

On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision

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Abstract

At the beginning of the renaissance of international criminal law in the 1990s, the law on crimes against humanity was in a fragile state. The International Criminal Tribunal for the former Yugoslavia (ICTY) decisively contributed to the consolidation of customary international law on crimes against humanity and paved the way for its first comprehensive codification in Article 7 of the Statute of the International Criminal Court (ICC). At the same time, the ICTY in its early decisions already showed a certain inclination to broaden the scope of the application of the crime by downgrading its contextual requirement. More recently, this tendency culminated in the complete abandonment of the policy requirement. While this 'progressive' facet of the ICTY's jurisprudence largely took the form of *obiter dicta*, the *Situation in the Republic of Kenya* has confronted the ICC with the need to 'get serious' about the present state of the law. This has led to a controversy in Pre-Trial Chamber II about the concept of organization in Article 7(2)(a) of the Statute. While the majority essentially follows the path of the more recent case law of the ICTY, the ICTR, and the Special Tribunal for Sierra Leone and supports a liberal interpretation, Judge Kaul prefers to confine the term to state-like organizations and generally calls for caution against too hasty an expansion of the realm of international criminal law *stricto sensu*. This comment agrees with the main thrust of the Dissenting Opinion and hopes that it will provoke a thorough debate.

Keywords

crimes against humanity; international criminal law; international human rights law; interpretation of the ICC Statute; non-state actors in international law

The concept of organization enshrined in Article 7(2)(a) of the Statute of the International Criminal Court (Statute) plays a crucial role in delimiting the outer reaches of crimes against humanity and, through this, of the scope of international criminal law *stricto sensu*¹ in general.² The *Situation in the Republic of Kenya* after the national

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1 International criminal law *stricto sensu* establishes individual criminal responsibility directly under international law; see C. Kress, 'International Criminal Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (forthcoming), para. 10; the electronic version can be accessed at www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e1423.pdf?stylesheet=EPIL-display-full.xml.

2 The point was made before the issuance of the *Kenya* decision in C. Kress, 'Völkerstrafrecht der dritten Generation gegen transnationale Gewaltakte Privater?', in G. Hankel (ed.), *Die Macht und das Recht. Beiträge zum Völkerrecht und zum Völkerstrafrecht am Beginn des 21. Jahrhunderts* (2008), 368.

elections held on 27 December 2007 makes this point plain. On 30 December 2007, the close and contested presidential election in Kenya resulted in a declaration by the Electoral Commission of Kenya that incumbent President Mwai Kibaki of the Party of National Unity (PNU) had been re-elected over the main opposition candidate Raila Odinga of the Orange Democratic Movement (ODM). According to the information available to the Prosecutor of the International Criminal Court (ICC), this triggered the eruption of violence in six out of eight Kenyan regions, which resulted in more than a thousand reported killings, almost a thousand reported rapes, and between three and four thousand reported acts of serious injury.³ Widespread looting and wanton destruction formed part of an environment which led about 350,000 persons to flee their homes.⁴ Most of the violence occurred in two phases between 29 December 2007 and 28 January 2008 and both the initial wave of attacks and the retaliatory attacks were conducted by gangs of young men with varied forms of support from leaders of, and businessmen associated with, the main political parties.⁵ Whatever the precise nature of these groups, they were quite distinct from state-like entities with some form of territorial control or at least with the minimal organizational structure of a party to a non-international conflict.

Yet the Prosecutor formed the view that there was a reasonable basis for believing that crimes against humanity had been committed and, therefore, in accordance with Article 15(3) of the Statute, he requested Pre-Trial Chamber II (PTC II) to authorize the commencement of an investigation 'into the situation in the Republic of Kenya in relation to the post-election violence of 2007–2008'.⁶ In *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Decision), PTC II authorized the commencement of an investigation in accordance with Article 15(4) of the Statute. In the opinion of the majority of judges of PTC II, the fact that the collective entities behind the post-election violence were not of a state-like nature does not pose an obstacle to considering them as organizations within the meaning of Article 7(2)(a) of the Statute.⁷ Judge Kaul disagreed and for this reason dissented from the majority's decision (Dissenting Opinion).⁸ Both the Decision and the Dissenting Opinion raise fundamental questions of substance and method.

I. THE DECISION

The Decision follows a tendency in the more recent international case law to downplay the significance of the contextual requirement of crimes against humanity.⁹

3 Office of the Prosecutor, Request for Authorisation of an Investigation Pursuant to Article 15, ICC-01/09, 26 November 2009, para. 56.

4 *Ibid.*, paras. 67, 68.

5 *Ibid.*, paras. 72, 73, 74, 75, 80.

6 *Ibid.*, Introduction.

7 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 115–128 (in particular 117).

8 *Ibid.*, Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010.

9 This tendency is most clearly discernible from the ICTY's and the ICTR's abandonment of any policy requirement in their more recent jurisprudence, which is usefully summarized in the Dissenting Opinion, *supra* note 8, para 31 (n. 29).

Without any supporting reasoning, for example, the Decision holds that ‘a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy’.¹⁰

1.1. The concept of organization

It is in line with this tendency that the Decision adopts a wide interpretation of the concept of organization in Article 7(2)(a) of the Statute. The first crucial passage reads as follows:

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 convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on [*sic*] basic human values.¹¹

This rather general statement is supplemented by the following considerations:

In the view of the Chamber, the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, *inter alia*: (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. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.¹²

On that basis, it is determined that ‘various groups including local leaders, businessmen and politicians associated with the two leading parties, as well as with members of the police force’ acting in Kenya at the material time constituted organizations within the meaning of Article 7(2)(a) of the Statute.¹³

1.2. The reasoning and a critique

This position is already open to argument on the basis of its internal consistency. While the reference to the ‘capability to perform acts which infringe on basic human values’ reads like the attempt to come up with a definition of the concept of organization, only three paragraphs later a ‘case-by-case’ approach is given preference over a ‘rigid definition’. Moreover, the ‘considerations’ which are to ‘assist’ in the suggested casuistic process of judicial concretization do not appear to flow naturally from the general ‘capability criterion’, and one wonders why the Decision did not simply adopt the wide formulation contained in Article 2 of the United

¹⁰ Decision, *supra* note 7, para. 89; this sweeping statement is questioned in the Dissenting Opinion, *supra* note 8, para. 43.

