

# **Annex D.11**

**Triffterer / Ambos**

# **The Rome Statute of the International Criminal Court**

**A Commentary**

**Third Edition**

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implicit policy with regard to the commission, or at least toleration<sup>640</sup>, of crimes against humanity in this territory. As to the quality of the (non-state) entity or organisation, it also seems to be clear that it must be in a position akin, or at least similar, to a state; that is, it must possess similar capacities of organisation and force<sup>641</sup>.

In the ICC's view the concept of 'organisation' is predicated on the respective group's 'capability to perform acts which infringe on basic human values' and not 'the formal nature of a group and the level of its organisation'<sup>642</sup>. Thus, it is to be determined on a case-by-case basis whether a respective group amounts to an 'organisation' within the meaning of article 7(2)(a)<sup>643</sup>. This rather broad approach is, however, not beyond controversy. This became clear in the *Kenya* proceeding where Pre-Trial Chamber II was split on the question with Judge Kaul issuing a dissenting opinion<sup>644</sup>, arguing that the respective entity must 'partake[s]

<sup>640</sup> *Prosecutor v. Kupreskić et al.*, No. IT-95-16-T, Judgment, Trial Chamber, 14 Jan. 2000 para. 552; cf. also Werle and Jessberger, *Principles of International Criminal Law* (2014) 345-6; Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 465.

<sup>641</sup> See Bassiouni, *The Legislative History of the International Criminal Court* (2005) 245 (non-state actors 'partake of the characteristics of state actors in that they exercise some dominion or control over territory and people, and carry out "policy" which has similar characteristics of those of "state action or policy"'); Schabas, in: Sadat and Scharf (eds.), *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni* (2008) 347, 359 ('state-like bodies').

<sup>642</sup> See *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, para. 90. In paras. 84 and 85 respectively the PTC refers to *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-717, Confirmation Decision, Pre-Trial Chamber, 30 September 2008, <<http://www.legal-tools.org/doc/67a9ec/>>, para. 396 and *Prosecutor v. Bemba*, No. ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, <<http://www.legal-tools.org/doc/07965c/>> accessed 30 January 2015, para. 81, both stating that the policy could be made by 'any organisation with the capability to commit a widespread or systematic attack against a civilian population'; cf. also *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 217; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, paras. 185; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1119; cf. also *Blé Goudé*, ICC-02/11-02/11-186, Confirmation Decision, 11 Dec. 2014, paras. 128, 186 where the PTC holds that the policy was both organisational (128: 'preparatory activities...planned and coordinated...through the forces under their control ... which included elements of the FDS, militia, mercenaries and pro-Gbagbo youth... constituted an organisation', and 186: 'The pro-Gbagbo forces constituted an organised and hierarchical apparatus of power.') and of a State (128: 'such entity, which comprised part of the State apparatus, may on this basis be also qualified as a State policy.').; cf. also Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 462 *et seq.*; for a thorough analysis of the views held in the *Kenya* Authorisation Decision regarding this element, see Hansen (2011) 43 *George Washington ILRev.* 1, 7 *et seq.*; Chaitidou, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 47, 74 *et seq.*

<sup>643</sup> See *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, para. 93. The Chamber lists some factors with a view to make this determination, namely: '(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the aforementioned criteria'. *In casu* the majority found that the 'organisational policy' element was met by 'various groups including local leaders, businessmen and politicians' (*ibid.*, para. 117); cf. also *Situation in Côte d'Ivoire*, ICC-02/11-14-Corr, Authorisation Decision, 15 November 2011, para. 46; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, paras. 185; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1118 (citing the *Situation in Kenya* (Authorisation Decision)).

<sup>644</sup> *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, Dissenting Opinion of Judge Kaul, paras. 21-70 (esp. 43-70), conducting a lengthy analysis of the historic origins of crimes against humanity and the proper interpretation of the term 'organisation'; cf. thereon also, Jalloh (2011) 105 *AJIL* 540, 543 *et seq.*