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Date: **9 October 2013**

APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer

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Introduction

1. The Amici Curiae ("the Amici") have been granted leave by the Appeals Chamber[1] to submit observations in the present proceeding, which is an appeal from a decision of Pre-Trial Chamber I. In that decision, a majority of the Chamber ("the Majority") decided to adjourn the confirmation hearing in the case concerning Mr. Laurent Gbagbo ("the Impugned Decision" or "Decision").[2]
2. Much of the controversy in this case arises from differing interpretations of the contextual elements of crimes against humanity, particularly Article 7(2)(a). These issues arise in the Impugned Decision and the certified question, and addressing them will assist with the proper determination of this appeal. By clarifying the relevant standard, the Appeals Chamber will provide valuable guidance in these and other proceedings.
3. First, the Impugned Decision and the certified question demonstrate a misunderstanding of the *scale* required for an 'attack' under Article 7(2)(a), as will be shown below. The Appeals Chamber should clarify that an 'attack' requires multiple acts, not multiple incidents; that 'multiple' should be given its natural interpretation in accordance with past authorities; and that 'multiple' should not be conflated with 'widespread'.
4. Second, the heart of the controversy among the parties and judges is not 'whether' sufficient evidence is required, but rather, their different understandable views about what constitutes 'sufficient evidence' for an attack. To answer the certified question in a manner that will assist the parties, it is desirable for the Appeals Chamber to give guidance on three issues arising from the Impugned Decision. (a) Direct evidence of formal adoption of a policy is not required; a policy need not be formalized and can be inferred from the manner in which the acts occur. (b) It is not required that particular perpetrators were motivated by the policy; the policy can be deduced from objective patterns relating to the attack as a whole. (c) A policy need not be proven in relation to each particular incident; a chamber should examine the totality of the evidence to see if the requirements of Article 7 are met.

[1] ICC-02/11-01/11-516.
[2] "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-432 ("Impugned Decision").

5. The most important of these points is that a policy may be implicit and can be inferred from circumstances. This point is crucial for the viability of the ICC as a forum for crimes against humanity prosecutions. Direct proof of formal adoption and organizational inner workings of a policy is required neither in law nor theory. Other national and international courts have readily inferred policy from the circumstances, namely the improbability of the random occurrence of the crimes. It is not desirable for the ICC to be anomalous in this respect, as it would have the regrettable effect of making the ICC one of the less effective forums for crimes against humanity cases.[3]
6. These issues are ripe for determination. The Defence has understandably argued that the Impugned Decision deals with the purported inadequacy of evidence and not with the contextual elements of crimes against humanity.[4] However, the adequacy of evidence can only be evaluated against a concept of the legal elements to be evidenced. Indeed, the Majority regards its Decision as having "set out its approach with regard to the examination of the contextual elements of crimes against humanity, in particular the existence of an 'attack' within the meaning of article 7(2)(a) of the Statute."[5] The dissent is of the same view.[6] Moreover, the Pre-Trial Chamber has affirmed its wish for guidance on these matters: "Authoritative and substantial guidance by the Appeals Chamber on the manner in which the contextual elements of crimes against humanity are to be assessed in this particular case will 'map a course of action along the right lines' and will assist the Chamber in its future article 61(7) decision".[7]

[3] L. Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107 *AJIL* 334.
[4] ICC-02/11-01/11-509 paras 5-6, 66.
[5] "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges", CC-02/11-01/11-464 ("Decision Granting Leave"), para 34.
[6] The dissenting judge expresses her disagreement with the Majority's 'understanding of the applicable law with regard to crimes against humanity': ICC-02/11-01/11-432-Anx para 4.
[7] Decision Granting Leave, para. 39. And see ICC-02/11-01/11-464-Anx (dissenting opinion of Judge Fernández de Gurmendi) at para 7 ("The uncertainty … can only be resolved at this stage by an authoritative and immediate resolution by the Appeals Chamber".)

I. An 'attack' under Article 7(2)(a) merely requires 'multiple' acts, which must not be conflated with 'widespread'

Issue

7. The Impugned Decision, and the certified question, are based on an incorrect understanding of the *scale* required for an 'attack' under Article 7(2)(a). In both the Impugned Decision[8] and the decision granting leave to appeal,[9] the Majority repeats the conclusion that '*none of the incidents, taken on their own, could establish the existence of such an "attack"*'. That view is also the central premise of the certified question ('multiple smaller incidents, *none of which alone rises to the level* of the minimum requirements of article 7' (emphasis added)).[10] Importantly, the Majority makes clear that its hesitation is not whether the stringent standard for '*widespread*' is met, but rather whether the more elementary threshold for an '*attack*' is met.[11]
8. To appreciate the legal standard entailed by the Majority's conclusion, one must consider the four incidents on which the Prosecution concentrated its case and brought direct evidence. One of the incidents allegedly involved 41 murders, 35 assaults and 15 rapes of non-combatants.[12] Another incident allegedly involved the killing of over 80 persons, including by burning people alive, and raping at least 17 women.[13] The premise that *none* of these incidents rose to the level required for an "attack" reflects a misapprehension of the scale required for Article 7(2)(a), which merely requires "multiple" acts.[14] In particular, the Majority appears to be injecting the requirement of "widespread" into the concept of "attack".
9. Any further evaluation of scale, beyond the simple requirement of "multiple" commission of acts, must be conducted under the "widespread or systematic" test. The Amici will not address the "widespread or systematic" test here, other