¹¹ Decision, *supra* note 7, para. 90 (footnote omitted).

¹² *Ibid.*, para. 93.

¹³ *Ibid.*, para. 117.

Nations Convention against Transnational Organized Crime.¹⁴ Apart from that, the list of considerations drawn up by the majority is not particularly homogeneous. For example, the criterion of territorial control points in quite a different direction from that of the primary purpose to attack any civilian population. Perhaps not entirely surprisingly, a closer look at the judicial determination in the present situation reveals a measure of uncertainty as regards the criterion or the combination of criteria on which the decision eventually rests. It is only possible to state with some confidence that the more demanding criteria of territorial control and a group under responsible command or with an established hierarchy have not been relied on.

1.2.1. *The reference to Marcello Di Filippo's article*

The reasoning against a requirement of state-like organizations in the Decision begins with a reference to a recent article written by Marcello Di Filippo.¹⁵ It is revealing for the possible broader implications of the Decision that Di Filippo advances an argument to include the core notion of terrorism as derived from the relevant body of transnational criminal law¹⁶ in the realm of international criminal law *stricto sensu*. And it is at least interesting that Filippo – unlike the Decision – uses the attributes ‘innovative’ and ‘liberal’ to characterize his position.¹⁷

1.2.2. *The Decision's two explicit arguments*

The Decision continues with two explicit arguments, one of which reads as follows:

The Chamber finds that had the drafters of the Statute intended to exclude non-State actors from the term ‘organization’, they would not have included this term in art. 7(2)(a) of the Statute.¹⁸

¹⁴ An organization is ‘any structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes’, with a structured group defined as being not ‘randomly formed . . . and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure’. It is only consistent with his general dislike of the policy requirement that Matt Halling supports the transfer of this wide definition in the context of Art. 7(2)(a) of the Statute; see ‘Push The Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity’ in this issue, at 829.

¹⁵ M. Di Filippo, ‘Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes’, (2008) 19 EJIL, 533, at 564–70. It may be mentioned in passing that the references to scholarly opinions in the Decision, *supra* note 7, para. 90, nn. 83 and 84) are fairly selective; for an at least somewhat fuller account of the scholarly writing on the subject, see Kress, *supra* note 2, at 368–71 (with references in nn. 138, 143–8). Beyond that, the article by Darryl Robinson to which the majority refers in the second place (Decision, *supra* note 7, para. 90, n. 84) does not really support the position taken by the majority. This author does not deal with the question of interpretation in any detail, but merely mentions that the drafters of Art. 7(2)(a) of the ICC Statute were aware of a formulation in the ICTY case law which ‘leaves open the possibility that other organizations [other than those with territorial control] might meet the test as well’. D. Robinson, ‘Defining “Crimes against Humanity” at the Rome Conference’, (1999) 93 AJIL 43, at 50 (see also subsection 2.2.4 *infra*, text following note 63).

¹⁶ The term ‘transnational criminal law’ denotes a body of international treaties dealing with crimes of a transnational character. The key components of such treaties are the duties of states parties to criminalize the prohibited conduct under their national laws and either to investigate and prosecute, or to extradite a suspect apprehended on their territory (*aut dedere aut judicare*, criminal jurisdiction of the *judex deprehensionis*); see further Kress, *supra* note 1, paras. 6–9.

¹⁷ Di Filippo, *supra* note 15, at 567 and 569 respectively.

¹⁸ Decision, *supra* note 7, at 92.

With respect, this is beside the point. That the term 'organization' refers to non-state entities is not at issue.¹⁹ The controversy is (only) about precisely which types of non-state entities are covered.²⁰

The other argument consists of a reference to a statement in the commentary to the 1991 Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (ILC), in which the ILC affirms the possibility that 'criminal gangs or groups' may constitute the collective entities behind crimes against humanity.²¹ While it is, of course, commendable to take the work of the ILC into consideration,²² it would have been helpful had the majority clarified the status of the argument within the canons of interpretation. Had this been done, a number of questions would have arisen to which I shall return in some detail in the context of the analysis of the Dissenting Opinion (section 2.2.4 *infra*).

1.2.3. *The Decision's implicit teleological interpretation*

With only these two arguments against the requirement of a state-like organization, one finds it rather difficult to describe the reasoning in the Decision as elaborate. Perhaps it can be said that the Decision essentially, albeit implicitly, rests on the following third argument: the ultimate goal of the international law on crimes against humanity, so the argument (if made explicit) would run, is to protect basic human values. This protection can be broadened through a wide construction of the concept of organization in Article 7(2)(a) of the Statute and therefore such latter construction is to be preferred. In that vein Di Fillipo states,

Though the latter view [the wide construction of the concept of organization] can look innovative, I deem it simply as the natural evolution of the category of crimes against humanity.²³

Such a teleological interpretation gives rise to a number of considerations. The first is whether the international law on crimes against humanity actually seeks to protect exclusively basic human values. While it is clear that the forms of conduct listed in Article 7(1)(a)–(k) of the Statute infringe basic human values, the purpose of the contextual requirement of a widespread or systematic attack against any civilian population is less evident, and it is this requirement which is at issue here. One possible explanation is that the contextual requirement establishes a link between the international law on crimes against humanity and the collective value of international peace and security. At the time of Nuremberg and Tokyo, the requirement of a connection with a crime against peace or a war crime linked crimes against humanity with a situation in which the international peace was disturbed. In the second generation of international criminal law *stricto sensu*, which is characterized by the

19 With the single exception of a statement by M. C. Bassiouni, *The Legislative History of the International Criminal Court: Introduction Analysis and Integrated Text*, vol. 1 (2005), 151; cf. Dissenting Opinion, *supra* note 8, para. 50 (with a reference in n. 52 to a contradiction in Bassiouni's writings on the matter).

20 Dissenting Opinion, *supra* note 8, para. 45.

21 Decision, *supra* note 7, para. 91.

22 On why the Decision refers to the 1991 Draft Code and not to the more recent 1996 Draft Code (UN Doc. A/51/10, 15), see subsection 2.2.4 *infra*.

