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International Decision, International Criminal Court, Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya

Charles Chernor Jalloh
Florida International University College of Law, charles.jalloh@fiu.edu

> Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights—the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case—is consistent with what has been found in respect of the latter provisions. (Para. 68)

Judges Greenwood and Keith helpfully pointed out that the cited jurisprudence on the expulsion provisions in issue did not, in point of fact, confer protection on substance, only on procedure (sep. op., paras. 11–14).[25] The leading commentary on the European Convention on Human Rights bears out this proposition; it tersely states that the procedural guarantees of the pertinent provision, Article 1 of Protocol 7 to the Convention, "provides no protections of substance, that is, relating to the grounds on which . . . expulsion might be sought."[26] As a result, the Court effectively went further in its interpretation of the human rights provisions at issue than the human rights bodies. By developing international human rights law in this way, the International Court in *Diallo* forcefully staked its claim as an arbiter of human rights to be reckoned with.[27]

EIRIK BJORGE

International Criminal Court—jurisdiction—prosecutor's proprio motu *power to initiate investigations—contextual elements of crimes against humanity—state or organizational policy—complementarity*

SITUATION IN THE REPUBLIC OF KENYA. No. ICC-01/09-19. Decision on the Authorization of an Investigation. *At* http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf.
International Criminal Court, March 31, 2010.

On March 31, 2010, the International Criminal Court (ICC) issued a decision[1] authorizing the first-ever *proprio motu* prosecutorial investigation into a situation. Unlike his counterparts in other international criminal tribunals, the ICC prosecutor must secure the approval of the pretrial chamber under Article 15 of the Rome Statute before initiating criminal investigations

[25] Judges Greenwood and Keith cite *Bolat v. Russia*, App. No. 14139/03, 2006-XI Eur. Ct. H.R. 67 (extracts, Eng.); *Lupsa v. Romania*, App. No. 10337/04, 2006-VII Eur. Ct. H.R. 369 (Eng.); *Situations of Haitians in the Dominican Republic* (Feb. 14, 1992), 1991 Inter-Am. Comm'n H.R., Annual Report, ch. V, OEA/Ser.L/V/11.81, Doc. 6 rev.1.

[26] ROBIN C. A. WHITE & CLARE OVEY, JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 544–45 (5th ed. 2010) (footnote omitted).

[27] This proposition is corroborated by the clear and engaging separate opinion of Judge Cançado Trindade:

> The subject of the rights, that the Court has found to have been breached by the respondent State in the present case, is not the applicant State: the subject of those rights is Mr. A. S. Diallo, an individual. The procedure for the vindication of the claim originally utilized (by the applicant State) was that of diplomatic protection, but the substantive law applicable in the present case,—as clarified after the Court's Judgment of 2007 on Preliminary Objections, in the course of the proceedings (written and oral phases) as to the merits,—is the International Law of Human Rights.

Sep. Op., Cançado Trindade, J., para. 223.

[1] Situation in the Republic of Kenya, No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), *at* http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf [hereinafter Kenya Decision]. The ICC documents cited herein are available at the Court's Web site, http://www.icc-cpi.int/. The entire URL is given for those that are hard to find.

on his own motion.[2] Besides the situations in Sudan and Libya, which the United Nations Security Council referred to the ICC in March 2005 and February 2011, respectively,[3] self-referrals by various African states have dominated the ICC's docket to date.

After the results of the Kenyan presidential elections of December 27, 2007, were announced, serious ethnically driven violence erupted in the country. Within two months, as many as 1220 Kenyans were killed, over 3560 injured, and about 350,000 displaced, and more than 900 acts of rape were documented (paras. 131, 190). A power-sharing deal brokered by African Union mediators led by former United Nations secretary-general Kofi Annan[4] ended hostilities with the creation of a coalition government composed of the incumbent president, Mwai Kibaki of the Party of National Unity, who had been accused of rigging the elections, and Prime Minister Raila Odinga of the Orange Democratic Movement, who claimed he had been robbed of a clear electoral victory.[5]

As part of a package of critical issues to be resolved, the tense Kibaki-Odinga coalition agreed to an impartial investigation of those responsible for the crime wave.[6] The coalition subsequently established the independent Commission of Inquiry into the Post-election Violence (CIPEV). After months of hearings, CIPEV issued a report uncovering unprecedented violence, some planned, some spontaneous, throughout most of Kenya.[7] To help end the cycle of impunity, CIPEV recommended, inter alia, that a hybrid special tribunal for Kenya be created to prosecute the architects of the shocking violence, or if not, that a confidential list of suspects entrusted with Annan be forwarded to ICC prosecutor Luis Moreno-Ocampo for possible investigations and prosecutions.[8]

