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**NO CRIMES AGAINST HUMANITY DURING THE  
MAYDAN PROTESTS IN UKRAINE? OR THE  
ICC PROSECUTOR’S FLAWED  
INTERPRETATION OF CRIMES  
AGAINST HUMANITY?**

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ABSTRACT

*The Article takes a fresh look at the definition of crimes against humanity and its applicability in the International Criminal Court (“ICC”) by analyzing the ICC Prosecutor’s decision not to proceed with the investigation of the Maydan crimes in Ukraine, based on her evaluation of the “widespread or systematic” requirement. It argues that the ICC Prosecutor did not correctly apply the systematic requirement of crimes against humanity to the factual circumstances surrounding the Maydan events that were supportive of the requirement. The ICC Prosecutor’s finding appears to stem from the lack of clarity in International Criminal Law as to how the systematic requirement is applied on a stand-alone basis as well as how it interacts with the policy element. By deciding not to forward with the investigation into the situation of Ukraine, the ICC Prosecutor denied the judges an opportunity to decide whether the Maydan crimes would satisfy the system-*

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\* I would like to thank Professor Elies van Sliedregt for her encouragement and comments on the early draft of my article.

*atic requirement of crimes against humanity despite its earlier finding on the existence of a State policy, which serves as an important indicator of the systematic requirement. This Article criticizes the ICC Prosecutor's overly narrow approach towards the interpretation of a "widespread or systematic" attack in the context of crimes against humanity and analyzes implications the prosecutorial discretion of not requesting the authorization of the investigation in Ukraine may have for the future direction of the Court with respect to the interpretation of crimes against humanity.*

## I. INTRODUCTION

This article re-examines the conceptual definition of crimes against humanity and its applicability in the International Criminal Court ("ICC") in light of the recent ICC Prosecutor's interpretation of crimes against humanity at the stage of its preliminary examination of the Maydan<sup>1</sup> crimes in Ukraine. It highlights uncertainty in the applicability of the requirement of a "widespread or systematic" attack and how it interacts with the element of a "state or organizational policy" in the context of crimes against humanity. This article argues that the disjunctive test of "widespread or systematic" in International Criminal Law does not work well, as judging by the developed jurisprudence, it entails that both characteristics of the attack are in fact present or at least the widespread dimension is overwhelmingly convincing. International criminal courts have not developed a practice for the prosecution of crimes against humanity based on the presence of the systematic requirement *alone*. The very absence of such a precedent somewhat explains the outcome of the situation in Ukraine, where the ICC Prosecutor decided not to proceed with the investigation of the Maydan crimes on the basis that the attack during which the alleged crimes against humanity occurred was not systematic. The ICC Prosecutor reached this conclusion during its preliminary examination of the situation in Ukraine, acting upon the Ukraine's declaration on the ad hoc jurisdiction acceptance with respect to the Maydan crimes. This article criticizes the ICC Prosecutor's overly narrow approach towards the interpretation of a "widespread or systematic" attack in the context of crimes against humanity. It argues that the Prosecutor misinterpreted the factual circumstances, which are indicative of the systematic dimension of the attack, and analyzes implications the prosecutorial discretion of not requesting the authorization of the investigation in Ukraine may have for the future direction of the Court with respect to the interpretation of crimes against humanity.

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<sup>1</sup> Maydan crimes refer to the crimes committed in the context of public protests against the anti-EU policies of the former Ukrainian government that took place in the capital of Ukraine, mostly concentrated at the Maydan Nezalezhnosti square, in period between November 2013 and February 2014.

This article will begin by providing a brief overview of the events leading up to the Maydan crimes and the Ukraine's acceptance of the ICC's ad hoc jurisdiction. It will focus on the ICC Prosecutor's evaluation of a "widespread or systematic attack" in relation to the Maydan crimes in deciding whether to proceed with the investigation into the situation in Ukraine. Initially, the article will situate the ICC Prosecutor's findings on crimes against humanity in Ukraine in a broader debate on the conceptual understanding of crimes against humanity in International Criminal Law. In order to illustrate uncertainty in the applicability of the requirement of a "widespread or systematic" attack in the context of crimes against humanity, the article will examine the evolution of this requirement from Nuremberg to the ICC. The subsequent parts of this article will explore how the ICC has construed the "widespread or systematic" requirement in similar situations based *solely* on the charges of crimes against humanity appearing before the Court. Ultimately, this article will argue that the ICC Prosecutor's finding of the absence of crimes against humanity during the Maydan protests was flawed, since the alleged crimes appear to have satisfied the systematic requirement of the disjunctive test for crimes against humanity as set out in the Rome Statute.

## II. MAYDAN CRIMES AND THE ICC

The first section of the Article provides a brief overview of the events during the Maydan protests that led the Ukrainian government to accept the jurisdiction of the ICC under Article 12(3) of the Rome Statute for the alleged crimes against humanity. It also details the steps undertaken by the ICC Prosecutor with respect to the preliminary examination of the Maydan crimes and lays the groundwork for the subsequent discussion as to how the Office of the Prosecutor's ("OTP") report on the absence of crimes against humanity during the Maydan protests may influence our understanding of the concept of crimes against humanity in International Criminal Law.

The Maydan protests, which lasted from November 2013 until February 2014, were sparked by the unpopular decision of the former President of Ukraine, Viktor Yanukovich, not to sign the association agreement with the European Union.<sup>2</sup> Following his decision, peaceful protests descended into confrontations between the Ukrainian security forces and demonstrators.<sup>3</sup> The situation began to spiral out of control with the adoption of controversial laws on January 16, 2014, commonly known as dictatorship laws, which imposed restrictions on freedom of assembly and

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<sup>2</sup> See *Ukraine protests after Yanukovich EU deal rejection*, BBC NEWS (Mar. 1, 2016), <http://www.bbc.com/news/world-europe-25162563>.

<sup>3</sup> See *id.*; see also UNHCR, REP. ON THE HUMAN RIGHTS SITUATION IN UKRAINE, ¶ 56-58 (Apr. 15, 2014), <http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/UARports.aspx>.

freedom of expression.<sup>4</sup> Following this, violent clashes between demonstrators and security forces escalated into the peak of violence on February 18, 2014, which resulted in the death of around one hundred demonstrators and hundreds of injuries.<sup>5</sup> In a desperate attempt to calm the situation, Yanukovich reached an agreement with opposition leaders on a new government and early presidential elections scheduled for May 2014.<sup>6</sup> This decision infuriated the public, which was appalled by the killing of demonstrators and demanded the resignation of the President with immediate effect.<sup>7</sup> Claiming that he feared for his life, Yanukovich fled the country to neighboring Russia.<sup>8</sup>

As Ukraine was effectively left without a president, the Ukrainian parliament, Verkhovna Rada, passed a resolution on self-withdrawal of President Yanukovich from his constitutional duties.<sup>9</sup> The chairperson of Verkhovna Rada, Oleksandr Turchynov, assumed responsibilities as *ex*

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<sup>4</sup> *Pro vnesennya zmin do Zakonu Ukrayiny "Pro sudoustrij i status suddiv" ta procesualnyx zakoniv shchodo dodatkovyx zaxodiv zaxystu bezpeky hromadyan* [On Amendments to the Law of Ukraine "On the Judicial System and Status of Judges" and procedural laws regarding additional measures to protect the safety of citizens] [Law of Ukraine] Jan. 16, 2014, No. 721-VII, <http://zakon4.rada.gov.ua/laws/show/721-18>, translated in <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802efb7f>.

<sup>5</sup> The number of casualties provided by various sources differs and fluctuates between seventy-five and one hundred persons killed during the protests. *Register of Proceedings of Crimes During the Revolution of Dignity*, GENERAL PROSECUTOR OF UKRAINE (Jan. 22, 2014), <http://rrg.gov.ua/reestr-kriminalnih-provazhen/golovne-slidche-upravlinnja-generalnoi-prokuraturi-ukraini/storinka-1/> (stating that during the protests seventy-seven civilians were killed, around 2 hundred civilians sustained gunshot wounds and more than 1 thousand civilians received injuries of various gravity).

<sup>6</sup> Hannah Strange, Ukraine crisis: Viktor Yanukovich denounces 'coup' as he leaves Kiev, TELEGRAPH (Feb. 22, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10655398/Ukraine-crisis-Opposition-demands-Viktor-Yanukovich-resign.html>.

<sup>7</sup> See *id.*

<sup>8</sup> Following Yanukovich's escape to Russia, he held a press conference in Rostov, during which he asserted his position as a legitimately elected president of Ukraine. See News of Ukraine, *Viktor Yanukovich Press Conference in Rostov 11 03 14*, YOUTUBE (Mar. 11, 2014), <https://www.youtube.com/watch?v=uR8IPqVYd84>.

<sup>9</sup> See *Pro samousunennya Prezydenta Ukrayiny vid vykonannya konstytucijnyx povnovazhen ta pryznachennya pozacherhovyx vyboriv Prezydenta Ukrayiny* [Resolution of Verkhovna Rada of Ukraine On Self-Withdrawal of the President of Ukraine from Performing His Constitutional Duties and Scheduling Early Elections of the President of Ukraine] (Feb. 22, 2014), <http://zakon5.rada.gov.ua/laws/show/757-18>.

