

THE POLICY REQUIREMENT IN CRIMES AGAINST HUMANITY: LESSONS FROM AND FOR THE CASE OF KENYA

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I. INTRODUCTION

Article 7(2)(a) of the Rome Statute stipulates that crimes against humanity are preconditioned on the existence of an attack on a civilian population “pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹ As noted by Peter Burns, the reference to a state or organizational policy introduces an “extremely cryptic element” to crimes against humanity.² Given inconsistent case law and clear disagreement in the literature, crucial questions, such as whether non-state actors can commit crimes against humanity, remain unanswered.

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1. Rome Statute of the International Criminal Court art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Elements of Crimes further clarifies Article 7(2)(a) as follows:

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

Assembly of States Parties to the Rome Statute of the Int’l Criminal Court, Elements of Crimes, art. 7, ¶ 3, ICC-ASP/1/3 (part II-B) (Sept. 9, 2002). Footnote 6 to the Elements of Crimes further states:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

Id. art. 7 n.6.

2. Peter Burns, *Aspect of Crimes Against Humanity and the International Criminal Court*, Paper for the Symposium on the International Criminal Court, Beijing, China (Feb. 2007), available at <http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf>.

Taking as a starting point the pending International Criminal Court (ICC) cases relating to Kenya's 2008 electoral violence, this Article examines two related topics.

First, it analyzes how Pre-Trial Chamber II (Pre-Trial Chamber II or Chamber) of the ICC has interpreted Article 7(2)(a) in the two cases concerning political violence in Kenya currently dealt with by the Chamber. The ICC decisions elaborate on fundamental questions concerning the policy requirement, offering a significant contribution to ongoing debates in the legal literature. In particular, it is of interest that the majority of the Chamber establishes a new threshold—the question of “whether a group has the capability to perform acts which infringe on basic human values”—for the term “organization” within the meaning of Article 7(2)(a).³ However, dissenting Judge Hans-Peter Kaul rejects this criterion, and instead argues that only organizations with a “state-like” nature can satisfy Article 7(2)(a).⁴ As will be shown, this disagreement relates to a more profound dispute concerning what crimes pose a threat to humanity and what role the ICC should play in the world order.

Second, this Article analyzes how Article 7(2)(a) has been applied to Kenya's post-election violence. If endorsed, some of the legal qualifications made would mean that certain, if not all, of the crimes committed following Kenya's disputed 2007 elections would fall outside the jurisdiction of the ICC. Since the Kenyan leadership has not been committed to establishing domestic accountability mechanisms—something that is unlikely to change in the near future—risks are that the post-election violence, or at least crucial elements thereof, may remain unaccounted for.⁵ Considering the role impunity has played for allowing large-scale political violence in Kenya, ultimately, the understandings endorsed of Article 7(2)(a) may impact peace and security in the country.⁶ Further, setting a high threshold for non-state actors as well as state actors that do not act in accordance with a state policy may exclude from the jurisdiction of the ICC highly organized instances of mass violence occurring in other countries.⁷ Due to the problems associ-

3. Int'l Criminal Court, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 90, ICC Doc. ICC-01/09 (Mar. 31, 2010) [hereinafter Kenya Investigation Authorization].

4. *Id.* ¶ 66 (dissenting opinion of Judge Kaul).

5. See Thomas Obel Hansen, *Why the Ocampo Six Should Not Become Kenya's Six*, OPENDEMOCRACY (Feb. 14, 2011), <http://www.opendemocracy.net/thomas-obel-hansen/why-ocampo-six-should-not-become-kenya%E2%80%99s-six>.

6. See *id.*

7. See *infra* Part V.

ated with prosecuting such crimes in many national jurisdictions, the standards that will be set for Article 7(2)(a) impact whether impunity will prevail in certain instances of large-scale violence.

Such considerations lay the ground for a re-examination of the requirements in Article 7(2)(a). This Article argues that policies to attack a civilian population are adopted in contexts so diverse that we cannot operate with one common understanding of the policy requirement. It therefore seeks to establish a differentiated understanding of when a state or organizational policy is present.

II. THE BACKGROUND TO THE ICC CASES CONCERNING KENYA'S POST-ELECTION VIOLENCE

Following a disputed presidential election in December 2007 where both incumbent President Mwai Kibaki of the Party of National Unity (PNU) and his challenger Raila Odinga of the Orange Democratic Movement (ODM) claimed victory, large-scale violence erupted in Kenya.⁸ During the course of a few weeks more than a thousand Kenyans were killed in clashes between Kibaki supporters and Odinga supporters.⁹ The police were also involved in the violence, responsible for perhaps one-third of the total casualties.¹⁰ The violence took place in many parts of the country, but—as is frequently the case in Kenya—it was most intense in the Rift Valley.¹¹ As a further result of the clashes, several hundred thousand Kenyans were displaced from their homes,¹² some of whom continue to live in internally displaced person camps today.¹³

Headed by former U.N. Secretary-General Kofi Annan, an internationally sponsored mediation process known as the Kenyan National Dialogue and Reconciliation enabled a political settle-

8. See generally COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE (CIPEV), REPORT OF THE COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE (2008), available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> [hereinafter CIPEV REPORT]; HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE* 24–59 (2008), available at <http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf>; Thomas Obel Hansen, *Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action* 3 (Inst. For Sec. Studies, ISS Paper No. 205, 2009), available at <http://www.issafrika.org/uploads/p205.PDF>.

9. CIPEV REPORT, *supra* note 8, at 224, 305.

10. *Id.* at 384–85.

11. *Id.* at 37–38.

12. *Id.* at 271–73.

13. See THE KENYA NAT'L DIALOGUE AND RECONCILIATION MONITORING PROJECT, REVIEW REPORT 13–19 (2011), available at <http://www.dialoguekenya.org/docs/June2011ReviewReport.pdf>.

ment to the dispute.¹⁴ This entailed the creation of a coalition government in which Kibaki remained president and Odinga became prime minister.¹⁵ Under pressure from the international community and Kenyan civil society, the two parties to the dispute publicly stated their commitment to the establishment of a number of mechanisms aimed at addressing Kenya's legacy of political violence, including criminal prosecutions, a Truth, Justice and Reconciliation Commission, a constitutional review process, and other measures.¹⁶

The Commission of Inquiry into Post-Election Violence, which was created by the parties to the election dispute, made recommendations for the establishment of a special tribunal composed of Kenyans and foreigners to prosecute those responsible for the post-election violence.¹⁷ Following parliament's rejection of a February 2009 bill to establish such a tribunal, it became increasingly clear that key elements in the Kenyan leadership remained opposed to dealing judicially with the violence.¹⁸ As a result, in July 2009 Kofi Annan handed over a list of key suspects in the violence to ICC Prosecutor Luis Moreno-Ocampo.¹⁹

Acting on Prosecutor Ocampo's request,²⁰ on March 31, 2010, Pre-Trial Chamber II of the ICC issued a decision authorizing the prosecutor to commence an investigation into Kenya's post-election violence.²¹ However, Pre-Trial Chamber II was split on the issue of whether the ICC has subject-matter jurisdiction in the case. Arguing that there were not sufficient grounds to believe that the crimes committed in Kenya in early 2008 took place "pursuant to

14. See generally The National Accord and Reconciliation Act, (2008) Cap. 4 (Kenya).

15. See generally MARTIN GRIFFITHS, CENTRE FOR HUMANITARIAN DIALOGUE, THE PRISONER OF PEACE: AN INTERVIEW WITH KOFI A. ANNAN (2008), available at [http://www.hdcentre.org/files/Kofi%20interview%20\(3\).pdf](http://www.hdcentre.org/files/Kofi%20interview%20(3).pdf) (describing the mediation process).

16. See Kenya Nat'l Dialogue and Reconciliation, *Agenda Item 3: How to Resolve the Political Crisis*, § 3 (Feb. 14, 2008), http://www.dialoguekenya.org/docs/14_Feb_08_Tsavo_Agreement.pdf; Kenyan Nat'l Dialogue and Reconciliation, *Longer-terms Issues and Solutions: Constitutional Review* (Mar. 4, 2008), http://www.dialoguekenya.org/docs/KenyaNationalDialogue_ConstituionalReview.pdf; Kenyan Nat'l Dialogue and Reconciliation, *Statement of Principles on Long-Term Issues and Solutions*, § 2 (May 23, 2008), http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf. For an analysis of these various processes, see Obel Hansen, *supra* note 8, at 10–15.

17. CIPEV REPORT, *supra* note 8, at 472.

18. See Human Rights Watch, *Kenya: Swiftly Enact Special Tribunal* (Mar. 25, 2009), <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>.

19. See Obel Hansen, *supra* note 8, at 9.

20. Int'l Criminal Court, Office of the Prosecutor, Situation in the Republic of Kenya: Request for Authorisation of an Investigation Pursuant to Article 15, ¶ 106, ICC Doc. ICC-01/09 (Nov. 26, 2009) [hereinafter Kenya Investigation Request].

21. See generally Kenya Investigation Authorization, *supra* note 3.

or in furtherance of a State or organizational policy” to commit an attack on a civilian population, as required by Article 7(2)(a) of the Rome Statute, Judge Hans-Peter Kaul issued a dissenting opinion.²²

Having finalized his investigations, on December 15, 2010, Prosecutor Ocampo submitted two applications requesting Pre-Trial Chamber II to issue summonses for six Kenyans, all suspected of having committed crimes against humanity, to appear before the ICC.²³ The suspects include high-ranking civil servants and prominent politicians, some with presidential ambitions.²⁴

On March 8, 2011, Pre-Trial Chamber II issued summonses for the six Kenyans to appear before the Court in early April of the same year.²⁵ Again Judge Kaul dissented, maintaining that the crimes committed in Kenya do not meet the threshold of crimes against humanity since the requirement of a state or organizational policy in Article 7(2)(a) is seen not to be met.²⁶

Prior to the six suspects appearing before the ICC, the Kenyan government filed an admissibility challenge, claiming that the ICC cannot exercise jurisdiction since reforms of the Kenyan judiciary

22. *See generally id.* (dissenting opinion of Judge Kaul).

23. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 224 (Dec. 15, 2010); Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 213 (Dec. 15, 2010).

24. For a profile of the so-called Ocampo Six, see Xan Rice, *Kenya Election Violence: Profiles of the ICC Suspects*, GUARDIAN (Dec. 15, 2010), <http://www.guardian.co.uk/world/2010/dec/15/kenya-election-violence-suspects-profiles>. For a discussion of how ICC proceedings have impacted the presidential aspirations of Ruto and Kenyatta, see Murithi Mutiga, *Hague Cases Set to Change the 2012 Election Game Plan*, DAILY NATION, (Apr. 9, 2011), <http://www.nation.co.ke/News/politics/A+race+against+time+/-/1064/1141852/-/2ifwihz/-/index.html>.

25. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 59 (Mar. 8, 2011); *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 57 (Mar. 8, 2011).

26. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ¶ 2 (Mar. 15, 2011); *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ¶ 2 (Mar. 15, 2011).

would shortly lead to domestic prosecution of post-election cases.²⁷ However, on May 30, 2011, the ICC rejected the admissibility challenge, noting that the Kenyan government had failed to show that investigations of the Ocampo Six—as they became known—were taking place in Kenya.²⁸

Further, on April 8, 2011—the same day that three of the suspects appeared before Pre-Trial Chamber II—the U.N. Security Council made clear that it would not support Kenya's bid to have the cases deferred under Article 16 of the Rome Statute.²⁹

III. THE KENYAN ICC CASES: SETTING NEW STANDARDS FOR CRIMES AGAINST HUMANITY?

The Kenyan ICC cases touch on a number of central elements of crimes against humanity. In particular, the ICC decisions, including Judge Kaul's dissenting opinions, elaborate significantly on the contextual requirement in Article 7(2)(a) that such crimes must be committed pursuant to a state or organizational policy.

Based on an examination of the decisions made by the three judges of Pre-Trial Chamber II, Ekaterina Trendafilova, Cuno Tarfusser, and Hans-Peter Kaul, the following Section outlines how the various understandings of Article 7(2)(a) in the Kenyan cases relate to earlier understandings of the policy requirement in the case law of international tribunals and in the legal literature.

27. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang & Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case Nos. ICC-01/09-01/11 and ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011). For a discussion of Kenya's admissibility challenge, see Thomas Obel Hansen, *How Will International Criminal Court Prosecutions Impact Kenya's Legacy of Political Violence?*, TOWARD FREEDOM (Apr. 12, 2011), <http://www.towardfreedom.com/afrika/2359-how-will-international-criminal-court-prosecutions-impact-on-kenyas-legacy-of-political-violence>.

28. See *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 70 (May 30, 2011); *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 66 (May 30, 2011).

29. See Kevin Kelley, *Kenya ICC Deferral Bid Fails*, DAILY NATION (Apr. 9, 2011), <http://www.nation.co.ke/News/politics/UN+Council+rejects+Kenya+ICC+deferral+bid/-/1064/1141408/-/qmart0z/-/index.html>; Alpha Sesay, *Kenyan Deputy Prime Minister and Two Others Make Initial Appearance in the Hague*, THE INT'L CRIM. CT. KENYA MONITOR (Apr. 8, 2011), <http://www.icckenya.org/2011/04/kenyan-deputy-prime-minister-and-two-others-make-initial-appearance-in-the-hague/> (discussing Kenyatta, Muthaura and Ali's initial appearance hearing). For further analysis of this attempt to obtain a UN Security Council deferral, see Obel Hansen, *supra* note 27.

A. *Do the Requirements in Article 7(2)(a) Set the Notion of Crimes against Humanity under the Rome Statute apart from Its Understanding under Customary Law?*

The question of whether the requirement of a state or organizational policy in Article 7(2)(a) narrows the concept of crimes against humanity compared to customary law has been the subject of some debate in the legal literature.

Antonio Cassese notes that a key implication of Article 7(2)(a) is that a “practice simply tolerated or condoned by a state or an organization would not constitute an attack on the civilian population or a widespread or systematic practice.”³⁰ Therefore, Cassese argues, Article 7(2)(a) clearly “goes beyond what is required under international customary law and unduly restricts the notion under discussion.”³¹

William Schabas examines certain issues relating to Article 7(2)(a) of the Rome Statute, such as whether non-state actors can adopt policies within the meaning of the provision in light of the practice of the *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).³² Unlike the Rome Statute, the statutes of these tribunals do not explicitly entail a policy requirement in their definition of crimes against humanity.³³ By referring so extensively to the practice of the *ad hoc* tribunals—which is often seen to have contributed significantly to the development of cus-

30. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 125 (2d ed. 2008).

31. *Id.*

32. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 111–14 (4th ed. 2011).

33. Compare Rome Statute, *supra* note 1, art. 7(2)(a), with Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex (1993) & S/25704/Add.1 (1993), *adopted by* S.C. Res. 827, art. 5, U.N. Doc. S/RES/827 (May 25, 1993) (defining crimes against humanity as “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”), and Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) (defining crimes against humanity as “the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (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”).

tomary law³⁴—Schabas seems to imply that the policy requirement in Article 7(2)(a) does not fundamentally set the Rome Statute apart from customary law.³⁵

Pre-Trial Chamber II is divided on the question of whether Article 7(2)(a) should be interpreted in light of the practice of the *ad hoc* tribunals.³⁶ This debate exemplifies a more profound disagreement concerning whether—or the extent to which—Article 7(2)(a) changes the concept of crimes against humanity compared to customary law.³⁷

Noting that the Rome Statute provides little clarification on how the policy requirement should be understood,³⁸ the majority of judges turn to an assessment of how the ICC, as well the *ad hoc* tribunals, have dealt with the issue.³⁹ The majority state that “[w]hile the Chamber is mindful of the jurisprudential evolution and the eventual abandonment of the policy requirement before the *ad hoc* tribunals, it nevertheless deems it useful and thus appropriate to consider their definition of the concept in earlier cases.”⁴⁰

Dissenting Judge Hans-Peter Kaul argues in contrast that the policy requirement in Article 7(2)(a) sets the Rome Statute so fundamentally apart from crimes against humanity under customary law that the case law of the *ad hoc* tribunals only has limited value.⁴¹ He states as follows:

A cautious approach is even more warranted in the event that the basic texts of other courts and tribunals do not contain the same legal *requirements* in a provision as contained in the Court's Statute. In this respect, it is worth noting that the pertinent provisions in the statutes of e.g., the ICTY and the ICTR do not contain *expressis verbis* a legal requirement equivalent to that of article 7(2) (a) of the Statute, namely the legal requirement of a “State or organizational policy”. Recent jurisprudence of these tribunals reveals that considerations of “policy” are not a legal requirement but may have evidential relevance for the presence of a “systematic” attack.⁴²

34. See INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE TRIBUNAL'S ACCOMPLISHMENTS IN JUSTICE AND LAW (2004), available at http://www.icty.org/x/file/Outreach/view_from_hague/jit_accomplishments_en.pdf.

35. See SCHABAS, *supra* note 32.

36. See Kenya Investigation Authorization, *supra* note 3, ¶¶ 30–32 (dissenting opinion of Judge Kaul).

37. *Id.*

38. *Id.* ¶ 84 (majority opinion).

39. *Id.* ¶¶ 84–87.

40. *Id.* ¶ 86.

41. *Id.* ¶¶ 28–32 (dissenting opinion of Judge Kaul).

42. *Id.* ¶ 31.

This last piece of Judge Kaul's argument leads to a more specific question concerning the understanding of crimes against humanity in the Rome Statute *vis-à-vis* the understanding in customary law: Should the requirement of a state or organizational policy be seen as an independent contextual requirement, or simply something that may support that a systematic attack has taken place, as required by Article 7(1) of the Rome Statute? This important question is discussed at some length in the Kenyan ICC cases.

Prosecutor Ocampo implies that he does not understand the existence of a state or organizational policy as a separate requirement, but rather as "an element from which the systematic nature of an attack may be inferred."⁴³ In so arguing, the prosecutor follows the reasoning of the ICTY Appeals Chamber in *Kunarac* as follows:

[N]either the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. . . . [P]roof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.⁴⁴

A similar understanding has been endorsed by Pre-Trial Chamber III of the ICC in its decision to issue an arrest warrant for Jean-Pierre Bemba Gombo.⁴⁵ The prosecutor relies on the exact wording of that decision—that "the existence of a State or organisational

43. Kenya Investigation Request, *supra* note 20, ¶ 79.

44. Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002). The standards set in this case—that there is no legal requirement of a plan or a policy—represents a change in the practice of the International Criminal Tribunal for the Former Yugoslavia. See Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, ¶ 653 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (noting that traditionally some form of policy was required for acts to constitute crimes against humanity).

45. See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, ¶ 33 (June 10, 2008).

policy is an element from which the systematic nature of an attack may be inferred.”⁴⁶

The majority of judges in Pre-Trial Chamber II clearly disagree with the prosecutor, and therefore also with Pre-Trial Chamber III of the same Court (in which, interestingly, Judge Trendafilova as well as Judge Kaul had a seat in the Gombo decision). As such, the judges observe five key elements inherent in crimes against humanity: “(i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack.”⁴⁷

However, despite holding that a state or organizational policy is a separate contextual requirement, the majority of judges in Pre-Trial Chamber II link the existence of a state or organizational policy to the requirement of systematic attack in that they argue that one of the relevant criteria to consider when determining whether a group qualifies as an organization within the meaning of Article 7(2)(a) concerns “whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population.”⁴⁸ This approach implies that if a systematic attack has indeed been carried out, this should be seen as evidence of the existence of a state or organizational policy, a line of reasoning that resembles that of the ICTY in *Tadic*.⁴⁹

Dissenting Judge Kaul argues more explicitly that Article 7(2)(a) lays down a separate contextual requirement to crimes against humanity, not limited to the question of whether a systematic attack has taken place, but rather “a legal *requirement* radiating on the entire *chapeau* of Article 7 of the Statute as it is linked with the element of ‘attack’ and not the component ‘systematic.’”⁵⁰

In sum, the majority of judges in Pre-Trial Chamber II imply that the notion of crimes against humanity is not fundamentally different under the Rome Statute as compared to customary law. While asserting that the policy requirement is a separate contextual requirement, the Chamber also implies that, to the extent a group has carried out a systematic attack, this could be seen as evidence

46. Compare *id.* with Kenya Investigation Request, *supra* note 20, ¶ 79.

47. Kenya Investigation Authorization, *supra* note 3, ¶ 79.

48. *Id.* ¶ 93.

49. See *Tadic*, Case No. IT-94-I-T, ¶ 653 (holding that “if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not”).

50. Kenya Investigation Authorization, *supra* note 3, ¶ 32 (dissenting opinion of Judge Kaul).

of an organizational policy. Dissenting Judge Kaul argues that the requirements of Article 7(2)(a) clearly set the Rome Statute apart from customary law, as they add an extra element of the existence of a state or organizational policy connected to the attack itself. As demonstrated below, these diverging opinions influence how the three judges deal with a number of other important issues.

