

# **Legal Brief**

**on the question of the existence of the context element of  
Crimes against Humanity with regard to the events in Chile  
between 17 and 28 October 2019 as described in the  
Acusación Constitucional of 30 October 2019**

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# Legal Brief

## on the question of the existence of the context element of Crimes against Humanity with regard to the events in Chile between 17 and 28 October 2019 as described in the *Acusación Constitucional* of 30 October 2019

### Executive Summary

1. The context element in Crimes against Humanity ('CaH') requires a systematic or widespread attack against "any" civilian population pursuant to a policy of a collective entity, especially a State, with knowledge of the attack (infra II.2.). The Chilean Law 20.352 is, on the one hand, clearer than Article 7 of the Rome Statute of the International Criminal Court ('ICC Statute') in that it explicitly refers the said policy to the attack as a whole, be it widespread or systematic (II.1.). On the other hand, however, it dilutes the policy requirement by linking it to mere State agents (as opposed to the State itself); this calls for a restrictive interpretation in light of International Criminal Law ('ICL') (thereto II.2.4.(a)).

2. The facts presented in the *Acusación Constitucional* ('AcusCon') point to serious and widespread rights violations by the security forces, especially the *Carabineros* police force (III.1.). This is confirmed by subsequent sources indicating a steady increase in these violations (up to 15 November 2019), which amount, at least quantitatively, to widespread and partially serious human rights violations (III.2.). In sum, it seems fair to say that during the time of writing this Brief the situation on the ground has not improved but rather deteriorated, with the government apparently unable to regain control and re-establish public order.

3. There is an important qualitative difference between widespread serious human rights violations and CaH. This difference is marked by the context element (II.2.), especially its policy requirement (II.2.4.). This requirement is particularly relevant in our context. While a (State) policy to commit CaH need not be formalised and/or explicit and may crystallise as actions unfold on the ground, i.e., it may come into being during an ongoing conflict or crisis (II.2.4.(a)), such a policy is difficult to prove (II.2.4.(b)), especially if it is not explicit and based on affirmative action but rather characterised by a (deliberate) failure to take protective action.

4. The existence of a policy may be inferred from a series of factors (II.2.4.(b)), but these are case specific and depend on the concrete circumstances on the ground. For this reason, it is difficult and risky to draw (definitive) legal-normative conclusions (IV.) from a highly general and written account (III.), which moreover rests largely on allegations and second-hand (hearsay) information. In fact, the AcusCon mentions the

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<sup>1</sup> I am indebted to Lara Barrêto Ambos (doctoral student University of Greifswald) and Sem Sandoval (doctoral student University of Göttingen) for technical and research assistance. – Thanks to Margaret Hiley for comments on the language, which have been incorporated into this **revised version**.

term CaH only in passing (“crímenes de lesa humanidad”) and interprets the events as a widespread or systematic attack within the meaning of Art. 1(1) and 2 of Law 20.357, but fails to provide any legal analysis of the context element, let alone the policy requirement (IV.1.). Other sources are similarly poor in legal reasoning (IV.2.), with the exception of the response of prominent Chilean legal scholar Juan Pablo Mañalich to INDH director Sergio Micco (IV.3.). At any rate, this controversy likewise lacks a thorough analysis of the relevant ICL standard; in particular, Mañalich draws on an overly broad reading of Art. 1(2) of Law 20.357 (ibid.).

5. Neither the facts presented in the AcusCon nor the subsequent facts (up to 15 November 2019) allow for the inference of an *active* CaH policy of the State of Chile. Nor do these facts permit the conclusion that there is such a State policy by *omission* (IV.4.). Clearly, such a policy is more difficult to prove than an active policy for the very reason that it does not manifest itself in active and explicit conduct. Furthermore, it cannot be inferred from the mere absence of governmental action or – more relevantly for our case – the apparent inability (rather than unwillingness) of the government to take back control of the public space. In fact, the apparent functioning of the institutions of the Chilean *Rechtsstaat*, especially the prominent role of the INDH as an independent public human rights agency with a compliance mandate and a *partie civile* (“querellante”) function and the follow-up of any *querrela* by the independent (criminal) justice system, rather indicate the opposite, namely that the Chilean State is committed to controlling its security forces and that human rights compliance mechanisms are in place. Ultimately, it is, of course, for the Chilean criminal courts or, in line with the complementarity principle (Art. 17 ICC Statute), for the ICC to decide whether CaH have taken place in Chile during the period object of this Legal Brief or thereafter.

## I. Mandate

In a letter of 7 November 2019, the signatory was tasked by Mr. Luis Hermosilla, on behalf of Mr. Andrés Chadwick, former Minister of the Interior of Chile, to write the present Legal Brief as follows:

“solicito a Ud. se sirva dictaminar, en su calidad de Catedrático de Derecho Penal Internacional, si a partir de los *hechos descritos en la acusación constitucional* ... es posible concluir la *existencia de un ataque sistemático o generalizado contra la población civil, producto de una política estatal.*” (emphasis added)

From this follows the limited nature of this mandate, namely, on the one hand, to carry out a *legal* assessment as to the “existence of a systematic or widespread attack against the civilian population, pursuant to a state policy” (so-called context element of CaH), which is, on the other hand, in *factual* terms, to be based on the facts provided for in the *Acusación Constitucional* (‘AcusCon’) of the *Cámara de Diputados* of the Chilean Congress.<sup>1</sup>

This task is carried out by the signatory in his academic capacity, fully independently, without any interference by and irrespective of the specific interests of the contacting party, as stated in the letter of 7 November 2019:

“El Dictamen debe emitirse objetivamente, atendida su calidad y experiencia como catedrático y Juez Internacional, sin atención al interés de mi cliente.”

A few *caveats* should be mentioned at this point, though. As the Brief had to be prepared under enormous time pressure – it had to be submitted by 17 November 2019, 24 h, Chilean time – the necessary research as to the applicable law (II.) and the available facts (III.) could not be carried out with the thoroughness and completeness that normally characterise the signatory’s work. Moreover, the drafting of the text and the refining of the argument leave something to be desired.

## II. Applicable Law

### 1. Relevant Provisions

The government of Chile deposited its instrument of ratification to the Rome Statute of the International Criminal Court (‘ICC Statute’) on 29 June 2009.<sup>2</sup> Thus, the Statute entered into force for Chile on 1 September 2009 (Art. 126(2) ICC Statute). As a consequence, the ICC has jurisdiction with regard to the events object of this legal brief (Art. 11(2), 12 ICC Statute).

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<sup>1</sup> The document has no date, but according to press reports (e.g. *Mercurio*, 31 October 2019, p. C4) it dates from 30 October 2019.

<sup>2</sup> <[https://asp.icc-cpi.int/en\\_menus/asp/states\\_parties/latin\\_american\\_and\\_caribbean\\_states/Pages/chile.aspx](https://asp.icc-cpi.int/en_menus/asp/states_parties/latin_american_and_caribbean_states/Pages/chile.aspx)> accessed 17 November 2019.

Law 20.352 of 30 May 2009, published on 18 July 2009, authorised the Chilean State to recognise the ICC jurisdiction under the terms provided for in the Rome Statute. This Law defines the context element of CaH in the relevant part as follows:

“Artículo 1º.- Constituyen crímenes de lesa humanidad los actos señalados en el presente párrafo, cuando en su comisión concurren las siguientes circunstancias:

1º. Que el acto sea cometido como parte de un ataque generalizado o sistemático contra una población civil.

2º. Que el ataque a que se refiere el numerando precedente responda a una política del Estado o de sus agentes; de grupos armados organizados ....

Artículo 2º.- Para efectos de lo dispuesto en el artículo precedente, se entenderá:

1º. Por "ataque generalizado", un mismo acto o varios actos simultáneos o inmediatamente sucesivos, que afectan o son dirigidos a un número considerable de personas, y

2º. Por "ataque sistemático", una serie de actos sucesivos que se extienden por un cierto período de tiempo y que afectan o son dirigidos a un número considerable de personas.”

Art. 7 ICC Statute reads in the relevant part as follows:

“(1) ... ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...”

“(2) (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack...”

Comparing these provisions, there are four noteworthy points, of which the first two are especially relevant in our context. First, and most importantly, while the relationship between the disjunctive widespread/systematic requirement and the policy element is unclear and controversial under Art. 7 ICC Statute, Art. 1 (2) of Law 20.352 clearly establishes, providing for concurring or cumulative conditions regarding the attack, that the attack must always be carried out pursuant to a policy of a collective entity. This is the correct approach, as will be shown below (II.2.4.(a)). Second, however, the same provision dilutes the concept of policy by extending it beyond a collective entity (especially a State) to State agents; this calls for a teleological restriction in light of ICL, especially the ICC Statute, as will also be shown below (ibid.). Third, Art. 2(2) of Law 20.352 contains a definition of systematic attack that is not in line with ICL, as will be demonstrated in turn (II.2.3.). Fourth, Law 20.352 does not require, as Art. 7(1) ICC Statute does, a specific “knowledge of the attack” (II.2.5.).

## **2. Five legal requirements (*elementos típicos*) of the context element of CaH**

Before the legal requirements of the context element are explained in greater detail, a few preliminary remarks on the applicable law and the relevant authorities are in order. As to the applicable law, it is clear from the above (II.1.) that the relevant Chilean Law and Art. 7 ICC Statute are not fully identical. Given that the ICC Statute does not formally impose implementation obligations on State parties (apart from Art. 70(4) regarding offences against the administration of justice and Art. 88 regarding cooperation

procedures),<sup>3</sup> a State party need not *tout court* incorporate the crime definitions of Art. 5 to 8bis ICC Statute in its domestic law, but only provide for punishment of the relevant conduct in light of the complementarity principle (Art. 17 ICC Statute).<sup>4</sup> It is for this reason that a domestic law such as Law 20.352 prevails in principle as far as domestic prosecution and adjudication is concerned. However, such a law must be interpreted in line with the accepted international standard, which in our context is Art. 7 ICC Statute in particular. This provision can generally be considered as a kind of minimum standard for a CaH definition therefore calling for universal application.<sup>5</sup> This view is confirmed by the fact that the International Law Commission ('ILC') has adopted Art. 7 literally in its CaH Draft Convention.<sup>6</sup>

As to the question of the relevant authorities relied on in this section of this Brief, it should be noted first that the case law of the international criminal tribunals, especially of the ICC (given its *de facto* binding effect on Chile as a State party), serves as a primary source. In contrast, as to the views of the doctrine, the Brief largely relies on previous works of the signatory (especially for further details and references);<sup>7</sup> other works are only quoted as far as they constitute leading textbooks/commentaries<sup>8</sup> and/or are especially relevant/innovative in the respective context; the same applies to works by international organisations or bodies, especially the ILC. This restrictive approach with regard to authorities/references has also been adopted for reasons of space, especially to avoid overly heavy footnoting throughout this part of the text. At any rate, a detailed list of authorities can be found as Annex II to this Brief.

## **2.1. Committed as part of an attack (“cometido como parte de un ataque”)<sup>9</sup>**

This requirement is provided for by both the Chilean Law and the ICC Statute. Accordingly, the underlying acts, i.e., the individual crimes, must occur as *part* of an attack. However, these acts could (but need not) constitute the attack itself.<sup>10</sup> For example, the mass murder of civilians may suffice as an attack against the civilian population; there is no need to prove a separate attack against the same civilians, as part of which the murders were committed.<sup>11</sup>

The concept of “*attack*” generally refers to a campaign or operation conducted against the civilian population – a “course of conduct” in the words of Art. 7(2)(a) ICC Statute

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<sup>3</sup> Cf. in more detail Ambos, *Internationales Strafrecht* (2018), § 6 mn. 36-7.

<sup>4</sup> On the complementarity principle in more detail, cf. Ambos, *Treatise ICL III* (2016), pp. 266 ff.

<sup>5</sup> Schabas, *Commentary* (2016), p. 153.

<sup>6</sup> ILC, *Draft Convention CaH* (2017), Art. 3.

<sup>7</sup> Cf. Ambos, *Treatise ICL II* (2014), pp. 46 ff. (Ch. II); id., *Internationales Strafrecht* (2018), pp. 261 ff. (§ 7 mn. 166 ff.); Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 1-29, 105-111.

<sup>8</sup> Robinson, in Cryer et al., *Introduction* (2019), pp. 231 ff.; Werle and Jessberger, *Völkerstrafrecht* (2020), mn. 972 ff.; Gil Gil, in Gil Gil and Maculan, *DPI* (2019), pp. 421 ff.; Stahn, *Critical Introduction* (2019), pp. 52 ff.; Jurovics, in Fernandez and Pacreau, *Commentaire* (2012), pp. 417 ff. Useful for (further) references are Schabas, *Commentary* (2016), pp. 145 ff. and Nilsson, in Klamberg, *Commentary* (2017), pp. 31 ff.

<sup>9</sup> Quotes in brackets are taken from Law 20.352.

<sup>10</sup> Cf. Robinson, in Cryer et al., *Introduction* (2019), pp. 232, 241.

<sup>11</sup> ICTR, *Akayesu*, 2 September 1998, TJ, para. 581.

– which involves the (multiple) commission of the underlying acts.<sup>12</sup> However, the attack need not involve military forces<sup>13</sup> or armed hostilities, or any violent force at all;<sup>14</sup> it can take place before, during or after an armed conflict, without necessarily being part of it.<sup>15</sup> It can involve any mistreatment of the civilian population.<sup>16</sup>

The expression “course of conduct” itself has widespread and systematic connotations, notwithstanding the widespread/systematic qualifiers discussed in turn (infra 2.2.).<sup>17</sup> The *Kenya* ICC Pre-Trial Chamber (‘PTC’), in line with and developing further earlier case law,<sup>18</sup> considered an attack as “a campaign or operation carried out against the civilian population”.<sup>19</sup> From this it becomes clear that isolated and random acts are excluded<sup>20</sup> and multiple acts required.<sup>21</sup> However, multiplicity alone is not sufficient, an attack is something more than “a mere aggregate of random acts”,<sup>22</sup> a certain pattern is required<sup>23</sup> (which implies a kind of policy element as discussed below, (d)). While the attack requires a multiplicity of (criminal) acts, it does not necessarily need a multiplicity of actors, nor does a single perpetrator have to act at different times.<sup>24</sup> For example, if

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<sup>12</sup> Cf. ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 80; also *Gbagbo*, 12 June 2014, Confirmation Decision, para. 209 (“course of conduct” embodying a systematic aspect); *Ntaganda*, 8 July 2019, TJ, para. 662 (‘overall flow of events’); also Nilsson, in: Klamberg (2017), *Commentary*, pp. 31-2.