*officio* Head of State until the election of the new president, Petro Poroshenko, in May 2014.<sup>10</sup>

States that have not ratified the Rome Statute have occasionally sought the ICC's help to address ongoing situations of violence by lodging the declaration under Article 12(3) of the Rome Statute. As an example, both Côte d'Ivoire and Palestine invoked Article 12(3) in order to submit to the jurisdiction of the ICC.<sup>11</sup> The "beauty" of the ad hoc jurisdiction acceptance mechanism is that it may be invoked by a non-state party to the Rome Statute that chooses to refer the situation to the ICC because it is incapable of dealing with the prosecution of the crimes that would otherwise fall within the jurisdiction of the Court.<sup>12</sup> The jurisdiction triggered by lodging the declaration also entitles the ICC to exercise its jurisdiction retroactively, that is, in relation to the crimes that have been committed.<sup>13</sup> Despite being a signatory to the Rome Statute, Ukraine has not ratified it.<sup>14</sup> The Constitutional Court of Ukraine stalled the ratification process by finding that the ICC's principle of complementarity was contrary to the Constitution of Ukraine's provision granting exclusive judicial competence to Ukrainian courts.<sup>15</sup> Ultimately, the Ukrainian

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<sup>10</sup> See generally *Konstytuciya Ukrainy*, art. 112 (providing that in the event of early termination of the presidential duties, the chairperson of Verkhovna Rada of Ukraine acts as *ex officio* Head of State until the elections of a new president); Shaun Walker and Alex Luhn, *Petro Poroshenko wins presidency, according to exit polls*, GUARDIAN (May 25, 2014), <https://www.theguardian.com/world/2014/may/25/poroshenko-ukraine-president-wins-election>.

<sup>11</sup> See Côte d'Ivoire, *Déclaration de Reconnaissance de la Compétence de la Cour Pénale Internationale*, ICC (Apr. 18, 2003), <https://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf> [hereinafter *Côte d'Ivoire Declaration*]; see also Palestine, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, ICC (Jan. 21, 2009), <https://www.icc-cpi.int/NR/rdonlyres/7CFB4B01-0B7E-4590-A8A8-7863E516F0A3/279777/20090122PalestinianDeclaration7.pdf>.

<sup>12</sup> INT'L CRIM. CT., *Understanding the International Criminal Court* 5, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> Ukraine signed the Rome Statute on January 20, 2000. All the ratification attempts have thus far been unsuccessful. For more see Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VAND. J. TRANSNAT'L L. 323, 326 (2016).

<sup>15</sup> See *id.* at 326-37; see also *Konstytucyjnyj Sud Ukrainy Vysnovok Konstytucijnoho Sudu Ukrainy u spravi za konstytucijnym podannyam Prezydenta Ukrainy pro nadannya vysnovku shhodo vidpovidnosti Konstytuciyi Ukrainy Rym'skoho Statutu Mizhnarodnoho kryminal noho sudu*, [Ruling on the Submission of the President of Ukraine Regarding Conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court] No. UKR-2001-2-001 (July 11, 2001), <http://www.ccu.gov.ua/en/docs/295>.

interim government accepted the jurisdiction of the ICC with respect to the Maydan events by lodging the declaration under Article 12(3).<sup>16</sup>

In reaction to the public outcry in the aftermath of the Maydan violence, the Ukrainian parliament accepted the ad hoc jurisdiction of the ICC under Article 12(3) of the Rome Statute with respect to the Maydan events.<sup>17</sup> In its Declaration, the parliament alleged that the Ukrainian senior government officials committed crimes against humanity through authorizing and condoning the violence unleashed by the Ukrainian security forces against demonstrators.<sup>18</sup> Nearly three months passed before Ukraine officially lodged its declaration accepting the ad hoc jurisdiction of the ICC with the ICC Registrar.<sup>19</sup> In its press release, the ICC acknowledged the receipt of Ukraine's declaration and relayed it for further consideration by the OTP.<sup>20</sup>

The ICC Prosecutor took one-and-a-half years to decide whether to seek the Pre-Trial Chamber's authorization to initiate an investigation into the situation.<sup>21</sup> In deciding whether a reasonable basis exists for initiating an investigation, the ICC Prosecutor follows a three-prong test laid down in Article 53(1) of the Rome Statute.<sup>22</sup> In its report on preliminary investigation activities, the ICC Prosecutor limited her legal analysis with respect to the Maydan events to the determination of whether "the crimes allegedly committed during the Maydan protests events may

<sup>16</sup> Declaration of the Verkhovna Rada of Ukraine, No. 790-VII, Feb. 25, 2014 [hereinafter Declaration I]. On Sept. 8, 2015, Ukraine lodged yet another declaration accepting the ad hoc jurisdiction of the ICC with respect to alleged crimes committed in eastern Ukraine and Crimea since 20 February 2014. *See e.g.*, Declaration of Verkhovna Rada of Ukraine, No 145-VIII, Feb. 4, 2015 [hereinafter Declaration II]; *see* Press Release, Int'l Crim. Ct., Ukraine Accepts the ICC Jurisdiction Over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014, ICC-CPI-20140417-PR997 (Apr. 17, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr997.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr997.aspx).

<sup>17</sup> *See* Declaration I, *supra* note 16.

<sup>18</sup> *Id.*; *see generally* Embassy of Ukraine, No. 61219/35-673-384 (Registrar, Int'l Crim. Ct. Apr. 9, 2014) <https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>.

<sup>19</sup> *See* Press Release, Int'l Crim. Ct., *supra* note 16.

<sup>20</sup> *Id.*

<sup>21</sup> *See* INT'L CRIM. CT. OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015) 18, ¶ 77-79 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [hereinafter OTP REPORT].

<sup>22</sup> According to Article 53(1)(a)–(c), The ICC Prosecutor shall consider whether "(a) the information available . . . provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is been committed; (b) the case is or would be inadmissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of justice." Rome Statute of the Int'l Crim. Ct. art. 53, ¶ 1, July 17, 1998, A/CONF.183/9. The author argues elsewhere that the test laid down in Article 53(1)(a)–(c) with respect to the evaluation of the Maydan crimes has been met. *See* Marchuk, *supra* note 14, at 347.

amount to crimes against humanity under article 7 of the Statute.”<sup>23</sup> The thrust of the Prosecutor’s argument is that the attack during which the Maydan crimes took place was neither widespread nor systematic.<sup>24</sup> Given the Prosecutor’s evaluation on the absence of a “widespread or systematic” attack during the Maydan protests, she concluded that the alleged crimes did not constitute crimes against humanity.<sup>25</sup>

Despite the test of “widespread *or* systematic” being disjunctive, there seems to exist a presumption in the work of international criminal courts that both dimensions of the attack have to be present in order for the Prosecutor to move forward with the investigation. The very absence of any precedent in the work of international criminal courts—when the Prosecutor decided to go forward with the investigation on the basis that the attack during which the crimes against humanity occurred was *solely* systematic—was largely to blame for the outcome in the situation of Ukraine. By illustrating how the requirement of a “widespread or systematic” attack was applied in the situation of Ukraine, and other situations, the author hopes to reinvigorate the debate on the conceptual definition of crimes against humanity and its applicability in International Criminal Law.

### III. THE EVOLUTION OF A WIDESPREAD OR SYSTEMATIC REQUIREMENT IN INTERNATIONAL CRIMINAL LAW: FROM NUREMBERG TO THE ICC

The “widespread or systematic” requirement for crimes against humanity is traced to the Nuremberg Tribunal, which prosecuted Nazi leadership in the aftermath of World War II.<sup>26</sup> This was the first time that crimes against humanity were featured as a distinct category of international crimes and enforced by a tribunal of an international character.<sup>27</sup> However, the Nuremberg Charter did not provide a comprehensive definition of crimes against humanity, but instead merely listed underlying acts that would qualify as crimes against humanity only if they were committed in execution of or in connection with any other crime within the jurisdiction of the Tribunal (“war crimes nexus”).<sup>28</sup> The “widespread or systematic” requirement is glaringly absent from this definition of crimes against humanity. The International Law Commission (“ILC”) noted that

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<sup>23</sup> OTP REPORT, *supra* note 21, at 89.

<sup>24</sup> *Id.* at 95.

<sup>25</sup> *See id.* at 101.

<sup>26</sup> U.N. Secretary-General, The Charter and Judgment of the Nuremberg Tribunal - History and Analysis, at 75, A/CN.4/5, [hereinafter Nuremberg Charter].

<sup>27</sup> *See id.* at 92-3 (listing the following crimes as crimes against humanity: “. . . murder, extermination, enslavement, deportation, other inhumane acts committed against civilian population . . . persecutions on political, racial or religious grounds. . .”).