[8] Impugned decision, para 23.
[9] ICC-02/011-01/11-466 (hereafter, "Decision Granting Leave").
[10] See above, para. 3.
[11] See eg. the certified question: "whether those incidents, taken together, indicate that … an 'attack' took place" (emphasis added). See also Decision Granting Leave, para 34: "In the Adjournment Decision the Chamber sets out its approach with regard to … the existence of an "attack" within the meaning of article 7(2)(a) of the Statute."
[12] "Document amendé de notification des charges", ICC-02/11-01/11-184-AnxI-Red ("DCC") para 43.
[13] DCC para 56.
[14] The awkward phrase 'multiple commission of acts' was adopted from a proposal by the Women's Caucus to avoid any impression that there might have to be different *types* of acts: R. Lee, *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999) p. 95 (n 47).

than to contrast and clarify the separate standard of Article 7(2)(a). The application of "widespread or systematic" will be considered by the Pre-Trial Chamber when the confirmation hearing resumes. The Amici simply urge that the Appeals Chamber clarify the standard for an "attack", so that the pending evaluation is conducted under the correct legal standard.

Analysis

10. In order to avoid a contradiction between Article 7(1) and Article 7(2)(a), the term "multiple" must entail a threshold significantly lower than the term "widespread". [15] Otherwise, the disjunctive nature of the "widespread or systematic" test would be negated. It is a basic principle of contextual interpretation that contradictory construction is to be avoided if possible. In this instance, a coherent interpretation of the Statute is easily achieved, by interpreting the term "multiple" in accordance with its ordinary meaning and with previous authorities.
11. The most literal meaning of the term "multiple" is "more than one"; it also commonly connotes "several".[16] In case law it has been interpreted as meaning "more than a few".[17] The phrase "course of conduct" does not import any scale beyond this threshold. The phrase "course of conduct" was expressly drawn from the *Tadić* decision,[18] which introduced the phrase as a contrast to 'one particular act'.[19] A great number of Tribunal cases have defined 'attack' as a 'course of conduct involving the commission of acts of violence', without any further scale requirement, other than stating 'acts' in the plural.[20] In the same vein, the English

[15] The structure of Article 7 combines a low-threshold but conjunctive test (multiple, policy) with a high-threshold but disjunctive test (widespread, systematic). H. von Hebel and D. Robinson, "Crimes Within the Jurisdiction of the Court" in R. Lee, ed, *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999) 96.
[16] *Oxford English Dictionary*, 2d ed, sub verbo "multiple"; *Webster's Third New International Dictionary of the English Language Unabridged*, 1st ed, *sub verbo* "multiple"; *Random House Webster's Unabridged Dictionary,* 2nd ed, sub verbo, "multiple".
[17] See eg. *Bemba Gomba*, ICC-01/05-01/08-424, para 81: "The legal requisite of "multiple commission of acts" means that more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred".
[18] H. von Hebel and D. Robinson, "Crimes Within the Jurisdiction of the Court" in R. Lee, ed, *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999) 95-97.
[19] *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para 644.
[20] *Prosecutor v. Kunarac et al*, Case No IT-96-23-T& IT-96-23/1-T, 22 February 2001 para 415; *Prosecutor v. Krnojelac*, Case No IT-97-25-T, 15 March 2002 at para 54; *Vasiljević*, IT-98-320T, 29 November 2002 at para 29; *Naletilić and Martinović*, IT-98-34-T, 31 March 2003 at para 233; *Simić,* IT-95-9-T, 17 October 2003 at para 39; *Galić,* IT-98-29-T, 5 December 2003 at para 141; *Brđanin*, IT-99-36-T, 1 September 2004 at para 131; *Blagojević and Jokić,* IT-02-60-T, 17 January 2005 at para 543; *Limaj et al*, IT-03-66-T, 30 November 2005 at

Court of Appeal, in *SK (Zimbabwe) v Secretary of State for the Home Department*, applied Article 7(2)(a) and, citing *Tadić* with approval, held that the requirements 'exclude single or isolated acts…' and 'ensure that what is to be alleged will not be one particular act but, instead, a course of conduct.'[21] As was noted in a Pre-Trial Chamber decision in *Bemba Gombo*, 'besides the commission of the acts, no additional requirement for the existence of an "attack" should be proven'.[22]

12. A single incident can qualify as an 'attack directed against a civilian population'. Under Article 7(2)(a), a single incident can certainly include the multiple commission of prohibited acts. This also conforms to ordinary usage: one violent attack killing dozens of non-combatants would fall literally and archetypically within the understanding of an attack against a civilian population. Jurisprudence also confirms that a single incident can qualify as a "widespread" attack, thereby a fortiori satisfying the requirements for an attack.[23]

13. In conclusion, the Impugned Decision and the certified question reflect a misapprehension of the scale required for an 'attack', as may be seen in the premise that none of the alleged incidents reach the scale required for an 'attack'.[24] To correct an error that arises in the Decision, and which is a premise of the certified question, the Appeals Chamber should clarify the requisite legal standard. In particular, Article 7(2)(a) requires multiple acts, not multiple incidents, and the term 'multiple' should be interpreted in accordance with its natural meaning and with past jurisprudence, and must not be conflated with the term 'widespread'.