B. *What Should be Understood by “Policy”?*

All three judges agree that “policy” and “state or organizational” must be analyzed as two separate, but obviously linked, requirements arising out of Article 7(2)(a).⁵¹ In defining “policy,” the majority of judges make reference to definitions of the term as set out in preceding decisions of the ICC pre-trial chambers.⁵² Reference is made to Pre-Trial Chamber I’s confirmation of charges against Germain Katanga and Mathieu Ngudjolo Chui,⁵³ in which it held as follows:

[I]n the context of a widespread attack, the requirement of an organisational 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. . . . The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.⁵⁴

51. *See id.* ¶¶ 84–93 (majority opinion) (analyzing the two notions separately); *id.* ¶ 40 (dissenting opinion of Judge Kaul) (concluding that “three components require [sic] to be established for the purpose of [Article 7(2)(a)]: (1) the existence of a State or an ‘organization’; (2) a policy to commit such attack; and (3) a link between the multiple commission of acts referred to in Article 7(1) of the Statute and the policy of such State or ‘organization’, as emphasized by the terms ‘pursuant to or in furtherance of’”).

52. *Id.* ¶¶ 84–85 (majority opinion).

53. *Id.* ¶ 84.

54. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 396 (Sept. 30, 2008). Further, Pre-Trial Chamber II in the Kenyan case cites an earlier decision made by the same chamber concerning charges against Jean-Pierre Bemba Gombo, in which the policy was also understood as: “[T]he attack follows a regular pattern The policy need not be formalised. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.” *See Kenya Investigation Authorization*, *supra* note 3, ¶ 85 (quoting *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81 (June 15, 2009) (footnotes omitted)).

Added to this, Pre-Trial Chamber II in the Kenyan case takes note of the judgment in the case against Tihomir Blaškić, in which the ICTY Trial Chamber held that the plan to commit an attack:

need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events, *inter alia*:

- the general historical circumstances and the overall political background against which the criminal acts are set;
- the establishment and implementation of autonomous political structures at any level of authority in a given territory;
- the general content of a political programme, as it appears in the writings and speeches of its authors;
- media propaganda;
- the establishment and implementation of autonomous military structures;
- the mobilisation of armed forces;
- temporally and geographically repeated and co-ordinated military offensives;
- links between the military hierarchy and the political structure and its political programme;
- alterations to the “ethnic” composition of populations;
- discriminatory measures, whether administrative or other . . . ;
- the scale of the acts of violence perpetrated - in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.⁵⁵

In other words, a low threshold for policy is applied, which does not, at least clearly, distinguish between a “policy” in the meaning of Article 7(2)(a) and a “plan,” as discussed by the ICTY Trial Chamber. Consequently, an attack which is organized and follows a regular pattern will be taken as evidence of the existence of a policy. By endorsing the views taken on other occasions by the ICC pre-trial chambers, the threshold for a policy adopted by the majority seems simply to be that the attack must be something more than spontaneous or isolated acts of violence.

Whereas Judge Kaul had earlier accepted that “an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence– will satisfy” the policy requirement in Arti-

55. Kenya Investigation Authorization, *supra* note 3, ¶ 87 (quoting Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 204 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (footnotes omitted)).

cle 7(2)(a),⁵⁶ he does not endorse this view in the Kenyan cases.⁵⁷ However, as Judge Kaul's disagreement essentially concerns what actors can adopt a policy,⁵⁸ it is more appropriate to turn to an assessment of that question at this point.

C. *What Should Be Understood by "State or Organizational"?*

Neither the majority of judges nor dissenting Judge Kaul seem to believe that it is necessary to elaborate significantly on what should be understood by "state." Though the majority of judges note that the term "state" is self-explanatory, they nonetheless make clear that state actors can refer to "the highest level of the State machinery" as well as "regional or even local organs of the State."⁵⁹ Also noting that term "state" is self-explanatory, Judge Kaul argues that although acts of low-level government officials are *attributable* to the state, only actors at "the high level" are capable of *establishing* a policy.⁶⁰

The term "organizational" causes more controversy. In particular, the central questions of whether—and if so, under what conditions—non-state actors can form an organization is the subject of considerable discussion in the Kenyan ICC cases.

To understand the various arguments made—and how they may contribute to developing the law—it is necessary first to briefly outline the debate in the legal literature.

M. Cherif Bassiouni, who chaired the drafting committee at the Rome Conference, argues that crimes committed by non-state actors do not fall within the jurisdiction of the ICC:

Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely, its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is

56. *Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81.

57. Judge Kaul seems to justify his new understanding of the criterion arguing that the *Bemba Gombo* case concerned "military-like organized armed groups in the context of an armed conflict not of an international character who over a prolonged period of time allegedly committed crimes according to a policy." See Kenya Investigation Authorization, *supra* note 3, ¶ 48 (dissenting opinion of Judge Kaul).

58. See *id.* ¶¶ 43, 68.

59. *Id.* ¶ 89 (majority opinion).

60. *Id.* ¶ 43 (dissenting opinion of Judge Kaul).

capable of inflicting significant harm in more than one state, falls within this category. In this author's opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7

. . . .

The text [of Article 7(2)(a)] clearly refers to state policy, and the words "organizational policy" . . . do not refer to the policy of an organization, but the policy of a state. It does not refer to non-state actors.⁶¹

Though suggesting that "crimes against humanity may in some circumstances be committed by non-State actors,"⁶² William Schabas observes that essentially all prosecutions before international tribunals "have involved offenders acting on behalf of a State and in accordance with a State policy, or those acting on behalf of an organization that was State-like in its attempts to exercise control over territory and seize political power, such as the Republika Srpska."⁶³ In light of this, Schabas concludes as follows:

Dictionary definitions consider an organization to comprise any organized group of people, such as a club, society, trade union, or business. Surely the drafters of the Rome Statute did not intend for Article 7 to have such a broad scope, given that all previous case law concerning crimes against humanity, and all evidence of national prosecutions for crimes against humanity, had concerned State supported atrocities. If they really meant to include any type of organization, such as a highly theoretical "organization" of two people, why did they put these words in at all? The biggest problem for the proponents of the broad view is their inability to explain how the term organization is to be qualified.⁶⁴

Peter Burns has quite a different view in his assessment of Article 7(2)(a). He notes that organizational policy "can undoubtedly include state organs and will extend to para-military units of a state, organized rebel groups within a state, or even unorganized rebel groups so long as there is a sufficient core that develops such a policy for the group."⁶⁵ And with regard to "non-military but highly organized and armed groups within a state," Burns argues that although non-state actors such as criminal gangs would usually lack the mental requirement of attacking a civilian population,

61. I M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 151-52 (2005).

62. SCHABAS, *supra* note 32, at 111.

63. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 954 (2008).

64. *Id.* at 972.

65. Burns, *supra* note 2, at 11.

they may in principle fulfill the organizational requirement, and therefore be subjected to the jurisdiction of the ICC.⁶⁶

Although the statutes of the *ad hoc* tribunals do not explicitly entail a requirement of a state or organizational policy, the case law of these tribunals clearly indicates that non-state actors can commit crimes against humanity under certain circumstances.⁶⁷ In the *Tadic* judgment, the ICTY noted as follows:

The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. . . . While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. . . . [T]he law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory.⁶⁸

The judgment concludes: “Therefore, although a policy must exist to commit these acts, it need not be the policy of a State.”⁶⁹

All three judges of Pre-Trial Chamber II agree that non-state actors can in principle constitute an organization under Article 7(2)(a).⁷⁰ The logic behind this conclusion is that had the drafters of the Rome Statute intended to exclude non-state actors, they would not have included the term “organization” in the text of Article 7(2)(a), but would rather have limited themselves to mentioning “state.”⁷¹ However, the two majority judges and Judge Kaul fundamentally disagree under *what conditions* non-state actors can satisfy the organizational requirement. The majority of judges note as follows:

With regard to the term “organizational”, the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as “organization” for the purposes of article 7(2)(a) of the Statute. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have

66. *See id.*

67. CASSESE, *supra* note 30, at 116.

68. Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, ¶ 654 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

69. *Id.* ¶ 655.

70. *See* Kenya Investigation Authorization, *supra* note 3, ¶ 92 (majority opinion); *id.* ¶ 45 (dissenting opinion of Judge Kaul).

71. *See* Kenya Investigation Authorization, *supra* note 3, ¶ 92 (majority opinion); *id.* ¶ 45 (dissenting opinion of Judge Kaul).

convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.⁷²

It remains unclear exactly how this criterion sets itself apart from the criteria so far applied by the pre-trial chambers, namely that Article 7(2)(a) includes “groups of persons who govern a specific territory” and “any organisation with the capability to commit a widespread or systematic attack against a civilian population.”⁷³

However, unlike earlier cases, the majority elaborates on what factors must be taken into account when determining whether a non-state actor has the capacity to infringe on basic human values:

- Whether the group is under a responsible command, or has an established hierarchy;
- Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
- Whether the group exercises control over part of the territory of a State;
- Whether the group has criminal activities against the civilian population as a primary purpose;
- Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population;
- Whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.⁷⁴

Judge Kaul disagrees with the majority, noting that not *any* group with the power to infringe on basic human values can form an organization under Article 7(2)(a), but only those that have a *state-like nature*.⁷⁵ He supports this interpretation using a variety of arguments.

72. Kenya Investigation Authorization, *supra* note 3, ¶ 90 (emphasis added). In justifying the use of this new criterion, the Chamber cites an article by Marcello Di Filippo, who argues: “the associative element, and its inherently aggravating effect, could eventually be satisfied by ‘purely’ private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by ‘territorial’ entities or by private groups, given the latter’s acquired capacity to infringe basic human values.” Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, 19 EUR. J. INT’L L. 533, 567 (2008).

73. See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 396 (Sept. 30, 2008); Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81 (June 15, 2009).

74. Kenya Investigation Authorization, *supra* note 3, ¶ 93 (not intended to be exhaustive).

75. *Id.* ¶ 66 (dissenting opinion of Judge Kaul).