<sup>28</sup> *Id.*

despite such absence, the existence of the requirement was implied, as the Tribunal, in considering whether certain acts constituted crimes against humanity, paid attention to the vast scale, as well as the systematic and organized nature of the policy of terror in which the crimes were committed.<sup>29</sup>

In its 1991 Draft Code, the ILC termed crimes against humanity as “systematic or mass violations of human rights.”<sup>30</sup> The two disjunctive terms were added to signal that the Draft Code covered only acts of an extremely serious character.<sup>31</sup> The “systematic” element was described through “a constant practice or to a methodical plan to carry out such violations,” whereas the “mass-scale” element was employed in relation “to the number of people affected by such violations or the entity that has been affected.”<sup>32</sup> It also made clear that the proof of either one of those disjunctive terms was sufficient.<sup>33</sup> The commentary recognized that the systematic or mass-scale dimension of the crimes was closely linked to a policy to commit such crimes designed either by public officials who have “factual opportunity to commit the crimes” or by private individuals “with de facto power or organized in criminal gangs or groups.”<sup>34</sup>

Several years later, the 1996 Draft Code further developed the definition of crimes against humanity, providing that they must be “committed in a systematic nature or on a large scale instigated or directed by a government or by any organization or group.”<sup>35</sup> It is clear from the wording that the “large scale” and “systematic” requirements were used in the alternative. The commentary to the 1996 Draft Code explicates that “on a large scale” requirement means that “the acts are directed against a multiplicity of victims,” and serves as a filter to exclude an isolated inhuman act to be considered as a crime against humanity.<sup>36</sup> The “systematic nature” requirement means that the acts are committed “pursuant to a preconceived plan or policy.”<sup>37</sup> This was introduced to exclude any ran-

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<sup>29</sup> Int’l Law Comm’n, REP. ON THE WORK OF ITS FORTY-EIGHTH SESSION, U.N. GAOR, 51st Sess., Supp. No. 10, at 47, ¶ 3, U.N. Doc. A/51/10; (1996), [hereinafter REP. ON FORTY-EIGHTH SESSION]; IMT, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg (Nuremberg Judgment)*, Germany, 1 October 1946, PART: *The Law Relating to War Crimes and Crimes Against Humanity*, available at <http://avalon.law.yale.edu/imt/judlawre.asp> (retrieved 1 March 2016) (finding that “the policy of terror was certainly carried out on a vast scale, and in many cases was *organized and systematic*” (emphasis added)).

<sup>30</sup> Int’l Law Comm’n, REP. ON THE WORK OF ITS FORTY-THIRD SESSION, U.N. GAOR, 46th Sess., Supp. No. 10, at 103, ¶ 3, U.N. Doc. A/46/10 (1991).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> REP. ON FORTY-EIGHTH SESSION, *supra* note 29, at 47.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶ 4.



dom acts, which were not committed as a part of a broader plan or policy.<sup>38</sup> Although the interpretation of both qualifiers is similar to that featured in the 1991 Draft Code, it is necessary to note that the term “systematic” was defined as the existence of a policy advanced by a state or any other group.<sup>39</sup> In other words, the proof of the existence of a policy to commit any underlying acts listed in the Draft Code was sufficient to qualify the acts as crimes against humanity.

The UN Commission of Experts elaborated on the “widespread or systematic” requirement attached to crimes against humanity in its report to the Secretary-General on the existence of serious violations of international humanitarian law in the territory of the former Yugoslavia.<sup>40</sup> It noted that that crimes against humanity “must be carried out in a systematic way or by means of a mass action.”<sup>41</sup> The test was construed as involving a “high number of victims and perpetrators” and the existence of a “common plan” masterminded by perpetrators.<sup>42</sup> Although the terms “systematic” and “mass action” are used in the alternative, one does have an impression that, in fact, the two elements were used as a cumulative characteristic of the attack within the meaning of crimes against humanity. This is evident from the committee’s conclusion: “it is the overall context of large-scale victimization carried out as part of a common plan or design which goes to the element of systematicity.”<sup>43</sup> The report highlights the significance of crimes against humanity due to “the abhorrent character of the overall policy, the means employed to carry out the policy and the number of victims it produces.”<sup>44</sup> Although the policy element was not singled out as a separate element of crimes against humanity, it is clear that it was embedded in the element of systematicity.

While the statute of the International Tribunal for the former Yugoslavia (“ICTY”) does not explicitly provide for the widespread or systematic requirement in the definition of crimes against humanity, the existence of the requirement was affirmed in the early jurisprudence of the ICTY in its pivotal *Tadic* case.<sup>45</sup> Interestingly, the Prosecution and the Defense were in disagreement as to whether the “widespread or systematic” test was conjunctive or disjunctive.<sup>46</sup> The Prosecutor submitted that the attack against the civilian population was meant to be widespread or systematic,

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> REP. OF THE COMM’N OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780, ¶ 84, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter - COMM’N OF EXPERTS’ REP.].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at ¶ 86.

<sup>45</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 646 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

<sup>46</sup> See *id.* at ¶ 645

whereas the Defense argued that the test required both elements to be in place.<sup>47</sup> The Trial Chamber agreed with the Prosecution, holding that it was well established that the acts directed against a civilian population can only be considered crimes against humanity if they occur on a widespread basis or in a systematic manner.<sup>48</sup> It substantiated its conclusion that both terms are used in the alternative by referring to the Report of the Secretary-General, the report of the ad hoc committee on the establishment of a permanent International Criminal Court, the ILC Draft Codes, and the *Vukovar Hospital* decision.<sup>49</sup> The Trial Chamber noted a discrepancy as to how those two terms had been used, in particular in the working documents of the ILC. However, it concluded that the prevailing opinion was that those two terms were used in the alternative, which it confirmed was also applicable in the ICTY.<sup>50</sup>

In its *Akayesu* case, the International Criminal Tribunal for Rwanda (“ICTR”) Trial Chamber also upheld the disjunctive test of “widespread or systematic.” It noted, however, that in the original French version of the ICTR Statute, the two requirements were used as cumulative terms.<sup>51</sup> In that respect, the Trial Chamber reinstated that the test in customary international law was disjunctive and attributed the cumulative use of terms to the translation error.<sup>52</sup> The “widespread” requirement was defined as “massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against the multiplicity of victims.”<sup>53</sup> The concept of “systematic” was defined as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”<sup>54</sup> The Trial Chamber further clarified that although the policy was not confined to a formal state policy, some kind of preconceived plan or policy must be present.<sup>55</sup>

The ICTY has construed the widespread or systematic test in a similar fashion. The ICTY Appeals Chamber re-affirmed that the term “widespread” referred to “the large-scale nature of the attack and the number of targeted persons,” whereas the term “systematic” referred to “the organized nature of the acts of violence and the improbability of their random occurrence.”<sup>56</sup> The Appeals Chamber held that patterns of crimes, which manifest themselves in the non-accidental repetition of

<sup>47</sup> *Id.* at ¶ 645.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at ¶ 646-47.

<sup>50</sup> *Id.* at ¶ 647.

<sup>51</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 579, fn. 144 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 2, 1998).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at ¶ 580.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at ¶ 580; *see also* REP. ON FORTY-EIGHTH SESSION, *supra* note 29, at 94.

<sup>56</sup> Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 101 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (citing Prosecutor v. Kunarac,

similar criminal conduct on a regular basis, constitute a common expression of systematic occurrence.<sup>57</sup> The ICTY further defines that the “systematic” element of crimes against humanity may be expressed through: (i) a political objective or plan, (ii) large-scale or the repeated and continuous commission of crimes which are linked, (iii) use of significant public or private resources, and (iv) the implication of high-level political or military authorities.<sup>58</sup>

Although at first glance the characteristics pertinent to a systematic attack seem to resonate with those outlined by the *Akayesu* Trial Chamber, there are some notable differences. The ICTR defines systematicity through the existence of a policy, whereas the ICTY does it through the existence of a political objective or a plan as well as the implication of political or military leadership. It is also clear from the ICTY definition that it defines “systematic” through the continuous and repeated commission of crimes rather than the level of organization as appears in *Akayesu*. The ICTY definition of the systematic requirement through the “large-scale” commission of crimes is also quite confusing, as it is clearly indicative of the “widespread” element. The two ad hoc tribunals are thus in agreement about the disjunctive use of a “widespread or systematic” requirement, although there are some differences as to characteristics of the systematic nature of the attack.

With respect to the assessment as to what constitutes a “widespread or systematic” attack, the ICTY Appeals Chamber in *Kunarac* upheld that it is “essentially a relative exercise,” which depends upon the civilian population that is attacked.<sup>59</sup> More specifically, such evaluation requires the Trial Chamber first to “identify the population which is the object of the attack,” and then “in light of the means, methods, resources and result of the attack upon the population” to ascertain whether the attack was widespread or systematic.<sup>60</sup> Apart from this, the Trial Chamber could also take into the account “the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes” in order to determine whether the attack satisfies either or both requirements of a “widespread or systematic” attack.<sup>61</sup>

Interestingly, the Appeals Chamber does not distinguish how to evaluate the “widespread or systematic” dimensions of the attack separately.

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Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002)).

<sup>57</sup> *Id.* at ¶ 101.

<sup>58</sup> Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, ¶ 203 (Int’l Crim. Trib. for the Former Yugoslavia March 3, 2000).

<sup>59</sup> Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment ¶ 95 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

<sup>60</sup> *Id.* (citing trial judgement).

<sup>61</sup> *Id.*

The test appears to be uniform and equally applies to both characteristics of the attack. The judges may have chosen to formulate the applicable uniform test for evaluating the “widespread or systematic” requirement since there was no need to elaborate in greater depth how to evaluate those two characteristics separately. It is commonly known that the violence in the former Yugoslavia was of large-scale and organized nature and therefore satisfied both characteristics within the meaning of crimes against humanity. The two dimensions of the attack were also easy to prove with respect to the violence fueled by ethnic hatred in Rwanda.

While the absence of a clearly formulated test for assessing the “widespread or systematic” requirement did not prove to be a major issue in the practice of the ad hoc tribunals, it has generally created uncertainty as to the application of the requirement in different situations when the existence of both elements of the attack is not as straightforward as in the situations in the former Yugoslavia and Rwanda. The article will attempt to demonstrate that the ICC Prosecutor has been confronted with that challenge in the situation in Ukraine, and will argue that the “widespread or systematic” test was wrongly construed and applied.