23 Di Fillipo, *supra* note 15, at 567.

emergence of crimes against humanity as autonomous crimes,²⁴ the old connection clause has come to be replaced with the contextual requirement of a widespread and systematic attack against any civilian population.²⁵ Whether or not this development implies a complete detachment of the law on crimes against humanity from the collective value of international peace and security is not entirely clear. After all, it was on the basis of determining threats to international peace and security that the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Similarly, the states parties to the Statute recognize in its Preamble that 'such grave crimes threaten the peace, security and well-being of the world'.²⁶ Within the framework of these rather cursory reflections, I shall not attempt to give an exhaustive treatment to the question whether there is still a link between the international law on crimes against humanity and the collective value of international peace and security. (I shall, however, briefly return to this question in the context of the analysis of the Dissenting Opinion.) I only wish to make the point that the teleological interpretation under consideration would first have to make the case for an exclusively human-rights based *raison d'être* of the law on crimes against humanity.

But also on the assumption that this case can be made, it is far from clear whether a teleological interpretation of the crime's policy requirement would lead to the inclusion of a wide range of non-state groups in the concept of organization. While the established body of international human rights law obliges only states,²⁷ the consequence of a broad, human-value-driven teleological construction of the term 'organization' in Article 7(2)(a) of the Statute would be the creation of new international human rights law directly incumbent on 'organs' or 'agents' of organizations which are not even state-like. Interestingly, Andrew Clapham clearly recognizes this result, and argues that the traditional approach to international human rights law should be revisited in the light of the development of international criminal law.²⁸ This, with respect, amounts to a misstatement of the proper relationship between international human rights law and international criminal law. While it is certainly possible to say that international criminal law has come to be an instrument to protect and enforce (a limited number of fundamental) international human rights,

24 The second key element of the emergence of a second generation of international criminal law *stricto sensu* is the crystallization of war crimes committed in non-international armed conflicts. Kress, *supra* note 1, para. 25.

25 S. Kirsch, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (2009), 105 (with a careful account of the historical development).

26 Para. 3 of the Preamble; note also the title of the 1996 ILC Draft (*supra* note 22) as 'Code of Crimes against the Peace and Security of Mankind'.

27 See, e.g., para. 8 of General Comment No. 31 of the UN Human Rights Committee: 'The article 2, paragraph 1, obligations are binding on State parties only and do not, as such, have direct horizontal effect as a matter of international law'. UN Doc. HRI/GEN/1/Rev.8, 8.5.2006.

28 A. Clapham, 'Human Rights Obligations of Organized Armed Groups', in M. Odello and G. L. Beruto (eds.), *Non-state Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century. 32nd Roundtable on Current Issues of International Humanitarian Law, San Remo, 11–13 September 2009* (2010), 102, at 103.

there can be no presumption in favour of a broad teleological interpretation of international criminal law as a back door for a progressive development of international human rights law. The sequence can only be the other way round: only once the obligation of an organization to respect international human rights can be clearly established under general international law can a human-rights-inspired teleological argument to include such organizations in the policy requirement of crimes against humanity become available.

Finally, and again on the assumption that the current international law on crimes against humanity should be conceived of as being exclusively a legal tool to protect and enforce international human rights law, the contextual requirement of crimes against humanity (however interpreted) effectively confines the use of this tool to certain forms and constellations of human rights violations. The purpose of this limiting effect must be external to human rights law and it is most likely to be found in sovereignty interests of states. The existence of sovereignty interests which militate in favour of confining the use of the international criminal law instrument to certain forms and constellations of human rights violations is rather obvious. International criminal law *stricto sensu* implies far more significant restrictions on state sovereignty than international human rights law as such. International criminal law *stricto sensu* carries with it the competence of properly instituted international criminal courts to decide on the genuineness of national criminal proceedings,²⁹ a presumption against immunities *ratione materiae*,³⁰ a presumption in favour of universal jurisdiction,³¹ and a presumption against the power to grant amnesties.³² The contextual requirement of crimes against humanity reflects the wish of states that these (and other³³) rather heavy restrictions on their sovereignty only apply in particular instances of human rights violations. This cautions against a downplaying of the significance of this contextual requirement on the basis of an international human-rights-law-inspired teleological interpretation.

On closer inspection, the teleological interpretation which would appear to underlie the Decision's broad construction of the concept of organization would evidence at least one of the interpretative fallacies which Darryl Robinson has identified in his enlightening study 'The Identity Crisis of International Criminal Law':³⁴ uncritically 'victim-focused teleological reasoning' in the international criminal law context.

29 See, for example, Art. 17 of the Statute; the intrusion into state sovereignty is even greater where, as in the case of the ICTY and the ICTR, the international criminal court possesses a primary right to exercise its jurisdiction.

30 C. Kress and K. Prost, 'Article 98', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), para. 16.

31 C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', (2006) 4 *Journal of International Criminal Justice* 561.

32 C. Kress and L. Grover, 'International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-international Character', in M. Bergsmo and P. Kalmanovitz (eds.), *Law in Peace Negotiations* (2009), 29.

33 For example, it should also be borne in mind that crimes against humanity are often referred to in the context of the debate about the proper threshold for forcible humanitarian interventions.

34 D. Robinson, 'The Identity Crisis of International Criminal Law', (2008) 21 *LJIL* 925, esp. at 933–46.

2. THE DISSENTING OPINION

The Dissenting Opinion sets a different tone from the Decision. While Judge Kaul leaves no doubt that he ‘strongly and unequivocally condemns’ the post-election violence in Kenya,³⁵ he makes it clear from the outset that the fundamental legal question at stake is the proper ‘demarcation line between crimes against humanity pursuant to article 7 of the Statute, and crimes under national law’. And, as if he wished to signal his disapproval of the prevailing trend, he states his ‘considered view that the existing demarcation line between those crimes must not be marginalized or downgraded, even in an incremental way’.³⁶ By adding ‘that a gradual downscaling of crimes against humanity towards serious ordinary crimes . . . might infringe on [sic] State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute’,³⁷ he rejects the teleology that underlies the Decision’s definition of the outer boundary of crimes against humanity. The Dissenting Opinion is not only more carefully reasoned and supported by references to relevant instances of international practice and to pertinent scholarly writings.³⁸ It is also methodologically transparent, which is conducive to analytical scrutiny.