First, he questions the relevance of the jurisprudence of the ICC on this issue since the groups under assessment in earlier cases were “military-like organized armed groups in the context of an armed conflict not of an international character who over a prolonged period of time allegedly committed crimes according to a policy.”⁷⁶

Second, Judge Kaul argues that “the juxtaposition of the notions ‘State’ and ‘organization’ in Article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those ‘organizations’ should partake of some characteristics of a State.”⁷⁷

Third, using a contextual interpretation of Article 7(2)(a), he argues that the preamble to the Rome Statute should be understood as instructing the ICC “to avoid a ‘banalisation’ or ‘trivialization’ of the crimes contained in the Statute,” which therefore justifies setting a high threshold for the term “organization.”⁷⁸

Finally, Judge Kaul turns to a teleological interpretation.⁷⁹ He observes that the notion of crimes against humanity was introduced by the international community in the wake of World War II to address “mass crimes committed by sovereign States against the civilian population, sometimes the State’s own subjects, according to a State plan or policy, involving large segments of the State apparatus.”⁸⁰ Such crimes, Judge Kaul argues, differ from other crimes in that they “represent an intolerable threat against the peace, security and well-being of the world, indeed a threat for humanity and fundamental values of mankind.”⁸¹ He further explains as follows:

Crimes of this nature and magnitude were made possible only by virtue of an existing State policy followed in a planned and concerted fashion by various segments of public power targeting parts of the civilian population who were deprived totally and radically of their basic fundamental rights. It was not (only) the fact that crimes had been committed on a large scale but the fact that they were committed in furtherance of a particular (inhumane) policy. Consequently, it was felt that the threat emanating from such State policy is so fundamentally different in nature and scale that it concerned the entire international com-

76. *Id.* ¶ 48.

77. *Id.* ¶ 51.

78. *See id.* ¶ 55.

79. *Id.* ¶ 56.

80. *Id.* ¶¶ 59, 61.

81. *Id.*

munity. In other words, the presence of a policy element elevated those crimes to the international level.⁸²

Judge Kaul concludes: “[H]istoric experience demonstrates that it is, exactly and above all, the phenomenon of a State adopting either formally or in practice a policy to attack a civilian population, which leads to this very grave, if not enormous risk and threat of mass crimes and mass victimization.”⁸³

Drawing a demarcation line “between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation,”⁸⁴ Judge Kaul thus excludes from the Rome Statute atrocities committed by non-state actors that do not have state-like features.⁸⁵

These considerations lead Judge Kaul to outline certain characteristics that can be indicative of a state-like nature of a private group:

(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.⁸⁶

Judge Kaul also examines when the acts of individuals can be linked to such an organization:

For the purposes of attribution, the acts of the members of the “organization” must be linked to the “organization”. Several factors may be indicative. A specific collectivity of persons with some kind of policy level and hierarchical structure, the capacity to impose the policy on its members and to sanction them, induces a particular relationship between the policy level of that “organization” and its members. Generally, any of the acts of a member of that ‘organization’ will be ascribed to the “organization”. Further, any such act of an individual that following such a policy, is condoned by the policy-making level of the ‘organization’ may be attributable. The attribution may also be ascer-

82. *Id.* ¶ 60.

83. *Id.* ¶ 61.

84. *Id.* ¶ 65.

85. According to this understanding, non-state actors, including groups of organized crime; mobs; groups of armed civilians or criminal gangs; and spontaneous violence-prone groups formed on an ad hoc basis without a structure and level to set up a policy, cannot qualify as an “organization” even if they engage in “numerous serious and organized crimes.” *See id.* ¶ 52.

86. *Id.* ¶ 51.

tained in the event that members of the ‘organization’ use the means of the “organization” to attack any civilian population.⁸⁷

In sum, the majority of judges make a distinction between groups that have the capability to perform acts which infringe on basic human values, and groups that do not. Judge Kaul, on the other hand, emphasizes that only non-state actors with a state-like nature can satisfy the requirement of an organization within the meaning Article 7(2)(a).

IV. APPLYING THE STANDARDS TO KENYA’S POST-ELECTION VIOLENCE

A. *ODM Case*

(i) What is the Case About?

The so-called ODM case concerns three supporters of Odinga’s 2007 presidential campaign, namely suspended Minister of Higher Education William Ruto, former Minister of Industrialization Henry Kosgey, and radio presenter Joshua Sang.⁸⁸ Prosecutor Ocampo alleges that Ruto and Kosgey prepared a plan for attacking supporters of the PNU political party, with the goals of punishing and expelling PNU supporters from the Rift Valley and gaining political power in the province.⁸⁹ When on December 30, 2007, the Electoral Commission of Kenya declared Kibaki the winner of the presidential election, a network established by Ruto and Kosgey, the prosecutor alleges, was activated to kill and oppress PNU supporters on various locations in the Rift Valley.⁹⁰ Sang is suspected of having supported the commitment of these crimes by using his radio program to provide signals to perpetrators on the ground on when and where to attack.⁹¹ The crimes allegedly committed include murder, torture, deportation or forcible transfer, and persecution based on political affiliation.⁹²

Based on the prosecutor’s application, on March 8, 2011, Pre-Trial Chamber II in a majority decision issued summonses for

87. *Id.* ¶ 69.

88. *See* Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶¶ 1, 37, 41, 43 (Dec. 15, 2010).

89. *Id.* ¶ 1.

90. *Id.* ¶¶ 2–3.

91. *Id.* ¶¶ 1, 4.

92. *Id.* ¶¶ 10, 26.

these three individuals to appear before the ICC.⁹³ The Chamber did not find sufficient evidence that torture had been committed as part of the plan, but otherwise agreed with the prosecutor's counts.⁹⁴ The majority found reasonable grounds to believe that Ruto and Kosgey are criminally responsible as indirect co-perpetrators of crimes against humanity in accordance with Article 25(3)(a) of the Rome Statute.⁹⁵ Concerning Sang, the Chamber only found reasonable grounds to believe that he is responsible for having in other ways contributed to the commission of crimes against humanity, in accordance with Article 25(3)(d) of the Rome Statute.⁹⁶

(ii) How does the Application of Article 7(2)(a) Impact this Case?

Article 7(2)(a) is central to the ODM case. The majority of judges agreed that there were reasonable grounds to believe that the crimes were committed pursuant to or in furtherance of a state or organizational policy to commit such attack,⁹⁷ but Judge Kaul issued a dissenting opinion, arguing that the requirements of Article 7(2)(a) were not met.⁹⁸ Therefore, the application of Article 7(2)(a) could potentially determine whether one or more of the suspects are charged and possibly convicted for crimes against humanity.⁹⁹

93. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 59 (Mar. 8, 2011).

94. *Id.* ¶¶ 32–33.

95. *Id.* ¶ 37.

96. *Id.* ¶ 38.

97. *Id.* ¶ 20.

98. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ¶ 2 (Mar. 15, 2011).

99. At the charging stage, the applicable standard requires there to be "reasonable grounds to believe" that the suspects have committed the crimes alleged by the prosecutor. Rome Statute, *supra* note 1, art. 58(1)(a). For the Chamber to confirm the charges against the suspects, there must be "substantial grounds to believe" they committed the crimes. *Id.* art. 61(7). For the suspects to be convicted by a trial chamber, Article 66(3) requires the Court to be "convinced of the guilt of the accused beyond reasonable doubt." *Id.* art. 66(3). In other words, the interpretation of Article 7(2)(a) of the Rome Statute may impact the outcome of the process since Judge Kaul is likely to dissent again, in which case the charges will not be confirmed should one of the two majority judges find that evidence presented by the Prosecutor does not meet the higher threshold laid down in Article 61(7) of the Rome Statute.

The prosecutor argued in his application to have summonses issued for the three suspects that Ruto, Kosgey, and Sang had “coordinated a series of actors and institutions to establish a network, using it to implement an organizational policy to commit crimes.”¹⁰⁰ It is this “network,” consisting of media representatives (including Sang), financiers, regional tribal Elders, and former members and leaders of Kenya’s security apparatus, that the prosecutor implies should be considered an “organization” within the meaning of Article 7(2)(a).¹⁰¹

In considering whether the “network” allegedly established by Ruto, Kosgey, and Sang should be understood as an “organization” within the meaning of Article 7(2)(a), the Chamber affirmed that there were reasonable grounds to believe that the network 1) was “under responsible command,” 2) had “an established hierarchy,”¹⁰² 3) “possessed the means to carry out a widespread or systematic attack against the civilian population” (since “its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower”), 4) “identified the criminal activities against the civilian population as its primary purpose,” and 5) “articulated an intention to attack the civilian population.”¹⁰³ On this basis, the majority concluded that the network had the capability to perform acts which infringe on basic human values, and hence that it constituted an organization within the meaning of Article 7(2)(a).¹⁰⁴

Considering whether a policy was established by the network, the Chamber simply noted that “there are reasonable grounds to believe that the organization promoted a policy aimed at targeting members of the civilian population.”¹⁰⁵ It gave few indications of how and by whom this policy was *established*, but instead turned to an assessment of how the policy was *implemented* through a series of “preparatory meetings”; “the appointment of commanders and divisional commanders responsible for operations on the field; the

100. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 1 (Dec. 15, 2010). As most of the text of the prosecutor’s application to have summonses issued is not available to the public, only a limited assessment can be made of how the prosecutor applies the criteria of Article 7(2)(a) of the Rome Statute.

101. *See id.* ¶ 19.

102. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 23 (Mar. 8, 2011).

103. *Id.* ¶ 24.

104. *Id.* ¶¶ 23, 25.

105. *Id.* ¶ 26.

production of maps marking out areas most densely inhabited by communities perceived to be or actually siding with the PNU; the purchase of weapons and their storage before the attack; the transportation of the perpetrators to and from the targeted locations; and the establishment of a rewarding mechanism to motivate the perpetrators to kill the highest possible number of persons belonging to the target communities as well as to destroy their properties.”¹⁰⁶

Since an organization as well as a policy was deemed to have been in place in the ODM case, the Chamber concluded that “the contextual elements for crimes against humanity alleged in the Prosecutor’s Application have been satisfied.”¹⁰⁷

Judge Kaul took a different approach in examining whether an organization was present in the ODM case. He analyzed separately each of the five branches of the network that the judge understood the prosecutor to allege to exist, namely the political, the media, the financial, the tribal, and the military branches.¹⁰⁸ Since, according to Judge Kaul, four of the branches of the network “either do not exist, or, rather reflect the Tribal Branch of the ‘Network,’”¹⁰⁹ his determination of whether an organization was present in the ODM case ultimately rested on his assessment of the so-called tribal branch of the network.¹¹⁰

This branch of the network, which is understood to be composed of tribal elders and other leaders of the Kalenjin community,¹¹¹ “played a pivotal, if not decisive role in the violence,” said the judge.¹¹² To a certain extent this network, seen by the judge as “an amorphous alliance for coordinating members of a tribe with a predisposition towards violence with membership of its different branches fluctuating,” is found to have coordinated its activities.¹¹³ But the lack of evidence of a hierarchy between the different branches of the network means that such coordination of activities took place at “a horizontal level,” which appeared to Judge Kaul as “a substitute for the prerequisite of ‘responsible command’ within

106. *Id.* ¶¶ 27–28.