#### A. *The Widespread or Systematic Requirement in the ICC*

The Rome Statute provides that crimes against humanity must be committed as part of a widespread or systematic attack directed against any civilian population.<sup>62</sup> Although the Statute uses both terms in the alternative similar to the practices of the ad hoc tribunals, the use of terms was subject to discussion during drafting of the Rome Statute.<sup>63</sup> The drafters were divided into two major groups: one of them campaigning for the disjunctive test of “widespread *or* systematic” and another one favoring the conjunctive test of “widespread *and* systematic.”<sup>64</sup> The proponents of the disjunctive test referred to the developed practices of the ad hoc tribunals.<sup>65</sup>

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<sup>62</sup> Rome Statute of the Int’l Crim. Ct. *opened for signature* July 17, 1988, art. 7, 2187 U.N.T.S. 90, (entered into force July 1, 2002).

<sup>63</sup> See Darryl Robinson, *Defining ‘Crimes Against Humanity’ at the Rome Conference*, 93 AM. J. INT’L L. 43, 47 (1999).

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 47; see also: U.N., *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONR183/13, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Official Records, Volume II, Rome, 15 June-17 July 1998. [hereinafter U.N. Diplomatic Conf.]. For the positions of individual states, please consult the following paragraphs of the summary records: Germany (¶ 21, p. 147), Czech Republic (¶ 36, p. 148), Brazil (¶ 50, p. 148), Denmark (¶ 55, p. 149), Poland (¶ 82, p. 150), Mexico (¶ 124, p. 152), Finland (¶130, p. 152), Spain (¶ 148, p. 153), Italy (¶ 162, p. 153), Netherlands (¶ 14 p. 155).

The drafters who opposed the disjunctive test argued that the proof of only one characteristic of the attack would create an over-inclusive test.<sup>66</sup> The Indian delegate raised concerns that in case of the adoption of a disjunctive test, “an individual murder, for instance, would fall within the jurisdiction of the Court.”<sup>67</sup> The representative of Thailand submitted that the adoption of a cumulative test was necessary to ensure that the crimes within the jurisdiction of the ICC “were of a truly serious nature and differed from ordinary criminal offences.”<sup>68</sup> Uruguay,<sup>69</sup> Iran,<sup>70</sup> Turkey,<sup>71</sup> Russia,<sup>72</sup> Sweden,<sup>73</sup> Japan,<sup>74</sup> and Syria<sup>75</sup> each advanced similar arguments, advocating for the adoption of the cumulative test.

This concern about the over-inclusiveness of the test was supposedly remedied by the introduction of the policy requirement, which ensured that the ICC could only prosecute the crimes committed as part of a “state or organizational policy.”<sup>76</sup> The delegates were, however, split on the subject of the policy element.<sup>77</sup> One of the most vocal opponents was the representative of Congo, who argued that the policy element “constituted an unacceptable threshold that in no way reflected contemporary realities or international law.”<sup>78</sup> Taking a different stance on the issue, the representative of Sri Lanka supported the adoption of the policy element arguing that it was intended to cover both government and non-government entities.<sup>79</sup> Contrary to the practice of the ad hoc tribunals, which treated the existence of a policy as an evidentiary matter, the drafters of the Rome Statute singled it out as a separate element in order to ensure that only crimes of sufficient gravity would reach the ICC.<sup>80</sup> However, concerns have been voiced in academia that the “widespread or systematic” requirement coupled with the policy element essentially turns the disjunctive test into the conjunctive one.<sup>81</sup>

The ICC Pre-Trial and Trial Chambers re-affirmed the disjunctive use of the terms “widespread or systematic.” Similar to the developed juris-

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<sup>66</sup> Robinson, *supra* note 63, at 47.

<sup>67</sup> U.N. Diplomatic Conf., *supra* note 65, at 148.

<sup>68</sup> *Id.* at 151.

<sup>69</sup> *Id.* at 156.

<sup>70</sup> *Id.* at 152.

<sup>71</sup> *Id.* at 154.

<sup>72</sup> *Id.* at 155.

<sup>73</sup> *Id.* at 155.

<sup>74</sup> *Id.* at 156.

<sup>75</sup> *Id.* at 271.

<sup>76</sup> Robinson, *supra* note 63, at 47.

<sup>77</sup> *Id.* at 48.

<sup>78</sup> U.N. Diplomatic Conf., *supra* note 65, at 345.

<sup>79</sup> *Id.* at 288.

<sup>80</sup> Robinson, *supra* note 63, at 48.

<sup>81</sup> See Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 HUM. RTS. Q. 335, 372 (2000).

prudence of the ad hoc tribunals, the “widespread” element has been defined as encompassing “the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>82</sup> The judges reinforced that what matters in proving the widespread requirement is “the large-scale nature of the attack” and “the number of resultant victims.”<sup>83</sup> At the same time, judges made it clear that the assessment test is “[neither] exclusively quantitative or geographical” as it must be based on the evaluation of individual facts.<sup>84</sup>

The “systematic” requirement was defined as encompassing the “organized nature of the acts of violence and the improbability of their random occurrence.”<sup>85</sup> The judges emphasized that the systematic nature of the attack can be revealed “through the patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”<sup>86</sup> Further, the judges took note of how the ICTY and ICTR defined the “systematic” requirement.<sup>87</sup> However, the judges refrained from elaborating what weight should be attributed to the interpretation that was earlier offered by the ad hoc tribunals.<sup>88</sup> This uncritical acceptance of various interpretations of the systematic requirement in the ad hoc tribunals adds very little to our understanding as to how the requirement should be construed and applied in the ICC. While accepting the definitions of its predecessors, the judges seem to have forgotten that the ICC definition of crimes against humanity is somehow different since it

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<sup>82</sup> Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009); *see also* Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 395; (Sept. 30, 2008), Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 580 (Sept. 2, 1998), Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeal Judgement, ¶ 204 (Jan. 27, 2000). The same test was endorsed by the Pre-Trial Chamber authorizing an investigation into the situation of the Côte d’Ivoire. *See* Situation in the Republic of Cote D’Ivoire, ICC-02/11-14, Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d’Ivoire, ¶ 53 (Oct. 3, 2011) [hereinafter Côte d’Ivoire art. 15 Decision].

<sup>83</sup> *Id.* (footnotes omitted).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 86 (citing *Katanga*, ICC-01/04-01/07-717, ¶ 394); Prosecutor v. Harun, ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007); Tadic, *supra* note 45, at ¶ 648; Prosecutor v. Kordic, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 94 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 17, 2004); Blaškic, Case No. IT-95-14-A, *supra* note 56, at ¶ 101; *see also* ICC, Côte d’Ivoire art. 15 Decision, *supra* note 82, at ¶ 54.

<sup>86</sup> *Id.* (original footnotes omitted).

<sup>87</sup> Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 96 (Mar. 31, 2010) [hereinafter Kenya art. 15 Decision].

<sup>88</sup> *Id.*

embodies the existence of policy as an indispensable element of crimes against humanity and not merely as an indicator of a systematic attack.<sup>89</sup> As Cupido rightly highlighted, the inclusion of the policy element in the ICC definition of crimes against humanity has not translated into its “more prominent role . . . in the crimes against humanity concept” in the ICC.<sup>90</sup>

Despite the use of the terms “widespread” and “systematic” in the alternative, the ICC Prosecutor seems to presume that both requirements must be present in order to seek the Pre-Trial Chamber’s authorization of an investigation. Apart from the situation in Ukraine, there are only two other situations before the ICC that have been solely based on the crimes against humanity charges, namely post-election violence in Kenya and in Côte d’Ivoire. However, in both instances at the stage of seeking the Pre-Trial Chamber’s authorization of an investigation, the ICC Prosecutor maintained that both the widespread and systematic requirements were in place.<sup>91</sup>

In the situation of Côte d’Ivoire, the ICC Prosecutor alleged that there was “a reasonable basis to believe” that the attack by the pro-Gbagbo forces against the civilian population was both widespread *and* systematic.<sup>92</sup> In support of this conclusion, the Prosecutor listed a number of factual circumstances, such as the extended time period in which crimes were carried out, from 28 November 2010 to May 2011, the large geographic range of the alleged crimes, and the high number of reported victims.<sup>93</sup> Interestingly, all the facts listed by the ICC Prosecutor to demonstrate both the “widespread” and “systematic” attack are only indicative of a widespread nature attack.<sup>94</sup> The Prosecutor does not name a single characteristic that demonstrates the systematic nature of the attack, yet concludes that both characteristics of the attack are present.<sup>95</sup> While the systematic dimension of the attack may in fact have been present, the ICC Prosecutor did not articulate which factual circumstances supported both characteristics of the attack. It does seem that the existence of the “widespread” requirement almost overrides the “systematic” requirement. Although the Prosecutor is not obliged to prove both characteristics of the attack, as the proof of one element is sufficient, it is worrying that by clearly listing facts, which are only pertinent to the

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<sup>89</sup> *Akayesu*, *supra* note 51, at ¶ 580.

<sup>90</sup> Marjolein Cupido, *The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate*, 22 CRIM. L. FORUM 275, 296 (2011).

<sup>91</sup> Kenya art. 15 Decision, *supra* note 87, at ¶ 100; ICC, Côte d’Ivoire art. 15 Decision, *supra* note 82, at ¶ 55.