<sup>13</sup> ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 80.

<sup>14</sup> ICTR, *Akayesu*, 2 September 1998, TJ, para. 581 (“An attack may also be non violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner ... if orchestrated on a massive scale or in a systematic manner”); conc. *Rutaganda*, 6 December 1999, TJ, para. 70; *Musema*, 27 January 2000, TJ, para. 205. For the ICTY cf. *Kunarac*, 22 February 2001, TJ, para. 416. Cf. also ICC, *Elements of Crimes* (2013), p. 3 para. 3. For a contrary view Mettraux, *International Crimes* (2005), p. 156.

<sup>15</sup> ICTY, *Stakić*, 31 March 2003, TJ, para. 623; conc. *Brdanin*, 1 September 2004, JT, para. 131; *Kordić and Čerkez*, 17 December 2004, AJ, para. 666; ICTR, *Nahimana et al.*, 28 November 2007, AJ, paras. 916-7.

<sup>16</sup> Cf. ICTY, *Kunarac*, 22 February 2001, TJ, para. 416; ICTR, *Semanza*, 15 May 2003, TJ, para. 327; also ICC, *Katanga*, 7 March 2014, TJ, para. 1101 (“toute forme de violence”). In this vein also Werle and Jessberger, *Völkerstrafrecht* (2020), mn. 983.

<sup>17</sup> ICC, *Gbagbo*, 12 June 2014, Confirmation Decision, para. 208 (“... quantitative and qualitative aspects ... relevant for the establishment of the ‘widespread’ or ‘systematic’ nature of the attack ...”).

<sup>18</sup> Starting with ICTR, *Akayesu*, 2 September 1998, TJ, para. 581 (“... attack ... as an unlawful act ... orchestrated on a massive scale or in a systematic manner”); conc. ICTY, *Prlić et al.*, 29 May 2013, TJ, para. 35; *Mladić*, 22 November 2017, TJ, para. 3024. For further case law references, cf. Ambos, *Treatise ICL II* (2014), p. 58, fn. 94.

<sup>19</sup> ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 80; also *Bemba*, 15 June 2009, Confirmation Decision, para. 75 and 21 March 2016, TJ, para. 149; *Situation in the Republic of Côte d’Ivoire*, 15 November 2011, Authorisation Decision, para. 31; *Ruto et al.*, 23 January 2012, Confirmation Decision, para. 109; *Katanga*, 7 March 2014, TJ, para. 1101; *Harun and Kushayb*, 27 April 2007, Arrest Warrant Decision, para. 61.

<sup>20</sup> Cf. already ICTY, *Tadić*, 7 May 1997, TJ, para. 644 (“... not ... one particular act, but, instead, a course of conduct”). Cf. also Jurovics, in Fernandez and Pacreau, *Commentaire* (2012), pp. 417, 471-2; Gil Gil, in Gil Gil and Maculan, *DPI* (2019), p. 424.

<sup>21</sup> ICC, *Blé Goudé*, 11 December 2014, Confirmation Decision, para. 127 (“course of conduct involving the multiple commission of acts”).

<sup>22</sup> ICC, *Gbagbo*, 12 June 2014, Confirmation Decision, para. 209 (“systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts”).

<sup>23</sup> ICC, *Bemba*, 15 June 2009, Confirmation Decision, para. 81; *Gbagbo*, 12 June 2014, Confirmation Decision, para. 209; *Ntaganda*, 8 July 2019, TJ, para. 664 (two operations as part of same military campaign and ‘logical succession of events’); cf. also Chaitidou, in Bergsmo and Song, *Convention* (2014), pp. 47, 66-7.

<sup>24</sup> Cf. Werle and Jessberger, *Völkerstrafrecht* (2020), mn. 982, 984.



a single perpetrator poisons the water of a large population, he would thereby commit a multiplicity of killings (and thus multiple criminal acts) with a single (natural) act.<sup>25</sup>

While the concept of attack has widespread/systematic and policy connotations, it is not required that *each individual act* occurring within the attack be widespread or systematic, providing that the respective act forms part of an attack with these characteristics. If, for example, some murders, some rapes, and some beatings take place, none of these acts need be widespread or systematic as long as together, the acts satisfy either of these conditions. It follows that the individual's actions themselves need not be widespread or systematic, provided that they form part of such a widespread or systematic attack. Indeed, the commission of a single act, such as one murder, can amount to a CaH in the context of a broader campaign against the civilian population.<sup>26</sup>

Note however that there must be a sufficient *nexus* between the unlawful acts of the perpetrator(s) and the attack.<sup>27</sup> The existence of a certain “degree of planning, direction or organisation by a group or organisation”<sup>28</sup> is the necessary nexus between individual acts that otherwise are unrelated. The precise degree of the nexus is not defined in the written law, but the jurisprudence recognises that the relationship can be established by way of an ‘objective assessment of the characteristics, aims, nature, and/or consequences of the acts concerned’,<sup>29</sup> ultimately depending on the factual circumstances of each case. Reliable indicia would include: the similarities between the perpetrator's acts and the acts occurring within the attack; the nature of the events and circumstances surrounding the acts; their temporal and geographical proximity to the attack;<sup>30</sup> and the nature and extent of the perpetrator's knowledge of the attack (thereto infra 2.5.) when committing the acts. The manner in which the acts are associated with or further the policy underlying the attack (thereto 2.4.) is of particular significance.

## 2.2. Widespread or systematic attack (“ataque generalizado o sistemático”)

First, it should be noted that the *alternative* approach – the attack must be either widespread or systematic – not only is contained in both Art. 1 (1) of Law 20.352 and Art. 7 (1) ICC Statute, but also has been repeated many times in case law<sup>31</sup> and adopted by some international codifications;<sup>32</sup> it can also be said to be the prevailing view in the

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<sup>25</sup> Cf. Ambos, *Treatise ICL II* (2014), p. 59.

<sup>26</sup> Cf. already ICTY, *Tadić*, 7 May 1997, TJ, para. 649 (“... individual perpetrator need not commit numerous offences to be held liable”).

<sup>27</sup> Cf. already ICTR, *Akayesu*, 2 September 1998, TJ, para. 579. See also Schabas, *Commentary* (2016), 166-167.

<sup>28</sup> ICC, *Gbagbo*, 12 June 2014, Confirmation Decision, para. 210; also *Blé Goudé*, 11 December 2014, Confirmation Decision, para. 146.

<sup>29</sup> ICC, *Bemba*, 21 March 2016, TJ, para. 165; *Katanga*, 7 March 2014, TJ, para. 1124; *Ntaganda*, 8 July 2019, TJ, para. 696.

<sup>30</sup> Cf. ICTY, *Tadić*, 7 May 1997, TJ, paras. 629-633; for the ICC cf. *Ntaganda*, 8 July 2019, TJ, para. 696 with further references.

<sup>31</sup> For the ICTY cf. only: *Tadić*, 7 May 1997, TJ, paras. 646-8; *Karadžić*, 24 March 2016, TJ, para. 477; for the ICTR *Akayesu*, 2 September 1998, TJ, para. 579; *Munyakazi*, 5 July 2010, TJ, para. 503; for the ICC: *Katanga*, 7 March 2014, TJ, para. 1123; *Bemba*, 21 March 2016, TJ, para. 65.

<sup>32</sup> More recently, Law on Specialist Chambers and Specialist Prosecutor's Office ('KSC Law'), 3 August 2015, Art. 13 and ILC, *Draft Convention CaH* (2017), Art. 3.

doctrine.<sup>33</sup> As regards Art. 7 ICC Statute, there is of course an apparent contradiction between para. 1 and para. 2 (a), the latter requiring that the multiple commission of acts be based on a certain policy (and thus apparently opting for a cumulative approach). We will explain below (2.4.(a)) how this contradiction can be resolved, in fact confirming the Chilean approach.

The term *widespread* has a mainly quantitative meaning, referring to the scale of the attack or, equivalently, to the (large) number of victims. This is reflected correctly in Art. 2(1) Law 20.352. The case law has interpreted the term by referring either only “to the [large] number of victims”,<sup>34</sup> “to the multiplicity of victims”,<sup>35</sup> or to the commission of the acts “on a large-scale ...[sic]”<sup>36</sup> or both to “the large-scale nature of the attack and the number of its victims”<sup>37</sup> (without however requiring a “specific numerical threshold of victims”).<sup>38</sup> The ICC case law adopts the same approach, stressing that the wide-spread element is to be assessed not in strictly (‘exclusively’) quantitative or geographical terms, but on the basis of the facts of the relevant case.<sup>39</sup> In particular, the concept is not limited geographically, but can include large numbers in a small area.<sup>40</sup>

As to the *systematic* qualifier, the early case law of the ICTY and ICTR interpreted it strictly, setting a very high threshold, i.e., as indicating “a pattern or methodical plan”,<sup>41</sup> “thoroughly organised on the basis of a common policy involving substantial public or private resources.”<sup>42</sup> However, subsequent jurisprudence adopted a broader definition referring “to the organised nature of the acts of violence and the improbability of their random occurrence”.<sup>43</sup> Chambers explained that “[p]atterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence”.<sup>44</sup> Essentially the same view was taken

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<sup>33</sup> Cf. Werle and Jessberger, *Principles* (2014), p. 339; Jurovics, in Fernandez and Pacreau, *Commentaire* (2012), pp. 466-7; Robinson, in Cryer et al., *Introduction* (2019), pp. 232-3; Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 4 with further references; on the historical development *ibid.*, mn. 18.

<sup>34</sup> ICTY, *Tadić*, 7 May 1997, TJ, para. 648.

<sup>35</sup> ICTR, *Kayishema and Ruzindana*, 21 May 1999, TJ, para. 123.

<sup>36</sup> ICTY, *Blaškić*, 3 March 2000, TJ, para. 206; confirmed by subsequent case law, e.g. *Gotovina et al.*, 15 April 2011, TJ, para. 1703; ICTR, *Nzabirinda*, 23 February 2007, TJ, para. 21; *Munyakazi*, 5 July 2010, TJ, para. 503; ICC, *Katanga*, 7 March 2014, TJ, paras. 1098, 1123.

<sup>37</sup> Cf. for ICTY recently *Mladić*, 22 November 2017, TJ, para. 3025 and *Šešelj*, 11 April 2018, AJ, para. 57; for ICTR cf. *Musema*, 27 January 2000, TJ, paras. 203-4; for ICC cf. *Bemba*, 21 March 2016, TJ, para. 163; *Katanga*, 7 March, TJ, para. 1123; *Ntaganda*, 8 July 2019, TJ, note 12, para. 691.

<sup>38</sup> ILC, *Draft Convention CaH* (2017), p. 33; Stahn, *Critical Introduction* (2019), p. 57.

<sup>39</sup> Cf. ICC, *Bemba*, 21 March 2016, TJ, para 163; *Ntaganda*, 8 July 2019, TJ, note 12, para. 691.

<sup>40</sup> ICC, *Ntaganda*, 9 June 2014, Confirmation Decision, para. 22 (“several locations”), 24 (in “a broad geographical area” over a long period of time); *Gbagbo* 12 June 2014, Confirmation Decision, para. 224 (“widespread (i) involved a large number of acts; (ii) targeted and victimised a significant number of individuals; (iii) extended over a time period of more than four months; and (iv) affected the entire city of Abidjan”); cf. also ILC, *Draft Convention CaH* (2017), p. 33 (“large geographic area is not required...”).

<sup>41</sup> ICTY, *Tadić*, 7 May 1997, TJ, para. 648.

<sup>42</sup> ICTR, *Akayesu*, 2 September 1998, TJ, para. 580. Cf. also (crit.) Ambos, *Treatise ICL II* (2014), pp. 60-61; Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 20 with fn. 137.

<sup>43</sup> ICTY, *Kordić and Čerkez*, 17 December 2004, AJ, para. 94; also *Blaškić*, 29 July 2004, AJ, para. 101; *Kunarac*, 12 June 2002, AJ, para. 94; recently *Mladić*, 22 November 2017, TJ, para. 3025 (“organized nature of the acts of violence”); ICTR, *Musema*, 27 January 2000, TJ, paras. 203-4.

<sup>44</sup> ICTY, *Kordić and Čerkez*, 17 December 2004, AJ, para. 94; *Blaškić*, 29 July 2004, AJ, para. 101; *Kunarac*, 12 June 2002, AJ, para. 94; ICTR, *Muhimana*, 28 April 2005, TJ, para. 527 (“a deliberate

by the ICC.<sup>45</sup> The *Ntaganda* PTC suggested as an example of such a “regular pattern” a “recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and coordinated ... unlawful acts ...”<sup>46</sup> and the employment of “similar means and methods to attack the different locations ...”<sup>47</sup> Similarly, the *Ntaganda* TC required an “organised nature” and “patterns of crimes”,<sup>48</sup> as manifested in “a series of repeated actions seeking to always produce the same effects on a civilian population...”.<sup>49</sup>

The common denominator of the various case law definitions<sup>50</sup> is that a systematic attack “is one carried out pursuant to a preconceived policy or plan”.<sup>51</sup> That does not mean, however, that the plan or policy element is “a legal element of the crime”, but only that it serves, at best, as an indicator of the “systematicity” of the attack.<sup>52</sup> Furthermore, an attack may be systematic even though there is no plan or policy as long as it is not random but directed against the civilian population as the main object of the attack.<sup>53</sup> Be this as it may, contrasting the definition of Art. 2(2) of Law 20.352 with the international standard leads to the conclusion that the Chilean definition does not take into account sufficiently the plan or policy component of the systematic qualifier.

