya case has support in the text of the ICC Statute and its negotiating history. The policy element was added to Article 7 at the last minute to reassure states that random or isolated acts would not be prosecuted at the ICC as crimes against humanity.[286] While I do not share Judge Kaul's legal conclusions, his thoughtful dissent signals a need for the prosecutor to use crimes against humanity only where its applicability to a particular situation is clear, not in borderline cases about which there is much dispute. Moreover, the Court must clearly define what it means by "organization" in future cases.

Vexing concerns about prosecutorial overreaching, interstate politics, and judicial efficiency may well need to be addressed at the ICC, but the Court's crimes against humanity jurisprudence is not the place for that debate. The negotiators of the Rome Statute were aware of the potential for states' resistance to the Court, and the Statute is replete with procedural devices and filtering mechanisms to ensure that the Court respects state sovereignty. These include the requirement of complementarity, the possibility of challenges to admissibility and jurisdiction, the possibility of Security Council deferral, the gravity requirement, robust defense and human rights protections, and the very rigorous vetting of cases before trial by the Court's judiciary. The Court's Assembly of States Parties is charged with governing the Court's operations, and can make clear any concerns it has with respect to either resources or proceedings, short of undermining the prosecutor's (or judges') statutory right to independence. Thus, it seems unnecessary to layer over these protections a narrow reading of Article 7, one of the most important substantive provisions of the Statute, particularly a reading not required by the Statute itself.

This article has demonstrated that crimes against humanity charges will be equally as important at the ICC as they have been at the ad hoc tribunals, both quantitatively and qualitatively. Moreover, crimes against humanity will often be the *only* offense chargeable in a particular case, as we have seen in the Libya situation, the Kenya situation and, for the time being, in Côte d'Ivoire. Thus, the ICC, even more than the ad hoc tribunals, is largely going to be a "crimes against humanity" court. Successful prosecutions for crimes against humanity will be critical if the Court is to fulfill its mandate to punish the perpetrators of atrocity crimes; the *possibility* of such convictions will be critical if it is to fulfill its mandate to prevent. No doubt, reasonable minds can differ as to the correct interpretation of Article 7 of the Rome Statute. Yet, as this article has demonstrated, the critical importance of Article 7 to the ultimate success of the International Criminal Court is without question.

[286] *See supra* notes 129–131 and accompanying text.