<sup>92</sup> Côte d’Ivoire Article 15 Decision, *supra* note 82, at ¶ 55.

<sup>93</sup> *Id.* at ¶ 57-60, 62.

<sup>94</sup> *Id.* at ¶ 55-62.

<sup>95</sup> *Id.*

“widespread” nature of the attack, the Prosecutor assumes that both “widespread *and* systematic” characteristics are present.

Similarly, in the situation in Kenya, the ICC Prosecutor alleged that the post-election violence occurred in the context of a “widespread *and* systematic” attack against the Kenyan civilian population when seeking the Pre-Trial’s Chamber authorization for an investigation.<sup>96</sup> According to the Prosecutor, this was evidenced by “hundreds of incidents with varying degrees of organization,”<sup>97</sup> which comprised of attacks directed against perceived supporters of the Party of National Unity by groups associated with the Orange Democratic Movement, retaliatory attacks directed against groups who initiated the violence, and attacks committed by the police.<sup>98</sup> In this instance the ICC Prosecutor points at the systematicity of the attacks by not only noting the large scale of the attacks but also the organization of parties that targeted groups they perceived as their opponents.<sup>99</sup> However, the Pre-Trial Chamber exclusively focused on the widespread rather than the systematic dimension of attacks.<sup>100</sup> It concluded that the attacks were widespread since they involved a large number of civilians.<sup>101</sup> The judges referred to a high number of casualties, approximately 1,220 deaths and 3,561 injured, in support of the widespread nature of the attacks.<sup>102</sup> On the basis of the casualties, the Pre-Trial Chamber concluded that the evidence was supportive of the “widespread” requirement<sup>103</sup> and therefore refrained from examining whether the “systematic” element was present, despite the Prosecutor’s allegations on the existence of the “widespread *and* systematic” characteristics of the attack.<sup>104</sup> It is not entirely clear why the Pre-Trial Chamber did not address the systematic dimension of crimes against humanity. On the one hand, it was the Pre-Trial Chamber’s right to do so, since the proof of only one characteristic of attacks was sufficient *per se*. On the other hand, it might be that the Pre-Trial Chamber was not entirely convinced of the “systematic” requirement to be met and therefore chose not to address the Prosecutor’s allegations on the existence of such requirement.

As clear from above, the ICC firmly upholds the disjunctive test of a “widespread or systematic” attack. However, in interpreting the requirement, the judges do not go beyond what has already been said by the ad hoc tribunals. On the one hand, it shows that the definition of crimes against humanity as it has evolved over the years of adjudication in inter-

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<sup>96</sup> Kenya art. 15 Decision, *supra* note 87, at ¶ 100.

<sup>97</sup> *Id.* at ¶ 101 (footnotes omitted).

<sup>98</sup> *Id.* at ¶ 102-06.

<sup>99</sup> *Id.* at ¶ 136-37.

<sup>100</sup> *Id.* at ¶ 110-12.

<sup>101</sup> *Id.* at ¶ 130.

<sup>102</sup> *Id.* at ¶ 131.

<sup>103</sup> *Id.* at ¶ 129-34.

<sup>104</sup> *Id.* at ¶ 100.



national courts is solid. On the other hand, the judges do not shed light on some less straightforward aspects of the definition of crimes against humanity within the meaning of the Rome Statute, namely the relationship between the policy element and the “widespread or systematic” requirement.

So far judging by the jurisprudence of the ICC, it is unclear what factual circumstances indicate the systematicity of an attack in the context of crimes against humanity. Some scholars suggest that the interpretation of the “systematic” requirement offered by the ICC judges is synonymous with its understanding of the policy element.<sup>105</sup> As demonstrated above, in the situation of Côte d’Ivoire, the Pre-Trial Chamber assumed the systematic dimension of the attacks was present, without engaging into the discussion what factual circumstances were supportive of this requirement.<sup>106</sup> In the situation of Kenya, the judges dismissed the Prosecution’s submissions on the existence of a “systematic” attack notwithstanding its earlier finding on the existence of an organizational policy, without offering any explanation what was the underlying rationale behind such conclusion.<sup>107</sup> In this particular case, the judges missed an opportunity to address the relationship between the requirement of an organizational policy and a “systematic” characteristic of an attack. An important issue regarding the relationship between those two elements will be addressed in the next section of the Article.

#### B. *Relationship Between the Policy Element and “Widespread or Systematic” Requirement*

For the purposes of our discussion below, it is necessary to analyze the interplay between the “widespread or systematic” requirement and the policy element in the context of crimes against humanity. The ad hoc tribunals have not considered the existence of a plan or policy as a separate element of the contextual elements of crimes against humanity, but have treated it as an evidentiary issue, which was relevant to establish the “widespread or systematic” nature of the attack.<sup>108</sup> This treatment of the policy element was greeted with a great degree of skepticism among leading academics who argue that the policy element is inherent to crimes against humanity.<sup>109</sup> Despite the voiced criticism in academia, the legal

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<sup>105</sup> See *Cupido*, *supra* note 90, at 291 (citing Matt Halling, *Push the Envelope—Watch it Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 *Leiden J. INT’L L.* 827, 836-37 (2010)).

<sup>106</sup> Côte d’Ivoire art. 15 Decision, *supra* note 82, at ¶ 62.

<sup>107</sup> Kenya art. 15 Decision, *supra* note 87, at ¶ 135.

<sup>108</sup> Kunarac, *supra* note 59, ¶ 98.

<sup>109</sup> See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 14 (Cambridge Univ. Press 2011); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 112 (Cambridge Univ. Press 2011); William A. Schabas, *Prosecuting Dr.*

finding of the Appeals Chamber in *Kunarac* on the treatment of a policy plan as an evidentiary matter rather than a distinct element of crimes against humanity has been approvingly cited in the subsequent jurisprudence of the ad hoc tribunals.<sup>110</sup>

Contrary to the statutory law and jurisprudence of the ad hoc tribunals, the Rome Statute explicitly provides for a “state or organizational policy” as a distinct element of crimes against humanity within an attack directed against any civilian population. This means that the attack must be committed pursuant to or in furtherance of a “state or organizational policy” to commit such attack. According to the ICC Elements of Crimes, “policy to commit an attack” within the meaning of crimes against humanity shall be understood as requiring that “the [s]tate or organization actively promote or encourage such an attack against the civilian population.”<sup>111</sup> In the absence of the developed jurisprudence on the interpretation of the policy element, the ICC had to grapple with the issue and provide a sensible definition as to what constitutes the policy element.

In the early jurisprudence of the ICC in *Katanga* and *Ngundjolo Chui* case, the Pre-Trial Chamber explained that a policy within the meaning of the Rome Statute “may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population.”<sup>112</sup> The ICC also made clear the policy does not have to be formalized or explicitly defined.<sup>113</sup> The policy element as understood by the Pre-Trial Chamber entails that “an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.”<sup>114</sup> The Pre-Trial Chamber endorsed the same interpretation of the policy element as was provided in the situation of Kenya.<sup>115</sup> The given

*Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes*, 23 LEIDEN J. INT’L L. 847, 847 (2010). *But see* Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 281 (2002).

<sup>110</sup> See *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment, ¶ 234 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31 2003); *see also* *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, ¶ 36 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); *see also* SCHABAS, *supra* note 109, at 112.

<sup>111</sup> INT’L CRIM. CT., ICC ELEMENTS OF CRIMES Art. 7(3) (Int’l Crim. Ct. 2011).

<sup>112</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to article 61(7) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Gombo, ¶ 81 (Jun. 15, 2009) (original footnotes omitted); *Prosecutor v. Katanga*, ICC-01/04-01/07-717, Decision on the confirmation of charges, ¶ 396 (Sep. 30, 20018) (original footnotes omitted)

<sup>113</sup> *Katanga*, *supra* note 82, at ¶ 396.

<sup>114</sup> *Bemba*, *supra* note 112, at ¶ 81.

<sup>115</sup> *See* M. CHERIF BASSIUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 243 (Kluwer Academic Pub. 1992, 2d rev. ed. 1999); *see also* M. CHERIF BASSIUNI, 1 *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL*

definition of a policy element is sufficiently broad and emphasizes that regardless of whether crimes are committed by a state or an organization what matters is the capability of those actors to commit crimes that affront universally protected human values. The Pre-Trial Chamber in the situation of Côte d'Ivoire summarized the earlier ICC jurisprudence and listed a number of elements demonstrating the existence of a policy: "(a) it must be thoroughly organised and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and d) it need not be explicitly defined or formalized."<sup>116</sup>

It is clear from the definition of the policy element that it entails a certain degree of planning and organization. An important question that springs to mind is how the policy element interacts with the systematic requirement, which also presupposes a certain level of organization. Academic literature describes the policy element as a low threshold test, whereas it describes the systematic criterion as a higher threshold test.<sup>117</sup> Does that mean that *some* sort of planning or organization conceived at the state or organizational level is needed to prove the policy element, while the proof of the systematic requirement would require demonstrating a higher degree of organization? It does seem that the policy requirement and "systematic" requirement have often been conflated in the jurisprudence. No clear guidance has been given thus far as to how those two elements interrelate. Although, as mentioned above, the existence of a policy or plan serves a completely different purpose in the ad hoc tribunals in comparison to the ICC, it is confusing that the ICC pre-trial chambers repeatedly refer to the jurisprudence of the ad hoc tribunals that interpret "systematic" requirement through the existence of a policy. Likewise, the involvement of public or private resources in furtherance of a common policy is viewed as an indicator of the "systematic" attack in the ad hoc tribunals,<sup>118</sup> while the same element in the ICC is used to demonstrate the existence of a policy. Given that the existence of a policy has been elevated to a separate legal element in the ICC, it would be beneficial if the ICC judges provided more guidance as how the policy

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COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 151-52 (Transnat'l Pub. 2005); *see also* Kenya Article 15 Decision, *supra* note 87, at ¶ 86 (stating that the majority interpretation of the organizational policy stands in contrast to the opinion of Professor Bassiouni who was engaged in drafting the Rome Statute and construed the reference to "organizational policy" as an expression of the policy of a state).