Taking the “widespread” and “systematic” qualifiers together, it is sometimes difficult to distinguish them and identify in concrete terms the actual circumstances covered by one or the other. For example, two coordinated attacks on two large buildings with many floors causing thousands of deaths may qualify as widespread because of the number of victims and because the geographic scope of the attack when the total floor space is taken into consideration. Such an attack may well be greater as a whole than several attacks on a group of widely scattered villages. Even a systematic attack must involve more than a few incidents. Similarly, a widespread attack should, and by its

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pattern of conduct”); ICC, *Ntaganda*, 9 June 2014, Confirmation Decision, para. 24; *Katanga*, 7 March 2014, TJ, para. 1123.

<sup>45</sup> ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 96; *Gbagbo*, 12 June 2014, Confirmation Decision, para. 223; *Katanga*, 7 March 2014, TJ, para. 1123; *Ntaganda*, 8 July 2019, TJ, para. 692.

<sup>46</sup> ICC, *Ntaganda*, 9 June 2014, Confirmation Decision, para. 24.

<sup>47</sup> ICC, *Ntaganda*, 13 July 2012, Art. 58 Decision, para. 31.

<sup>48</sup> ICC, *Ntaganda*, 8 July 2019, TJ, para. 692.

<sup>49</sup> ICC, *Ntaganda*, 8 July 2019, TJ, para. 693 (considering whether (i) identical acts took place or similarities in criminal practices can be identified; (ii) the same *modus operandi* was used; or (iii) victims were treated in a similar manner across a wide geographic area).

<sup>50</sup> For more case law references cf. Ambos, *Treatise ICL II* (2014) p. 60 with fn. 111; Schabas, *Commentary* (2016), 164-165.

<sup>51</sup> Cf. ICTR, *Bagilishema*, 7 June 2001, TJ, para. 77; ICTY, *Vasiljevic*, 29 November 2002, TJ, para. 35; ICC, *Katanga and Ngudjolo Chui*, 30 September 2008, Confirmation Decision, para. 397; conc. *Gbagbo*, 12 June 2014, Confirmation Decision, para. 225 (“preparations for the attack were undertaken in advance”, “the attack was planned and coordinated”, “the acts of violence ... reveal a clear pattern of violence”).

<sup>52</sup> Cf. ICTY, *Kunarac*, 12 June 2002 AJ, para. 98 (“evidentially relevant”); *Blaškić*, 29 July 2004, AJ, para. 100; ICTR, *Muhimana*, 28 April 2005, TJ, para. 527; also ICC, *Harun and Kushayb*, 27 April 2007, Arrest Warrant Decision, para. 62 (“policy is an element from which the systematic nature of an attack may be inferred”); *Katanga*, 7 March 2014, TJ, paras. 1098, 1113, 1123.

<sup>53</sup> Cf. ICC, *Situation in the Republic of Kenya*, 31 March 2010, Authorisation Decision, paras. 81, 109 (“civilian population primary target...”); *Katanga*, 7 March 2014, TJ, paras. 1111-13 (1113: “L’analyse du caractère systématique de l’attaque va dès lors au-delà de l’existence d’une quelconque politique visant à éliminer, persécuter ou affaiblir une communauté”); cf. also Robinson, in Cryer et al., *Introduction* (2019), p. 236.

very nature is likely to, be based upon or carry forward a policy. A widespread attack need not, however, be systematic and *vice versa*.

### 2.3. Directed against a civilian population (“cometido ... contra una población civil”)

The acts must be directed at “any civilian population”. “Population” refers to a multiplicity of persons sharing common attributes,<sup>54</sup> implying the collective nature of the crimes to the exclusion of single acts<sup>55</sup> (and in this sense repeating the “widespread” qualifier). This requirement does not mean, however, that the entire population of a State, entity, or territory must be attacked;<sup>56</sup> rather, it suffices “that enough individuals were targeted in the course of the attack, or that they were targeted in such a way ... that the attack was in fact directed against a civilian ‘population’ ...”.<sup>57</sup>

The use of the term “*directed against*” means that the civilian population must be the primary object of the attack and that the attack follows a certain course of conduct.<sup>58</sup> In this regard, the trial judge will consider, *inter alia*, “the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.”<sup>59</sup> The victims of the attack need not be targeted because of their membership in a certain group; a discriminatory intent is not required.<sup>60</sup>

The population requirement qualifies the targeted group as being “civilian”. While the peculiarities of CaH speak against an automatic and unreserved application of the (narrow) understanding of civilian in International Humanitarian Law (‘IHL’),<sup>61</sup> in our

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<sup>54</sup> Cf. ICC, *Bemba*, 15 June 2009, Confirmation Decision, para. 76; *Ruto et al.*, 23 January 2012, Confirmation Decision, para. 164; *Katanga*, 7 March 2014, TJ, para. 1103; *Ntaganda*, 8 July 2019, TJ, para. 667 (‘collective’); cf. also Werle and Jessberger, *Principles* (2014), p. 334.

<sup>55</sup> Cf. ICTY, *Tadić*, 7 May 1997, TJ, para. 644 (“emphasis is not on the individual victim but rather on the collective”); cf. also Werle and Jessberger, *Völkerstrafrecht* (2020), mn. 973; Robinson, in Cryer et al., *Introduction* (2019), p. 239; Gil Gil, in Gil Gil and Maculan, *DPI* (2019), p. 425.

<sup>56</sup> Cf. ICTY, *Tadić*, 7 May 1997, TJ, para. 644; ICC, *Ruto et al.*, 23 January 2012, Confirmation Decision, para. 164.

<sup>57</sup> ICTY, *Kunarac*, 12 June 2002, AJ, para. 90 (fn. omitted); conc. *Kordić and Čerkez*, 17 December 2004, AJ, para. 95; *Blaškić*, 29 July 2004, AJ, para. 105; more recently *Mladić*, 22 November 2017, TJ, para. 3026.

<sup>58</sup> Cf. already ICTY, *Tadić*, 7 May 1997, TJ, para. 644 (requirement “ensures that what is to be alleged will not be one particular act, but, instead, a course of conduct”); also Robinson, in Cryer et al., *Introduction* (2019), p. 236.

<sup>59</sup> Cf. ICTY, *Kunarac*, 12 June 2002, AJ, para. 91 (fn. omitted); conc. *Blaškić*, 29 July 2004, AJ, para. 105; ICTR, *Semanza*, 15 May 2003, TJ, para. 330; conc. SCSL, *Fofana and others*, 28 May 2008, AJ, para. 299; ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 82; *Katanga*, 7 March 2014, TJ, paras. 1104-5; *Bemba*, 21 March 2016, TJ, para. 154; *Ntaganda*, 8 July 2019, TJ, para. 668.

<sup>60</sup> Cf. ICTY, 15 July 1999, *Tadic*, AJ, paras. 283 ff., 288 ff. (“discriminatory intent ... only with regard to those crimes for which this is expressly required, that is, for article 5(h), concerning various types of persecution”). See insofar also on “grounds of targeting” Robinson, in Stahn, *ICC* (2015), p. 715.

<sup>61</sup> Cf. Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 24. The issue will be discussed in greater depth by this author in a paper on the ECCC’s contribution to this question in a forthcoming special issue of the JICJ on the legacy of the ECCC.

context it suffices to refer to Article 50(3) of Additional Protocol I to the Geneva Conventions, according to which “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. This clarification has been followed by national and international courts.<sup>62</sup> It means that the fact that there may be some non-civilians (e.g. de facto combatants) amidst a group of civilians (e.g. in the context of a civic manifestation) does not mean that the group itself becomes non-civilian. Further, it is not required that the attack be directed against the civilian population as a whole, only against a sufficient number of individuals.<sup>63</sup>

## **2.4. The policy element (“ataque ... responda a una política del Estado”)**

### **(a) General considerations**

Law 20.352 (Art. 1(2)) and the ICC Statute (Art. 7(2)(a)) are on the same page concerning the requirement of a policy, although, as already stated above (II.1.), the Chilean law on the one hand is clearer in that the policy required needs to refer explicitly to the widespread or systematic attack as a whole, but on the other hand is overly broad as to the policy concept, extending it to a mere policy of State agents (“política ... de sus agentes”).

Before taking a closer look at the policy element (and the ensuing restrictive interpretation of Art. 1(2) of Law 20.352), it is worth noting that the Statutes of other international criminal tribunals do not contain such an element<sup>64</sup> and their case law has even rejected its customary law status since the *Kunarac* Appeals Judgment,<sup>65</sup> giving this element, at most, an evidentiary weight as indicating the existence of a widespread or systematic attack.<sup>66</sup> At any rate, apart from the unclear development of customary international law in this and other areas,<sup>67</sup> the lack of the policy element does not mean that this element cannot be derived from the requirement of the attack, especially in its *systematic* form,<sup>68</sup> as already indicated above.<sup>69</sup> For any kind of systematic conduct requires a degree of organisation, however small, which in turn requires a policy and

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<sup>62</sup> ICC, *Bemba*, 21 March 2016, TJ, para. 153; *Katanga*, 7 March 2014, TJ, para. 1105; *Ntaganda*, 8 July 2019, TJ, para. 668; *Gbagbo*, 12 June 2014, Confirmation Decision, para. 63; also ICTY, *Tadić*, 7 May 1997, TJ, para. 638; *Galić*, 30 November 2006, AJ, para. 144; *Blaškić*, 29 July 2004, AJ, para. 115 (depending on the number of the soldiers); ICTR, *Akayesu*, 2 September 1998, TJ, para. 582; *Nzabirinda*, 23 February 2007, TJ, para. 22.

<sup>63</sup> Cf. ICC, *Katanga*, 7 March 2014, TJ, para. 1105.

<sup>64</sup> Cf. on the one hand Art. 5 ICTY and Art. 3 ICTY Statutes and, most recently, Art. 13 KSC Law, supra note 32, which copies only para. 1 of Art. 7 ICC Statute but not para. 2 containing the policy element. For more details, including customary international law, Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 109; Robinson, in Cryer et al., *Introduction* (2019), pp. 234 ff.

<sup>65</sup> ICTY, *Kunarac*, 12 June 2002 AJ, para. 98, basically following Mettraux (2002), 237 *HarvILJ* 43, 270 ff.; crit. Schabas, *Commentary* (2016), p. 157 (“unconvincing”); Robinson, in Stahn, *ICC* (2015), pp. 712-713; Robinson, in Cryer et al., *Introduction* (2019), p. 235.

<sup>66</sup> Cf. supra note 52 and main text.

<sup>67</sup> Thus, the Canadian Supreme Court rightly indicates, referring explicitly to Art. 7(2)(a) ICC Statute, that “customary international law may evolve over time so as to incorporate a policy requirement...” (*Mugesera v. Canada*, [2005] 2 SCR 100, para. 158).

<sup>68</sup> Cf. in greater detail Ambos, *Treatise ICL II* (2014), pp. 67-76; also Chaitidou, in Bergsmo and Song, *Convention* (2014), pp. 47, 66-7; on the equivalence also Robinson, in Cryer et al., *Introduction* (2019), pp. 232-3, 236.

<sup>69</sup> Supra note 51 with main text.

an entity powerful enough to implement it.<sup>70</sup> Thus, the “systematic” qualifier inevitably implies a policy element, albeit without fully assimilating ‘policy’ and ‘systematic’. In fact, the case law stresses the difference between the two concepts, arguing that the ‘systematic’ element is more demanding than ‘policy’;<sup>71</sup> at any rate, there is clearly a need to clarify the relationship between these two elements further.<sup>72</sup> On the other hand, the policy element may, arguably, also be inferred from the “widespread” qualifier (cf. already supra (b) *in fine*), given that multiple acts must emanate from or contribute to a State or organisational policy.<sup>73</sup>

These considerations clarify that the policy requirement and its *function* is key to fully capturing the rationale of CaH. It speaks to the specific wrongfulness of CaH, distinguishing them from both ordinary criminality and basic human rights violations.<sup>74</sup> Thus, the main function of the policy element is to exclude random (“opportunistic”)<sup>75</sup> acts of violence or “isolated criminal conduct” from the scope of CaH<sup>76</sup> and to stress the planned, directed, organised and pattern-like nature of the attack.<sup>77</sup> Nevertheless, a

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<sup>70</sup> ICC, *Gbagbo*, 12 June 2014, Confirmation Decision, para. 216 (“both refer to a certain level of planning of the attack ... evidence of planning, organisation or direction ... relevant to prove both the policy and the systematic nature of the attack...”). Cf. also *Katanga and Ngudjolo Chui*, 30 September 2008, Confirmation Decision, para. 396; *Katanga*, 7 March 2014, TJ, para. 1111 (“systematic” presupposing policy); *Bemba*, 15 June 2009, Confirmation Decision, para. 81; conc. *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 96 (organisation and “regular pattern” belong to the core of the notion of “systematic”).

<sup>71</sup> ICC, *Katanga*, 7 March 2014, TJ, paras. 1111 ff. (not “synonymous” [1111], systematic nature of attack goes beyond existence of policy [1113]); also *Gbagbo*, 12 June 2014, Confirmation Decision, para. 216 (notwithstanding the similarity as indicated in the previous fn., concepts “should not be conflated” and “imply different thresholds”). In the same vein Robinson, in Bergsmo and Song, *Convention* (2014), pp. 103, 114 ff. (arguing that “‘policy’ does not necessarily require deliberate planning, direction or orchestration but only that some State or organisation must have at least encouraged the attack...”); also Robinson, in Stahn, *ICC* (2015), p. 714 (‘systematic’ requiring “a high degree of coordination and organization activity”, ‘policy’ “more moderate, satisfied by a more general link to a state or organization” which “may be demonstrated by the improbability that the crimes are coincidental unprompted acts”), 721 (policy “less demanding”); critically of the almost equivalency of “systematic” and “policy” in the early ICC case law Halling (2010), 836 *LJIL* 23, 836-7; Sadat (2013) 334 *AJIL* 107, 334; Robinson, in Stahn, *ICC* (2015), p. 713-714.