2.1. The concept of organization

According to the Dissenting Opinion, an organization³⁹ within the meaning of Article 7(2)(a) of the Statute must

partake of some characteristics of a State. Those characteristics could involve the following: (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.⁴⁰

Although the list of criteria is introduced by the words ‘could involve’, it becomes apparent from the following that Judge Kaul understands these criteria as elements of a definition. Clearly, this definition mirrors that of a party to a non-international armed conflict, as contained in Article 1(1) of the Second Additional Protocol to the Geneva Conventions,⁴¹ with the one (significant) exception that territorial control is not needed.⁴²

35 Dissenting Opinion, *supra* note 8, para. 6.

36 *Ibid.*, para. 9.

37 *Ibid.*, para. 10.

38 It may be noted in passing that the Dissenting Opinion demonstrates a commendable effort not to exclusively rely on publications written in English.

39 For a compelling argument on why Art. 7(2)(a) of the Statute, although its English version speaks of an ‘organizational policy’, refers to an organization and not simply to an organized manner, see Dissenting Opinion, *supra* note 8, paras. 37–39.

40 *Ibid.*, para. 51.

41 The Dissenting Opinion itself makes it clear that it draws on that provision (*ibid.*, para. 51, n. 55).

42 *Ibid.*, para. 51 (n. 56 *in fine*).

2.2. The reasoning and a critique

2.2.1. *The wording of Article 7(2)(a) of the Statute*

The first argument may be called one of internal consistency. Article 7(2)(a) of the Statute does not simply refer to the concept of organization; it also mentions the state. As the latter constitutes itself an organization, so the argument runs, it should be seen as the *Idealtypus* of the organizations which the provision has in mind. This makes it reasonable to assume that the other organizations do not deviate too much from the state. This is a plausible point, although certainly not a compelling one in itself.

2.2.2. *The principle of strict construction*

The second argument is presented under the rubric of ‘contextual interpretation’. Reference is made to the Preamble and to Article 22 of the Statute in order to stress the need for a strict interpretation of the crimes contained in the Statute.⁴³ Although one may perhaps wonder whether the category ‘contextual’ is a happy one,⁴⁴ it is to be welcomed that the principle of strict construction is taken seriously.⁴⁵ This is all the more so because the principle of strict construction is re-emphasized, as the Dissenting Opinion does not fail to mention,⁴⁶ in the Introduction of the Elements of Crimes (Elements) for crimes against humanity.

2.2.3. *The ‘historical–teleological’ interpretation*

The third and final argument is the one on which the Dissenting Opinion eventually rests. It is an argument about the *raison d’être* of the international law on crimes against humanity, and the 11 paragraphs concerned form a truly fascinating piece of international judicial reasoning.⁴⁷ Judge Kaul refers to the Preamble of the Statute and identifies ‘the peace, security and well-being of the world’ as the international values at stake. To those he adds ‘humanity and fundamental values of mankind’. Historically, he continues, crimes against humanity were recognized as crimes under international law as a consequence of intolerable threats to those values in the form of ‘mass crimes committed by sovereign states against the civilian population, sometimes the state’s own subjects, according to a plan or policy, involving large segments of the state apparatus’.⁴⁸ Turning from this historic origin to the present

43 Dissenting Opinion, *supra* note 8, paras. 54–55.

44 One could also see the principle contained in the second sentence of Art. 22(2) as a meta-principle of interpretation rather than trying to bring this principle within one of the canons of interpretation.

45 For doubtful techniques to reduce the significance of this principle to almost zero, see Robinson, *supra* note 34, at 935.

46 Dissenting Opinion, *supra* note 8, para. 55 n. 61. In this footnote, the interesting point is made that Art. 22(2) of the Statute does also relate to the ‘jurisdictional ambit’ of the Court. Whether the contextual requirement of crimes against humanity is of an exclusively jurisdictional nature is beyond the scope of this case note (but see the observation in note 60 *infra*). For a recent argument in support of such a characterization see Kirsch, *supra* note 25, *passim*.

47 Dissenting Opinion, *supra* note 8, paras. 56–66; for an enlightening comparison between this reasoning and observations made by the eminent Dutch scholar B. V. A. Röling about sixty years earlier, see L. van den Herik, ‘The Dutch Engagement with the Project of International Criminal Justice’, (2010) 57 *Netherlands International Law Review* 313.

48 Dissenting Opinion, *supra* note 8, para. 59.

he concludes,

The Statute in relation to crimes against humanity ... further accommodates new threats which may equally shock the very foundations of the international community and deeply shock the conscience of humanity. Such policy may also be adopted and implemented by private entities. However, it follows from the above that the private entity must have the means and resources available to reach the gravity of systemic injustice in which parts of the civilian population find themselves.⁴⁹

Judge Kaul is right to assume that the teleology behind the contextual requirement of crimes against humanity extends beyond the criterion of 'infringement of basic human values'. At the same time, the Dissenting Opinion makes it plain how challenging it is to conceptualize the additional element or elements which distinguish a crime against humanity from a violation of an internationally recognized human right. Judge Kaul seems to be of the view that the contextual requirement refers to a distinct collective value rather than a mere quantitative assessment of the threat to individual rights. The difficulty is to define this value. While the Dissenting Opinion uses the concept 'peace and security of the world' to which the Preamble of the Statute refers, it does not particularly emphasize the danger of cross-border repercussions of crimes against humanity. Accordingly, it is doubtful whether the collective value that Judge Kaul has in mind is international peace and security in its traditional 'negative' meaning. Instead the Dissenting Opinion emphasizes the fact that crimes against humanity pose 'a threat for humanity and fundamental values of mankind'.⁵⁰ The categories of 'humanity' and 'fundamental values of mankind', however, are highly abstract and the question remains what more than the accumulation of a very significant number of very important individual rights they actually denote.