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para 182; *Martić*, IT-95-11-T, 12 June 2007 at para 49; *Mrkšić* IT-95-13/1-T, 27 September 2007 at para 436; *Milutinović* IT-05-87-T, 26 February 2009 at para 144; *Lukić*, IT-98-32/1-T, 20 July 2009 at 873; *Đorđević*, IT-05-87/1-T, 23 February 2011 at para 1589; *Perišić,* IT-04-81-T, 6 September 2011 at para 82. Several of these cases note that mistreatment other than violence is also included.

[21] *SK (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 807 (19 June 2012), available at http://www.bailii.org/ew/cases/EWCA/Civ/2012/807.html para 46. On the simple requirement of 'multiple' acts, see also another case applying Article 7(2)(a) in the refugee context: *Attorney General v Tamil* X [2010] NZSC 107; [2011] 1 NZLR 721 (27 August 2010).

[22] ICC-01/05-01/08-424, 15 June 2009, para. 75.

[23] See eg. *Blagojević and Jokić,* IT-02-60-T, 17 January 2005, para. 545: 'A crime may be widespread by the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'; see also *Yearbook of the International Law Commission 1996, Volume II, part 2*, Report of the Commission to the General Assembly on the work of its forty-eight session, p. 47. For an example of a case confirming that each one of single 'incidents' can constitute an 'attack' in crimes against humanity, see *Milutinović et al*, IT-05-87-T, 26 February 2009, paras. 1181, 1184, 1189, 1194 and 1201.

[24] The certified question states that none of the incidents "alone rises to the level of the minimum requirements of article 7". The latter part of the question makes clear that the level referred to is specifically the requirement for an "attack" ("whether those incidents, taken together, indicate that… an 'attack' took place".) See also Decision Granting Leave, para 34.

II. Evidence Required for the 'Policy Element'

14. The second issue on which the Amici have been granted leave to submit observations concerns the requisite proof of the 'policy' element of the attack. The Impugned Decision reflects expectations about the evidence required to satisfy the policy element that are at odds with past authority. Clarification is necessary to preserve the viability of the ICC as a forum for crimes against humanity prosecutions. The Amici therefore propose that the Appeals Chamber provide the requested guidance by clarifying three points. (A) Direct evidence of formal adoption of a policy is not required; a policy need not be formalized and can be inferred from the manner in which the acts occur. (B) It is not required that particular perpetrators were motivated by the policy; the policy can also be deduced from an examination of objective patterns. (C) Policy need not be proven on an incident-by-incident basis.
15. It is appropriate, valuable and necessary to clarify these issues in this proceeding. The Defence may quite reasonably argue that, given that the impugned decision was merely a decision to adjourn, and given that Majority has merely made 'requests' rather than asserting firm legal rules, the Appeals Chamber must wait for a decision to decline before it may clarify the legal and evidentiary standards. However, in the impugned decision, the Majority has stated its difficulties identifying the policy element, and stated its expectations for additional evidence, some of which appear to be a significant departure from international and national jurisprudence. Accordingly, it is timely to provide guidance, rather than waiting for these questions to be appealed again in this same case.
16. Furthermore, guidance on these questions is necessary to answer the certified question in a manner that will assist the parties and the Pre-Trial Chamber. The controversy among the parties and the judges is not '*whether*' sufficient evidence is needed, but rather it is their understandable but diverging views about *what constitutes* sufficient evidence.[25] The question cannot be answered with a 'yes' or a 'no' without some explanation of what is meant by sufficient evidence,

[25] If read literally, the question of 'whether sufficient evidence is needed' might seem somewhat hollow or rhetorical, which was clearly not the intention of the Prosecutor in seeking leave to appeal, nor of the PTC in granting leave. Both the majority and the dissenting judges indicated their desire for guidance from the Appeals Chamber on how to assess the contextual elements in this case. See Decision Granting Leave, para 39; and see also dissenting decision, ICC-02/11-01/11-464-Anx at para 7.

particularly with respect to the policy element, which is a recurring point of contention among the parties and the judges in the proceedings. Such clarification will provide guidance in the confirmation proceedings.

A. Direct evidence of adoption of a policy is not required; a policy need not be formalized and may be inferred from the manner in which the acts occur

The Issue

17. The Impugned Decision requests additional evidence as to, inter alia:

> *How, when and by whom* the alleged policy/plan to attack the "pro-Outtara civilian population" was adopted, *including specific information about meetings* at which this policy/plan was allegedly adopted, as well as how the existence and content of this policy/plan was *communicated or made known* to members of the "pro-Gbagbo forces" once it was adopted. (emphasis added)[26]

The Decision also requested additional evidence about the coordination, structure and operating methods of the "inner circle" of the pro-Gbagbo forces.[27]

18. To assess the legal significance of the Majority's approach, one must note that the Prosecutor's case included many of the forms of evidence typically used to establish a policy element. These include evidence intended to establish: the general circumstances such as repeated attacks by pro-Gbagbo forces against civilians supportive of his political opponent; failure of police to intervene or even participation by police; preparation for atrocities, such as policemen bringing condoms to the site where they raped female protestors; measures to identify supporters of the opposition; public statements of leaders of the inner circle; internal instructions; prior warnings that unarmed demonstrators would be killed; and witness statements that perpetrators referred to instructions or were targeting victims because of their opposition to Gbagbo.[28]

19. The Amici fully support the role of the Pre Trial Chamber as a 'gate-keeper' and its need to be satisfied on the available evidence. The Amici suggest, however, that the Majority's approach indicates an incorrectly onerous legal understanding

[26] Impugned Decision, para 44.
[27] Ibid. For the evidence that was provided on the pro-Gbagbo forces, the inner circle, its membership, its control, and its meetings, see DCC paras. 59-86.
[28] See eg. "Document amendé de notification des charges", ICC-02/11-01/11-184-AnxI-Red ("DCC") para 21, 37, 40, 44, 50, 81-84.

of the policy element. The Majority indicated its reservations about the inferences it was asked to draw.[29] While taking no position as to the inferences to be drawn in this particular case, the Amici wish to emphasize the general proposition that a policy will almost always be a matter of inference. In particular, the request for direct evidence of formal adoption of a policy is at odds with past jurisprudence, which consistently states that a policy need not be formally adopted and can be inferred from the manner in which the acts occur.