The proposed bill to establish a special tribunal was rejected twice by Kenyan lawmakers.[9] Annan therefore transmitted the list of suspects to the ICC prosecutor, just after Kenyan government officials visited The Hague to pledge prosecutions of the crimes within a year through a special court or other domestic judicial mechanism, or referral of the situation to the ICC.[10]

[2] Rome Statute of the International Criminal Court, Art. 15, July 17, 1998, 2187 UNTS 3 [hereinafter Rome Statute]. Article 15(1) states: "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." Article 15(3) provides in relevant part: "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."

[3] SC Res. 1593, para. 1 (Mar. 31, 2005) (Sudan); SC Res. 1970, para. 4 (Feb. 26, 2011) (Libya).

[4] Shashank Bengali, *Kenyan Rivals Agree to Share Power After Disputed Election*, KNIGHT RIDDER, Feb. 28, 2008, *available in* LEXIS, News Library, Wire Service Stories File.

[5] Xan Rice, *Kenyans Riot as Kibaki Declared Poll Winner*, GUARDIAN, Dec. 31, 2007, at 1, *available in* LEXIS, News Library, Major World Newspapers File.

[6] Kenyan National Dialogue and Reconciliation, Annotated Agenda and Timetable at A)2 (Feb. 1, 2008), *at* http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf.

[7] *See Report of the Commission of Inquiry into Post-election Violence*, Executive Summary at vii (Oct. 15, 2008), *at* http://www.dialoguekenya.org/docs/PEVReport1.pdf.

[8] *Id.* at 18, 472–75.

[9] Kofi Annan, Press Statement on the Defeat of the Constitution of Kenya Amendment Bill in Parliament (Feb. 13, 2009), *at* http://www.dialoguekenya.org/press.aspx (describing the rejection of the bill as "a major setback to the implementation" of the CIPEV report and "a blow to efforts aimed at ending the culture of impunity in Kenya").

[10] ICC, Office of the Prosecutor, Press Release, ICC Prosecutor Receives Sealed Envelope from Kofi Annan on Post-election Violence in Kenya (July 9, 2009), *at* http://www.icc-cpi.int; Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government at 2 (July 3, 2009), *at* http://www.icc-cpi.int/ (follow hyperlinks to press release of July 3, 2009).

In November 2009, after over a year of inaction by Kenyan authorities, Prosecutor Moreno-Ocampo requested judicial authorization to investigate the post-election violence (para. 2).[11] In brief, he asserted that he had a reasonable basis to believe that various crimes against humanity had been perpetrated after Kenya's elections; that the offenses fell within the temporal, territorial, and personal jurisdiction of the ICC; that there were no national criminal proceedings that would divest the ICC of jurisdiction; that because of the nature and gravity of the crimes, the cases from his investigations would be admissible before the ICC; and finally, that his investigations would not be against the interests of justice (paras. 52, 63, 70).

Following a four-month review of the prosecutor's application, Pre-trial Chamber II granted Moreno-Ocampo's request. In a 2-1 decision, Judge Hans-Peter Kaul dissenting, the majority[12] examined the available information, keeping in mind the purpose of Article 15 of the Rome Statute, which regulates the prosecutorial *proprio motu* power. Stressing the low standard of review applicable to the investigative stage of proceedings, the judges ruled that all the jurisdictional and admissibility criteria for the ICC to assert jurisdiction had been fulfilled.

After elaborating the applicable legal tests for prosecutorial investigations under Articles 15 (paras. 17–25, 64–69) and 53 (paras. 26–63) of the Rome Statute, the chamber reviewed the prosecutor's supporting evidence and found a reasonable basis to believe that crimes against humanity within ICC jurisdiction had been committed in Kenya (paras. 73, 76, 180). As part of the analysis, the majority examined jurisdiction *ratione materiae*, *ratione temporis,* and *ratione loci* in turn.

Regarding jurisdiction *ratione materiae*, Moreno-Ocampo submitted that murder, rape, and other forms of sexual violence, as well as deportation or forcible transfer of population and other inhumane acts, were the underlying crimes against humanity in Article 7 of the Rome Statute that formed the basis of the ICC's subject matter jurisdiction in Kenya (paras. 72–74).