<sup>72</sup> For a good discussion see Robinson, in Stahn, *ICC* (2015), p. 714; Marchuk (2017) 55 *BostonUniv.IJLJ* 35, 55 ff.

<sup>73</sup> Cf. ICC, *Blé Goudé*, 11 December 2014, Confirmation Decision, para. 128 (“course of conduct against the civilian population was carried out pursuant to a State or organisational policy”); *Bemba*, 21 March 2016, TJ, para. 151; *Ntaganda*, 8 July 2019, TJ, paras. 663-4; cf. also Chaitidou, in Bergsmo and Song, *Convention* (2014), pp. 47, 65; considering that “widespread” entails a higher threshold Robinson, in Cryer et al., *Introduction* (2019), p. 233.

<sup>74</sup> See most convincingly ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, Dissenting Opinion Judge Kaul, para. 56 ff. (63: “decisive, characteristic and indispensable feature of CaH .... fundamental rationale ...”). In more detail cf. Ambos, *Treatise ICL II* (2014), pp. 55-56 with further references.

<sup>75</sup> Cf. e.g. ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, para. 117.

<sup>76</sup> It goes back to the ILC’s Draft Code 1996, Art. 18 with commentary (here quoted from para. 5.). Cf. also Robinson, in Bergsmo and Song, *Convention* (2014), pp. 119-120 (screening out “unconnected ordinary crime”); Robinson, in Stahn, *ICC* (2015), p. 705; also Gil Gil, in Gil Gil and Maculan, *DPI* (2019), p. 427 (“concepto más estricto” of CaH); Jurovics, in Fernandez and Pacreau, *Commentaire* (2012), p. 459; Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 135.

<sup>77</sup> ICC, *Katanga and Ngudjolo Chui*, 30 September 2008, Confirmation Decision, para. 396; *Bemba*, 15 June 2009, Confirmation Decision, para. 81; *Situation in Kenya*, 31 March 2010, Authorisation Decision, paras. 84 ff.; for a nuanced view with regard to a “regular pattern” however ICC, *Katanga*, 7 March 2014, TJ, paras. 1112-1113 (distinguishing “policy” from “systematic attack”, which requires a pattern).

widespread attack alone, in the sheer quantitative sense of the term, does not necessarily entail a policy (although it *could*, as just argued above); otherwise, even ordinary crimes, if only “widespread” enough, would amount to CaH.<sup>78</sup> Therefore, a – *quantitatively* – widespread attack only amounts to CaH if at the same time it is – *qualitatively* – based on (“pursuant to or in furtherance of” [Art. 7(2)(a) ICC Statute]) a certain policy of a collective, centralised entity.<sup>79</sup> Indeed, the policy requirement entails, as explicitly set out by the ICC Elements of Crimes, that the State (or organisation) “actively promote[s] or encourage[s]” the attack.<sup>80</sup> Thus, while Art. 7 (2)(a) ICC Statute does not require that an attack be both widespread *and* systematic (for that would turn the disjunctive formulation of para. 1 in a cumulative one), it sets out that any attack, regardless of being widespread or systematic, must be “pursuant to or in furtherance of a State or organisational policy” (Art. 7(2)(a) ICC Statute) or, in the words of Law 20.352, “responda a una política del Estado ...”. As a consequence, there must be a nexus between the attack and the policy.<sup>81</sup>

Note that the international authorities always refer to a policy of a *collective entity*, excluding a loose association of individuals without a hierarchical structure and *centralised authority*. While this may be less clear in the case of non-state actors (“organizational policy”, Art. 7(2)(a) ICC Statute),<sup>82</sup> in case of a State, as in our context, such a policy must surely be designed at or come from the central level of government,<sup>83</sup> not just from subordinate State (security) agencies or even mere “agents” (“agentes”, Art. 1(2) Law 20.352).<sup>84</sup> Otherwise, the distinguishing function of the policy element – to distinguish CaH from ordinary crimes/basic human rights violations, as explained above – would be undermined, and CaH would come very close to (widespread) human rights violations by distinct State security forces. Thus, the relevant part of Art. 1(2) Law 20.352 must be interpreted restrictively in line with the *telos* of CaH, demanding, under any circumstances, a State policy (which then of course may be implemented by State agents). Apart from this it is important to note that the attack as a

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<sup>78</sup> Cf. Ambos, *Treatise ICL II* (2014), p. 69, with further references.

<sup>79</sup> Cf. also Robinson, in Stahn, *ICC* (2015), p. 707 ff. (“logical corollary” of non-random attack, “associative dimension” [710], “both scale and associativity” [711, emphasis in the original]); Werle and Jessberger, *Völkerstrafrecht* (2020), mn. 1002.

<sup>80</sup> ICC, *Elements of Crimes* (2013), p. 3, para. 3.

<sup>81</sup> Cf. ICC, *Katanga*, 7 March 2014, TJ, para. 1115 (attack “carried out pursuant to or in furtherance of the policy”), 1116 (“nexus” between “course of conduct” and “policy”).

<sup>82</sup> Cf. insofar on the debate in the context of the Kenya litigation before the ICC Ambos, *Treatise ICL II* (2014), pp. 73 ff.; Schabas, *Commentary* (2016), p. 159, 161 ff.; Robinson, in Cryer et al., *Introduction* (2019), p. 238; Werle and Jessberger, *Völkerstrafrecht* (2020), mn. 995 ff. One leading authority even argues that Art. 7(2)(a) “does not refer to non-state actors...” (Bassiouni, *History I* (2005), pp. 151-152), but this position is not supported by current law and practice (I note in passing that Bassiouni was the chairman of the Rome Conference Drafting Committee).

<sup>83</sup> See also ILC Draft Code 1996, Art. 18 (“directed by a government”).

<sup>84</sup> The reference to ICTY, *Blaskic*, 3 March 2000, TJ, para. 205 to the effect that the policy “need not implicate the highest levels of a state or organization” (see e.g. Robinson, in Stahn, *ICC* (2015), p. 709 with fn. 14, emphasis in the original) is misleading as concerns the former entity (“state”). For the *Blaskic* TC discusses the “State machinery” in this context (para. 205) as opposed to a (non-State) organisation, as becomes clear from the references to the ILC discussion (“criminal gangs”) and the French *Barbie* case (“... forces and organizations greater ... than those of certain countries...”). It is also worth recalling in this context, as already mentioned (*supra* note 64 with main text), that the Statutes of the Ad Hoc Tribunals do not even provide for a policy element.

whole, not the individual underlying act, has to take place pursuant to a policy<sup>85</sup> (as already explained above, 2.1., the underlying act must be part of the attack – nexus requirement – but not necessarily have its – widespread/systematic – characteristics).

As to the *form of the policy*, there is no great controversy. It has been stated repeatedly by the *ad hoc* tribunals that “[t]here is no requirement that this policy must be adopted formally as the policy of a state”<sup>86</sup> (or of an organisation which can equally be the “policymaker” as explicitly recognised by Art. 7(2)(a) ICC Statute but not relevant in our context);<sup>87</sup> nor must the policy or plan “necessarily be declared expressly or even stated clearly and precisely”.<sup>88</sup> It may develop as part of an ongoing process as actions are undertaken.<sup>89</sup> Thus, in sum, an *implicit or de facto policy* is sufficient.

While the policy must surely be one to commit CaH<sup>90</sup> and the entity behind it must promote or encourage the respective attack,<sup>91</sup> this does not answer the question of *how this policy manifests itself*, of how it is expressed. Is active conduct necessary or does a mere omission (acquiescence, tolerance) suffice? While an active policy seems to be implicit in the systematic qualifier – how can something be planned or organised without the respective active policy of the entity behind it? – it is less clear how a policy can exist with regard to a multiplicity of criminal acts (i.e. a widespread attack) which are not organised or planned (i.e. systematic). This only seems conceivable if the policy can also consist of an omission on the part of the entity, for example of the *deliberate failure to take protective action*,<sup>92</sup> thereby tolerating the respective (unsystematic) crimes.<sup>93</sup> Such a policy by omission is, however, an exceptional scenario and “cannot be inferred solely from the absence of governmental or organisational action.”<sup>94</sup> While this seems to limit the policy to active conduct,<sup>95</sup> it is unclear how to distinguish objectively between a simple omission (failure to act) and the absence of action; a subjective

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<sup>85</sup> Rightly emphasised by ICC, *Katanga*, 7 March 2014, TJ, para. 1115: “... not ... demonstrating that each of the acts listed in article 7(1) of the Statute took place pursuant to or in furtherance of a State or organizational policy ...”, but “the operation or course of conduct [i.e. the attack, K.A.] ...”.

<sup>86</sup> Cf. already ICTY, *Tadić*, 7 May 1997, TJ, para. 653; ICTR, *Akayesu*, 2 September 1998, TJ, para. 580; more recently ICTY, *Mladić*, 22 September 2017, TJ, para. 3025; *Karadžić*, 24 March 2016, TJ, para. 477; ICC, *Katanga*, 7 March 2014, TJ, para. 1108. Cf. also Robinson, in Bergsmo and Song, *Convention* (2014), pp. 122 ff.

<sup>87</sup> Cf. Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 111.

<sup>88</sup> ICTY, *Blaškić*, 3 March 2000, TJ, para. 205; cf. also ICC, *Katanga and Ngudjolo Chui*, 30 September 2008, Confirmation Decision, para. 396; *Bemba*, 15 June 2009, Confirmation Decision, para. 81; *Katanga*, 7 March 2014, TJ, paras. 1108 ff. (no “formal design”, “since explicitly advanced motivations are ultimately of little importance.”); *Bemba*, 21 March 2016, TJ, para. 160 (policy need “not be formalised”); *Ntaganda*, 14 June 2014, Arrest Warrant Decision, para. 24.

<sup>89</sup> Cf. ICC, *Katanga*, 7 March 2014, TJ, para. 1110 (policy may only become visible “in the course of its implementation”, as “part of an ongoing process”, that is, retrospectively); *Ntaganda*, 8 July 2019, TJ, para. 674 (“crystallise and develop ... as actions are undertaken”).

<sup>90</sup> Cf. already, ICTY, *Tadić*, 7 May 1997, TJ, para. 653.

<sup>91</sup> Cf. already supra note 80 with main text.

<sup>92</sup> ICC, *Katanga*, 7 March 2014, TJ, para. 1108.

<sup>93</sup> For examples thereof, cf. Ambos, *Treatise ICL II* (2014), p. 70; in the same vein, Robinson, in Bergsmo and Song, *Convention* (2014), pp. 130 ff.; also Rodenhäuser (2014), 913 *LJIL* 27, 925-6.

<sup>94</sup> Cf. ICC, *Elements of Crimes* (2013), p. 3, para. 3 with fn. 6; also ICC, *Ntaganda*, 8 July 2019, TJ, para. 673. Note that the Ntaganda TC affirmed a policy of “active” promotion of the UPC/FPLC pursuant to a “preconceived strategy” specifically targeting the Lendu population (para. 689).

<sup>95</sup> Fouchard, in Bellivier et al., *Crimes* (2018), p. 139.



distinction, focusing on mere negligence in the former case and on tolerance consciously directed to facilitate the commission of crimes in the latter case,<sup>96</sup> while theoretically possible, entails the usual evidentiary problems with regard to the proof of a mental state.

Against this background it appears as if the manifestation of the policy depends on the nature of the attack as systematic or widespread. In the former case, the policy would provide at least certain guidance regarding the prospective victims in order to coordinate the activities of the individual perpetrators. A systematic attack thus requires active conduct on the part of the entity behind the policy without necessarily amounting to extensive or repeated activity. Rather, what counts is whether the conduct suffices to trigger and direct the attack, for example by promises of impunity for attacking certain persons. A widespread attack that is not at the same time systematic is one that lacks any guidance or organisation. The policy behind such an attack may be one of mere deliberate inaction, tolerance, or acquiescence.

**(b) In particular: proof of a policy (the evidentiary conundrum)**

Clearly, the less explicit a policy is, the more difficult is it to prove. Note that this is highly relevant in our context, as we will see below (IV.), when applying the law to the facts. Usually there is no “smoking gun” by way of an explicit plan or pre-established design,<sup>97</sup> and the existence of a policy needs to be *inferred* from a series of factors, for example, as indicated by the Ntaganda TC, the planned nature of the attack, the existence of a recurrent pattern of violence, the mobilisation of (state) forces, statements or other documents attributable to the entity.<sup>98</sup> Previously, the Katanga TC referred to “repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilization orchestrated and coordinated by that State or organization.”<sup>99</sup> In concrete terms, the Chamber highlighted the involvement of local authorities and commanders as well as the organised nature of one specific attack at a village’s civilian population.<sup>100</sup> The Kenya PTC stressed the organised and coordinated nature of the attacks linking concrete acts of (police) violence to politicians and other men in the background.<sup>101</sup> It is also worth noting in this context that the OTP has terminated a preliminary examination regarding events in Honduras between July 2009 and April 2014 (after the *coup d’état* of 28 June 2009) due to lack of sufficient proof of the respective policy.<sup>102</sup>

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<sup>96</sup> Cf. Gil Gil, in Gil Gil and Maculan, *DPI* (2019), p. 428.

<sup>97</sup> ICC, *Katanga*, 7 March 2014, TJ, para. 1109.

<sup>98</sup> Cf. recently *Ntaganda*, 8 July 2019, TJ, para. 674 with more factors and various references; previously ICTY, *Blaskic*, 3 March 2000, TJ, para. 204 (listing a series of indicators).

<sup>99</sup> ICC, *Katanga*, 7 March 2014, TJ, para. 1109.

<sup>100</sup> *Ibid.*, paras. 1142 ff., 1167 (systematic attack on Bogoro pursuant to a policy).

<sup>101</sup> ICC, *Situation in Kenya*, 31 March 2010, Authorisation Decision, paras. 117 ff.

<sup>102</sup> Cf. ICC-OTP, *Honduras* (2015), para. 102 ff. (103: “... while it appears that the *de facto* regime developed a plan to take over power and assert control over the country, the design of this plan and implementation of measures pursuant to this plan did not entail or amount to a policy to commit an attack against the civilian population ...”).