107. *Id.* ¶ 29.

108. *Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ¶¶ 16–17 (Mar. 15, 2011).

109. *Id.* ¶ 45.

110. *See generally id.* ¶¶ 40–44.

111. *Id.* ¶ 40.

112. *Id.* ¶ 42.

113. *Id.* ¶ 46.

a vertical hierarchical structure.”¹¹⁴ Another feature of the network, according to the judge, concerns “its temporary existence for a specific purpose.”¹¹⁵ Judge Kaul concluded: “[T]he ‘Network’ was created *ad hoc* solely to assist, admittedly in an abhorrent way, the community’s aspiring and existing political leaders in gaining or maintaining political power in the Rift Valley on the occasion of the 2007 presidential elections.”¹¹⁶

These features, Judge Kaul argued, mean that the network did not equal a state-like organization.¹¹⁷ Rather what materialized was a “group of perpetrators with a pre-disposition to violence engaged in a regional campaign of aggressive inter-ethnic violence, at the instigation of those persons within their tribe who were seeking to achieve their political aims at all costs.”¹¹⁸

In sum, the majority of judges found that the network alleged by Prosecutor Ocampo to have been created by the three suspects, encompassing a number of branches, qualifies as an organization in accordance with Article 7(2)(a). Without providing much detail, the majority further accepted that this organization promoted a policy aimed at targeting members of the civilian population. Judge Kaul argued that the various branches of the network either did not exist or rather reflected the tribal branch of the network. Examining this tribal branch of the network, the dissenting judge concluded that it was an *ad hoc* arrangement, which lacked a proper command structure and other features of state-like entities, and therefore does not satisfy his understanding of an organization.

B. *PNU Case*

(i) What is the Case About?

The second ICC case concerns supporters of Kibaki’s 2007 presidential campaign and/or government officials, namely Head of Public Services Francis Muthaura, Minister for Finance Uhuru Kenyatta, and then Head of Kenya’s Police Forces Mohammed Ali.¹¹⁹ Prosecutor Ocampo claims that as a response to the vio-

114. *Id.*

115. *Id.* ¶ 47.

116. *Id.*

117. *Id.* ¶ 48.

118. *Id.*

119. Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶¶ 5, 37, 43, 47 (Dec. 15, 2010).

lence launched by ODM supporters—and with the purpose of keeping PNU in power—Muthaura and Ali used their positions in the National Security Advisory Committee to order the Kenyan Police Forces to use excessive violence in ODM strongholds, including Kisumu and Kibera (a Nairobi slum).¹²⁰ As a second tactic used to fight ODM supporters, Kenyatta allegedly facilitated a meeting between Muthaura and the Mungiki criminal gang in early January 2008, during which it was agreed that Mungiki members should carry out retaliatory attacks against civilian supporters of the ODM in the Rift Valley towns of Nakuru and Naivasha.¹²¹ Muthaura allegedly coordinated with Ali to ensure that the police would not interfere with the planned Mungiki attacks.¹²² According to the prosecutor, Kenyatta provided the necessary financial and logistical support for the plan to be carried out.¹²³ The crimes allegedly committed by the three suspects include murder, rape and other forms of sexual violence, deportation or forcible transfer of population, other inhumane acts causing serious injury, and persecution based on political affiliation.¹²⁴

In issuing its summonses, the Chamber found reasonable grounds to believe that Kenyatta and Muthaura are responsible as indirect co-perpetrators in accordance with Article 25(3)(a) of the Rome Statute.¹²⁵ However, the Chamber only found reasonable grounds to believe that Ali is responsible for having otherwise contributed to the commission of crimes in accordance with Article 25(3)(d) of the Rome Statute.¹²⁶ Importantly, the Chamber found reasonable grounds to believe that crimes against humanity were committed in the context of the Mungiki attacks,¹²⁷ but did not find reasonable grounds to believe that the police inaction in Nakuru and Naivasha or the police shootings in Kisumu and Kibera amount to crimes against humanity.¹²⁸

120. *Id.* ¶¶ 5–6.

121. *Id.* ¶¶ 7–8. For an analysis of the Mungiki criminal gang, see generally David M. Anderson, *Vigilantes, Violence and the Politics of Public Order in Kenya*, 101 AFR. AFF. 531 (2002).

122. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 7 (Dec. 15, 2010).

123. *See id.*

124. *Id.* ¶ 30.

125. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 45 (Mar. 8, 2011).

126. *Id.* ¶ 49.

127. *Id.* ¶¶ 25–28.

128. *Id.* ¶¶ 24, 31–32.

(ii) How does the Application of Article 7(2)(a) Impact this Case?

The policy requirement in Article 7(2)(a) is central to the various aspects of the PNU case, including the Mungiki attacks in Nakuru and Naivasha, the police inaction in Nakuru and Naivasha, and the police shootings in Kisumu and Kibera. Concerning the Mungiki crimes in the Rift Valley towns, Judge Kaul again disagreed with the majority of judges, arguing that the threshold for an organization is not met.¹²⁹ Furthermore, all three judges argued that the police inaction as well as the police shootings could not be attributed to an organizational policy as the prosecutor has suggested, therefore declining to include these aspects in the case against the three suspects.¹³⁰

1. Mungiki crimes in Nakuru and Naivasha

In his application to have summonses issued, Prosecutor Ocampo argued that Kenyatta, in coordination with Muthaura and Ali, made arrangements for the Mungiki and pro-PNU youth to attack civilian supporters of the ODM.¹³¹ It seems clear that Prosecutor Ocampo alleges the existence of a policy, noting that the three suspects “adopted and implemented a common plan.”¹³² However, it is not clear from the extracts of the prosecutor’s application that are publically available whether he considers the Mungiki criminal gang as the relevant entity to be examined as an organization, or whether the organization should be understood more broadly to include the Kenyan Police Forces, the Mungiki, pro-PNU youth, and/or the National Security Advisory Committee.¹³³

129. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ¶¶ 31–32 (Mar. 15, 2011).

130. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶¶ 24, 30–31 (Mar. 8, 2011); *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ¶¶ 33–34 (Mar. 15, 2011).

131. See *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶¶ 7–8 (Dec. 15, 2010).

132. *Id.* ¶¶ 16, 18.

133. *Id.* ¶¶ 17–18. However, as discussed below, in the prosecutor’s application for leave to appeal certain decisions of the Chamber, it is implied that the prosecutor consid-

As in the ODM case, the Chamber undertakes separate assessments of whether an organization existed and whether a policy was adopted.¹³⁴ In assessing whether an organization existed the Chamber found that the “Mungiki operate as a large and complex hierarchical structure featuring various levels of command and a clear division of duties in the command structure.”¹³⁵ The Chamber further concluded “that obedience to the internal rules of the Mungiki is achieved by way of strict disciplinary measures.”¹³⁶ Both of these findings seemed to satisfy the Chamber that the Mungiki “is under a responsible command, or has an established hierarchy.”¹³⁷ Noting that “[t]he material also shows the existence of a trained militant wing of the Mungiki, which is employed to carry out violent operations, including executions,”¹³⁸ the Chamber seems to indicate that the “group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population.”¹³⁹ The Chamber also remarked as follows:

The extent of the power of the Mungiki is sustained by the available material which demonstrates the Mungiki’s control over core societal activities in many of the poor residential areas, particularly in Nairobi. In this regard, according to the material presented, the Mungiki, *inter alia*: (i) control and provide social services such as electricity, water and sanitation; (ii) administer criminal justice through local chairmen who act as judges in their communities; and (iii) control the transport sector and other business activities, where they provide informal employment for members.¹⁴⁰

It is unclear how these remarks would support any of the five criteria established by the Chamber to determine whether the group has the ability to infringe on basic human values.¹⁴¹ Emphasizing these various activities of the Mungiki seems to contravene the criteria that “the group has criminal activities against the civil-

ers the relevant organization to include the Mungiki, the Kenyan police, and other actors. See *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Prosecution’s Application for Leave to Appeal the “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali”, ¶ 10 (Mar. 14, 2011).

134. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶¶ 21, 23 (Mar. 8, 2011).

135. *Id.* ¶ 22.

136. *Id.*

137. *Id.* ¶¶ 21–22.

138. *Id.* ¶ 22.

139. *Id.* ¶ 21.

140. *Id.* ¶ 22.

141. See *supra* note 74 and accompanying text.

ian population as a primary purpose.”¹⁴² Finally, it is not clear whether in the specific case at hand the Chamber believed the criterion that “the group articulates, explicitly or implicitly, an intention to attack a civilian population” is fulfilled.¹⁴³ The Chamber simply concluded: “In light of the foregoing, the Chamber is of the opinion that the material submitted provides reasonable grounds to believe that the Mungiki qualify as an organization within the meaning and for the purposes of Article 7(2) (a) of the Statute.”¹⁴⁴

Concerning the policy requirement, the Chamber found reasonable grounds to believe that the “attack in Nakuru and Naivasha was carried out pursuant to a policy established to that effect by the Mungiki organization.”¹⁴⁵ It reached this conclusion on the basis of evidence that the Mungiki planned meetings; ferried attackers from elsewhere to the location of the attacks; distributed “large quantities of crude weapons” to the attackers; and circulated leaflets announcing the attacks among the targeted population.¹⁴⁶

Dissenting Judge Kaul noted that “there is evidence which tends to show that crimes were committed by the Mungiki gang together with pro-PNU youth in Nakuru and Naivasha.”¹⁴⁷ He disagrees, however, with the majority’s interpretation that the Mungiki crimes should be examined separately. Rather, Judge Kaul understood the prosecutor to have alleged the existence of a policy of *one* organization, which included the Mungiki, the pro-PNU youth, the Kenyan Police Forces, other PNU politicians, and wealthy PNU supporters.¹⁴⁸

Based on this understanding, Judge Kaul examined whether one such organization existed. He found no existence for several reasons. First, he noted that the Mungiki gang established “parallel structures in the poorer parts of the country, notably the slums of Nairobi, where there is no effective State authority,” and “has in the past shown a certain degree of flexibility in supporting various

142. Kenya Investigation Authorization, *supra* note 3, ¶ 93.

143. *Id.*

144. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 22 (Mar. 8, 2011).