To prove crimes against humanity under Article 7(1), the chamber explained that the prosecutor must show that the following chapeau and contextual requirements of the offense had been met in addition to proof of the elements of the underlying acts: "(i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack" (para. 79). The last requirement could not be feasibly considered at this early investigative phase given that there were no suspects before the judges (*id.*). The majority therefore confined its review to the first four elements, of which only the second, requiring a state or organizational policy for crimes against humanity, proved controversial.

The terms "State or organizational policy" are not defined in the Rome Statute (para. 84). According to the majority, however, this policy requirement encompasses not only the policies of states, which may be adopted at the highest levels or by regional or even local organs, but also those of any nonstate actors capable of adopting and implementing a policy to commit widespread or systematic attacks against a civilian population (paras. 89–90, 92). Although

[11] *See also* Situation in the Republic of Kenya, No. ICC-01/09-3, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 26, 2009), *at* http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf. The prosecutor's office had been conducting preliminary investigations in Kenya. *See* ICC, Office of the Prosecutor, OTP Statement in Relation to Events in Kenya (Feb. 5, 2008), *at* http://www.icc-cpi.int/ (follow hyperlinks from "Office of the Prosecutor" to "Reports and Statements").

[12] Presiding Judge Ekaterina Trendafilova and Judge Cuno Tarfusser formed the majority.

whether a particular entity will qualify as the author of an organizational policy must be ascertained on a case-by-case basis, establishing the formal nature of a group and its degree of organization is not determinative of the existence of crimes against humanity under Article 7(2)(a) of the Rome Statute (paras. 90, 92–93). Instead, someone must have planned, directed, or organized the attacks against civilians, rather than their having been spontaneous, random, or isolated events (paras. 117, 121). Applying this reading of the law to the prosecutor's supporting evidence, which was mostly drawn from tentative reports of nongovernmental organizations, the chamber ruled that the elements for each of the underlying crimes against humanity in Moreno-Ocampo's request had been met (paras. 139–71), given the relatively low standard of proof at this investigative stage.

After criticizing the prosecutor for vagueness in the time frame for his proposed investigation, the chamber delimited jurisdiction *ratione temporis* to run from the date of the Rome Statute's entry into force for Kenya, June 1, 2005, to that of Moreno-Ocampo's request to investigate the situation, November 26, 2009 (paras. 172–74, 201–07).

The prosecutor's last jurisdictional hurdle was to demonstrate that the alleged crimes occurred in the territory of a state party, or alternately, that they were committed by a national of such a state (paras. 39, 70, 175). He submitted that all the incidents in issue occurred within Kenya (para. 176). Since the evidence he adduced confirmed that the violence affected 136 constituencies in six of the eight Kenyan provinces, this statutory requirement was also satisfied, which made it unnecessary to examine the alternate ground of personal jurisdiction (paras. 177–79).

Having established reasonable grounds to believe that crimes within ICC jurisdiction had been committed, and that those offenses fulfilled the relevant jurisdictional criteria, the chamber examined whether the situation would be admissible under the complementarity principle in Article 17 of the Rome Statute. That provision gives national authorities primary responsibility to investigate and prosecute unless they prove unwilling and/or unable to do so, which then activates ICC jurisdiction. The prosecutor argued that, as regards the high-level political and business leaders associated with the two main political camps, there were no proceedings in Kenya to bar the ICC's assertion of jurisdiction (paras. 53, 183). As the Kenyan legislators had rejected the bill on the special tribunal, and the limited domestic proceedings had focused on minor offenses, those in leadership positions faced neither current prosecutions nor serious prospects of any—whether in Kenya or a third state. Consequently, the cases arising from his investigations, which would focus on those bearing the greatest responsibility for crimes against humanity, would be admissible (paras. 184–85). The chamber concurred that there was "inactivity" in Kenya regarding potential cases of investigative interest to the ICC, reflecting a general reluctance to address the post-election violence (paras. 54, 184–86).[13]