Such abstract considerations have limits, of course. Ultimately, everything depends on the *concrete circumstances* of the respective situation or case. At the ICC, the prosecution of Laurent Gbagbo, former president of Ivory Coast, for alleged CaH committed under his watch, is a good example of the difficulty of finding convincing proof of the context element, especially its policy requirement.<sup>103</sup> Gbagbo was acquitted with a two to one majority (Judges Tarfusser and Henderson, Judge Herrera Carbuccion dissenting) by TC I on 15 January 2019,<sup>104</sup> the gist of the issue being the proof of an attack against the civilian population by pro-Gbagbo forces. At the time of the confirmation proceedings, Judges Kaul and van den Wyngaert (Judge Fernández de Gurmendi dissenting) raised the question whether the evidence presented with regard to the policy requirement (largely focusing on the aggregation of individual incidents arguably amounting to an attack) was sufficient to meet the “substantial-grounds-to-believe” threshold of Art. 61(5) ICC Statute. The Chamber’s majority, in substance following the previous Mbarushimana (majority) non-confirmation decision,<sup>105</sup> was not convinced. Thus, the confirmation hearing was adjourned and the Prosecutor asked to present more evidence.<sup>106</sup> Let us take a closer look at the main legal-evidentiary points of the PTC’s majority.

The decision starts out with a *distinction* between the proof of the suspect’s personal responsibility and the proof of the context element of CaH, arguing that the former “need[s] to be proven in greater detail than the latter.”<sup>107</sup> While information “relevant as proof of the contextual elements” may be “less specific”, it still needs to be “sufficiently probative and specific so as to support the existence of an ‘attack’ against a civilian population.”<sup>108</sup> Thus this information must, for example, include details as to the “identity of the perpetrators, or at least information as to the group they belonged to”,

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<sup>103</sup> See also Schabas, *Commentary* (2016), p. 159-60 (arguing that some PTCs “have been quite demanding of evidence of a policy.”).

<sup>104</sup> Cf. <<https://www.icc-cpi.int/cdi/gbagbo-goude>>. The judgment also concerns Charles Blé Goudé since the cases were joined at the trial phase on 11 March 2015. However, the final version of the judgment has not been published so far: it was put on the website but then removed because of confidentiality issues; since then it has not been put up again.

<sup>105</sup> ICC, *Mbarushimana*, 16 December 2011, Confirmation Decision, para. 242 ff., especially 263-267 (deciding by majority [Judges Steiner and Tarfusser, Judge Mmasenono Monageng dissenting] that because of the lack of the policy element, pursuant to the evidentiary standard of Art. 61(5) ICC Statute, CaH have not been established. This decision has been upheld both by the Gbagbo Adjournment Decision (infra note 118) and by the AC (*Mbarushimana*, 20 May 2012, Appeal Adjournment Decision). The Gbagbo Adjournment Decision in its relevant part (para. 24 ff. with fn. 38 ff.) refers several times concurring to both the Mbarushimana PTC Confirmation and the AC decision. For a detailed critique of the Mbarushimana Confirmation decision, however, Robinson, in Stahn, *ICC* (2015), p. 724 ff. (arguing that the majority’s approach was “inappropriately stringent”, “incongruous with its own factual findings” and “inexplicably rigorous ... assessing each piece of evidence of policy in isolation without considering the totality” [725]).

<sup>106</sup> ICC, *Gbagbo*, 3 June 2013, Adjournment Decision, after para. 47 (Judge Fernández de Gurmendi dissenting). The Chamber asked the Prosecutor specifically to provide further evidence on six issues (ibid., para. 44), namely on, *inter alia*, the “position(s), movements and activities” of the relevant armed groups, the “organizational structure of the ‘pro-Gbagbo forces’” (especially “how the ‘inner circle’ coordinated, funded and supplied the means for the activities of the different sub-groups...”), “[H]ow, when and by whom the alleged policy/plan to attack ... was adopted, including specific information about meetings...” and very specific and precise information on the alleged (sub-)incidents (e.g. as to perpetrators and their link to an alleged policy and number of victims, the concrete acts committed etc).

<sup>107</sup> ICC, *Gbagbo*, 3 June 2013, Adjournment Decision, para. 22.

<sup>108</sup> Ibid.

as well as to the identity of the victims or at least their political or other allegiance.<sup>109</sup> Furthermore, the Prosecutor must prove “a sufficient number of incidents relevant to the establishment” of the context element.<sup>110</sup> As to the *kind of evidence*,<sup>111</sup> the PTC considers it “preferable” to have “as much forensic and other material evidence as possible”, “duly authenticated” and with “clear and unbroken chains of custody”;<sup>112</sup> if testimonial evidence is offered it should be “first-hand”, while hearsay evidence clearly has “less probative value”, with anonymous hearsay being especially problematic.<sup>113</sup> In this context, the majority expresses “serious concern” that the Prosecutor “relied heavily on NGO reports and press articles”, since this kind of evidence is neither the product of a “full and proper investigation”, nor does it “usually constitute a valid substitute for the type of evidence” mentioned above.<sup>114</sup> Ultimately, the majority thus “is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence...”.<sup>115</sup> As to inferences (drawn from conduct of Gbagbo, his inner circle and forces) the majority emphasises that they need to be “sufficiently supported by the evidence”.<sup>116</sup>

While the charges against Gbagbo were confirmed in a second attempt one year later (again by a majority decision),<sup>117</sup> the AC upheld the evidentiary considerations of the PTC’s adjournment decision<sup>118</sup> and the TC, as already mentioned above, acquitted Gbagbo due to lack of evidence (again by majority).<sup>119</sup> This suggests that the flaws of the Prosecutor’s case highlighted by the adjournment majority with a view to, *inter alia*, the policy element of CaH, did not seem to have been remedied at trial, at least in the eyes of the TC majority. To be sure, both the PTC’s adjournment decision (confirmed by the AC) and the TJ’s acquittal (still under appeal) have received some serious criticism as to the majority’s take on evidence.<sup>120</sup> Be this as it may, however, the whole

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid., para. 23.

<sup>111</sup> Ibid., paras. 24 ff.

<sup>112</sup> Ibid., para. 27.

<sup>113</sup> Ibid., paras. 27-8; for a more flexible approach Robinson, *EJIL: Talk*, November 2019, Part 2; on (anonymous) hearsay in international criminal procedure also Ambos, *Treatise ICL III* (2016), pp. 474 ff.

<sup>114</sup> ICC, *Gbagbo*, 3 June 2013, Adjournment Decision, para. 35; also para. 36 (“unable to attribute much probative value to these materials”). For a contrary view Robinson, *EJIL: Talk*, November 2019, Part 1 (“... UN and NGO reports can provide reliable information...”).

<sup>115</sup> Ibid., para. 37; for a contrary, much more flexible approach Dissenting Opinion, Judge Fernández de Gurmendi, paras. 23 ff. (criticising, at para. 48, the “legal and methodological mistake” of the majority “to seek to assess the policy requirement in relation to separate acts, or ‘incidents’, instead of considering it with respect to the attack as a whole” and, further, the majority’s “piecemeal approach to facts and evidence” which “is simply not helpful to assess systemic forms of criminality”).

<sup>116</sup> ICC, *Gbagbo*, 3 June 2013, Adjournment Decision, para. 36.

<sup>117</sup> ICC, *Gbagbo*, 12 June 2014, Confirmation Decision (Judge van den Wyngaert dissenting).

<sup>118</sup> ICC, *Gbagbo*, 16 December 2013, Appeal Adjournment Decision, paras. 36 ff., 67.

<sup>119</sup> Cf. <<https://www.icc-cpi.int/cdi/gbagbo-goude>>. The written judgment was put on the website but then removed again, since it apparently contained some confidential information. At the time of writing the new redacted version of the judgment has not been put up again.

<sup>120</sup> For a detailed critique of the PTC (majority) adjournment decision see Robinson, in Stahn, *ICC* (2015), p. 716 ff. (arguing that inferring the policy “from the improbability of the competing hypothesis of coincidence” would have been sufficient to affirm a CaH policy of pro-Gbagbo forces [723] and calling for a “correction” of this jurisprudence [731]) and Robinson, in Cryer et al., *Introduction* (2019), p. 237 (arguing that a “policy may be inferred from the manner in which events occur” or “from the sheer improbability of the rival hypothesis ...”). In essence, Robinson’s view corresponds to the dissenting opinions of Judges Mmasenono Monageng and Fernández de Gurmendi in the Mbarushimana Confirmation

controversy, with split Chambers and ongoing academic debate, shows that the evidentiary approach to the policy element of CaH is by no means settled and that it is indeed an understatement if one of the basic contenders calls the policy element “a quite basic threshold that is fairly easy to satisfy.”<sup>121</sup>

## 2.5. Mental element (*elemento subjetivo*)

Article 7(1) ICC Statute explicitly requires that the perpetrator commit the acts with *knowledge* of the broader widespread or systematic *attack* on the civilian population. Law 20.352 is silent in this regard. The knowledge requirement is further defined in the ICC Elements of Crimes,<sup>122</sup> requiring that “[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” This requirement is consistent with the jurisprudence of the ICTY and ICTR, which has concluded that the perpetrator must know that there is an attack on a civilian population and that she knows that her acts are part of that attack.<sup>123</sup>

The knowledge requirement constitutes an *additional mental element* to be distinguished from the general mental element of Article 30 ICC Statute<sup>124</sup> (or, for that matter, the general *dolus* according to Art. 2 Chilean Penal Code [‘PC’]<sup>125</sup>). In structural terms, the knowledge requirement provides the necessary connection between the perpetrator’s individual acts and the overall attack by means of the perpetrator’s mindset, and ensures that single, isolated acts, which only happen to have been carried out contemporaneously with an overall attack (so-called “opportunistic” acts), do not qualify as CaH.<sup>126</sup>

While the perpetrators must be aware that their acts form part of the collective attack, this does not mean that they must have knowledge of the entire attack in all its detail.<sup>127</sup>

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and Gbagbo Adjournment decisions. Robinson et al. also tried to convince the ICC AC – unsuccessfully – to overturn the PTC adjournment decision (cf. Robinson et al., *Amicus Curiae* (2013)). For his recent critique on the TJ’s acquittal see Robinson, *EJIL: Talk*, November 2019 (three parts) criticising a “Cartesian” (“hypersceptical”) approach to evidence. Robinson seems to have got hold of the once published version of the judgment (supra note 104).

<sup>121</sup> Robinson, in Stahn, *ICC* (2015), p. 706. While the policy element, as already stated above (note 71), is less demanding than the systematic qualifier, it is not completely undemanding, i.e. “fairly easy to satisfy.” Equally, demanding solid (primary and reliable) evidence to prove the policy element does not create “new formidable hurdles” or mean “imposing idealized conceptions of the policy element” (ibid., p. 730).

<sup>122</sup> ICC, *Elements of Crimes* (2013), p. 4, Art. 7(1)(a), para. 3.

<sup>123</sup> ICTY, *Tadić*, 15 July 1999, AJ, note 73, para. 248; *Kunarac*, 12 June 2002, AJ, paras. 99, 102; more recently *Karadžić*, 24 March 2016, TJ, para. 479; *Mladić*, 22 November 2017, TJ, para. 3029; ICTR, *Musema*, 27 January 2000, TJ, para. 206; more recently *Munyakazi*, 5 July 2010, TJ, para. 504; ICC, *Katanga and Ngudjolo Chui*, 30 September 2008, Confirmation Decision, paras. 401-2; *Al Bashir*, 12 July 2010, Second Arrest Warrant Decision, para. 87; *Katanga*, 7 March 2014, TJ, paras. 782, 971, 983.

<sup>124</sup> Cf. Ambos, *Treatise ICL II* (2014), p. 77, with further references.

<sup>125</sup> The PC does not define the *dolus*, but it is understood in line with mainstream doctrine as containing a cognitive and volitional element, cf. Politoff et al., *DP Chileno* (2004) p. 255.

<sup>126</sup> Cf. also Robinson, in Cryer et al., *Introduction* (2019), p. 241.

<sup>127</sup> Cf. ICC, *Elements of Crimes* (2013), p. 3, para. 2 (no “knowledge of all characteristics of the attack”); also Ambos, *Treatise ICL II* (2014), p. 78 with further references.

The *specific contents* of the required knowledge and its *object of reference* are disputed,<sup>128</sup> but further discussion can be dispensed with here, since there is no information (cf. III.) as to the state of mind of the alleged perpetrators of the underlying acts of CaH. At any rate, the necessary knowledge can be proven by circumstantial evidence.<sup>129</sup>

### III. Available Facts

#### 1. Facts presented in the *Acusación Constitucional*

According to our mandate (supra I.) the relevant facts are to be taken from the *AcusCon*. These facts (“hechos fundantes”) are presented in the second and third part of the *AcusCon* (pp. 5 ff., 8 ff.),<sup>130</sup> albeit somewhat jumbled up with legal and normative considerations. As these do not belong to the factual basis proper of the situation under examination, they will be dealt with in our (legal) assessment (IV.1.).

As to the actual facts, the document starts with 13 paragraphs (numbers) (pp. 6-8) mainly referring to the protest, its causes and the government’s (counter-)measures, only in para. 12 (p. 8) pointing to data of the *Instituto Nacional de Derechos Humanos* (‘INDH’), according to which by 27 October the situation was as follows: “there are” (“hay”) 547 persons injured by the use of firearms; 122 gravely injured (“en sus globos oculares”); 103 complaints (“querellas”) have been presented referring to torture, mistreatment and sexual violence by military and police forces; 5 (five) killings by state agents; and 3,193 people arrested. It is not clear whether all these figures are confirmed, since the information itself changes from the presentation of – apparently – objective facts at the beginning (regarding the injured and mistreated persons) to a mere presentation of complaints, followed by the statement as to killed and detained persons. The *AcusCon* again refers to this data (the 103 complaints re torture etc.) at p. 17 (Second Part, Ch. II) and then to several cases documented by the INDH (pp. 21-23) indicating a higher (sic!) number of persons injured (1,092, of whom 546 were injured by firearms, of whom 122 were hit in the eyeball) based upon visits to 50 hospitals between 17 and 27 October 2019 (p. 21); it repeats the number of arrested persons (3,193) on the basis of 104 visits to police stations.<sup>131</sup>

The document quotes a statement by the National Association of Judges (*Asociación Nacional de Magistrados*) where the Association expresses concerns regarding the excessive use of force by security (military) forces, which, if proved to be true (“acciones de ser ciertas”), goes beyond what is permissible under the state of emergency and is “especially worrying” (“especialmente preocupante”) given multiple complaints

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<sup>128</sup> Cf. Ambos and Wirth (2002), 1 *CLF* 13, 37 ff.; for more details Hall/Ambos, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 26.