145. *Id.* ¶ 23.

146. *Id.*

147. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ¶ 24 (Mar. 15, 2011).

148. *Id.* ¶ 26.

political parties as a means to advance its own interests.”¹⁴⁹ But, Judge Kaul argued, the Mungiki and the Kenyan police forces had been fighting each other prior to the election violence, thereby revealing an “antagonistic relationship.”¹⁵⁰ Judge Kaul therefore concluded that the Mungiki appear “to have benefited from certain *ad hoc* arrangements during the relevant period, despite a long record of violent clashes with the Kenyan police,”¹⁵¹ which rendered it impossible that “an ‘organisation’ could have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces.”¹⁵² Judge Kaul thus concluded as follows:

[A] series of meetings with facilitators and the Principal Perpetrators does not transform a limited partnership of convenience into an “organization” within the meaning of article 7(2)(a) of the Statute. Forging an opportunistic partnership of convenience for a specific purpose, namely the upcoming 2007 presidential elections, tends to demonstrate that the coalition between the Mungiki and the Kenyan Police Forces was created *ad hoc* in nature.¹⁵³

Having determined that an organization consisting mainly of the Mungiki gang and the Kenyan Police Forces did not exist,¹⁵⁴ Judge Kaul also rejected the assertion by the majority that the Mungiki on its own could possibly form an organization within the meaning of Article 7(2)(a).¹⁵⁵

2. Police Inaction in Nakuru and Naivasha

The Chamber dismissed the Prosecutor Ocampo’s allegation that police inaction in Nakuru and Naivasha constitutes crimes against humanity on the grounds that “the Prosecutor explicitly submitted that the attack occurred pursuant to an ‘organizational’ policy, without alleging the existence of a State policy by abstention.”¹⁵⁶ This must be understood to mean that the Chamber believed any allegations made in connection to state actors must

149. *Id.* ¶ 29.

150. *Id.*

151. *Id.*

152. *Id.* ¶ 31.

153. *Id.*

154. *Id.*

155. *Id.* ¶ 32 (expressing doubts “whether the Mungiki gang had the capacity and the means at its disposal to attack any civilian population on a large scale”).

156. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 24 (Mar. 8, 2011).

make reference to a state policy, rather than an organizational policy, to fulfill the requirements of Article 7(2)(a).¹⁵⁷

On this matter, Judge Kaul agreed with the majority of the judges that Article 7(2)(a) should be understood so that state actors, including the police, cannot be agents of an organizational policy.¹⁵⁸

In his application for leave to appeal the Chamber's decision not to include police inaction in the case, Prosecutor Ocampo made the argument that because there was no state policy to commit these crimes, but state actors together with non-state actors adopted and implemented a policy to attack the civilian population, it should rightfully be categorized as an organizational policy.¹⁵⁹ By holding that state agencies can only act according to a state policy, the prosecutor noted that the standards applied by the Chamber provide impunity for the criminal activities of state actors who act on a private basis, rather than according to a policy of the state as such.¹⁶⁰ Further the prosecutor elaborates on what entities should be understood as forming part of the organization, implying that it includes the police, the Mungiki and possibly other state and non-state actors.¹⁶¹ This would seem to undermine the construction made by the majority of judges that the Mungiki itself should be seen as an organization under Article 7(2)(a).¹⁶²

In a somewhat cryptic ruling that does not provide further explanation of the Chamber's prior conclusion that crimes committed by state agencies, including police inaction, cannot be examined if

157. See *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Prosecution's Application for Leave to Appeal the Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali, ¶ 6 (Mar. 14, 2011) (presenting the issue on appeal "whether Article 7(2)(a) permits the prosecution of persons within a network which includes State actors who act pursuant to an 'organizational policy,' but not a 'State policy'").

158. See *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ¶ 34 (Mar. 15, 2011).

159. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Prosecution's Application for Leave to Appeal the Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali, ¶¶ 4, 12 (Mar. 14, 2011).

160. *Id.*

161. See *id.* ¶ 10.

162. For a further critique of this construction, see *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ¶¶ 25–26 (Mar. 15, 2011).

they are alleged to form part of an organizational policy, Presiding Judge Ekaterina Trendafilova rejected the prosecutor's application for leave to appeal the decision that police inaction in Nakuru and Naivasha should not be considered as part of the case against the three suspects.¹⁶³

3. Police shootings in Kisumu and Kibera

Without explicitly confirming the existence of a widespread or systematic attack against a civilian population, the Chamber noted that there are "reasonable grounds to believe that in late December 2007 and in January 2008, Kenyan police used excessive force, in particular live ammunition, against the civilian residents of Kisumu, which resulted in over 60 deaths" as well as that the police "raided the slums of Kibera and that this resulted in deaths, injuries and rapes."¹⁶⁴

However, the Chamber disagreed with the prosecutor that these crimes fall under the Rome Statute, holding that the requirements in Article 7(2)(a) are not met. Similar to its findings concerning police inaction in Nakuru and Naivasha, the Chamber—without offering any explanation for this unconvincing interpretation—stated that these crimes could only have been examined had the prosecutor alleged them to take place pursuant to a state policy.¹⁶⁵ Again, Judge Kaul agrees with the majority that crimes allegedly committed by state actors cannot be considered if categorized by the prosecutor as taking place pursuant to an organizational policy.¹⁶⁶

In his request for leave to appeal the Chamber's decision not to include police shootings in Kisumu and Kibera in the case, Prosecutor Ocampo noted that these crimes did not take place pursuant

163. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'", ¶ 20 (Apr. 1, 2011).

164. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 30 (Mar. 8, 2011).

165. *Id.* ¶¶ 31, 33. However, having noted the prosecutor's failure to categorize these crimes as part of a state policy, the Chamber further held that the material presented by the prosecutor "does not provide reasonable grounds to believe that the events which took place in Kisumu and/or in Kibera can be attributed to Muthaura, Kenyatta and/or Ali under any mode of liability embodied in article 25(3) of the Statute." *See id.* ¶ 32.

166. *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶¶ 33–34 (Mar. 15, 2011).

to a state policy, but rather the policy of an organization, which was made up of state as well as non-state actors.¹⁶⁷

Examining the prosecutor's request for leave to appeal, Presiding Judge Ekaterina Trendafilova seems to have ignored that the Chamber had indeed stated that it would not examine the police shootings in Kisumu and Kibera since the prosecutor had categorized these crimes as taking place according to an organizational policy, rather than a state policy.¹⁶⁸ Instead Judge Trendafilova rejected the prosecutor's application for leave to appeal making reference only to a second finding of the March 8 decision, namely that there is insufficient evidence that the police shooting in Kibera and Kisumu can be attributed to the three suspects.¹⁶⁹

V. RE-EXAMING THE POLICY REQUIREMENT IN THE ROME STATUTE

There are several good reasons why the ICC should only deal with the gravest of all crimes, and not a broader spectrum of human rights abuses. One major reason has to do with problems related to selective prosecutions.¹⁷⁰ Unless significantly more resources are allocated, expanding the scope of the crimes that can be prosecuted before the ICC would lead to increased selectivity in the prosecution of international crimes. Though the ICC is already selective in prosecuting the crimes that undoubtedly fall

167. See *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Prosecution's Application for Leave to Appeal the Decision on the Prosecutor's Application for Summones to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali, ¶¶ 4, 10, 12 (Mar. 14, 2011).

168. See *Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/11, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summones to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'", ¶¶ 11–14 (Apr. 1, 2011).

169. *Id.* ¶¶ 11–12.

170. On the ICC and selectivity, see generally Margaret M. DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. (forthcoming Winter 2012) (manuscript at 8–10), available at <http://ssrn.com/abstract=1780446> (detailing criticisms of ICC's prosecution selections and how this undermines the ICC's legitimacy); William Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 549 (2010) (arguing that the prosecutor picks ICC cases on a political basis); Charles Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 462–63 (2009) (discussing the criticism leveled by several African states that the ICC is a political instrument of the West); Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF. (2009), <http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html> (noting that many African leaders are worried that international criminal justice becomes a political instrument).

under its jurisdiction,¹⁷¹ increased selectivity is problematic for a number of reasons.

First, the existence of the ICC is mainly justified on deterrence and retributive grounds.¹⁷² Some commentators argue that retribution is preconditioned on the punishment of every single offender.¹⁷³ Whether or not one would agree that retributive theory as such is incompatible with selective prosecution,¹⁷⁴ *increased* selectivity would further compromise the argument that the ICC is needed since the crimes under its jurisdiction cannot go unpunished.¹⁷⁵

Deterrence is more complicated.¹⁷⁶ On the one hand a broader conception of the crimes under the jurisdiction of the ICC holds the potential for deterring a wider spectrum of offenders. For example, to the extent Article 7(2)(a) is understood as allowing

171. See generally INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009-2012 (2010), available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (follow the "Reports and Statements" hyperlink; find and click on the "Prosecutorial Strategy 2009-2012" hyperlink). See also DeGuzman, *supra* note 170, at 10–12 (describing the mechanics of ICC selection decisions); Schabas, *supra* note 170, at 542–43 (acknowledging the limited resources forcing selective prosecution).

172. The Preamble to the Rome Statute affirms *inter alia* "that the most serious crimes of concern to the international community as a whole must not go unpunished," and notes that the state parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." Rome Statute, *supra* note 1, pmb1; see also DeGuzman, *supra* note 170, at 38 (noting that "[r]etribution, along with deterrence, is the most frequently invoked justifications for international criminal law punishment"). On the objectives of international justice, see generally MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW (2007).

173. See, e.g., Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 61–62 (2002).

174. See generally CARLOS NINO, RADICAL EVIL ON TRIAL 135–42 (1996) (discussing various elements normally considered key to retributive theory).

175. See DeGuzman, *supra* note 170, at 38–41 (discussing how selective prosecutions present a problem for retributive theory).