[13] Kenya now claims that it is willing and able to prosecute. *See* Situation in the Republic of Kenya, No. ICC-01/09-01/11, Decision on the Conduct of the Proceedings Following the Application by the Government of Kenya Pursuant to Article 19 of the Rome Statute (Apr. 4, 2011), *at* http://www.icc-cpi.int/iccdocs/doc/doc1050886.pdf; *see also* James Thuo Gathii, *Kenya's Credible Commitment to Keep Its Date with the ICC*, NAIROBI L. MONTHLY, Jan. 2011, *available at* http://ssrn.com/abstract=1729813. *But see* Prosecutor v. Ruto, No. ICC-01/09-01-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011); Prosecutor v. Muthaura, No. ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), *at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/ (follow "Chambers" hyperlink) (denying admissibility challenges on the basis that Kenya had failed to take concrete steps

The last part of the Article 17 admissibility test required consideration of the gravity of the alleged offenses (para. 57). The gravity threshold, which is both qualitative and quantitative, is an additional filter to prevent the ICC from "investigating, prosecuting and trying peripheral cases" (para. 56). The prosecutor claimed that the scale, nature, and impact of the post-election violence fulfilled the gravity requirement (paras. 190, 192). The chamber found that his supporting material and the victims' representations substantiated that argument in relation to both the entire Kenyan situation and the potential cases of investigative interest, and therefore held that the gravity threshold had also been fulfilled (paras. 191, 193, 200).

In a solid dissent, Judge Hans-Peter Kaul would have denied the prosecutor's request for a *proprio motu* investigation because he believed the evidence presented fell far short of the constitutive contextual requirements of crimes against humanity to trigger ICC jurisdiction (diss. op., para. 4). As he understood the contextual requirement of Article 7(2) of the Rome Statute, the essence of crimes against humanity is that certain prohibited acts must be committed in attacks directed against any civilian population in pursuit of or to further a state or organizational policy (*id.*, para. 24). While reprehensible acts were certainly committed during the post-election violence, the real issue was not whether those acts should be investigated or prosecuted, but whether the ICC, instead of Kenya, was the "right *forum*" to do so (*id.*, paras. 6–8).

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As this was the first ruling by an ICC pretrial chamber on a prosecutorial *proprio motu* request under the Rome Statute, the decision raises several significant issues.[14] For reasons of space, this case report focuses only on the core issue that sharply divided, and continues to divide, the chamber: namely, how to interpret the contextual element of crimes against humanity in Article 7(2) of the Rome Statute.[15]

Essentially, in the absence of proof of a high-level *state policy* to commit the post-election-related crimes in Kenya, the issue became whether the prosecution's evidence revealed the presence of an *organizational policy* that would raise the underlying acts to the level of crimes against humanity. This approach begged the question whether such a policy must be authored by an organization with statelike qualities or whether it suffices that it be constituted by an amorphous or private group of individuals whose principal distinguishing feature, as the majority

to investigate or prosecute the suspects for allegedly having committed crimes against humanity). On June 6, 2011, Kenya appealed the decisions denying its admissibility challenges.

[14] Since this case report was drafted, some respected scholars have begun to assess the implications of the *Kenya* decision. *See* Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC* Kenya *Decision*, 23 LEIDEN J. INT'L L. 855 (2010); William A. Schabas, *Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes*, 23 LEIDEN J. INT'L L. 847, 852 (2010).

[15] Prosecutor v. Ruto, No. ICC-01/09-01/11-2, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" (Mar. 15, 2011), *at* http://www.icc-cpi.int/iccdocs/doc/doc1039488.pdf; Prosecutor v. Muthaura, No. ICC-01/09-02/11-3, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-trial Chamber II's "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (Mar. 15, 2011), *at* http://www.icc-cpi.int/iccdocs/doc/doc1039485.pdf (opposing the issuance of summonses; finding that the ICC lacks subject matter jurisdiction over the alleged offenses in Kenya); *see also* Charles C. Jalloh, *Kenya's Dangerous Dance with Impunity* (Aug. 18, 2009), *at* http://jurist.law.pitt.edu/forumy/2009/08/kenyas-dangerous-dance-with-impunity.php (expressing early doubt that the violence in Kenya constituted crimes against humanity because of weak evidence for fulfillment of the state or organizational policy requirement).

decision found, turned on its ability to perpetrate vile acts that "infringe on basic human values" (para. 90; diss. op., para. 53). The chamber observed that rogue police participated in some of the violence, especially the killings of suspected youth militias, without clarifying whether there was enough of this activity to amount to a state policy. Ultimately, the majority determined that many of the post-election attacks were planned, directed, or organized by a concert of local leaders, businessmen, and politicians affiliated with the two leading parties, and on that basis essentially disposed of the organizational policy requirement to ground a finding of crimes against humanity (paras. 116–28).