This difficulty in conceptualizing the additional element or elements which distinguish a crime against humanity from a violation of an internationally recognized human right reflects the controversy about the concept of '(threat to) international peace and security' within the meaning of Article 39 of the UN Charter, which has been triggered by the more recent Security Council practice of intervening in cases of egregious human rights abuses without actual cross-border spillover effects.⁵¹ According to a more cautious view, this practice should be explained on the basis of the traditional 'negative' understanding of the concept of international peace and security, and it should be recognized that massive human rights abuses typically have cross-border repercussions and may *therefore* be considered a threat to peace. If one translates this approach into the law on crimes against humanity this law would remain linked with the collective value of international peace and security in its

49 Ibid., para. 66.

50 The pertinent formulation in the Dissenting Opinion (see the text accompanying note 44 *supra*) would appear to mirror the classic formulation by E. Schwelb, 'Crimes against Humanity' (1946) 23 *British Yearbook of International Law* 178, at 195: 'A crime against humanity is an offence against certain principles of law, which, in certain circumstances, become the concern of the international community, namely if it has repercussions across international frontiers, or if it passes "in magnitude or savagery any limits of what is tolerable by modern civilisations".'

51 For an extraordinarily clear presentation and discussion of this debate, see E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 138–44.

traditional understanding. There is, however, also the suggestion to expand somewhat the concept of 'international peace and security' so that it 'positively' covers the recognition, as a matter of principle, of the legal personality of human beings. The systematic and radical denial of human rights to the members of an entire group of the population of a state would then also adversely affect 'international peace and security'. More recent scholarly attempts to explain the rationale underlying the recognition of crimes against humanity would appear to mirror such a positive concept of 'international peace and security',⁵² and the latter is certainly also very similar to the concepts of 'humanity' and 'fundamental values of mankind' to which the Dissenting Opinion refers.

Whatever the best answer to the intriguing question whether the law on crimes against humanity protects a distinct collective value, the Dissenting Opinion would seem implicitly to suggest that the Security Council's practice of intervening in cases of egregious human rights abuses without actual cross-border spillover effects should be borne in mind in interpreting the contextual requirement. Certainly, as this practice stands, this entails a very stringent threshold,⁵³ but Judge Kaul correctly reminds us of two facts. First, the historic origins of the recognition of crimes against humanity support a stringent interpretation of its contextual requirements. Second, 'extremely grave threats'⁵⁴ caused the Security Council to initiate the renaissance of international criminal law including, in particular, the consolidation of the international law on crimes against humanity through the establishment of the ICTY and the ICTR.⁵⁵

If one therefore accepts the premise of the Dissenting Opinion that the contextual requirement of crimes against humanity refers to most serious human rights violations that amount to a 'threat to peace', the question remains whether this stringent threshold implies Judge Kaul's narrow interpretation of the concept of organization within Article 7(2)(a) of the Statute. His argument was that a private entity 'must have the means and resources available to reach the level of systemic injustice in which parts of the civilian population find themselves'.⁵⁶ This may give rise to the counterargument that extremely grave threats to basic human rights can nowadays also emanate from loosely organized private individuals (such as transnational networks of terrorist cells) depending on the destructive technology in their possession.

52 According to those views, a crime against humanity is an attack on the foundations of the international legal order in that members of a significant part of the population of a state are systematically deprived of their essential human rights; see G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit* (2003), 360–4; K. Gierhake, *Begründung des Völkerstrafrechts auf der Grundlage der kantischen Rechtslehre* (2006), 266–76; the Dissenting Opinion, *supra* note 8, uses similar language in para. 60.

53 I am unaware of any Security Council determination under Chapter VII of the UN Charter that the situation in the republic of Kenya constituted a threat to international peace and security; the Presidential Statement of 6 February 2008 mentions the Security Council's 'call for those responsible for violence to be brought to justice', but does not use language that would suggest the qualification as crimes against humanity. S/PRST/2008/4, 6.2.2008, at 1.

54 Dissenting Opinion, *supra* note 8, para. 63.

55 *Ibid.*, para. 62.

56 *Ibid.*, para. 66.

Two arguments would seem to be possible in response.⁵⁷ The first is that the cases where loosely organized private individuals may pose the kind of threat in question will also nowadays be very exceptional and that it is legitimate for the definition of a crime to deal with the typical case. The second answer is perhaps more important. It refers to a second and quite distinct function of the element of organization within the context requirement. Judge Kaul does not emphasize this second function, but he clearly alludes to it when he states,

If leaders of a State who normally have the duty to uphold the rule of law and to respect human rights engage in a policy of violent attacks against a civilian population, it is the community of States which must intervene and prevent, control and repress this threat to the peace, security and well-being of the world . . . Consequently, when the concept of crimes against humanity was developed in 1945, the prosecution as common crimes at the national level was deemed inadequate. Indeed, it was feared that with the involvement of State and government resources in the commission of heinous crimes of such nature, the crimes would go unpunished if left solely to national prosecutorial authorities.⁵⁸

Where the state itself is the collective entity behind the widespread or systematic attack against the civilian population, there is reason to doubt that genuine investigations into these crimes will take place within that state. A similar measure of doubt will arise when the non-state organization behind the attack has established so powerful a presence in a given state that it can prevent the exercise of criminal jurisdiction in that state.⁵⁹ In both cases, the judicial intervention by the international community is warranted.⁶⁰ The negotiations on the Statute reveal that this consideration continues to be relevant. After all, one reason for not including a (peacetime) crime of (non-state) terrorism in the list of crimes within the jurisdiction of the Court was the conviction that such a crime can be dealt with satisfactorily at the national level.⁶¹

The term 'organization' in Article 7(2)(a) of the Statute would thus seem to have a double function. It helps to ensure that the scope of application of crimes against humanity remains confined to extremely grave threats to basic human values, and it helps to describe a situation where there is reason to doubt that a judicial response at the national level will follow.⁶²

57 I shall not return, at this point in the analysis, to the consideration advanced in subsection 1.2 *supra* that it is only the state which can violate international human rights law *stricto sensu*. This point was made to demonstrate that the general scope of application of crimes against humanity cannot simply be broadened in order to strengthen the protection of internationally recognized human rights. At this juncture, we start from the premise of a very high threshold for crimes against humanity. Within such a limited sphere, as in the case of genocide, the international community might have accepted the international criminalization of conduct outside the context of state or state-like action.

58 Dissenting Opinion, *supra* note 8, paras. 63, 64.

59 In the literature, this point has been made, for example, by E.-J. Lampe, 'Verbrechen gegen die Menschlichkeit', in H.-J. Hirsch et al. (eds.), *Festschrift für Günter Kohlmann* (2003), 153; Kirsch, *supra* note 25, at 150–4.