<sup>116</sup> Côte d'Ivoire Article 15 Decision, *supra* note 82, at ¶ 43.

<sup>117</sup> Robinson, *supra* note 63, at 51.

<sup>118</sup> *See Akayesu*, *supra* note 51, at ¶ 580; *see also Blaškić*, *supra* note 58, at ¶ 203.

element should be construed and how it interrelates with the requirement of a “systematic” attack.

So far, the discussion on the policy element, introduced in the ICC, has dwelled on the definition of the organizational policy element, which is considered by many practitioners and academics broad enough to capture crimes that were not intended to be included within the scope of the ICC jurisdiction.<sup>119</sup> The issue on the interrelation between the policy requirement and “systematic” requirement has not yet been widely debated, but it has become more relevant in light of the latest ICC Prosecutor’s decision not to proceed with the situation in Ukraine when the Prosecutor concluded that the systematic dimension of the attack was absent, notwithstanding the existence of a state policy to commit such attack, which should have been viewed at least as an indicator of the systemacity of attacks.<sup>120</sup>

The next section of this article examines the applicability of a “widespread or systematic” requirement with respect to the Maydan crimes. The author argues that the ICC Prosecutor’s finding on the absence of crimes against humanity during the Maydan protests stems from the lack of a clear understanding in International Criminal Law as to how the systematic dimension of an attack should be understood on a stand-alone basis and how it interacts with the policy element.

#### IV. PROSECUTOR’S DECISION NOT TO PROCEED IN THE ABSENCE OF CRIMES AGAINST HUMANITY DURING THE MAYDAN PROTESTS

Following the preliminary examination of the crimes against humanity allegations with respect to the Maydan crimes, the ICC Prosecutor concluded that there is not a reasonable basis to believe that the crimes within the jurisdiction of the Court were committed.<sup>121</sup> In reaching her decision whether a “reasonable basis” exists for initiating an investigation, the ICC Prosecutor is guided by Article 53(1) of the Rome Statute. It establishes a set of criteria that the ICC Prosecutor shall consider, in particular whether: (a) the information available to the Prosecutor pro-

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<sup>119</sup> See WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 152 (Oxford Univ. Press 2010); see also Charles Chernor Jalloh, *What Makes a Crime Against Humanity a Crime Against Humanity?*, 28 AM. U. INT’L L. REV. 381, 436 (2013); see also Claus Kress, *On the Outer Limit 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, 873 (2010); see also Kenya Article 15 Decision, *supra* note 87, at ¶ 52 (Hans-Peter Kaul, J., dissenting) (arguing that the Majority definition would technically cover all kinds of criminal gangs with fluctuating membership that engage in serious and organized crimes).

<sup>120</sup> OTP REPORT, *supra* note 21, at ¶ 99-100.

<sup>121</sup> *Id.* at ¶ 95-101.

vides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be inadmissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of justice, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.<sup>122</sup> Given the Prosecutor's finding that the requirement laid down in Article 53(1)(a) was not fulfilled, the Prosecutor did not examine the remaining two prerequisites for evaluating whether to initiate an investigation.<sup>123</sup>

As mentioned above, the declaration accepting the ad hoc jurisdiction of the ICC alleged criminal responsibility of the Ukrainian highest political leadership for crimes against humanity.<sup>124</sup> In assessing the situation, the ICC Prosecutor examined whether the factual circumstances were supportive of the allegations of crimes against humanity.<sup>125</sup> More specifically, the ICC Prosecutor analyzed whether the contextual elements of crimes against humanity were in place by looking into: (1) whether the alleged crimes constituted an attack against the civilian population, (2) whether there existed a state of organizational policy to carry out such attack, and (3) whether the alleged attack was widespread or systematic.<sup>126</sup>

At the outset, the ICC Prosecutor established that the Ukrainian security forces used "excessive and indiscriminate force" against protesters who took to the streets to express their dissent with the former government and journalists who covered the events.<sup>127</sup> Further to this, the ICC Prosecutor acknowledged that during the three months of demonstrations, protesters and other individuals were killed as well as subjected to ill-treatment, including torture and other inhumane acts, by members of Ukrainian law enforcement agencies as well as the pro-government group of civilians, commonly known as *titushky*, who provided support to law enforcement during demonstrations.<sup>128</sup> The report continues that the Ukrainian security forces and *titushky* targeted individuals on the basis of their opposition to the former government of beleaguered President Viktor Yanukovich.<sup>129</sup> This led the ICC Prosecutor to conclude that the violent acts against protesters unleashed by the Ukrainian security forces

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<sup>122</sup> Rome Statute, *supra* note 22, at art. 53.

<sup>123</sup> OTP REPORT, *supra* note 21, ¶ 77-110.

<sup>124</sup> Declaration I, *supra* note 18.

<sup>125</sup> OTP REPORT, *supra* note 21, ¶ 89.

<sup>126</sup> OTP REPORT, *supra* note 21, at ¶ 89-100.

<sup>127</sup> *Id.* at ¶ 90.

<sup>128</sup> *Id.* (defining "*titushky*" as "pro-government group of civilians who coordinated with, and provided support to, law enforcement during public order operations").

<sup>129</sup> *Id.*

and *titushky* satisfy the requirement of article 7 of the Rome Statute of “an attack to be directed against a civilian population.”<sup>130</sup>

Following this, the Prosecutor recognized that the acts of violence were not random, but formed part of a campaign or operation against the Maydan protesters.<sup>131</sup> Moreover, the Prosecutor maintained that the acts of violence followed a regular pattern in terms of their characteristics and nature, the population targeted, the alleged perpetrators and locations, which were mainly the sites of demonstrations.<sup>132</sup> The existence of a state policy to attack the civilian population during the protests was inferred from a number of factual circumstances, among others, (1) “coordination of, and cooperation with, anti-Maydan citizen volunteers”; (2) the “consistent failure of state authorities to take any meaningful or effective action to prevent the repetition of incidents of violence”; and (3) “the apparent efforts to conceal or cover the alleged crimes.”<sup>133</sup> On the basis of this information and at the backdrop of a political situation in Ukraine, the Prosecutor concluded that the acts of the Ukrainian security forces and *titushky* were carried out pursuant to or in furtherance of a state policy aimed at suppressing the Maydan protest movement.<sup>134</sup>

Subsequently, the ICC Prosecutor proceeded to evaluate whether any attack directed against the civilian population was widespread or systematic in nature. She ruled out the widespread nature of the attack noting “the alleged attack was limited in its intensity and geographic scope.”<sup>135</sup> In support of this finding, the Prosecutor referred to a number of factual circumstances, stating that “the alleged crimes were committed almost exclusively in the context of a limited number of clashes and confrontations between security forces and protesters,” during the three-month period and “the majority of the alleged crimes occurred in a limited geographic area within the city of Kyiv, particularly in and around Maydan Nezalezhnosti.”<sup>136</sup> The Prosecutor also looked at the number of individuals killed and injured during the protests, and concluded that the cumulative effect of the killing of at least seventy-five civilians and the injury of more than 700 protesters rendered it questionable the existence of the widespread nature of the alleged crimes against humanity.<sup>137</sup>

Having ruled out the widespread characteristic of the attack, the Prosecutor examined whether the evidence supported the conclusion of the systematic nature of the attack within the meaning of crimes against

<sup>130</sup> *Id.* at ¶ 90.

<sup>131</sup> *Id.* at ¶ 92.

<sup>132</sup> OTP REPORT, *supra* note 21, at ¶ 92.

<sup>133</sup> *Id.* at ¶ 93.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at ¶ 96.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at ¶ 97 (stating that some injuries were far less serious in nature and, therefore, did not constitute underlying acts of crimes against humanity).

humanity.<sup>138</sup> The report concluded that the systematic dimension of crimes against humanity was missing, given that the alleged crimes did “not necessarily appear to have been carried out in a consistent, organized manner or on a regular or continual basis.”<sup>139</sup> The report emphasized that “the alleged crimes occurred in an infrequent and often more reactive manner, determined by the different circumstances as events developed during the demonstrations.”<sup>140</sup> Although the ICC Prosecutor acknowledged the unjustified and disproportionate nature of the attack against protesters, she nevertheless concluded that the alleged acts fall short of meeting the systematic criterion of crimes against humanity as they were “aimed to limit the protests rather than being part of a deliberate, coordinated plan of violence methodically carried out against the protest movement,”<sup>141</sup> and appear to have “occurred only sporadically, in limited instances.”<sup>142</sup>

## V. DECISION ANALYSIS

The decision analysis is confined to the Prosecutor’s evaluation of a “widespread or systematic” requirement that led the Prosecutor to conclude that there was no supporting evidence to demonstrate the proof of such requirement and thus no crimes against humanity occurred during the Maydan protests. The analysis of the Prosecutor’s evaluation of a “widespread or systematic” criterion is important, as it lays ground for the subsequent applicability of the law on crimes against humanity in the ICC.