Thus, while not totally ignoring the organizational policy requirement, the majority lowered the threshold as much as possible by glossing over what type of organizations and persons could develop such a policy. It took support for this liberal interpretation of Article 7(2)(a) from the ad hoc tribunals' jurisprudence and commentary on the Rome Statute, which concluded that "the policy element only requires that the acts of individuals alone, which are isolated, un-coordinated, and haphazard, be excluded" (para. 86 n.78).[16] But the novel interpretation in the ICC context that the policy brains behind crimes against humanity need not be part of an organization as such, as opposed to being merely organized and systematic in executing their criminal activities, appears contrary to the ICC Elements of Crimes, which clarifies that the "policy to commit such attack" explicitly "requires that the State or *organization* actively promote or encourage such an attack against a civilian population."[17]

Judge Kaul sharply criticized the majority for its overly permissive notion of the authorship of the organizational policy. To him, a state or organizational policy is conceived at the high policymaking level either by a state or by a nonstate entity that possesses some of the attributes of a state (diss. op., paras. 43, 51). The latter feature is what eventually transforms a private group into an entity that may act like a state (*id.*). Though he would not demand that such an organization fulfill the requirements of statehood, there must be, at a minimum, a collectivity of persons arranged in some type of hierarchy that is acting together toward a common purpose and is capable of formulating and implementing a policy to attack civilians on a large scale (*id.*). Violence-prone groups, such as mobs and criminal gangs that are constituted randomly and spontaneously for temporary purposes, have a fluid membership, and lack a coherent policymaking structure, fall outside the ambit of crimes against humanity even if they perpetrate numerous serious criminal acts (*id.*, paras. 52, 69). For ultimately, it is not the cruelty or massiveness of the acts but, rather, the context in which they take place that determines the issue (*id.*, paras. 52–53). It could not be otherwise, since the majority's interpretation effectively obliterates the distinction between mass human rights violations, on the one hand, and international crimes, on the other. Indeed, precisely because the organization must have the means and resources to commit the types of systematic and grave crimes that only the state is usually capable of, "Article 7(2)(a) of the Statute . . . serves also as a jurisdiction-endowing provision elevating ordinary crimes to the level of international crimes" (*id.*, para. 26).

The dissent's interpretation of the organizational policy requirement found support in the equally authentic Arabic, French, and Spanish versions of the Rome Statute, which clarify the

[16] Quoting Rodney Dixon & Christopher K. Hall, *Article 7, para. 2 a-i, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 236 (Otto Triffterer ed., 2d ed. 2008).

[17] ICC, Elements of Crimes, intro., para. 3, UN Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (emphasis added), *quoted in* Kenya Decision, para. 83; Diss. Op., para. 39.

ambiguity of the English text by showing that the policy to commit attacks must in fact be authored by an organization, rather than merely organized, planned, or systematic (diss. op., paras. 38–40)—as the majority basically implied. Judge Kaul accepted that nonstate actors could formulate, or at least endorse, an organizational policy to commit crimes against humanity if they have the relevant features, though the less an organization performs statelike functions, the harder it will be to impute responsibility to it (*id.*, paras. 43, 67, 69). This issue perhaps anticipates the evidentiary challenges that will face the prosecutor when seeking to prove charges of crimes against humanity against specific persons in a situation like Kenya's where unemployed, ethnicized youth militias entered into a marriage of convenience with politicians and others, and played a prominent role in carrying out opportunistic attacks against civilians.

The dissent directly takes on the majority's reliance on inconsistent case law of the ad hoc tribunals, especially since other international criminal courts are not sources of law with textually granted authority in the ICC system. As Judge Kaul explained, "Article 21 of the Statute sets forth in a comprehensive manner the applicable law for this Court. This article contains a list of sources of law and establishes a hierarchy between them, manifesting the primacy of the Statute" (diss. op., para. 29). Nowhere in this list is the jurisprudence of other ad hoc tribunals, a factor that becomes critical considering that those tribunals are creatures with a fundamentally different legal basis from that of the ICC. Yet the majority, for example, employed indicia (paras. 87–88) developed in the *Blaškić* case[18] by the International Criminal Tribunal for the Former Yugoslavia to infer the existence of an organizational policy that would raise ordinary domestic crimes to the status of international crimes against humanity.