60 It should be emphasized that this consideration is a purely jurisdictional one.

61 H. v. Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in R. Lee (ed.), *The International Criminal Court* (1999), at 186.

62 For such a two-pillar explanation of the right to exercise (true) universal jurisdiction, see T. Weigend, 'Grund und Grenzen universaler Gerichtsbarkeit', in J. Arnold et al. (eds.), *Festschrift für Albin Eser* (2005), at 973.

2.2.4. *The missing argument: customary international law*

It is worth restating that Judge Kaul, though he duly notes the philosophical debate about the subject⁶³, does not ‘deduce’ the *raison d’être* of crimes against humanity from first principles, but ‘induces’ it from the historic development leading to the codification in Article 7(2)(a) of the Statute. This ‘historical–teleological’ reasoning, however, is difficult to reconcile with the attempt made in the Dissenting Opinion to detach its finding from the state of customary international law. The consistency problem becomes most apparent when one contrasts two statements contained in the Dissenting Opinion. The first is as follows:

Given these [historic] experiences, it continues to seem a logical application of a lesson learnt that the drafters of the Statute confirmed in 1998 in article 7(2)(a) of the Statute the requirement ‘pursuant to or in furtherance of a State organizational policy’ as a decisive, characteristic and indispensable feature of crimes against humanity.⁶⁴

If this is true, it is not very consistent to assume that

the drafters may have deliberately deviated from customary rules.⁶⁵

Quite the opposite—the Dissenting Opinion’s ‘historical–teleological’ reasoning very strongly suggests that the narrow interpretation of the term ‘organization’ loyally reflects customary international law. I would suggest that by not making this point explicitly, the Dissenting Opinion has failed to avail itself of an important argument and has missed a good opportunity to make a statement of general importance about the relevance of customary law for the interpretation of Articles 6 to 8 of the Statute.

It is certainly true that Article 10 of the Statute recognizes the possibility that there may or will be customary international law that goes beyond the definitions of crimes contained in Articles 6 to 8. This statement, however, does not work the other way. Instead, there are three reasons which, if taken together, form a compelling argument why there is at least a very strong presumption that the definitions contained in Articles 6 to 8 do not exceed existing customary international law and should be interpreted accordingly.⁶⁶ The first reason is that the Preamble describes the crimes referred to in Article 5(1) of the Statute as ‘the most serious crimes of concern to the international community as a whole’. The second reason is that, in two cases, the Statute allows the Court to apply Articles 6 to 8 where no state concerned has

63 The Dissenting Opinion, *supra* note 8, para. 58 (n. 62), refers, *inter alia*, to one important strand of the debate which is situated within the context of the philosophy of Immanuel Kant. This has remained, for the time being, a debate led by German scholars and in the German language (the three most important contributions – two of which are referred to in the Dissenting Opinion, *ibid.* – are M. Köhler, ‘Zum Begriff des Völkerstrafrechts’, (2003) 11 *Annual Review of Law and Ethics* 435; Manske, *supra* note 52, at 273–365 and *passim*; Gierhake, *supra* note 52, at 266–76 and *passim*). It would be fascinating to see to what extent a similar philosophical debate is under way elsewhere. For a scholarly recent attempt in the English language to explore the nature of crimes against humanity, see C. Macleod, ‘Towards a Philosophical Account of Crimes against Humanity’, (2010) 21 *EJIL* 281.

64 Dissenting Opinion, *supra* note 8, para. 63.

65 *Ibid.*, para. 32; see also the statement in para. 5: ‘This conclusion does not preclude or prejudice any finding on individual criminal responsibility for crimes committed in the Republic of Kenya under customary law [footnote omitted].’

66 For a thoughtful and more detailed discussion of this point, see L. Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’, (2010) 21 *EJIL* (forthcoming).

ratified the Statute.⁶⁷ Finally, it has been the well-recorded intention of the drafters of the Statute not to create new law, but to codify customary international law.⁶⁸ For this reason, it holds true that if a narrow interpretation of an element of one of the crimes listed in Article 5(1) of the Statute is necessary in order to remain within the confines of customary international law, such narrow interpretation will reflect the general intent of the drafters of the Statute.

In our case, the general intent of the drafters not to go beyond customary international law is corroborated by the specific drafters' intent behind the inclusion of the term 'organization' in Article 7(2)(a) of the Statute, as Darryl Robinson, one of the leading negotiators on Article 7 of the Statute, has reported.⁶⁹ The drafters used the concept of organization because the ICTY referred to it in one important decision in the *Tadić* case. The pertinent passage is as follows:

In this regard the 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. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a de jure state, or by a terrorist group or organization.⁷⁰

The ICTY's Trial Chamber, in turn, relied on the passage in the ILC's commentary of the 1991 Draft Code. The passage reads that the respective ILC's Draft Code's article

does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article.⁷¹

Robinson's account of the negotiations is worth citing in full:

The *Tadić* opinion and judgment [of May 1997] acknowledges that the entity behind the policy could be an organization with de facto control over territory, and leaves open the possibility that other organizations might meet the test as well. To reflect these developments, the delegations at the Rome Conference made reference to a state or organizational policy. [The following text is that in the footnote accompanying the preceding sentence.] Although the 1954 ILC draft code required the involvement or acquiescence of public officials, the ILC subsequently expanded this to include instigation by a 'State, organization or group' in the 1991 draft Code of Crimes. The solution reached in Rome was to refer only to a state or organization, as it was agreed that using the term 'organization' is fairly flexible, and to the extent that there may be a gap between the concept of 'group' and 'organization', it was considered that

67 The most important case is a Security Council referral of a situation pursuant to Art. 13(b) of the Statute and the second case is a non-state party's declaration under Art. 12(3).

68 A. Zimmermann, 'Article 5', in Triffterer, *supra* note 30, para. 1; for many further references see Grover, *supra* note 66.

69 Robinson, *supra* n. 15, at 50 (n. 44); this reference does not, of course, carry the same weight as a reference to the *travaux préparatoires* of the Statute. Such a weighty reference, however, is not required at this juncture as the general intent is clear and the point here is simply to indicate that the negotiations on the contextual requirement of crimes against humanity are fully in line with this general intent.

70 *Prosecutor v. Tadić*, Case No. IT-91-1-T, 7 May 1997, para. 654.