In its assessment of a widespread characteristic, the Prosecutor paid attention to the geographical distribution of crimes and a number of casualties. One can concur with the Prosecutor’s finding that the alleged crimes were predominantly perpetrated in Kyiv where the protests took place. Although the protests were also commonplace in other regions of Ukraine, the alleged crimes were geographically concentrated at the heart of Kyiv.<sup>143</sup> If one compares the situation in Ukraine with the situation in Côte d’Ivoire, the crimes were more geographically spread out in Côte d’Ivoire.<sup>144</sup> Likewise, crimes against humanity were scattered across various regions in Kenya.<sup>145</sup>

An interesting issue is the ICC Prosecutor’s interpretation of a number of casualties, which, in her opinion, was insufficient to demonstrate the

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<sup>138</sup> *Id.* at ¶ 98.

<sup>139</sup> OTP REPORT, *supra* note 21, at ¶ 98.

<sup>140</sup> *Id.* at ¶ 99.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at ¶ 100.

<sup>143</sup> *Id.* at ¶ 92.

<sup>144</sup> Côte d’Ivoire art. 15 Decision, *supra* note 82, at ¶ 105 (stating that the crimes were committed in Duekoue and other towns in the west of the Côte d’Ivoire).

<sup>145</sup> See Kenya art. 15 Decision, *supra* note 87, at ¶ 129-34.

widespread dimension of an attack. However, there is no minimum numerical threshold in International Criminal Law that is required to prove that the attack within the context of crimes against humanity was widespread. Casting a look at the two other situations, in which crimes against humanity were alleged before the ICC, it becomes clear that the number of casualties was substantially higher than in the situation of Ukraine during the Maydan protests. As an example, post-election violence in Kenya reportedly caused between 1,133 and 1,220 deaths and 3,561 individuals injured.<sup>146</sup> In the situation of Côte d'Ivoire, the Pre-Trial Chamber referred to the reports of Amnesty International and Human Rights Watch that provided an account of the killings of hundreds of civilians.<sup>147</sup> The official UN figures show that more than 1,000 persons were killed during the post-election violence in the Côte d'Ivoire.<sup>148</sup> These figures are higher than the number of victims during the Maydan protests.

The ICC Prosecutor's decision not to recognize the widespread dimension of the alleged crimes against humanity appears to be in line with its developed practice. However, it raises an interesting issue as to the minimum numerical threshold of crimes that would be sufficient to demonstrate the widespread dimension of attack(s) within the context of crimes against humanity. As pointed out by the Pre-Trial Chamber before, the assessment as to whether the attack is widespread is "neither exclusively quantitative nor geographical," as it must be based on the evaluation of individual facts.<sup>149</sup> It has been repeatedly upheld in the jurisprudence of international criminal courts that a widespread attack may be "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."<sup>150</sup> Technically speaking, there is nothing in the jurisprudence of international criminal courts suggesting that the number of victims who were killed and injured during the Maydan protests in Ukraine does not meet the widespread requirement. However, despite the absence of a numerical threshold, the developed practice in the ICC suggests that the "widespread" requirement would not be met unless the number of persons killed in the context of crimes against humanity exceeded 1,000 and the crimes were geographically scattered.

The Prosecutor's finding on the absence of a systematic attack is more controversial. It is at odds with the Prosecutor's earlier finding on the existence of a deliberate State policy to suppress the Maydan protests. If

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<sup>146</sup> *Id.* at ¶ 131.

<sup>147</sup> Côte d'Ivoire art. 15 Decision, *supra* note 82, at ¶ 103, 105.

<sup>148</sup> *Death Toll in Ivorian Postelection Violence Surpassed 1,000*, UN (May 26, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38522#.VcDGJvOqpBc> (last visited 1 March 2016).

<sup>149</sup> Kenya art. 15 Decision, *supra* note 87, at ¶ 95.

<sup>150</sup> *Id.*; see also *Blaškic*, *supra* note 85, at ¶ 101, *Kordic*, *supra* note 85, at ¶ 94.



one were to follow the jurisprudence of the ad hoc tribunals that is repeatedly cited by the ICC, one would at least treat the existence of a policy element as an indicator of a “widespread or systematic attack” in the context of crimes against humanity. However, despite the existence of such policy, the ICC Prosecutor concluded that she had limited information at her disposal to support the finding that the alleged attack carried out in the context of the Maydan protests was systematic.<sup>151</sup> Of course, the proof of a policy element alone does not automatically translate into the systematic requirement of crimes against humanity; however, it is an important indicator of the systematicity, which seems to have been neglected in the Prosecutor’s analysis of the systematic requirement.

As demonstrated by the discussion above, it is not yet clear from the still developing ICC jurisprudence how the policy element and a “widespread or systematic” requirement interrelate. In the ICTY, the proof of a “widespread or systematic” requirement was treated as demonstrating a policy, whether formalized or not.<sup>152</sup> Hence, it is logical to assume that the existence of a policy must at least be viewed as an indicator of a “widespread or systematic” attack. It also brings us to the question of what is the core of a crime against humanity, i.e. the presence of a state or organizational policy or the widespread or systematic dimension of an attack directed against the civilian population?<sup>153</sup> The historical evolution of crimes against humanity shows that the involvement of a state in the commission of crimes directed against its own population makes it nearly impossible to domestically prosecute those crimes, indicating the intervention of international courts is warranted in such situations. In the situation in Ukraine, the implication of the Ukrainian political leadership in authorizing the crimes against its own population serves as a clear indicator of a “systematic” attack. However, the ICC Prosecutor did not adopt this view and dismissed the existence of a systematic requirement.

On the one hand, in her analysis of the policy element, the Prosecutor acknowledges “the acts of violence do not appear to be mere aggregate of random acts.”<sup>154</sup> On the other hand, in her discussion on the systematic requirement, the Prosecutor submits that “the alleged crimes do not necessarily appear to have been carried out in a consistent, organized manner or on regular or continual basis.”<sup>155</sup> It is somehow paradoxical to conclude that acts of violence, which involved security forces killing over seventy-five individuals and injuring over 700 at the peak of violence in

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<sup>151</sup> OTP REPORT, *supra* note 21, at ¶ 98, 101.

<sup>152</sup> *Tadic*, *supra* note 45, at ¶ 653 (stating that “[i]f the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not”).

<sup>153</sup> See *Jalloh*, *supra* note 119, at 385 (posing similar questions on crimes against humanity).

<sup>154</sup> OTP REPORT, *supra* note 21, at ¶ 92.

<sup>155</sup> *Id.* at ¶ 98.

February, were carried out in a completely unorganized and inconsistent manner.<sup>156</sup> Such a high number of casualties by the security forces and *titushky* acting on orders from the Ukrainian senior officials hardly seems to be unorganized. The targeting of the protesters was a conscious choice of the perpetrators since they were sure of their impunity for the crimes they had committed given the backing of the Ukrainian political leadership.

Moreover, apart from the existence of a state or organizational policy, there exist other indicators of the systematic dimension of the attacks that could be inferred from the developed jurisprudence of international courts. The attacks were not random but thoroughly organized, which is evidenced by a high degree of organization of the Ukrainian security forces and *titushky* who coordinated in quelling the protests. There existed a clear pattern of behavior pursued by the Ukrainian security forces and *titushky* in terms of characteristics, the targeted population, the alleged perpetrators and location. The Ukrainian senior officials condoned the crimes by failing to take any meaningful steps to ensure responsibility of the culprits of crimes.

The implication of high-level political authorities is also indicative of the systematic dimension of the attack. In the aftermath of the Maydan protests, on the basis of the available evidence, the Ukrainian Prosecutor General Office (“PGO”) initiated a number of cases against the most senior Ukrainian officials, including the former President of Ukraine, Viktor Yanukovych, and the former Minister of Interior Affairs, Vitaliy Zakharchenko.<sup>157</sup> With respect to the willful killings and intentional infliction of serious bodily harm against protesters that were commonplace in January and February 2014, the PGO issued indictments on the charges of aggravated murder under Article 115(2) of the Criminal Code of Ukraine against senior public officials, including both Yanukovych and Zakharchenko.<sup>158</sup> The former General Prosecutor of Ukraine, Viktor Pshonka, was also charged with abuse of power that entails serious consequences under Article 364(2) of the Criminal Code of Ukraine.<sup>159</sup> The charges levied against the high-ranking Ukrainian politicians do not comprise crimes against humanity since the Ukrainian Criminal Code does not penalize this category of international crimes.

Despite the initiation of cases against the most senior Ukrainian officials accused of directing the Maydan crimes, none of them have been

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<sup>156</sup> OTP REPORT, *supra* note 21, at ¶ 97.

<sup>157</sup> *Register of Proceedings of Crimes During the Revolution of Dignity*, PROSECUTOR GENERAL’S OFFICE OF UKRAINE, <http://trg.gp.gov.ua/reestr-kriminalnih-provadzhen/golovne-slidche-upravlinnja-generalnoi-prokuraturi-ukraini/storinka-1/> (last visited Mar. 1, 2016).

<sup>158</sup> *Id.* (providing an account of national criminal proceedings with respect to the Maydan crimes).