Judge Kaul's understanding of the state or organizational policy requirement is also supported by the origins of the crime, in the atrocities committed by the Nazi German regime (diss. op., paras. 59–61). Although at customary international law the link between state policy and crimes against humanity appears to have evolved from the Nuremberg Tribunal's requirement of state-sponsored crimes,[19] the historical context in which "crimes against humanity" developed cannot be overlooked.[20] That context seemingly makes plain that it was not only the mass nature of the crimes against civilians that was deemed a grave threat to world peace and security, but also the fact that such offenses were calculated to further particularly inhumane policies by means of state resources (*id.*, paras. 60–64). This rationale distinguishes heinous crimes against humanity from ordinary human rights violations, local crimes from international offenses, and crimes that otherwise fall within the exclusive competence of domestic courts from those that merit the attention of international penal tribunals like the ICC (*id.*, paras. 9, 53).

[18] Prosecutor v. Blaškić, No. IT-95-14-T, paras. 204–05 (Mar. 3, 2000).

[19] In addition to a nexus to a conflict, the preamble to Article VI of the Statute of the Nuremberg Tribunal, while not explicitly mandating a state policy, required the suspects to have acted in the interests of European Axis countries. These were the jurisdictional elements that transformed otherwise domestic offenses into international crimes. For summaries of the relevant case law, see Kenya Decision, para. 86 n.79; Diss. Op., paras. 31 n.29, 49 n.51.

[20] The birth and uneven growth of crimes against humanity as an international crime remains controversial. For more on this question, see Joseph Rikhof, *Crimes Against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda*, 6 NAT'L J. CONST. L. 233 (1996); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AJIL 43 (1999). *Contra* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237 (2002).

M. Cherif Bassiouni, who played a prominent role in the negotiations on drafting the Rome Statute and creating the ICC, has observed that a state or organizational policy is an "essential characteristic of crimes against humanity,"[21] but that "non-state actors must have some of the characteristics of state actors" to be able to implement policies similar in nature to those carried out by states and thereby trigger the international or jurisdictional element of that offense.[22] Other leading scholars have taken the same position.[23] Particularly at the ICC, which departs from customary international law on this point, the very existence of that additional policy element justifies international criminalization and international enforcement.[24] Without this crucial distinction, the scope of crimes against humanity could be extended to encompass any situation where mass atrocities have taken place. Diluting the concept in this way may expand the range of possible situations within ICC jurisdiction, which may explain the majority's interpretation, but it also undermines by judicial fiat the message emphasized in the preamble and fundamental provisions of the Rome Statute, such as Article 17, that the ICC was intended to be a court of last, not first, resort that supplements, instead of supplants, national jurisdictions.

To be sure, this author does not oppose ICC involvement in situations that warrant it, especially in certain parts of Africa where ruthless governments take advantage of a climate of impunity to play the ethnic card and foment violence against vulnerable civilians and opposition politicians. But the recent trend of post-election violence since the events in Kenya, most notably in Guinea, Ivory Coast, and Nigeria, suggests that in the future it may be appropriate for ICC judges to demand more from a prosecutorial finding that crimes against humanity have been committed—even at the time of the request for authorization to investigate. This course seems prudent because the fledgling ICC might eventually prove unable to bear the burden of trying as many cases as it could be asked to adjudicate if the majority decision is taken to its logical conclusion.

CHARLES CHERNOR JALLOH
University of Pittsburgh School of Law

ICSID annulment—U.S.-Argentina bilateral investment treaty—ILC articles on state responsibility—necessity—essential interests—lawful measures during economic crises

SEMPRA ENERGY INTERNATIONAL v. ARGENTINE REPUBLIC. No. ARB/02/16. Annulment Decision. 49 ILM 1445 (2010), *available at* http://icsid.worldbank.org.
International Centre for Settlement of Investment Disputes, June 29, 2010.

Marking a new jurisprudential trend in international investment law, an ad hoc committee of the International Centre for Settlement of Investment Disputes (ICSID) annulled the arbitral award in *Sempra Energy International v. Argentine Republic.*[1] The arbitral tribunal had

[21] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 277 (2d rev. ed. 1999).

[22] *Id.* at 275.

[23] *See, e.g.*, William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008).

[24] On the evolution of this concept, see Kenya Decision, para. 86 n.79; Diss. Op., para. 50 n.51.

[1] Sempra Energy Int'l v. Argentine Republic, ICSID No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (June 29, 2010). This and other ICSID decisions mentioned below are available on the ICSID Web site, http://icsid.worldbank.org, unless another source is given.