<sup>129</sup> ICC, *Bemba*, 15 June 2009, Confirmation Decision, para. 126; *Bemba*, 21 March 2016, TJ, paras. 166-9; *Katanga and Ngudjolo Chui*, 30 September 2008, Confirmation Decision, para. 402.

<sup>130</sup> The document does not indicate pages, but I will quote them from the pdf file and/or refer to the respective part or respective footnotes.

<sup>131</sup> The INDH further points out (as quoted on p. 22): “Hemos podido registrar relatos simulacros de ejecución, desnudamientos, amenazas de violación y otras formas de violencia sexual, grave maltrato físico y verbal, golpes, excesiva demora de la policía en conducir a las personas detenidas a la comisaría, manteniéndose en los furgones, con mala ventilación y hacinadas, durante largas horas.”

of excessive action with regard to cruel, inhuman and degrading treatment, particularly with regard to children and young people (p. 23). The AcusCon also cites a report of the “Departamento de Derechos Humanos del Colegio Médico de Chile”, according to which at least 6% of the injured persons are minors and 68% of the injuries were caused by projectiles (p. 23). The document further quotes a declaration of the “Juventudes Comunistas” complaining about illegal and arbitrary arrests and political persecution (p. 24) and a series of journalistic accounts of rights violations (pp. 25-6).

## 2. Facts presented in further sources (until 15 November 2019)

Given the importance of the factual basis for the following conclusions, some additional research, although not required by our mandate, has been carried out in order to contrast the facts presented in the AcusCon with other sources. Clearly, the most important source is the INDH, since it works directly on the ground and thus presents first-hand (primary) information. It updates its numbers regularly via Twitter.<sup>132</sup>

A radio report,<sup>133</sup> citing (earlier) data by the INDH, gives slightly lower numbers than the AcusCon. This is of course unsurprising, given that the number of casualties/incidents increases with time. The report mentions abuse by the police force during and prior to detentions in the form of forced stripping, physical and verbal abuse (“maltrato físico y verbal”),<sup>134</sup> beatings (“golpes”) and police keeping detainees in overcrowded vans with poor ventilation for many hours. The vast majority of people are allegedly detained for simple disorders, so they usually leave the Police Station on the same day. Of the registered people admitted to hospitals, several were injured by firearms (“heridas por armas de fuego”), injured (“lesionadas”), and many of them have eye injuries due to the impact of pellets (“heridas oculares a casaca de impacto de balines”). These numbers keep rising with time, as is to be expected.<sup>135</sup>

INDH numbers of 10 November<sup>136</sup> indicate the following: 5,629 detentions (of which 861 are women, 3,981 men and 634 minors), 2,009 injured people hospitalised (643 were hit by rubber pellets [“perdigones”<sup>137</sup>], 42 by bullets [“bala”], 41 by pellets [“balines”] and 345 by unidentified firearms, 938 injured by beatings, gases and other means [“golpes, gases y otros”]; 182 of these resulted in eye injuries) and 283 judicial cases (“acciones judiciales”: 5 homicides, 6 attempted killings [“homicidio frustrado”],

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<sup>132</sup> <<https://twitter.com/inddhh>>.

<sup>133</sup> <<https://radio.uchile.cl/2019/10/22/nuevo-informe-del-indh-reporta-1-601-detenedos-y-violencia-sexual-contra-mujeres/>> accessed 17 November 2019.

<sup>134</sup> The report cites examples given by the INDH, inter alia, as follows: “Dos de las querellas son por hechos de violencia sexual contra mujeres en Comisarías. Una de ellas relata haber sido puesta boca al suelo sobre la basura y con el arma de servicio, haber sido amenazada con dispararle si se movía, para luego tocar su cuerpo con el fusil y amenazarla con penetrarla con el arma. Otra señala haber sido desnudada completamente por parte de efectivos policiales, obligada a hacer sentadillas, insultada y amenazada con violencia sexual”.

<sup>135</sup> Cf. specific numbers released by the INDH on 4 November 2019 <<https://twitter.com/inddhh/status/1191410625739661315/photo/1>> accessed 17 November 2019.

<sup>136</sup> <<https://twitter.com/inddhh/status/1193613314217185281>>. Cf. also CNN Chile, 23 October 2019/ 22:49: INDH files complaints against police and military for sexual violence <[https://www.cnnchile.com/pais/indh-detenedos-heridos-querellas-violencia-sexual\\_20191023/](https://www.cnnchile.com/pais/indh-detenedos-heridos-querellas-violencia-sexual_20191023/)>.

<sup>137</sup> The “perdigón de goma” is defined as follows in the respective police instructions (Instrucciones, infra note 172, p. 28): “Cartucho calibre 12 mm. el cual mantiene como proyectil 12 postas de goma endurecida, de material de caucho, el cual es de carácter no letal.”

52 complaints of sexual violence, 192 of torture and cruel treatment [“torturas y tratos crueles”], 12 complaints of injuries [“querellas lesiones”], three further remedies [“recursos de queja”] and 13 cases of constitutional remedies [“amparos”]. According to the most recent numbers of 15 November 2019, detentions had risen to 6,362 and the number of injured persons to 2,381.<sup>138</sup>

Another important domestic source are the reports of the *Defensoría Jurídica* of the University of Chile, which is monitoring the situation on the ground and so far has produced 15 reports. The latest one of 14 November 2019, 2 p.m.,<sup>139</sup> reports 1,518 complaints in total received up until that (exact) date, referring mainly to different kinds of injuries (mainly caused by non-ballistic projectiles [“proyectiles no balísticos”]) but also to arbitrary detentions (69 cases) and rights violations of especially vulnerable groups (e.g. 95 cases of children and teenagers<sup>140</sup>); for the period between 13 November 2 p.m. and 14 November 2 p.m. it reports 125 complaints, referring to 93 cases of injuries caused by shootings with “perdigones” and 14 cases caused by tear bombs (“bombas lacrimógena”).

Besides these, there are other, less reliable secondary sources. On 8 November, an *independent group of human rights specialists*,<sup>141</sup> appointed by the UN Human Rights Council, made a declaration condemning the excessive use of force by security forces, pointing to at least 20 people killed and about 1,600 injured, including police officers.<sup>142</sup> Furthermore, the use of excessive force prior to detention (thousands, including minors), abuses of children, and ill-treatment possibly amounting to torture is reported.<sup>143</sup> Again, reference is made to information on sexual violence against women, men and adolescents, including practices such as forced stripping (“desnudamientos forzados”), touching and rape (“tocamientos y violaciones”) during detention.<sup>144</sup>

According to a *New York Times* report of 10 November,<sup>145</sup> quoting (alleged) victims and participants in the protests, police officers have been aiming purposely at the faces and especially eyes of civilians so that the non-lethal pellets create the most damage. These statements by victims, allegedly attacked without reason by the police, are con-

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<sup>138</sup> Ibid and <<https://www.theclinic.cl/2019/11/15/balance-del-indh-a-cuatro-semanas-del-estallido-social-2-381-heridos-y-6-362-detenidos/>> accessed 17 November 2019.

<sup>139</sup> Universidad de Chile - Defensoría Jurídica, *Informe de Monitoreo* N° 15, 14 November 2019.

<sup>140</sup> With regard to children and teenagers, see also Defensoría de la Niñez, *Informe* (2019) (reporting rights violations between 18 and 26 October 2019).

<sup>141</sup> Clément Nyaletsossi Voule, relator especial sobre el derecho a la libertad de reunión pacífica y de asociación; José Antonio Guevara Bermúdez, presidente-relator, Grupo de Trabajo sobre la Detención Arbitraria; Agnes Callamard, relatora especial sobre ejecuciones extrajudiciales, sumarias o arbitrarias; David Kaye, relator especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión; Michel Forst, relator especial sobre la situación de los defensores de los derechos humanos; Philip Alston, relator especial sobre la extrema pobreza y los derechos humanos y presidente del Grupo de Trabajo sobre la discriminación contra la mujer y las niñas, <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25269&LangID=E>>.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> <<https://www.nytimes.com/video/world/americas/10000006795557/chile-protesters-shot-eye.html>>.

trusted with President Piñera's (unfortunate) statement: "We are at war against a powerful and relentless enemy who does not respect anyone or anything" ("Estamos en Guerra contra un enemigo poderoso, implacable, que no respeta a nada y nadie").<sup>146</sup>

Last but not least, on 11 November Amnesty International ('AI') released a statement, based on a two-week *in situ* visit,<sup>147</sup> pointing to continuing widespread human rights violations ("violaciones de derecho humanos de forma generalizada") and the President's (alleged) failure to take (effective) decisions to stop the crisis ("decisiones efectivas para hacer frente a la crisis").<sup>148</sup> We will return to AI's position below.

Comparing the facts presented in the AcusCon with these other sources, it seems fair to conclude that the information coincides, bearing in mind that the quantitative data mentioned in the AcusCon has been overtaken by subsequent developments. At any rate, given the sharp increase in numbers within a relatively short period of time,<sup>149</sup> it appears that the government has not been able gain control of the situation, especially as regards the abuses of the police force Carabineros.

## **IV. Legal Assessment of the Available Facts (*Subsunción*)**

### **1. CaH (context element) with regard to the facts presented in the *Acusación Constitucional*?**

In view of our mandate, the key question is whether the facts presented in the AcusCon allow the conclusion that CaH have been committed during the period covered by the AcusCon (i.e. 17 to 28 October 2019). The answer to *this* question is clearly in the negative. This follows, on the one hand, from the AcusCon itself, since it does not contain any relevant and plausible information from which the existence of the context element of CaH, especially the policy requirement, could be inferred. As set out above (III.1.), the AcusCon contains data which demonstrates a series of (police) abuses which, taken as a whole, allows the conclusion that generalised or widespread *human rights violations* – to be distinguished from CaH – have been committed.

However, the AcusCon's own assessment goes much further than this. The document speaks of "systematic violence against the population" ("violencia sistemática contra la población" [p. 17, subtitle a.]) and a "systematic praxis" ("práctica sistemática") of the security forces to use non-lethal munition in a way that causes the greatest possible

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<sup>146</sup> Min. 4:52 <<https://www.nytimes.com/video/world/americas/10000006795557/chile-protesters-shot-eye.html>>.

<sup>147</sup> "El equipo de crisis y respuesta táctica para las Américas de Amnistía Internacional lleva dos semanas en terreno, y junto con Amnistía Internacional Chile está realizando una minuciosa documentación de graves violaciones a derechos humanos y crímenes de derecho internacional. El equipo de investigación se ha reunido con autoridades chilenas, organizaciones de la sociedad civil, víctimas de violaciones de derechos humanos y sus familiares. Asimismo, en solo una semana, Amnistía Internacional recibió más de 10,000 denuncias y abundante material audiovisual sobre el uso excesivo de la fuerza por parte de militares y carabineros, los cuales están siendo verificados por los especialistas digitales y de armas de la organización." <<https://www.amnesty.org/es/latest/news/2019/11/chile-amnistia-internacional-denunciara-violaciones-ante-cidh/>>.

<sup>148</sup> Ibid.

<sup>149</sup> Rising within the two weeks from 27 October to 10 November from 1,092 to 2,009 injured persons, of whom 122 to 197 were gravely injured; from 3,193 to 5,629 detentions and from 103 to 192 complaints of torture, mistreatment and sexual violence etc.



harm, especially “trying to cause harm to the eyes” (“buscando producirles daños oculares”), punishable as “mutilaciones” according to Art. 396 of the Chilean Penal Code (pp. 23-4). In the context of the alleged “systematic violence”, CaH (“crímenes de lesa humanidad”) are mentioned for the first time (p. 18); further, it is stated that a widespread or systematic attack as defined in Art. 2 of Law 20.357 “resuena en nuestra lectura del momento que hace unos días vivió Chile” (ibid., after fn. 21 main text). Last but not least, albeit *stricto sensu* beyond our mandate, but worth mentioning given the legal implications, the AcusCon imputes to the (former) Minister Chadwick the “systematic violence” (“violencia sistemática” [p. 26]) of the police forces by way of omission, invoking, *inter alia*, Art. 28 ICC Statute regulating the concept of “command responsibility” (pp. 26-29).

Unfortunately, none of these legal-normative claims are backed up by any kind of legal analysis whatsoever. The AcusCon discusses neither the widespread and systematic qualifiers nor the requirements – explained above (II.2.) – of CaH (nor the highly complex and controversial concept of command responsibility). The document only repeats the wording of Art. 1 and 2 of Law 20.357 (without contrasting it with the ILC standard, especially regarding the systematic qualifier, thereto II. 1 and 2.2.), refers to a CaH definition by the UN High Commissioner for Refugees (pp. 18-9) (although this is a UN agency specialised in refugee issues without any specific ICL expertise) and lists several human rights instruments (International Covenant for Civil and Political Rights, UN Torture Convention, Convention against Enforced Disappearance, pp. 19-21) that it fails to analyse in any way and that in any case do not contribute to clarifying the relevant legal issues. This deficit in legal analysis is especially striking with regard to the claim of “systematic” violence: while the targeting of protesters by shooting pellets right in their eyes may well in principle amount to a systematic attack,<sup>150</sup> this requires first an analysis of this concept in light of the applicable ICL (thereby restricting the overly broad definition of Art. 2(2) Law 20.357) and second the presentation of reliable information indicating that these shootings follow a plan, pattern or a policy designed at the highest State level (cf. II.2.2.).