176. On the role that international tribunals can play in deterring large-scale violence, see generally DRUMBL, *supra* note 172, at 169–73 (arguing that international courts face a number of serious obstacles deterring potential war criminals and perpetrators of other international crimes); Aukerman, *supra* note 173, at 63–71 (expressing doubts as to how effective a deterrent criminal justice is); DeGuzman, *supra* note 170, at 42–45 (assuming that deterrence "provides a partial justification for the ICC's work," but emphasizing that "deterrence theory also fails to provide an adequate basis for making selection decisions at the Court"); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999) (arguing that international courts have a limited deterrent effect); Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747, 766–67 (2005) (arguing that capital punishment is not necessarily an effective deterrent); Jonathan I. Charney, *Editorial Comment: Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 462 (1999) (arguing that consistent prosecution of state leaders may have some deterrent effect).

that the various aspects of Kenya's post-election violence be prosecuted in The Hague, this could potentially deter political leaders in Kenya and elsewhere from orchestrating attacks on supporters of their political opponents.¹⁷⁷ Though recent political violence in Côte d'Ivoire,¹⁷⁸ Egypt,¹⁷⁹ Syria,¹⁸⁰ Libya,¹⁸¹ Nigeria,¹⁸² and elsewhere raises doubts as to how effective a deterrent the ICC is, expanding the understanding of crimes against humanity may at least in theory deter a *wider* range of actors.¹⁸³ On the other hand, due to the limited resources of the ICC, broadening the scope of the crimes under the jurisdiction of the ICC would mean that a smaller proportion of those who commit crimes punishable under the Rome Statute are prosecuted, something which is generally seen as an obstacle to deterrence.¹⁸⁴

Put simply, the justifications for international justice might face additional problems should the crimes under the Rome Statute be understood in more liberal terms.

Second, increased selectivity in the prosecution of crimes would probably also lead to greater criticism that the ICC is a politicized institution that serves only the interests of certain countries.¹⁸⁵ In

177. For a critical account of the ability of criminal justice to deter political leaders in other countries, see SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 103 (1991) (arguing that Argentinean President Raul Alfonsín's decision to prosecute members of the prior junta regime "stimulated some Uruguayan military to back away from their commitment to relinquish power").

178. See generally *Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive*, HUMAN RIGHTS WATCH (Apr. 9, 2011), <http://www.hrw.org/en/news/2011/04/09/c-te-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive> (detailing violence perpetrated by forces loyal to the president-elect against supporters of his rival).

179. See generally *Egypt Unrest: 846 Killed in Protests - Official Toll*, BBC NEWS (Apr. 19, 2011), <http://www.bbc.co.uk/news/world-middle-east-13134956>.

180. See generally *Syrian Army Attacks Protest City of Deraa*, BBC NEWS (Apr. 25, 2011), <http://www.bbc.co.uk/news/world-middle-east-13185185>.

181. See generally *Libya: Indiscriminate Attacks Kill Civilians*, HUMAN RIGHTS WATCH (Apr. 17, 2011), <http://www.hrw.org/en/news/2011/04/17/libya-indiscriminate-attacks-kill-civilians> (outlining casualties resulting from Libyan government forces attempting to retake rebel-held city).

182. See generally Joe Brock, *Nigerian Election Victory for Goodluck Jonathan Sparks Riots*, GUARDIAN (Apr. 18, 2011), <http://www.guardian.co.uk/world/2011/apr/18/nigeria-election-goodluck-jonathan-riots> (describing violence orchestrated by those refusing to accept election results).

183. On the question of what actors to focus on if wanting to achieve deterrence, see DeGuzman, *supra* note 170, at 42–45.

184. See DRUMBL, *supra* note 172, at 169–70.

185. Rwandan President Paul Kagame, for example, has expressed such criticism. See *Rwandan President Says ICC Targeting African Countries*, SUDAN TRIBUNE (July 31, 2008), <http://www.sudantribune.com/Rwandan-president-says-ICC,28103>. On the issue of whether the International Criminal Court is a politicized institution that serves the interests of certain countries, see generally Ali Khan, *International Criminal Court's Focus on Dar-*

other words, by expanding the number of cases that could potentially be investigated and prosecuted, the ICC would also become increasingly open to criticism such as “why us and not them?” Given that the Court already faces significant challenges in this regard—as illustrated by the current threat of African Union members to withdraw from the Rome Statute¹⁸⁶—this is a concern that should be taken seriously.

Further, there is a more principled concern relating to expanding our understanding of international crimes, including crimes against humanity. As noted by Judge Kaul, such an expansion may blur the line between crimes that due to their nature and scope constitute a threat to humanity, and serious crimes that do not constitute such a threat.¹⁸⁷ By using a broad criterion, such as a group’s ability to “infringe on basic human values,”¹⁸⁸ Judge Kaul is arguably right in arguing that the “demarcation line between crimes against humanity” and other crimes might eventually blur.¹⁸⁹

Endorsing an understanding of the requirements in Article (7)(2)(a) of the Rome Statute whereby essentially any plan to attack a civilian population in a widespread or systematic manner is subjected to ICC jurisdiction might, as Judge Kaul notes, “broaden the scope of possible ICC intervention almost indefinitely.”¹⁹⁰ This would inevitably result in increased selectivity, which would be problematic for the penal justifications underpinning the ICC. It might also further jeopardize the legitimacy and credibility of an international juridical institution, which is already being subjected to the criticism that it targets poor countries in the South,¹⁹¹ but neglects serious violations of international humanitarian law committed by Western powers, for example in Iraq.¹⁹² Finally, there is

fur Shows Anti-Muslim Bias, JURIST (July 11, 2008), <http://jurist.law.pitt.edu/hotline/2008/07/international-criminal-court-icc-joins.php>; Matthew Happold, *The International Criminal Court and the Lord’s Resistance Army*, 8 MELB. J. INT’L L. 159, 170–71 (addressing criticisms that the prosecutor is a tool of the Ugandan government); Schabas, *supra* note 170, at 548–50; Jalloh, *supra* note 170, at 462–63 (noting pervasive African criticism of the perceived one-sided selection of African cases); Flint & de Waal, *supra* note 170.

186. See Walter Menya, *Igad: Kenya Case May Trigger Walkouts*, DAILY NATION (Mar. 22, 2011), <http://www.nation.co.ke/News/politics/-/1064/1130700/-/7q5iev/-/index.html>.

187. See Kenya Investigation Authorization, *supra* note 3, ¶ 65 (dissenting opinion of Judge Kaul).

188. See *id.* ¶ 90 (majority opinion).

189. *Id.* ¶ 9 (dissenting opinion of Judge Kaul).

190. *Id.* ¶ 10.

191. See generally *supra* note 185.

192. On the decision of the ICC Prosecutor not to investigate alleged war crimes by British soldiers in Iraq, see Press Release, ICCwatch, Why Won’t the ICC Move Against

some merit in claiming that we must uphold high thresholds for international crimes, exactly in order not to confuse these serious threats to humanity with other crimes.

Where the threshold applied by Judge Kaul—that the group possesses state-like characteristics¹⁹³—certainly limits the application of Article 7 of the Rome Statute, it is less obvious that it leads to the *right* limitations.

Though Judge Kaul is right in arguing that the historical origin of crimes against humanity is closely linked to the attempts of prosecuting individuals who had organized and planned atrocities on behalf of the state,¹⁹⁴ it is not necessarily a reasonable argument that in today's world only the state or state-like organizations have the capability to plan, organize, and carry out large-scale atrocities targeting civilians. Nor is it a reasonable argument that state actors cannot act in their private capacities—as an organization, rather than as a state—to plan, organize, and implement such atrocities.

If any, the Kenyan case reveal how this is possible. The violence organized by political leaders in Kenya following the disputed 2007 elections took place in a context where the state—if understood as “a collectivity with a structure of authority and a capacity for agency”¹⁹⁵—partly ceased to exist. Instead, a complex situation emerged, where political leaders, who seemed to have lost trust in the state as a legitimate authority, mobilized the masses—generally by manipulating ethnicity—and/or utilized entities normally understood to be a prerogative of the state, such as the police, to achieve their own private political goals.¹⁹⁶ Such fragmented political situations where the state is undermined by individuals seeking power and the biased use of institutions such as the police, however, are not necessarily characterized by lack of organization, nor are they necessarily characterized by unsuccessful implementation of policies. The Kenyan case reveal how these situations, despite the absence of a coherent state policy, may be characterized by the adoption of plans, resource allocation, effective coordination, and

Tony Blair on War Crimes? (Feb. 4, 2010), <http://www.iccwatch.org/pdf/Press%20Release%2004Feb10.pdf>; DeGuzman, *supra* note 170, at 9, 20.

193. Kenya Investigation Authorization, *supra* note 3, ¶ 66 (dissenting opinion of Judge Kaul).

194. *Id.* ¶¶ 59–61.

195. Chandran Kukathas, *A Definition of the State*, Presentation at the Conference on Discrimination and Powers: The Nature of the State, University of Wisconsin (Mar. 29, 2008), available at <http://philosophy.wisc.edu/hunt/A%20Definition%20of%20the%20State.htm>.

196. See CIPEV REPORT, *supra* note 8, at 28–30; HUMAN RIGHTS WATCH, *supra* note 8, at 36; Obel Hansen, *supra* note 8, at 4–5.

other measures of mobilization, all aimed at violently targeting perceived supporters of political opponents.¹⁹⁷

Interestingly, Judge Kaul recognizes that many of the features pointed to above were indeed present in Kenya following the disputed 2007 elections. In the PNU case, he noted that “the Mungiki gang appears to have benefited from financial and other support from PNU politicians,”¹⁹⁸ that evidence indicated that “Uhuru Kenyatta was the principal contact between the Mungiki gang and the Principal Perpetrators,”¹⁹⁹ and that “the police did not intervene to stop crimes committed by Mungiki members.”²⁰⁰ In the ODM case Judge Kaul noted that the evidence presented by the prosecutor tended to demonstrate that “elders and other leaders of the Kalenjin community were present at meetings, directed the youth and participated in the attacks,”²⁰¹ that “William Ruto was part of the coordinating efforts prior to the outbreak of the violence” in various locations in the Rift Valley, that “William Ruto promised perpetrators monetary reward in exchange for the destruction of Kikuyu buildings and every Kikuyu person killed,” that “William Ruto made available guns, grenades and gas cylinders to selected perpetrators,”²⁰² that “in his daily talk show, Joshua Sang spread propaganda instigating violence against the non-Kalenjin population and calling for their eviction,”²⁰³ and that “messages were broadcasted on Kass FM for the erection of roadblocks.”²⁰⁴

Besides the lack of a coherent *state* policy, does this sound fundamentally different from, say, how the Rwandan genocide was planned and implemented?²⁰⁵

197. See Obel Hansen, *supra* note 8, at 5.

198. Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ¶ 29 (Mar. 15, 2011).

199. *Id.* ¶ 31.

200. *Id.* ¶ 29.

201. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ¶ 42 (Mar. 15, 2011).

202. *Id.* ¶ 37.

203. *Id.* ¶ 26.

204. *Id.* ¶ 27.