20. In defence of the Decision, it can be said that these were merely 'requests'. Nonetheless, by requesting such specific evidence, after declaring the proffered evidence to be inadequate, and not indicating any alternative way to satisfy it, the Majority appears to have in mind heightened legal and evidentiary requirements for the policy element.

21. More specifically, these requests – relating to specific meetings at which a policy was "adopted", dates of such meetings,[30] and transmission of the policy to the rank and file – all indicate a formalistic and bureaucratic conception of the policy element. That conception is somewhat understandable, given that one common sense of the word "policy" does indeed connote something official and formally adopted, perhaps by a Cabinet or board of directors. However, as will be explained below, this is not and has never been the meaning of the term of art "policy" in crimes against humanity authorities. Furthermore, such a conception would not reflect the diverse types of organizations that may orchestrate crimes, nor the diverse cultural contexts in which they may be found.

Analysis

22. It is instructive to recall the reason for inclusion of the policy element in the Statute. At the time of the Rome Conference, "widespread or systematic" was already emerging as the appropriate standard, but a significant number of states expressed concern that the test was over-inclusive, because ordinary unconnected crimes in a city or region could be 'widespread'. It was agreed that unconnected crimes would not constitute an 'attack'. To reflect this idea of connection, a

[29] Impugned Decision, para. 36.
[30] Impugned Decision, para 44.

Canadian compromise proposal, based explicitly on the *Tadić* decision, advanced Article 7(2)(a), adopting the concept of a policy element.[31] The *Tadić* decision employed the term "policy" to explain the idea that an attack is not composed of "isolated, random acts of individuals",[32]and "cannot be the work of isolated individuals alone".[33] The *Tadić* decision equated the policy element with the requirement recognized by the ILC in the 1996 draft Code of Crimes, that an attack does not consist of individuals acting on their own initiatives in pursuit of their "own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".[34] Thus, the purpose of the policy element in the Rome Statute, in the *Tadić* decision, and in the ILC draft Code, was simply to exclude 'ordinary' crime; crime occurring without any active or passive encouragement.

23. The purpose of the policy element is well-stated by the Supreme Court of Peru in the Fujimori case:

> the political factor [policy element] requires only that *the casual acts of individuals acting on their own, in isolation, and with no one coordinating them, be excluded*... Such common crimes, even when committed on a widespread scale, do not constitute crimes against humanity, unless they are at least connected in one way or another to a particular State or organizational authority: they must at least be tolerated by the latter." (emphasis added)[35]

24. This modest purpose is reinforced by three features of the policy element that have been consistently emphasized in the jurisprudence. First, it is not a bureaucratic concept: a policy need not be formalized, need not be stated expressly, and need not be defined precisely. Second, the policy element merely requires a sufficient link to a state or organization: a policy need not be adopted at the highest levels of a state or organization, but it does require that the crimes are not simply the product of a few isolated members acting on their own. Third, a policy may be inferred from the manner in which the acts occur. These three features are consistent with the purpose of the policy element, which is to exclude the 'ordinary' crimes of individuals on their own initiative without direction or

[31] D. Robinson, 'Defining Crimes Against Humanity at the Rome Conference', (1999) 93 AJIL 43.
[32] *Prosecutor v. Tadić*, IT-94-1-T, 7 May 1997, para 653.
[33] *Tadić*, ibid, para 655.
[34] *Tadić*, ibid para 655.
[35] *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases*, Case No. AV 19-2001, Sala Penal Especial de la Corte Suprema, 7 April 2009 (Peru) para 715 (citing Kai Ambos); translation available 25 Am. U. Int. L. Rev. (2010) 657.

encouragement. Thus, it can be satisfied by showing the improbability that the acts occurred randomly.[36]

25. Early ICTY decisions (prior to the eventual rejection of the policy element in *Kunarac*[37]) offer helpful guidance about the element and affirm these features. The seminal *Tadić* decision emphasized that the "policy need not be formalized and can be deduced from the way in which the acts occur."[38] Other cases affirm that the "policy need not be explicitly formulated"[39] and that it need not be conceived at the highest levels.[40] The *Blaškić* decision is particularly instructive. The decision affirmed that "[t]his plan, however, need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events…";[41] the decision then provided a list of factors from which one could deduce a policy, including *inter alia* repetition of the acts, the scale of the acts, and overall political background.[42]
26. Other jurisdictions have affirmed these features. Prior to the *Kunarac* decision, ICTR cases consistently held that a policy need not be adopted formally.[43] Likewise, the SCSL has had little difficulty inferring a policy from the manner in which acts occur. For example, in the *Fofana (CDF)* case, the SCSL held "[i]n view of these findings of fact, taken as a whole, the Appeals Chamber is of the view that the criminal conduct against those civilians was neither random nor isolated acts but was rather perpetrated pursuant to a common pattern of targeting the civilian population."[44]