## **2. CaH (context element) with regard to subsequent facts (until 15 November 2019)?**

The further sources (III.2.), while showing a serious increase of human rights violations and thus speaking, at best, to the quantitative element (“widespread”) of CaH, do not change the picture significantly as to the systematic qualifier and policy requirement of CaH. Similarly to the AcusCon, some reports and declarations are not limited to the description of (alleged) facts but contain legal-normative considerations, including value judgments. Perhaps the most obvious example is the declaration of AI published on 11 November 2019,<sup>151</sup> where the organisation does not simply report facts (III.2.)

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<sup>150</sup> In this context, the composition of the pellets (*perdigones*) may also be relevant, see thereto the recent findings by the University of Chile according to which only 20% consist of rubber, <<https://www.24horas.cl/nacional/estudio-de-la-universidad-de-chile-afirma-que-solo-20-de-la-composicion-de-perdigones-de-carabineros-es-de-goma---3731418>>, accessed 18 November 2019 (German time).

<sup>151</sup> <<https://www.amnesty.org/es/latest/news/2019/11/chile-amnistia-internacional-denunciara-violaciones-ante-cidh/>> accessed 17 November 2019.

but mixes these with legal-normative considerations alleging and attributing severe human rights violations (“graves violaciones de derechos humanos”) and even possible international crimes (“possible crímenes de derecho internacional”), with Erika Guevara Rosas, Al directora para las Américas, making the following statement:

“Es evidente que el presidente Sebastián Piñera no ha dispuesto de todas las medidas a su alcance para detener las graves violaciones de derechos humanos y posibles crímenes de derecho internacional que siguen ocurriendo en Chile desde el inicio de las protestas sociales. La represión violenta en contra de quienes se manifiestan ha sido constante e incluso podría intensificarse tras las medidas de seguridad propuestas por el presidente el 7 de noviembre ... Esta *continuidad demuestra que no hay una voluntad real de cambiar la estrategia fallida* para atender los reclamos de la ciudadanía, con pleno respeto de sus derechos.”<sup>152</sup>

However, as in the case of the AcusCon, these claims are not backed up by any legal analysis whatsoever. By contrast, the independent UN Experts, while also critical of the situation on the ground (III.2.), take a more cautious approach. They see in the excessive use of force a violation of “the requirements of necessity and proportionality”.<sup>153</sup> At the same time, however, they welcome the government’s decision to invite an UN mission to the country so that an independent assessment of the situation can be made. They also stress that the authorities have shown the “explicit will” (“voluntad expresa”) to “prosecute and determine responsibilities” (“perseguir y determinar las responsabilidades”) for possible human rights violations, especially those committed by State agents.<sup>154</sup>

### 3. The Micco / Mañalich controversy

None of the above reports and statements contribute anything to the relevant legal issues. Instead, they either make legal claims without sufficient justification (AcusCon, AI) or do not even refer to CaH but only – which is bad enough! – to rights violations due to excessive use of force (UN experts). However, a more helpful legal debate has ensued pursuant to the following statement by Sergio Micco, director of the INDH, responding to a question on the legal merits of the AcusCon:

“Conceptualmente, la violación sistemática de los derechos humanos supone una *concertación* entre distintas instituciones, donde se crean leyes o se hacen políticas públicas que directamente, intencionadamente, tiene el *objetivo* de violar los derechos humanos (...) si tu me preguntas a mi como director del Instituto, te diría que *no* y quien diga ... tiene que probarlo”.<sup>155</sup>

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<sup>152</sup> Ibid., emphasis added.

<sup>153</sup> “[...] el elevado número de heridos y la manera en la cual se han utilizado las armas no letales parece indicar que el uso de la fuerza fue excesivo y violó los requisitos de necesidad y proporcionalidad” <<https://news.un.org/es/story/2019/11/1465161>>; English <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25269&LangID=E>>.

<sup>154</sup> “voluntad expresa de perseguir y determinar las responsabilidades en casos de violaciones de los derechos humanos, en particular las cometidas por agentes del Estado”, <<https://news.un.org/es/story/2019/11/1465161>>.

<sup>155</sup> <<https://www.t13.cl/noticia/nacional/sergio-micco-violacion-sistemica-dd.hh.-no-y-quien-diga-contrario-tiene-probarlo>> accessed 17 November 2019, emphasis added.

Apart from general criticism regarding this statement,<sup>156</sup> there was, apparently, only one rebuttal of its (legal) merits, namely by Juan Pablo Mañalich,<sup>157</sup> a prominent and internationally respected Chilean criminal law scholar. Mañalich summarises,<sup>158</sup> largely accurately,<sup>159</sup> the state of the law with regard to the context element of CaH, *inter alia* referring to the disjunctive widespread/systematic element,<sup>160</sup> to several rights violations amounting to underlying acts of CaH<sup>161</sup> and to the “manifestantes” as the (targeted) civilian population,<sup>162</sup> in order to then state regarding the policy element:

“... la fisonomía de la situación presente solo vuelve pertinente la pregunta de si el ataque generalizado o sistemático ‘respond[e] a una política del Estado o de sus agentes’. Es fundamental partir observando que, de acuerdo con el tenor de la disposición legal, la política en cuestión tiene que ser atribuible *o bien* al Estado *o bien* a ‘sus agentes’. La disyunción así introducida solo resulta inteligible si se asume que, en el segundo caso, la política a la que responda el ataque no necesita haber sido definida, ni impulsada, desde el poder central del Estado. Es perfectamente concebible, por ende, que la exigencia se vea cumplida por el hecho de que esa política sea reconocible en el actuar de los funcionarios de Carabineros de Chile o del Ejército, sin que ello necesite descansar en una ‘concertación’ entre alguna de estas fuerzas y otras instituciones del Estado, como erradamente lo sugiriera el Director del INDH.”

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<sup>156</sup> Cf. <<https://radio.uchile.cl/2019/11/04/balance-del-indh-4-364-detenedos-y-1-569-heridos-en-hospitales/>> accessed 17 November 2019.

<sup>157</sup> Mañalich (2019) *El Desconcierto*.

<sup>158</sup> Mañalich’s argument that Micco incorrectly invoked the presumption of innocence since he “no está formulando una imputación” is irrelevant in our context, but I note in passing that Mañalich himself formulates such an imputation regarding the Chilean President (based on command responsibility pursuant to Art. 35 Law 20.357, i.e. an omission liability) in another commentary ([2019] *CIPER/Académico*), showing that Micco’s argument is not too far-fetched.

<sup>159</sup> However, I do not agree with him when he equates the context element and the systematic qualifier (“... es a este requisito que se alude cuando, de manera técnicamente impropia, se habla del carácter “sistemático” de las violaciones de derechos humanos ...”), given that the context element contains more requirements, as explained above (II.2.).

<sup>160</sup> “... para alcanzar la gravedad que las [human rights violations, K.A.] convierta en crímenes de lesa humanidad, las respectivas violaciones de derechos humanos en las que incurran agentes del Estado necesitan ser *o bien* masivas *o bien* sistemáticas, en circunstancias de que su carácter “masivo” ha tendido a ser equiparado a su carácter “generalizado”...” Mañalich also correctly distinguishes between a widespread and systematic form of an attack further below (with fn. 8). The fn. are omitted here and in the following quotes, but I note in passing that Mañalich refers to my *Treatise ICL II* in notes 6-8.

<sup>161</sup> “... Estos antecedentes [rights violations demonstrated by INDH, K.A.] son preliminarmente suficientes para concluir que en las últimas dos semanas han sido perpetrados, por funcionarios de las Fuerzas Armadas y de Orden y Seguridad, delitos que con toda probabilidad quedan comprendidos en el catálogo fijado en los arts. 3º y siguientes de la Ley 20357, a saber: homicidio (art. 4º), lesión corporal gravísima (art. 5º Nº 2); violación o abuso sexual calificado (art. 5º Nº 8); tortura (art. 7º Nº 1); menoscabo grave de la salud física o mental (art. 8º Nº 1); y abuso sexual o estupro (art. 8º Nº 3).” It is worth noting in this context that Art. 7(1) ICC Statute criminalises serious injuries only as “other inhumane acts” (subpar. (k), thereto Hall/Stahn, in Triffterer and Ambos, *Commentary* (2016), Art. 7 mn. 99).

<sup>162</sup> “En lo concerniente a la exigencia de que se configure un ataque generalizado o sistemático contra una población civil, ella debe ser interpretada en el sentido de la exigencia de un “hecho global”, que puede consistir en una multiplicidad de actos delictivos que exhiban características comunes o incluso en un solo acto que llegue a afectar a un número considerable de personas. La circunstancia de que “una población civil” deba venir en consideración como objeto del ataque se traduce en que este tiene que afectar a un grupo que sea, en mayor o menor medida, susceptible de diferenciación. Una categoría que, en referencia a la situación de las últimas semanas, pudiera servir para identificar la población civil afectada sería la de “manifestantes”.”

These are important, well-formulated considerations, but I think they are legally and theoretically unsound. First of all, while correctly taking Law 20.357 *in casu* as the starting point, Mañalich apparently overlooks that it must be interpreted in light of the international standard as set out by Art. 7 ICC Statute, especially taking into account the function of the policy element. On that basis one must conclude, as already argued above (II.2.4.(a)), that Art. 1(2) Law 20.357 must be interpreted restrictively, limiting it to a State policy proper, i.e. a policy defined by the central level of the State concerned. While it is perfectly possible, as already explained above (II.2.4.(a)), for such a policy to arise in the course of a conflict,<sup>163</sup> it is not at all “perfectly conceivable” (“perfectamente concebible”) that it is “recognisable” (“reconocible”) in the conduct of mere State agents – unless they act on behalf or at least with the tolerance of the (central) State. And for this same reason Mocci is correct, from a legal-theoretical perspective, when he requires a “concertación” between State institutions (or, for that matter, between mere State agents and State institutions), this being necessary, however, for both the “systematic” qualifier and the policy element (with the former, at any rate, being more demanding than the latter<sup>164</sup>).

Apart from these strictly legal considerations, the Mocci-Mañalich controversy also has a factual side to it: when Mañalich rejects a “concertación” between the security forces involved in rights violations and other State institutions – as a legal requirement flowing from the policy element (contrary to Mocci, for whom it is part of the systematic qualifier) – it appears as if he, at least implicitly, admits that such a “concertación” has not taken place in actual fact, or at least that it has not been proven. This is confirmed by Mañalich’s last – absolutely correct – consideration, namely that it is ultimately up to the criminal courts to determine the existence of the context element.<sup>165</sup> And this, in fact, reconnects with Micco’s statement that the systematicity – or, for that matter, the policy – must be proven (“tiene que probarlo”), which only can happen in a court of law.<sup>166</sup>

#### 4. Policy by omission?

It should be clear from the above that the available facts up to 15 November 2019 – and *a fortiori* the facts presented in the AcusCon – do not allow for the inference of an *active* policy of the State of Chile, represented by its government, to commit CaH. The

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<sup>163</sup> Cf. Mañalich (2019) *El Desconcierto*: “no necesariamente tendrá que haber sido reconocible en el momento inicial de despliegue del ataque correspondiente. Es perfectamente imaginable, en cambio, que esa política se haya vuelto suficientemente reconocible en algún momento o a partir de un hito posterior.” Cf. also previously *id.* (2019) *CIPER/Académico*: “... reconocible en algún momento o a partir de un hito posterior.”

<sup>164</sup> See *supra* II.2.2. and 2.4.(a), especially note 71 with main text.

<sup>165</sup> “Es obvio que los tribunales de justicia deberán determinar si las condiciones precedentemente analizadas han llegado a verse cumplidas ...”

<sup>166</sup> It is for this reason that Micco’s later statement (4 November 2019) before the Human Rights Commission of the Senate (“Comisión de DDHH del Senado”) to the effect that “no estamos en condiciones hoy día de afirmar que existe tal sistematicidad, pero tampoco es oportuno descartarlo” (<<https://www.biobiochile.cl/noticias/nacional/chile/2019/11/04/micco-matizo-sus-dichos-sobre-violacion-sistematica-de-ddhh-tampoco-es-oportuno-descartarlo.shtml>> accessed 17 November 2019) does not constitute a retraction of the earlier statement, but rather a more nuanced approach focusing on the (final) legal assessment of the available facts *o sea una subsunción*.

remaining question is whether these facts allow for the inference of a policy by *omission*. This is suggested by some of the statements quoted above, for example the one by AI,<sup>167</sup> criticising the President's and/or government's failure to take adequate countermeasures. While such an alleged failure also has implications for the mode of liability (indicating a responsibility for omission, especially pursuant to the concept of command/superior responsibility),<sup>168</sup> in our context it gains importance with regard to the policy requirement of CaH. However, as explained above (III. 2.4.(a)), such a policy by omission is an exceptional scenario and certainly cannot be inferred from the mere absence of governmental action<sup>169</sup> or, more relevantly in our case, the apparent inability (rather than unwillingness) to take back control of the public space and have the security forces, especially the Carabineros, comply with the rules of engagement of a *Rechtsstaat*. In this context, another statement by Sergio Micco is of interest:

“El daño que está provocando el uso de balines y perdigones no se condice con el *protocolo progresivo del uso de la fuerza*. Es por eso que el INDH presentó una *querrela* por lesiones graves gravísimas contra Carabineros ... El INDH *condena* todos los actos de violencia, como incendio de edificios patrimoniales y vandalismos contra iglesias, y declara que estas acciones no contribuyen en nada a la causa de los derechos humanos, pero tampoco justifican el uso indiscriminado de escopeta antimotines.”<sup>170</sup>

First of all, Micco makes reference to non-compliance<sup>171</sup> with the applicable domestic police instructions (“protocolo ... del uso de la fuerza”) of 1 March 2019,<sup>172</sup> which contain highly detailed rules that not only are in line with international (soft law) standards<sup>173</sup> but go beyond them, being more concrete and precise. For example, these instructions establish not only the principles of necessity and proportionality, referred to by the UN Experts,<sup>174</sup> but also the ones of legality and responsibility,<sup>175</sup> the latter providing for individual responsibility of superiors and direct perpetrators for any violations.<sup>176</sup> Furthermore, the instructions contain a sliding five-level scale of nuanced rules for the use of force,<sup>177</sup> for the use of lethal weapons,<sup>178</sup> and for the maintenance of public order with

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<sup>167</sup> Supra note 148 with main text.