205. On the Rwandan genocide, see generally MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA (2001); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1995); ALISON DES FORGES, LEAVE NONE TO TELL THE STORY (2d ed. 1999); PHILIP GOUREVITCH, WE WISH TO INFORM YOU

The problem with Judge Kaul's approach to crimes against humanity is that it is based on a Eurocentric understanding of mass violence where only the state (or entities that resemble a state) is seen as capable of adopting and implementing policies to conduct such violence. This view neglects that in many countries, and in particular poor countries with ineffective or illegitimate state structures, individuals with access to resources may organize and implement atrocities on a scale often similar to the kind of state-sponsored violence that gave birth to the notion of crimes against humanity. Besides Kenya's post-election violence, atrocities in the Democratic Republic of Congo (DRC),²⁰⁶ Northern Uganda,²⁰⁷ Somalia,²⁰⁸ the Central African Republic,²⁰⁹ and other places are all testimonies of how in the *absence* of efficient and legitimate state structures, rebel groups, clan leaders, and other non-state actors—and sometimes state agencies acting on behalf of particular leaders, rather than according to a policy of the state—may organize extremely serious abuses against the civilian population.

True, the Rwandan genocide reached the scale that it did in part due to the insistence of the *state* that the Tutsi be eradicated.²¹⁰ But the fact that the Rwandan genocide—like the Nazi atroci-

THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998). Rather than being a consequence of the absence of a state policy, the fact that Kenya's post-election violence "only" claimed the lives of around one thousand should be seen as the positive outcome of the establishment of an internationally sponsored mediation process that quickly brought to an end the political dispute that had triggered the calls for violence by allowing a power-sharing deal. *See* The National Accord and Reconciliation Act, (2008) Cap. 4 (Kenya).

206. Though state actors (such as the Rwandan and Ugandan armies) have been heavily involved in the Democratic Republic of Congo (DRC) wars, and are responsible for many of the human rights violations committed, non-state actors, such as the Democratic Forces for the Liberation of Rwanda, have been able to target the civilian population in part due to the absence of effective state structures notably in the Kivu provinces. *See* INTERNATIONAL CRISIS GROUP, BACK TO THE BRINK IN THE CONGO 1 (2004).

207. The Lords Resistance Army, which has for decades terrorized the civilian population in northern Uganda, Central African Republic, DRC, and South Sudan, seems to operate in areas where there are few or no efficient state-structures. Admittedly, however, the Ugandan army has also been responsible for some of the large-scale atrocities that have taken place in Northern Uganda. *See generally* INTERNATIONAL CRISIS GROUP, NORTHERN UGANDA: UNDERSTANDING AND SOLVING THE CONFLICT 5 (2004).

208. *See generally* INTERNATIONAL CRISIS GROUP, SOMALIA: TO MOVE BEYOND THE FAILED STATE 13 (2008).

209. Though the state is also involved in attacks on the civilian population, militia groups responsible for atrocities benefit from the lack of efficient state structures. *See generally* INTERNATIONAL CRISIS GROUP, DANGEROUS LITTLE STONES: DIAMONDS IN THE CENTRAL AFRICAN REPUBLIC 23 (2010); INTERNATIONAL CRISIS GROUP, CENTRAL AFRICAN REPUBLIC ANATOMY OF A PHANTOM STATE 22 (2007).

210. *See* MAMDANI, *supra* note 205, at 5.

ties—was contingent on a radicalization process at the level of the state does not mean that large-scale violence directed against a civilian population cannot be planned and organized by entities other than the state or state-like organizations.

And so, Judge Kaul might be right in arguing that historically “[c]rimes of this nature and magnitude were made possible only by virtue of an existing State policy followed in a planned and concerted fashion by various segments of public power.”²¹¹ But he is not right in assuming that today this is the only fashion in which “this very grave, if not enormous risk and threat of mass crimes and mass victimization” can materialize.²¹²

Another argument sometimes posed as to why we should be careful to include non-state actors as potential perpetrators of crimes against humanity is that the crimes committed by these actors—unlike state crimes—will tend to be prosecuted in domestic jurisdictions. As William Schabas notes: “Most States are both willing and able to prosecute the terrorist groups, rebels, mafias, motorcycle gangs, and serial killers who operate within their own borders.”²¹³ Again, this reflects a Eurocentric understanding, according to which the state is naturally perceived to have the structures and resources necessary to investigate and prosecute serious crimes committed by non-state actors in its territory. As illustrated by the self-referrals made by the governments of Uganda, DRC, and Central African Republic²¹⁴ to the ICC, many poor countries do not have the means to deal judicially with large-scale violence committed by non-state actors that operate in an organized manner.²¹⁵ Others, such as Kenya, do not have the willingness.²¹⁶

In sum, neither the majority of the Chamber, nor dissenting Judge Kaul present convincing criteria for how to approach the

211. Kenya Investigation Authorization, *supra* note 3, ¶ 60 (dissenting opinion of Judge Kaul).

212. *Id.* ¶ 61.

213. Schabas, *supra* note 63, at 974.

214. On these state referrals, see Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?*, 21 CRIM. L.F. 103, 106 (2010).

215. Importantly, however, in some of these cases, self-referrals seem in part to have been motivated by the state wishing to get rid of rebel leaders, while at the same time avoiding the fact that the ICC investigates crimes committed by state agencies. See William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557, 564–65, 566–67 (2005).

216. See Obel Hansen, *supra* note 5.

requirement of a state or organizational policy in Article 7(2)(a) of the Rome Statute.

A more sound approach to Article 7(2)(a) would recognize—as do all three judges of Pre-Trial Chamber II—that the requirement of the attack taking place pursuant to or in furtherance of a state or organizational policy constitutes a separate contextual requirement to crimes against humanity. This functions as a safeguard that the ICC does not deal with sporadic instances of large-scale violence; it ensures that only actors who have *planned* violent attacks on the civilian population are subjected to the jurisdiction of the ICC. However, rather than operating with *one* consistent criterion for what should be understood by state or organizational policy, we must recognize that policies to attack the civilian population are adopted and implemented under quite different circumstances. The following key scenarios could lay the foundation for an interpretation of Article 7(2)(a).

1) In the first scenario, such as Nazi Germany, Al-Bashir's Sudan, Rwanda in the early 1990s, and Argentina during the reign of military juntas, state actors are involved in formulating and implementing policies to attack certain groups of civilians on a large-scale. These instances do not really pose a problem since they would either qualify as genocide or clearly meet the requirement of a “state policy,” thereby satisfying Article 7(2)(a). In these instances, a state policy should be seen as present whether or not the *entire* state apparatus is involved in planning and organizing the violence. It is sufficient that central actors acting on behalf of the state adopted a plan to attack the civilian population. However—as illustrated by the case of Rwanda²¹⁷—one must be aware that the adoption of a state policy to attack elements of the civilian population may take place in the context of a civil war, where the other side to that conflict also commits serious crimes. These crimes may amount to crimes against humanity if, in addition to fulfilling the other criteria in the Rome Statute, the rebel group satisfies the requirements mentioned below in scenario two.

2) In the second scenario, such as Uganda, the DRC, and the Central African Republic, rebel groups carry out large-scale attacks against the civilian population. To the extent a rebel group carries out such attacks in a coordinated manner, has some level of command structure, and the attacks form part of or promote central

217. See PRUNIER, *supra* note 205, at 261–62 (noting that RPF massacres may have cost the lives of as many as 100,000 civilians).

objectives of the group, the presumption must be that an organizational policy within the meaning of the Rome Statute is present. It is important to be aware that in these instances, the counter-insurgency efforts of the state may potentially qualify as crimes against humanity. Whether that is the case must be determined according to the criteria put forward in scenario one.

3) In the third scenario, such as Kenya and Côte d'Ivoire, political competition—frequently with ethnic or other group-based components—leads actors to attack the civilian population. In such instances, individuals who already hold power may utilize parts of the state security apparatus and other armed groups to attack supporters of their political opponents. This might either take place according to a state policy (in which case it should be analyzed under scenario one, or on a private basis, where elements of the state security apparatus or other armed entities are called upon by powerful individuals who wish to maintain political power. To the extent such individuals direct elements of the state security apparatus or other armed entities to attack civilians on a large-scale (typically the political opposition), the presumption must be that an organizational policy within the meaning of the Rome Statute is present. In these instances, crimes against humanity may also be committed by individuals who seek to challenge those in power. To the extent such individuals, whether brought together on an *ad hoc* basis or more permanently, make a coordinated effort to attack civilians on a large scale, the presumption must be that an organizational policy within the meaning of the Rome Statute is present. It should not be a determining factor whether the group is structured in a hierarchical way resembling a state, although there must be some level of command structure.

VI. CONCLUSIONS

The Rome Statute's requirement that crimes against humanity take place pursuant to or in furtherance of a state or organizational policy to commit an attack on a civilian population is at the very core of the two ICC cases relating to Kenya's post-election violence. Though the judges agree that non-state actors can in principle satisfy the policy requirement in Article 7(2)(a), the cases point to profound disagreement concerning what criteria should be applied for non-state actors as well as the question of whether state actors may adopt an organizational policy.

Given Judge Kaul's dissenting opinion and the fact that the majority of judges exclude some of the crimes committed in 2008

on the basis of their understanding of the policy requirement, the understanding endorsed of Article 7(2)(a) may ultimately determine the extent to which the planners and organizers of Kenya's electoral violence will be brought to justice. Should those politicians and state officials who called for violent attacks against supporters of their opponents end up walking free due to the ICC's construction of the policy requirement, this may have unfortunate consequences for a country where periods of intensified political competition have tended to be accompanied by highly organized violence.

Further, adopting a uniform standard with a high threshold for the existence of an organizational policy might complicate the task of holding accountable non-state actors for atrocities committed elsewhere as well as proving an obstacle to prosecuting leaders in other countries who organize widespread attacks on the civilian population by utilizing state security forces for private purposes.

The disagreements highlighted in this Article concerning the meaning of Article 7(2)(a) have to do with different understandings of which actors are capable of committing the most serious crimes, as well as different understandings of what role the ICC should play in the world order. Although this Article has argued that we need to maintain a clear distinction between international crimes and other crimes, it is necessary to understand that not only the state or state-like organizations are capable of adopting and implementing policies to attack the civilian population. We need to recognize that highly organized incidents of mass violence take place under very different circumstances, which in some cases are not preconditioned on the state or state-like entities endorsing policies to attack the civilian population. Rather than applying a uniform standard for interpreting Article 7(2)(a), we need therefore to approach the policy requirement in such a way that it allows prosecuting various actors responsible for planning and organizing large-scale violence.