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[36] R. Dixon and C. Hall, Article 7, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2d ed) at 236 ("policy need not be formalised, and can be deduced from the manner in which the acts occur…. In essence, the policy element only requires that the acts of individuals alone, which are isolated, uncoordinated, and haphazard, be excluded"); K. Kittichaisaree, *International Criminal Law* (OUP, 2002) at 97-98 (excludes individuals acting on own initiative without direction or encouragement from a sate or organization, not formal, not express, not highest level, infer from circumstances); R. Cryer et al, *An Introduction to International Criminal Law and Procedure (*2d ed, OUP, 2010) 237-240; K. Ambos & S. Wirth, "The Current Law of Crimes Against Humanity", 13 *Criminal Law Forum* (2002) 1 at 30-34.
[37] *Kunarac* IT-96-23/1-A 12 June 2002, para. 98.
[38] *Tadić*, IT-94-1-T, 7 May 1997, para 653.
[39] See eg. *Kupreškić*, IT-95-16-T, 14 January 2000 para 551; *Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para 181.
[40] *Blaškić,* IT-95-14-T, 3 March 2000 para 205.
[41] *Blaškić,* IT-95-14-T, 3 March 2000, para 204.
[42] *Ibid.*
[43] See eg., *Akayesu,* ICTR-96-4-T, 2 September 1998, para 508; *Prosecutor v Rutaganda,* ICTR-96-3-T, para. 68; *Prosecutor v. Musema*, ICTR-96-13-T, para 204. *Akayesu* and later cases note that a policy need not be adopted formally by a State, and all that is needed is some 'preconceived' plan or policy. It is now well accepted that a policy may also be that of a non-state organization.
[44] *Fofana and Kondewa* ("CDF case") SCSL-04-14-A, 28 May 2008, para 307.

27. The fact that the customary law status of the policy element is controversial, and that it has been rejected inter alia by the ICTY, ICTR, and SCSL,[45] are further reasons not to interpret the element in an expansive and onerous manner (thereby increasing the fragmentation of the law of crimes against humanity), and instead to give it a modest interpretation, as in the mentioned precedents.[46]

28. Other expert bodies have affirmed that the policy element is not a difficult threshold. For example, the 1994 Commission of Experts on crimes in former Yugoslavia, which recognized the policy element,[47] inferred the policy from the circumstances: "There is sufficient evidence to conclude that the practices of "ethnic cleansing" were not coincidental, sporadic or carried out by disorganized groups or bands of civilians who could not be controlled by the Bosnian-Serb leadership."[48] Most pertinently, the Commission noted:

> It should not be accepted at face value that the perpetrators are merely uncontrolled elements, especially not if these elements target almost exclusively groups also otherwise discriminated against and persecuted. Unwillingness to manage, prosecute and punish uncontrolled elements may be another indication that these elements are, in reality, but a useful tool for the implementation of a policy of crime against humanity.[49]

29. National courts have also recognized that a policy need not be formalized and can be inferred from circumstances. For example, a court in Bosnia and Herzegovina, applying a provision identical to Article 7(2)(a) in a crime against humanity case, held that:

> The following factual factors are considered with regard to *establishing the existence of a policy* to commit an attack: *concerted action* by members of an organization or State; *distinct but similar acts* by members of an organization or State; *preparatory acts* prior to the commencement of the attack; prepared acts or steps undertaken during or at the conclusion of the attack; the existence of political, economic or other strategic *objectives* of a State or organization furthered by the attack; and in the

[45] *Kunarac* IT-96-23/1-A 12 June 2002, para. 98; *Semanza*, ICTR-97-20-T, 15 May 2003 at para 329 (following *Kunarac*); *Fofana* ("CDF case") SCSL-04-14-A, 28 May 2008 (following *Kunarac*).
[46] Interpretation in accordance with the above-mentioned authorities therefore either conforms with customary international law (Article 21 ICC Statute) or, if a policy element is not required in customary international law, it at least minimizes the divergence from custom. R. Cryer et al, *An Introduction to International Criminal Law and Procedure* (2d ed, OUP, 2010) at 239-240; L. Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107 *AJIL* 334 at 372-6.
[47] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, 27 May 1994, para 84.
[48] Ibid para 142. See also para 313, inferring policy behind ethnic cleansing, rape and sexual assault, based on frequency of occurrence and the consistent failure to prevent or punish such crimes.
[49] Ibid at para 85.

> case of omissions, *knowledge of an attack or attacks and willful failure to act*. (emphasis added)[50]

30. Similarly, in *Sexual Minorities Uganda v. Scott Lively*,[51] a US court held, "one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty or wickedness".[52] While this was a civil law case, it relied on criminal law authorities, and on this point the court referred to the late Antonio Cassese.

31. An Argentine court in the famous *Junta* trial demonstrates admirably how policy is inferred from the improbability of coincidence:

> The operative system put in practice … was substantially identical in the whole territory of the Nation and prolonged over time. It having been proved that the acts were committed by members of the armed and security forces, vertically and disciplinarily organized, *the hypothesis that this could have occurred without express superior orders is discarded*. (emphasis added)[53]

Similarly, a more recent case against Jorge Rafael Videla held:

> It having been proved that the events were directly committed by members of the army, the State Intelligence Secretariat, the Buenos Aires Provincial Police… organised vertically and disciplinarily, it does not appear probable – in this stage – that they could have been committed without orders from hierarchical superiors.[54]

The same approach of inferring policy is also taken in the recent Guatemalan case against General Rios Montt.[55]

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[50] *Prosecutor v. Mitar Rašević and Savo Todović,* Court of Bosnia and Herzegovina, 28 February 2008, Case No. X-KR/06/275, available at http://www.legal-tools.org/en/doc/6a28b5/

[51] 2013 U.S. Dist. LEXIS 114754.