<sup>168</sup> Thereto Mañalich (2019) *CIPER/Académico*.

<sup>169</sup> Cf. supra note 94 with main text.

<sup>170</sup> <<https://www.indh.cl/declaracion-del-director-del-indh-y-querella-contra-carabineros/>>, emphasis added.

<sup>171</sup> Cf. also <<https://www.24horas.cl/data/heridos-con-perdigones-concentran-la-mayor-cantidad-entre-todas-las-personas-danadas-en-marchas--3719256?fbclid=IwAR2NHEqtzo3J2rTcnJkKtw-M3JMu74-ZEkilP9bdsO4fXYjXzxjgReoFznc>> accessed 17 November 2019: “Los testimonios de las víctimas denuncian la presencia de niños, la poca distancia a la que les dispararon y una actitud pacífica al momento de ser atacados; lo que se *contrapone con las instrucciones del protocolo de Carabineros* y con los principios de necesidad y proporcionalidad según el INDH.”

<sup>172</sup> Cf. the updated “instructions” (“instrucciones”) about the “use of force” (“uso de la fuerza”), Circular No. 1832, 1 March 2019, in *Diario Oficial*, Núm. 42.295, 4 March 2019.

<sup>173</sup> For these cf. <[https://www.hchr.org.co/documentoseinformes/documentos/carceles/1\\_Universales/B%E1sicos/5\\_Funcionarios\\_hacer\\_cumplir\\_ley/FuncionariosCumplirLey.htm](https://www.hchr.org.co/documentoseinformes/documentos/carceles/1_Universales/B%E1sicos/5_Funcionarios_hacer_cumplir_ley/FuncionariosCumplirLey.htm)> especially the most recent and detailed “Basic Principles” adopted at the Eighth UN Congress on Crime Prevention in Havana, 27 August to 7 September 1990.

<sup>174</sup> Cf. supra note 153 and main text.

<sup>175</sup> Instrucciones, supra note 172, p. 2 (also establishing principles of legality and responsibility).

<sup>176</sup> *Ibid.*, p. 2 (“... responsabilidades individuales por las acciones y omisiones incurridas, sino también la responsabilidad de los mandos llamados a dictar órdenes ...”).

<sup>177</sup> *Ibid.*, pp. 2-3.

<sup>178</sup> *Ibid.*, p. 4.

regard to demonstrations.<sup>179</sup> The fact that these instructions exist and, more importantly, that their compliance is demanded by the INDH, an independent public watchdog for human rights,<sup>180</sup> clearly speaks against a (State) policy by omission; to the contrary, it rather suggests that the Chilean State is committed to controlling the use of force by its security forces, especially Carabineros, and has proper mechanisms for their human rights compliance in place. Of course, the mere existence of rules of proper conduct does not in itself exclude a policy of CaH, especially if these rules are not complied with in practice and enforced.<sup>181</sup> However, in the situation at hand, there is no indication that these rules are a mere “paper tiger” with the purpose of facilitating and/or concealing rights violations. To the contrary, the very existence of the INDH with its autonomy from the government and a broad human rights compliance mandate, complemented by the proper functioning of the Chilean (criminal) justice system, shows that these rules are taken seriously, and that non-compliance with them entails administrative and/or criminal sanctions.<sup>182</sup>

This is indeed confirmed, second, by Micco’s reference to a complaint (“querella”) presented against Carabineros,<sup>183</sup> since this entails the triggering of the – just alluded to – administrative (“sumarios”) and criminal proceedings against the responsible agents and may lead to criminal convictions.<sup>184</sup> It is important to note that such “querellas” can be presented by any citizen and the already mentioned *Defensoría Jurídica* of the University of Chile (the most important university in the country) has indeed also presented a total of 430 up to 14 November 2019.<sup>185</sup> The independent (criminal) justice system of Chile is in charge of such proceedings. Clearly, such a treatment of (alleged) police abuses is not possible in a State whose policy is – by commission or omission – to commit CaH. Third, Micco condemns (“condena”) all acts of violence. In this context it is worth highlighting the INDH’s role during the crisis. As we have seen above (III.), it has continuously reported rights violations and in fact serves as the primary and most reliable source of information regarding these violations. Apart from that, its important

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<sup>179</sup> Ibid., pp. 5 ff. (including providing for the classification of the arms used in annex 1, pp. 26-7).

<sup>180</sup> Cf. Law No. 20.405 of 24 November 2009 (published 10 December 2009) which created the INDH as an autonomous agency of public law with legal personality and its own budget (“corporación autónoma de derecho público, con personalidad jurídica y patrimonio propio”, Art. 1) to promote and protect human rights (Art. 2).

<sup>181</sup> Cf. *Mbarushimana*, 16 December 2011, Confirmation Decision, dissenting opinion Judge Mmasenono Monageng, para. 14-16 (pointing to the internal rules and instructions of the FDLR which were not “always” followed [para. 14], however, and therefore concluding that the existence of these rules “does not negate the allegation that an order to target the civilian population was issued by the leaders of the organisation.” [para. 16]); thereto also Robinson, in Stahn, *ICC* (2015), p. 727.

<sup>182</sup> See *infra* note 184.

<sup>183</sup> At the time of writing an even more important *querella* for manslaughter by obstruction (“homicidio por obstrucción”) was presented, since Carabineros allegedly attacked medical personnel and thus impeded life-saving measures for a 29-year-old man. According to Sergio Micco this was the sixth, gravest case of this kind, cf. <<https://www.latercera.com/nacional/noticia/querella-homicidio-carabineros-plaza-italia/904111/>> accessed 17 November 2019.

<sup>184</sup> Apart from the administrative “sumarios”, the INDH has important rights of intervention in criminal proceedings as a “querellante” (pursuant to Art. 3(5) Law 20.405 in connection with Art. 111(3) CPP), for example, it can ask the Office of the Prosecutor (Ministerio Público) to carry out certain investigative measures (Art. 183 CPP), request pre-trial detention before the “Juez de Garantía” (Art. 140(1) CPP) and even compel proceedings by way of the “forzamiento de la acusación” (Art. 258(3) CPP).

<sup>185</sup> *Universidad de Chile / Defensoría Jurídica*, Informe de Monitoreo N° 15, 14 November 2019.

role as an independent human rights watchdog is generally recognised, even by critics of the government's handling of the crisis.<sup>186</sup>

Last but not least, it must not be overlooked that the proof of a CaH policy by omission, i.e., the deliberate toleration of or acquiescence in the commission of CaH, is even more demanding than the proof of active conduct. As to the latter, we have discussed above (II.2.4.(a)) the (controversial) stance of PTC I and TC I in the Gbagbo litigation before the ICC. Even if one takes a more flexible approach to the evidentiary standard, there is no way around the fact that general human rights reports – independently of authorship (be it government bodies like the INDH, international bodies like a UN expert commission or NGOs like AI) – and press articles do not present reliable first-hand evidence as to the individual responsibility of alleged perpetrators; rather, they usually rely on hearsay and untested allegations of parties to the respective conflict who may or may not be victims of the alleged abuses. Such evidence would normally only be used as background information in criminal proceedings or for purposes of corroboration. It would not serve as a proper evidentiary basis for conviction, unless primary evidence resulting from it, such as direct witnesses, were tested – for example by cross-examination – in a court of law. The available “facts”, the object of this Brief, do not meet these standards, and however that may be, there is no evidence pointing to a State policy of CaH by omission. Quite to the contrary, the various observer and verification missions invited or at least tolerated by the government, its willingness in principle to cooperate with these missions and the – already mentioned – functioning of domestic control and compliance mechanisms, most prominently represented by the INDH and its director, demonstrate the interest and willingness of the Chilean State, represented by its government, to deal with alleged human rights violations by documenting them, identifying (alleged) perpetrators and initiating the respective proceedings. Last but not least, the agreement between the main political forces,<sup>187</sup> including the government parties (RN and UDI), to initiate a democratic process to reform the current Constitution<sup>188</sup> is another sign of willingness to respond to the situation of social unrest and protest that gave rise to the alleged human rights violations.

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<sup>186</sup> Cf. e.g. Mañalich (2019) *El Desconcierto*: “... para que el INDH pueda seguir cumpliendo la tarea que le corresponde, con la solvencia y la consistencia que le han sido justificadamente reconocidas hasta ahora ...”

<sup>187</sup> The Communist Party, the “Federación Regionalista Verde Social” and three parties of the FA did not sign the Agreement, cf. <<https://www.eldesconcierto.cl/2019/11/15/solo-tres-partidos-del-fa-firmaron-acuerdo-por-nueva-constitucion-diputado-boric-lo-hizo-de-forma-personal/>> and <[https://www.latercera.com/politica/noticia/chile-inicia-historico-proceso-reemplazar-constitucion-congreso-acuerda-plebiscito-abril-2020/901398/?fbclid=IwAR29Ohu9Ha0\\_8zU\\_mYpgTiwe37yXQcLVLcntuHX90\\_aGL6jf6TqgG27Rj1o](https://www.latercera.com/politica/noticia/chile-inicia-historico-proceso-reemplazar-constitucion-congreso-acuerda-plebiscito-abril-2020/901398/?fbclid=IwAR29Ohu9Ha0_8zU_mYpgTiwe37yXQcLVLcntuHX90_aGL6jf6TqgG27Rj1o)> accessed 17 November 2019.

<sup>188</sup> “Acuerdo Por la Paz Social y la Nueva Constitución”, 15.11.2019, available (at the end of the article) at <[https://www.latercera.com/politica/noticia/chile-inicia-historico-proceso-reemplazar-constitucion-congreso-acuerda-plebiscito-abril-2020/901398/?fbclid=IwAR29Ohu9Ha0\\_8zU\\_mYpgTiwe37yXQcLVLcntuHX90\\_aGL6jf6TqgG27Rj1o](https://www.latercera.com/politica/noticia/chile-inicia-historico-proceso-reemplazar-constitucion-congreso-acuerda-plebiscito-abril-2020/901398/?fbclid=IwAR29Ohu9Ha0_8zU_mYpgTiwe37yXQcLVLcntuHX90_aGL6jf6TqgG27Rj1o)> accessed 17 November 2019.

## ANNEX I: List of Abbreviations

AC	Appeals Chamber
AcusCon	Acusación Constitucional
AI	Amnesty International
AJ	Appeals Judgment
AJIL	American Journal of International Law
Art.	Article
BostonUniv.ILJ	Boston University International Law Journal
CaH	Crimes against Humanity
cf.	confer ('compare')
Ch.	Chapter
conc.	concurring
CPP	Código de Procedimiento Penal
crit.	critical(ly)
DDHH	Derechos Humanos
DP	Derecho Penal
DPI	Derecho Penal Internacional
e.g.	exempli gratia ('for example')
ECCC	Extraordinary Chambers of the Courts of Cambodia
ed.	edition/editor
eds.	editors
et al.	et alii ('and other')
ff.	following (pages)
fn.	footnote
FA	Frente Amplio
FPLC	Forces Patriotiques pour la Libération du Congo
HarvILJ	Harvard International Law Journal
IACHR	Inter-American Commission on Human Rights
ibid.	ibidem ('in the same place')
ICC	International Criminal Court
i.e.	id est ('that is')



ICC Statute	Rome Statute of the International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
id.	idem ('the same')
IHL	International Humanitarian Law
ILC	International Law Commission
INDH	Instituto Nacional de Derechos Humanos
JICJ	Journal of International Criminal Justice
KSC	Kosovo Specialist Chambers
LJIL	Leiden Journal of International Law
MICT	Mechanism for International Criminal Tribunals
mn.	margin number
OTP	Office of The Prosecutor (ICC)
p. / pp.	page / pages
para.	paragraph
PC	Penal Code
PTC	Pre-Trial Chamber
RN	Renovación Nacional
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
SCSL	Special Court for Sierra Leone
TC	Trial Chamber
TJ	Trial Judgment
UDI	Unión Demócrata Independiente
UN	United Nations
UPC	Union des Patriotes Congolais

## **ANNEX II: List of Authorities**

### **I. Table of Cases**

#### **International Criminal Court**

Prosecutor v Bemba G., No. ICC-01/05-01/08-424, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (15 June 2009).

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Prosecutor v Bosco Ntaganda, No. ICC-01/04-02/06-309, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (14 June 2014).

Prosecutor v Bosco Ntaganda, No. ICC-01/04-02/06-2359, TC VI, Judgment (8 July 2019).

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Prosecutor v Callixte Mbarushimana, No. ICC-01/04-01/10-465-Red, PTC I, Decision on the confirmation of charges (16 December 2011).

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Prosecutor v Laurent Gbagbo, No. ICC-02/11-01/11-432-Anx-Corr, PTC I Decision Adjourning the Hearing on the Confirmation Charges, Dissenting Opinion of Judge Silvia Fernández de Gurmendi (6 June 2013).

Prosecutor v Laurent Gbagbo, No. ICC-02/11-01/11-572, AC, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled

"Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (16 December 2013).

Prosecutor v Laurent Gbagbo, No. ICC-02/11-01/11-656-Anx, PTC I, Decision on the Confirmation Charges (12 June 2014).

Prosecutor v Omar Hassan Ahmed Al Bashir, No. ICC-02/05-01/09-94, PTC I, Second Decision on the Prosecution's Application for a Warrant of Arrest (12 July 2010).

Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, No. ICC-01/09-01/11-373, PTC II, Decision on the Confirmation Charges (23 January 2012).

Prosecutor v Harun and Kushayb, No. ICC-02/05-01/07-2, PTC I, Arrest Warrant Decision (Harun) (27 April 2007).

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