71 (1991-II-2) YILC, at 103.

the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept.⁷²

At this point in the analysis, the Decision's reference to the ILC's 1991 Draft Code (*supra* subsection 1.2.2) can be better understood. It should be seen as an implicit reference to the drafter's intent and to customary international law. This reference, however, is too sweeping. It implies that the drafters of Article 7(2)(a) of the Statute, by borrowing the term 'organization' from the 1997 *Tadić* decision, have also endorsed a wide interpretation of that term. This, however, is not the case. The *ratio decidendi* of the 1997 *Tadić* decision is the assimilation of organizations with territorial control to states for the purpose of the policy requirement of crimes against humanity. Through its reference to other organizations and even 'terrorist groups', the *Tadić* decision 'leaves open the possibility', by way of an *obiter dictum*, 'that other organizations might meet the test as well' (to borrow Robinson's language). By borrowing the term 'organization' from *Tadić* 1997, the drafters of the Statute, too, have accepted the possibility that organizations without territorial control might be covered. If and to what extent, however, this is in fact the case, has been left to be determined by the judges by reference to customary international law as it stands at the material time. Only this is in accordance with the general intent of the drafters not to exceed customary international law.

The Dissenting Opinion's case should therefore have run as follows. Under existing customary international law, crimes against humanity require a policy by a state or a state-like organization. Therefore the term 'organization' in Article 7(2)(a) of the Statute must be construed accordingly. One can, of course, only speculate why the Dissenting Opinion so conspicuously refrains from stating its case in this manner. To me, the most plausible explanation is that Judge Kaul did not wish, on top of dissenting from the Decision's interpretation of Article 7(2)(a) of the Statute, to explicitly disagree with the more recent case law of the ICTY, the ICTR, and the Special Tribunal for Sierra Leone on the present state of the customary international law on crimes against humanity; for it is well known that this case law rejects the existence of a policy requirement altogether.⁷³ It is generally both understandable and reasonable that judges are reluctant to disagree with prior judicial decisions. With respect to the legal issue at stake, however, one would have wished that Judge Kaul had carried his case through and had also disagreed with the line of cases in question.

This is all the more true as he devotes an important paragraph to the relevance of the prior case law and its limits for the jurisprudence of the ICC. The following parts of this paragraph deserve to be reproduced in full:

The jurisprudential legacy of such other tribunals and courts, which is not as such applicable law before the Court, may be referred to by chambers of this Court within the parameters of article 21 of the Statute. In my view, the Court may resort to the jurisprudence of other courts and tribunals in the process of identifying 'principles

⁷² Robinson, *supra* note 69.

⁷³ The judgment of the ICTY Appeals Chamber in *Prosecutor v. Kunarac*, Case Nos. IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 98, marks the famous turning point of the international jurisprudence; see also *supra* note 9.

and rules of international law', which may be *mirrored* in such decisions or judgments of other courts and tribunals . . . Yet again, I believe that such an approach does not release the Court from ascertaining for itself in a given instance whether, e.g., the constitutive elements of custom, namely State practice and *opinio juris sive necessitates*, are met.⁷⁴

In this passage, the Dissenting Opinion rightly qualifies the 'jurisprudential legacy' as a persuasive authority, and the degree of persuasive force must be dependent on the strength of the reasoning and the authority which underpins the respective decisions. The policy requirement of crimes against humanity and its precise content is a perfect example to illustrate this point. In *Prosecutor v. Kunarac*, the Appeals Chamber of the ICTY abandoned the policy requirement, which it had recognized in its early case law, without any reasoning and just by way of reference to a list of cases which, on close inspection, turn out not to support the decision.⁷⁵ The weakness of the reasoning is so striking that even a critic of the policy requirement *de lege feranda* calls the brevity of Appeals Chamber's analysis *de lege lata* 'shocking'.⁷⁶ As yet, therefore, the case for abandoning the policy requirement under customary international law remains to be made, and Article 7(2)(a) of the Statute itself constitutes a weighty piece of evidence to the contrary.⁷⁷

As far as the collective entity behind this policy requirement is concerned, the Trial Chamber of the ICTY in the 1997 *Tadić* decision cannot be spared a similar criticism in so far as it alluded to the possibility that organizations without territorial control and even 'terrorist groups' might be covered. The Chamber did not adduce any hard state practice in support of its *obiter dictum* and relied entirely on a sentence in the commentary of the 1991 ILC Draft Code which, on somewhat closer inspection, also proves to be unsupported by state practice.⁷⁸ While it is of course true, as the Chamber states in *Tadić* 1997, that the ILC commentary was 'transmitted to Governments for their comments and observations',⁷⁹ this is simply not enough to support a change of customary international (criminal!) law on a point of such fundamental importance. Larry May was thus right when he stated in 2005, in almost complete agreement with the Dissenting Opinion, that '[t]he actions of States, or State-like actors, have given the international community its clearest rationale for entry into what would otherwise be a domestic legal matter'.⁸⁰

There would not seem to be much in the more recent hard state practice to suggest that this position has undergone a change. The latest precedent which strongly

74 Dissenting Opinion, *supra* note 8, para. 30 (emphases in the original).

75 For a full exposition of this critique, see W. A. Schabas, 'State Policy as an Element of International Crimes', (2008) 98 *Journal of Criminal Law & Criminology* 981. It is highly deplorable that the Trial Chamber within the Extraordinary Chambers in the Courts of Cambodia uncritically accepts *Kunarac* in its recent judgment of 26 July 2010, 001/18-07-2007/ECCC/TC, para. 301.

76 Halling, *supra* note 14, at 830.

77 Of course, it is *possible* in the light of Art. 10 of the Statute that Art. 7(2)(a) is more restrictive than customary international law, but nothing suggests that the drafters have made a deliberate choice to fall behind existing customary international law. The far better explanation of the inclusion of the policy requirement in the Statute's definition of crimes against humanity is that there is as yet no consensus on a customary definition of those crimes without such a requirement.

78 For a full exposition of this critique, see Kress, *supra* note 2, at 377–8.

79 *Prosecutor v. Tadić*, *supra* note 70, para. 655.