[52] See also *Doe v. Alvaro Rafael Saravia*, 348 F. Supp. 2d 1112; 2004 U.S. Dist. LEXIS 27531, para 260 (same quote).

[53] *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires (C.Fed), 9/12/1985, "Causa No. 13/84 (Juicio a las Juntas Militares)," Sentencia* 9 December 1985, Second Part, paragraph 3(c) available at http://www.derechos.org/nizkor/arg/causa13/cap20.html.

[54] Causa N° 1.285/85, "Videla, Jorge Rafael y otros s/ presunta infracción a los arts. 146, 293 y 139, inc. 2do. del Código Penal", Juzgado Federal de San Isidro, 13 July 1998 ;

[55] "[T]he army carried out these massacres using the same pattern of conduct, which is verified by the actions carried out in each of the communities. This circumstance is very important because it is evidence of prior planning and the implementation of that planning. Why do we say this? It is important because, as has been shown, the violent acts against the Ixil [people] was not a spontaneous action but the concretization of previously prepared plans which formed part of a state policy towards the elimination of that group." *Tribunal de Alto Riesgo A, Sentencia* C-01076-2011-00015 (Rios Montt, Rodriguez Sanchez) Of. 2o, of 2 May 2011, Folio 697 available at http://paraqueseconozca.blogspot.com/; judgment annulled pending appeal against the rejection of a defence motion to recuse two trial judges: Corte de Constitucionalidad, 20 May 2013, decision available at http://www.right2info.org/resources/publications/constitutional-court-judgment-5.20.2013

32. Other ICC chambers have correctly noted this jurisprudential tradition. Pre-Trial Chamber I held in the *Bemba* confirmation decision that 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."[56] Pre-Trial Chamber II made the identical observation in the *Katanga* confirmation decision.[57] And Pre-Trial Chamber III held in the Gbagbo arrest warrant decision that a policy "need not be explicitly defined or formalised."[58]
33. Furthermore, the draft Elements of Crimes at one point included a proviso that a policy may be inferred from the manner in which the acts occur, but this was removed on the grounds that it was unnecessary.[59] The provision was based on a proposal by Canada and Germany, which stated: "The existence of a policy may be inferred on the basis of the available evidence as to the facts and circumstances. It is not necessary to prove that a policy has been formally adopted."[60] The proposition that a policy need not be formally adopted "was considered by the majority to be sufficiently well-established that it did not need to be repeated."[61]
34. In addition to departing from authority, to require direct proof of adoption of a policy is also conceptually and practically undesirable. The orderly, clinical vision of a formal policy being 'adopted' at specific meetings and then transmitted to underlings will often not correspond to how crimes against humanity are unleashed. When members of an organization start to direct or encourage crimes against a civilian population, they often do so in an organic, implicit and evolving manner, and sometimes deliberately avoid creating a record. Furthermore, the modern reality of crimes against humanity, which may involves different forms of human organization in different cultural contexts,

[56] *Prosecutor v Bemba*, Pre-Trial Ch II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ICC-01/05-01/08-424, 15 June 2009, para 81.
[57] *Prosecutor v Katanga*, Pre-Trial Ch I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para 396: "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."
[58] *Prosecutor v Gbagbo*, Pre-Trial Ch III, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ICC-02/11-01/11-9-Red, 30 Nov 2011 (Public redacted version), para 37.
[59] Roy S. Lee et al, eds, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) at 77.
[60] UN Doc. PCNICC/1999/WGEC/DP.36, 23 November 1999.
[61] Roy S. Lee et al, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) at 77.

cannot assume one organizational model. The law must be supple enough to apply, within the bounds of established principle, to the diverse entities that may be involved in such crimes.[62] The features of the policy element in prior jurisprudence provide that flexibility.

35. Finally, contextual interpretation of Article 7 also dictates a modest interpretation of the policy element. In order to avoid a contradiction between Article 7(1) and Article 7(2)(a), 'policy' must entail a threshold less demanding than 'systematic' (just as 'multiple' must be less demanding than 'widespread'). Otherwise, the disjunctive nature of the widespread or systematic test would be negated. As Kai Ambos, Steffen Wirth and others have noted, the reconciliation of Article 7(2)(a) and 7(1) is achieved by interpreting it in accordance with the above-noted authorities (a policy may be 'implicit' and can be inferred from improbability of random occurrence).[63] Any further proof of organizational efforts may be pertinent to the 'systematic' test (the precise definition of which is not at issue here), but is not required for 'policy'.

36. In conclusion, the Appeals Chamber should affirm the well-established features that a policy may be implicit and may be inferred.[64] It is important that ICC jurisprudence take cognizance of these features, which will enhance conformity with the national and international authorities, provide a coherent interpretation of Article 7(1) and 7(2)(a), and accord with drafting history. Failure to do so will hamper the Court's appropriate jurisdiction over crimes against humanity.[65] International and national courts have had little difficulty inferring policy from the circumstances surrounding crimes;[66] the ICC should not be the anomaly.