<sup>159</sup> *Id.*

successfully prosecuted since the suspects have absconded justice and, according to media reports, fled to neighboring Russia. According to the Ukrainian Ministry of Interior figures, over 400 extradition requests sent to Russia were left unanswered.<sup>160</sup> Although the ICC Prosecutor is not bound by the findings of the PGO and other public information with respect to the identification of suspects who were responsible for orchestrating the Maydan crimes, the available information demonstrates the implication of the Ukrainian senior officials in the commission of crimes and indicates the systematic dimension of the attack directed against the Maydan protesters. A slow pace of criminal proceedings, inability to obtain the suspects in the custody of the Court, the very absence of the criminalization of crimes against humanity in the Criminal Code of Ukraine, and the involvement of the top political leadership in the commission of crimes highlight the importance of the Ukraine's declaration that accepted the jurisdiction of the ICC and viewed it as a last resort to address the Maydan crimes.

Another characteristic of the systematic dimension of the attack is the commitment of substantial public and private resources by the Ukrainian authorities to quell the public protests. Despite this criterion being viewed as an indicator of a policy requirement in the ICC, it has been consistently viewed by the ad hoc tribunals as demonstrating the systematicity of attacks. It has been documented that around 11,000 law enforcement officers and hundreds of *titushky* were deployed in Kyiv on public order duties during the period of Maydan protests and hundreds of *titushky*.<sup>161</sup> According to the PGO preliminary investigation, hundreds of *titushky* were organized, paid and armed by the Minister of Interior, and were involved in kidnapping, assaulting and killing of the protesters.<sup>162</sup> Whereas the employment of the security forces was carried out to contain the Maydan protests, it is clear that they did not feel restrained and felt authorized to use violence against the protesters. Contrary to the Prosecutor's statement that there did not exist a consistent pattern that demonstrated "Ukrainian security forces seeking out and attacking or violently targeting participants in the Maydan protest movement,"<sup>163</sup> the CoE investigative panel documents that, at the peak of violence, Berkut officers within the period of one hour and a half hour shot forty-nine persons dead and inflicted firearm injuries on ninety persons.<sup>164</sup> Two days before, eight persons were killed and more than 1,000 were injured during the Maydan protests.<sup>165</sup>

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<sup>160</sup> International Advisory Panel on its Review of the Maidan Investigations, Council of Eur., ¶. 404 (Mar. 21, 2015) [hereinafter CoE Report].

<sup>161</sup> *Id.* at ¶ 88, 402.

<sup>162</sup> CoE Report, *supra* note 160, at ¶ 292.

<sup>163</sup> OTP REPORT, *supra* note 21, at ¶ 98-99.

<sup>164</sup> CoE Report, *supra* note 160, at ¶ 84.

<sup>165</sup> *Id.* at ¶ 71.

The existence of a state policy to suppress the Maydan protests that resulted in the violence against the protesters coupled with the: (1) level of the organization of the attacks, (2) the existence of a regular pattern of behavior demonstrated by the Ukrainian security forces and *titushky*, (3) repeated and continuous commission of crimes directed against the protesters who opposed the former government, (3) condoning of crimes by the Ukrainian political leadership and failure to sanction the commission of crimes, (4) implication of high-level political leaders in the commission of crimes, and (5) involvement of substantial public and private resources to quell the Maydan protests are all indicative of the systematic dimension of attack, which the ICC Prosecutor overlooked in her evaluation of the Maydan crimes.

It is also worth mentioning that at this preliminary stage of seeking the Pre-Trial Chamber's authorization to initiate an investigation, the ICC Prosecutor applied an unreasonably high evidentiary standard. The reasonable basis standard, which must be proved at this stage, is the lowest evidentiary threshold that must be demonstrated by the Prosecutor in order for the judges to authorize the initiation of an investigation into a specific situation. The information available to the Prosecutor, which is submitted to the Pre-Trial Chamber, need not be "comprehensive" or "conclusive" of the alleged crimes at the preliminary stage.<sup>166</sup> In other words, at the preliminary stage, it is only necessary for the Pre-Trial Chamber to arrive at the conclusion that "a sensible or reasonable justification for a belief" that the crimes within the jurisdiction of the Court have been committed exists.<sup>167</sup> By deciding not to seek the Pre-Trial Chamber's authorization and terminating its inquiry into the Maydan crimes, the ICC Prosecutor has stripped the judges of the opportunity to elaborate further on the interpretation of the "widespread or systematic" requirement and its relationship with the policy element.

Having narrowly focused on the evaluation of the contextual elements of crimes against humanity, the ICC Prosecutor has also overlooked the gravity of the crimes and the interests of justice. The crimes had a devastating effect on the surviving family members of the protesters who were killed for their dissent with the former government and left an indelible mark on the entire community that struggle to come to terms with the fact that the violent crimes took place in a peaceful country in the midst of public protests. No justice has been delivered in the aftermath of the Maydan crimes. Turning a blind eye to the Maydan crimes reinstates the impunity of top political leadership for unleashing violence against its own nationals. Following the ICC Prosecutor's decision, the Ukrainian government submitted that it would provide further evidence supportive of the crimes against humanity allegations. Whereas it is uncertain whether additional evidence provided by Ukraine would make the ICC

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<sup>166</sup> Kenya art. 15 Decision, *supra* note 87, at ¶ 27, 24.

<sup>167</sup> *Id.* at ¶ 27-35.

Prosecutor change her mind with respect to the initial evaluation of the Maydan crimes, the Prosecutor has to yet to make determination on the second declaration lodged by Ukraine that deals with the crimes associated with the annexation of Crimea by the Russian Federation and ongoing armed conflict in eastern Ukraine.<sup>168</sup>

## VI. CONCLUDING WORDS

This Article takes a fresh look at the definition of crimes against humanity and its applicability in the ICC by analyzing the ICC Prosecutor's decision not to proceed with the investigation of the Maydan crimes in Ukraine, based on her evaluation of the "widespread or systematic" requirement. The author argues that the ICC Prosecutor did not correctly apply the systematic requirement of crimes against humanity to the factual circumstances surrounding the Maydan events that were supportive of the requirement. The ICC Prosecutor's finding appears to stem from the lack of clarity in International Criminal Law as to how the systematic requirement is applied on a stand-alone basis as well as how it interacts with the policy element. The uncertainty as to the interaction between those two elements is particularly noticeable in the context of the ICC. It is rooted in the fact that the Rome Statute treats the existence of a policy as an indispensable element of crimes against humanity contrary to the ad hoc tribunals that have considered it as an evidentiary matter indicative of the systematicity of an attack. Although the ICC judges have attempted to breathe life into the definition of a policy element, they have thus far limited their discussion to what constitutes an "organizational policy." As for the interpretation of a "widespread or systematic" requirement of crimes against humanity, the ICC judges have repeatedly and uncritically cited the jurisprudence of the ad hoc tribunals, without engaging in the discussion on how the policy element and a "widespread or systematic" requirement interact. The golden opportunity to address such interaction was missed when the ICC Pre-Trial Chamber in the situation of Kenya confirmed the existence of an organizational policy, but failed to address the ICC Prosecutor's submissions that the attacks were also systematic after it had earlier established the widespread nature of attacks. In the situation of Ukraine, the ICC Prosecutor denied the judges an opportunity to decide whether the Maydan crimes would satisfy the systematic requirement of crimes against humanity despite its earlier finding on the existence of a State policy, which serves as an important indicator of the systematic requirement.

In its narrow interpretation of the "widespread or systematic" requirement, the Prosecutor missed the bigger picture and overlooked the interests of justice in reaching its decision not to move forward with the investigation. The decision is regrettable in many aspects. First, the Prose-

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<sup>168</sup> Declaration II, *supra* note 16.

ctor applied a very stringent interpretation of the systematic requirement in the context of crimes against humanity. This may be due to the absence of any practice where the ICC Prosecutor decided to seek the Pre-Trial Chamber's authorization of an investigation on the basis of the existence of a systematic requirement on a stand-alone basis. Second, the Prosecutor seems to have undermined the seriousness of the situation evidenced by the involvement of the Ukrainian top political leadership who were behind the crimes and did absolutely nothing to stop the crimes against the protesters. Despite the initiation of a number of criminal cases by PGO, it proved impossible to apprehend the high-level accused and initiate credible prosecutions of the Maydan crimes. Third, the impact of the crimes on the surviving family members and the entire country is difficult to underestimate, since the majority of those who were killed were young university students who strived for a better democratic future for their country. Due to the public deficit of trust in the Ukrainian public prosecutor's office, which is marred by widespread corruption claims, the ICC intervention would be enormously valuable.

Following the ICC Prosecutor's decision, the Ukrainian government announced that it would provide further evidence supportive of the crimes against humanity allegations. Whereas it is uncertain whether additional evidence provided by Ukraine would make the ICC Prosecutor change her mind with respect to the initial evaluation of the Maydan crimes, the Prosecutor has to yet to make determination on the second declaration lodged by Ukraine that deals with the crimes associated with the annexation of Crimea by the Russian Federation and ongoing armed conflict in eastern Ukraine.<sup>169</sup> In this instance, there will be no leeway to deny war crimes and crimes against humanity that have been widely documented by international NGOs and Ukrainian authorities.<sup>170</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> For an in-depth discussion of legal issues linked to the second declaration lodged by Ukraine to the ICC *see* Marchuk, *supra* note 14, at 360-69.