80 L. May, *Crimes against Humanity: A Normative Account* (2005), 88.

cautions against a downgrading of the contextual requirement for crimes against humanity is the non-inclusion of crimes against humanity within the jurisdiction of the Special Tribunal for Lebanon.⁸¹

Judge Kaul should therefore not have refrained from stating that, contrary to a number of bold jurisprudential assertions since the *Kunarac* judgment, the customary definition of crimes against humanity includes the requirement of a policy by a state or a state-like organization and that Article 7(2)(a) of the Statute should also therefore be construed accordingly.

3. TWO ADDITIONAL ARGUMENTS FOR A WIDE CONCEPT OF ORGANIZATION

It is rather astonishing that the Decision does not make use of two further arguments in support of its position. In an attempt to mention the relevant considerations comprehensively, I shall deal with both arguments in turn.

3.1. Internal consistency

It has been widely observed that the policy requirement in Article 7(2)(a) of the Statute does not sit well with the disjunction of the attributes ‘widespread’ and ‘systematic’, as it tends to nullify the apparent autonomy of the ‘widespread’ attribute.⁸² It is certainly possible to argue that a narrow interpretation of the term organization as suggested in the Dissenting Opinion constitutes a further step towards depriving the ‘widespread’ attribute of any independent meaning. Yet, when balanced against the considerations discussed so far, this argument cannot carry decisive weight. Although it was strongly supported by a number of ‘progressive’ delegations, a purely disjunctive solution was simply not acceptable to many others. Whether one likes it or not, it is difficult to avoid the conclusion that the ‘compromise’ language which was finally agreed upon essentially accords with the more ‘conservative’ view.

3.2. Consistency between the definitions of genocide and crimes against humanity

The definition of genocide contained in Article 6 of the Statute, which reflects customary international law, does not require the policy of a state or state-like organization. In fact, it leaves open the possibility of the perpetration through a ‘lone *génocidaire*’ in a case, as the Elements usefully clarify, where such an individual is capable of ‘effecting the destruction’ of one of the protected groups.⁸³ While this

81 For the same view, see W. A. Schabas, ‘Prosecuting Dr Strangelove, Goldfinger and the Joker at the International Criminal Court: Closing the Loopholes’, in this issue, at 850.

82 See, for example, Halling, *supra* note 14, at 836.

83 It is regrettable that the ICTY does not as yet appreciate the usefulness of this clarification and instead attempts to distance the state consensus reflected in this ‘contextual element’ from customary international law; for the most recent rehearsal of this position see *Prosecutor v. Popović*, Case No. IT-5-88-T, 10 June 2010, para. 829; for an explanation of the ‘contextual element’ see C. Kress, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the Al Bashir Case’, (2009) 7 *Journal of International Criminal Justice* 297.

scenario has rightly been described by William Schabas as 'little more than a sophomoric *hypothèse d'école* and a distraction for judicial institutions',⁸⁴ the possibility remains as a matter of law and one can certainly argue that the definition of genocide, as a special historic emanation of the general concept of crimes against humanity, should inspire the interpretation of the latter's definition.⁸⁵ Again, this argument cannot be completely refuted; it can only be balanced against the other relevant considerations to assess its proper weight. It is submitted that it cannot stand up against the importance of the Dissenting Opinion's 'historical–teleological' reasoning, which, as we have seen, is to be complemented by a customary law argument. For the time being, the rather theoretical case of a 'lone *génocidaire* should therefore be considered as an oddity instead of inspiring a wide interpretation of the policy requirement in the definition of crimes against humanity.⁸⁶

4. CONCLUSION

The judicial debate which has been the subject of the foregoing reflections is not only a textbook example of the challenges involved in the interpretation of the Statute. Its outcome is of paramount importance for the future development of the law on crimes against humanity. I have attempted to demonstrate that and why the Dissenting Opinion's case for a restrictive interpretation of the term organization in Article 7(2)(a) of the Statute is the stronger one.⁸⁷ This does not exclude a development of the law to the point at which the Decision holds it has already arrived. Such a development would, however, constitute a very important step.⁸⁸ The jurisdiction of the International Military Tribunal at Nuremberg was limited to aggression, war crimes committed in international armed conflicts, and, if committed in execution or connection with one of the preceding crimes, crimes against humanity. By clearly linking all these crimes with a breach of international peace in the strict meaning of the term, the first generation of international criminal law reflected, despite its revolutionary recognition of criminality directly under international law, the traditional, almost entirely state-centred, configuration of the international legal order. It was only on 2 October 1995, with the by now historic decision of the ICTY's Appeals Chamber in *Tadić*, that a decisive step towards a second generation of

84 W. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 LJIL 877.

85 This argument is also made by Halling, *supra* note 14, at 838.

86 For the same view, see Schabas, *supra* note 75, at 981.

87 In Kress, *supra* note 2, at 378, I had argued that there is as yet no state practice in support of an expansion of the concept of organization in Art. 7(2)(a) of the Statute into the area of organizations *without* territorial control. In my more recent article 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', (2010) 15 *Journal of Conflict & Security Law* 271, I had, however, recognized that a case could be made for including also those organizations which pass the organizational threshold for classification as a party to a non-international armed conflict; this would seem to be position endorsed in the Dissenting Opinion (see the text accompanying note 42 *supra*).

88 On the following text see C. Kress, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), 147, 153–4.

international criminal law was taken.⁸⁹ In *Tadić*, the Chamber reached the conclusion that criminality directly under international law had extended to armed conflicts not of an international character. This legal determination was complemented by a second and equally significant finding that crimes against humanity under customary international law may be committed in peacetime. The crystallization of customary war crimes committed in conflicts not of an international character, and the emergence of crimes against humanity by making them an autonomous crime, moved the protective scope of international criminal law beyond *inter*-state incidents to also cover certain forms of *intra*-state strife. It now encompasses situations where a government and/or state-like organization (typically in the form of armed opposition forces) spread terror among the people under its power. The *Situation in the Republic of Kenya* raises the question whether international criminal law is to make a third generational step and would move into the area of national and transnational conflicts between states and destructive private organizations of all kinds. This would mean that the law's protective thrust, which was hitherto confined to situations of war and internal strife, would extend to protect states and their populations from internal or external threats emanating from private persons. Such an important move should, I would suggest, not be initiated by the international judiciary but should rather be supported by a solid amount of state practice.

89 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras. 96–135.