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[62] For similar concerns see Thomas Obel Hansen, "The Policy Requirement in Crimes Against Humanity: Lessons From and For the Case of Kenya" 43 Geo, Wash. Int. L. Rev. (2011) 1 esp at 37; Charles Jalloh, "What Makes A Crime Against Humanity A Crime Against Humanity", 28 Am. U. Int. L. Rev. (2013) 382.

[63] K. Ambos & S. Wirth,"The Current Law of Crimes Against Humanity", 13 *Criminal Law Forum* (2002) 1 at 28 (policy may be 'implicit') and 31-34 (distinguishing from 'systematic'); M. DeGuzman, "The Road From Rome: The Developing Law of Crimes Against Humanity", 22 Human Rights Quarterly (2000) 335 at 372-4; D. Donat-Cattin, "A General Definition of Crimes Against Humanity Under International Law: The Contribution of the Rome Statute", 8 *Revue de Droit Pénal et des Droits de l'Homme* (1999) 83; Wiebke Rückert and Georg Witschel, "Genocide and Crimes Against Humanity in the Elements of Crimes" in Fischer, Kreß and Lüder, eds, *International and National Prosecution of Crimes Under International Law* (2000) at 71.

[64] Namely, a policy need not be formalized, expressly stated, defined clearly, nor adopted at the highest levels, and may be inferred from the manner in which the acts occur, in particular the improbability of random occurrence without some support, direction or encouragement from a state or organization.

[65] Leila Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107 *AJIL* 334 esp at 335, 359, 365, 372-6.

[66] For some further illustrations of inference of policy from fact patterns, see *Blaškić* Trial Judgment, para. 467-8 ; *Fofana and Kondewa* ("CDF case") SCSL-04-14-A, 28 May 2008, para 307; *Sudrajat,* Judgment, No. 11/PID.B/HAM.AD HOC/2002/PN.JKT.PST. (HRCI, Dec. 27, 2002)(Indonesia); *B.v. Refugee Appeals*

Most importantly, rather than requiring proof of formal adoption, Chambers must assess the available evidence to compare the plausibility of a hypothesis of coincidence against a hypothesis of active or passive[67] encouragement from a state or organization.

B. Policy is inferred in relation to the attack, and need not be proven in relation to specific perpetrators

Issue

37. The Impugned Decision requests evidence concerning "whether the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy" in relation to each incident.[68] This is a subtle but significant shift from Article 7(2)(a), which links the policy to the *attack*, not to particular *perpetrators.* This change to a more specific object of application (perpetrators) implies – perhaps inadvertently – that perpetrators must be specifically acting to carry out the policy, and thus that some special intent or motive may be required.

Analysis

38. The physical perpetrators of a crime against humanity need not be obedient soldiers executing instructions. Perpetrators of such crimes may act for a range of personal motives, including personal advancement, sadism, vengeance, gratification, or peer conformity. Orchestrators may encourage crimes in subtle ways, manipulating emotions and information and thus concealing the policy from the physical perpetrators. A wave of crimes may be entirely driven by personal motives and passions and yet be passively and deliberately encouraged by state actors failing to intervene.[69] Proof of the motives or *mens rea* of perpetrators at large has never been required for crimes against humanity. Even with respect to the accused, for whom *mens rea* is required, there is no requirement of motive, or special intent, or sharing or approving of the context,

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Tribunal & Anor [2011] IEHC 198 (05 May 2011) (Ireland) paras. 29-34; *Attorney General v Tamil X* [2010] NZSC 107; [2011] 1 NZLR 721 (27 August 2010)(New Zealand) para. 49; 6. *SRYYY v. Minister for Immigration and Multicultural Affairs* [2006] AATA 320 (5 April 2006)(Australia) para 100-107; and cases cited above.

[67] ICC Elements of Crimes, footnote 6.

[68] Impugned decision para 44; see also ibid para 36.

[69] ICC Elements of Crimes, footnote 6.

and even the requisite knowledge of context is attenuated (no need for knowledge of details, awareness of risk suffices).[70]

39. Accordingly, the Appeals Chamber should clarify that evidence that specific perpetrators were acting pursuant to or in furtherance of a policy (eg. chanting slogans, making remarks) may of course be *valuable* evidence, but it is not required. The policy underlying an attack can be inferred from other circumstances of the attack, as noted above.

C. Policy need not be proven on an incident-by-incident basis

Issue

40. The Impugned Decision requests evidence of policy "for each of the incidents allegedly constituting the attack".[71] An incident-by-incident approach also appears to be suggested in the certified question, which asks whether '*each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration* to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an 'attack' took place' (emphasis added).

Analysis

41. It would be valuable for the Appeals Chamber to clarify that policy need not be proven in relation to each incident, but rather may be assessed in relation to the attack as a whole. Often it is only by looking at repeated patterns of incidents that one can infer the policy element. If a Chamber were to require proof of policy in relation to each incident before the incident could be considered, then it could well dismiss all of the incidents, and fail to discern the policy implied by the

[70] *Limaj,* IT-03-66-T, 30 November 2005, para 190; *Tadic,* IT-94-1-A, 15 July 1999, paras 270-272; Kunarac, IT-96-23/1-A, 12 June 2002 para 102-3; *Blaškić,* IT-95-14-A, 29 July 2004 para 124; *Kordić and Čerkez,* IT-95-14/2-A, 17 December 2004, para. 99 (need not share purpose or goals); *Krnojelac,* IT-97-25-A 17 September 2003, para. 102 (personal motives irrelevant; for example, could be economic gain or political advantage); *Simić, Tadić and Zarić*: IT-95-9-T, 17 October 2003 para. 45 ("The accused need not "share the motive, intent, or purpose of those involved in the attack"); *Kupreškić,* IT-95-16-T, 14 January 2000 para 558 (personal motives irrelevant); *Ndindababizi* ICTR-2001-71-I, 15 July 2004 para 478 (don't need discriminatory intent); *Fofana and Kondewa* (CDF case) SCSL-04-14-T, 2 August 2007 para 121 (not purpose, goals, motives); *Brima, Kamara and Kanu* (AFRC case) SCSL-2004-16-A 22 February 2008 para 221-2 (motives irrelevant). On attenuated knowledge in ICC law specifically see ICC Elements of Crimes, Article 7, Introduction, para 2; K. Ambos & S. Wirth, "The Current Law of Crimes Against Humanity", 13 *Criminal Law Forum* (2002) at 39-41.

[71] Impugned Decision, para 44(4). See also ibid para 36.

totality. The correct legal approach is to assess all of the evidence in its totality to see whether the elements of Article 7(2)(a) are satisfied.[72]

42. It may be mentioned parenthetically that an incident-specific approach would also be problematic in relation to broader contextual features of an attack, such as its 'widespread' character. One can be convinced of a 'forest' without evidence of the nature and location of particular 'trees'. As the Indonesian ad hoc Tribunal for East Timor has noted, one can be satisfied of the widespread scale of crimes without details of the crimes.[73] The Impugned Decision rightly recognizes a difference between the crimes underlying the suspect's individual liability and the crimes relating only to the context, and that the latter may be less specific;[74] however this is partially undermined by the Decision's requirement of direct evidence even for the latter.[75] Because direct evidence of hundreds or thousands of crimes is rarely feasible or desirable, international and national courts routinely refer to UN reports, press articles, and NGO reports,[76] as well as expert witnesses, as necessary and appropriate for broader context elements. Thus, some forms of evidence may be valuable in relation to broader contextual patterns even if they are not relied upon for specific facts or particular incidents.

[72] Dissenting Opinion of Judge Silvia Fernández de Gurmendi, ICC-02/11-01/11-432-Anx para 45, 48. See also Dissenting Opinion of Judge Sanji Mmasenono Monageng, Decision on the confirmation of charges (*Mbarushimana*), ICC-01/04-01/10-465-Red para 3.

[73] *Soedjarwo,* Judgment, No. 08/Pid.HAM/Ad.Hoc/2002/PN.JKT.PST, 27 December 2002, noting that 'widespread' can be proven without specific details such as identities, number and causes of deaths: "[according] to the practices of the international judiciary (the Nuremberg trial and [ICTR]) as would also be implemented in this case, it was decided that (the above details) need not be elaborated, it would be sufficient that the legal facts from the legal evidences revealed that the assault did result in a number of civilian casualties."

[74] Impugned Decision, para 22.

[75] Ibid para 28-35. The Majority rightly notes the difficulties of relying on such reports for specific contested facts related to the accused. However, for broad contextual background, they have often been regarded as probative.

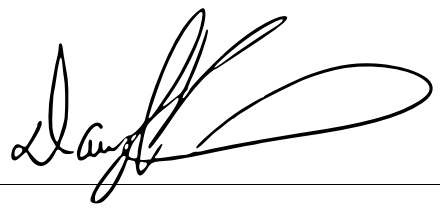
[76] "In the nature of such a requirement [widespread or systematic attack directed against a civilian population], background country evidence will play a critical part in deciding whether it is met.": *MT v. Secretary of State for the Home Department* [2012] UKUT 15 (IAC) (02 February 2012), para 112 (relying on human rights reports, state department reports, and press articles in relation to Zimbabwe). Examples of international decisions are discussed in the OPCV brief, ICC-02/11-01/11-513 para 32-40. For a recent prominent criminal law case relying on third party reports for broader contextual elements, see *Tribunal de Alto Riesgo A, Sentencia* C-01076-2011-00015 (Rios Montt, Rodriguez Sanchez) Of. 2o, of 2 May 2011, Folios 662-665 paras 685-686 and olio 666-7 para 665 and 687-689.

Conclusion

43. Much of the controversy in this case arises from differing interpretations of Article 7(2)(a). Indeed, the adequacy of evidence can only be assessed in relation to a legal element (what must be proved). The central premise of the certified question, that none of the incidents are sufficient to meet the level for an attack, requires a clarification of the standard for the term "multiple". The controversy over "sufficient evidence", hinges on different interpretations of what is required to prove the policy element. Clarifications by the Appeals Chamber will be valuable not only for this proceeding, but for the jurisprudence of the Court in general. This case provides an opportune moment to clarify the interplay of Article 7(2)(a) and Article 7(1). The Amici have sought to show that 'attack' is a relatively modest threshold, after which one must address the 'widespread or systematic' test.

44. In particular, the Appeals Chamber should clarify that:

- An 'attack' under Article 7(2)(a) requires multiple commission of acts; 'multiple' should be given its natural interpretation in accordance with past authorities, and not be conflated with 'widespread'.
- Evidence of formal adoption of a policy is not required; a policy need not be formalized and can be inferred from the manner in which the acts occur.
- The policy element need not be proven in relation to particular perpetrators nor in relation to particular incidents; a chamber should look at the totality of the evidence to see if Article 7(2)(a) is satisfied.



Darryl Robinson

Dated this 9th day of October 2013

At Kingston, Canada