

**Impact of the ruling in The Prosecutor v Laurent Gbagbo and Charles Blé Goude on the Common Plan Policy provided for under Article 7(2) of the Rome Statute.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

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December 2019

Word Count: 10246 Words

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## **ACKNOWLEDGEMENTS**

I would like to thank my family and friends for the continuous support, encouragement and assistance throughout the process. In a special way I would like to thank my supervisor, Ms. Claire Adionyi, for the direction and guidance. Thank you very much for helping me put this together. Finally, I would like to thank the Strathmore Law School for its monumental help in providing the much needed facilities and resources that have been fundamental in this research process.

Thank you all!

## **DECLARATION**

I, WAITHAKA MARY WANJIRU, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:.....

Date:.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Adionyi Claire

## ABSTRACT

A statute or any codified law can be considered to be the bible of its jurisdiction. However, what happens where a verse in the bible is not clear? It is prone to varied interpretations by the religious practitioners. The same is the occurrence in the interpretation of a Statute. The Rome Statute was enacted to provide for the law related to crimes in the international regime. The absence of clarity in the legal provision leads to its various interpretations in the cases heard at the International Criminal Court.. Such is the case in Article 7 of the Rome Statute that provides for the crimes against humanity. There is no clear definition of what constitutes a common plan under the organisational policy in this provision. This paper seeks to analyze the impact that the ruling in the case of *The Prosecutor v Laurent Gbagbo and Charles Ble Goude* will have in the attempt to defining what the common plan constitutes of. In this case, the court was of the opinion that the prosecutor had failed to establish the existence of a common plan, yet the accused were alleged to be in authority and control over the pro-Gbagbo forces. So, what does this mean? What is the threshold of proof of a common plan? On analysis of the development of jurisprudence on proving the common plan policy, it is evident that there has been a move from the broad approach to the more stringent, formal approach. In the case at hand in this study, the majority have required that the Prosecution provides direct evidence of the formal adoption of the common plan. This decision is of a high precedential value in the future determination of such related cases. However, judges are not bound by this decision and therefore there will still be an inconsistency in the interpretation by the Court. This may result in the creation of a barrier to access international criminal justice.

## **LIST OF ABBREVIATIONS**

<b>FOCA</b>	<i>Forces Combattantes Abacunguzi</i>
<b>ICC</b>	International Criminal Court
<b>ICL</b>	International Criminal Law
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>OTP</b>	Office of the Prosecution
<b>UCLA</b>	University of California, Los Angeles

# CHAPTER 1

## Introduction

### Background of the study

Antonio Cassese states that despite the adoption of the Rome Statute, the international criminal law is still quite rudimentary and lacks specificity.<sup>1</sup> This is evident in the provision on crimes against humanity under Article 7 of the Rome Statute.

Article 7(1) of the Rome Statute defines a crime against humanity as an act that is committed as part of a widespread attack against a civilian population.<sup>2</sup> Subsection 2 of the same, then further expounds on what an attack directed against a civilian population is. It states that it involves the multiple commissions of acts pursuant to or in furtherance of a State or organisational policy to commit the act.<sup>3</sup>

Further to that, the Rome Statute further provides for the element of criminal responsibility as an individual or as a group. Specifically, Article 25(3) (d) provides for the criminal responsibility of a person who acts or attempts to act with a common purpose of a group. It is stated that the contribution shall be intentional and shall either:

- ‘(i) be made with the aim of furthering the criminal activity or criminal purpose of the group... or,
- (ii) Be made in the knowledge of the intention of the group to commit the crime’<sup>4</sup>

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<sup>1</sup> Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts. Volume I: Commentary, Volume II (2 Parts): Documents and Cases*, The Hague: Kluwer Law International, 2000

<sup>2</sup> Article 7(1), Rome Statute of the International Criminal Court, 17 July 1998.

<sup>3</sup> Article 7(2), Rome Statute of the International Criminal Court.

<sup>4</sup> Article 25(3) (d), Rome Statute of the International Criminal Court

Laurent Gbagbo, the former Ivory Coast president, alongside his co-accused Ble Goude was accused of committing crimes against humanity.<sup>5</sup> This was within the period of November 2010 to April 2011. There was a violent political conquest following the presidential elections in which Gbagbo allegedly did not want to leave power and therefore used his inner circle and pro-Gbagbo forces to achieve this.<sup>6</sup> It was alleged that he exercised authority, control and issued commands, directly and through his inner circle referred to as the ‘pro-Gbagbo’ forces. Specifically, the allegations highlighted the fact that Gbagbo was the one who was behind the common plan, that he created a structure that helped him achieve this, provided them with weapons to be used at their disposal and finally, he coordinated the commission by holding frequent meetings for briefings.<sup>7</sup> These forces constituted an organisation apparatus of power and Gbagbo and his inner circle could use this to implement their plan to attack the supporters of Alassane Outtara who was the newly-elected president and therefore an enemy to Gbagbo and his forces.<sup>8</sup>

During the trial period, the accused persons remained in custody. However, a hearing was scheduled on the 13th of December 2018 to discuss the continued detention of the two accused. In January 2019, an oral decision was delivered in which most of the bench was in favor of the conditional acquittal of the accused persons. It was further stated that the defense had no need to produce further evidence in the case as the prosecution had failed to qualify the threshold of burden of proof. Particularly, the prosecution failed to prove that there was a common plan to keep Gbagbo in power which included the commission of the crimes against humanity therefore failing to prove that the charges committed were in furtherance of the organisational policy.<sup>9</sup>

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<sup>5</sup> The Prosecutor v Laurent Gbagbo and Charles Ble Goude, International Criminal Court.

<sup>6</sup> <https://www.icc-cpi.int/pages/item.aspx?name=PR1016> on 6 February 2019.

<sup>7</sup> The Prosecutor v Laurent Gbagbo and Charles Ble Goude, ‘Excerpt from the decision confirming the charges in the Laurent Gbagbo case of 12 June 2014: Charges confirmed’ <https://www.icccpi.int/iccdocs/PIDS/other/Gbagbo-Sec4-Eng.pdf>

<sup>8</sup> The Prosecutor v Laurent Gbagbo and Charles Ble Goude, ‘Excerpt from the decision confirming the charges in the Laurent Gbagbo case of 12 June 2014: Charges confirmed’ <https://www.icccpi.int/iccdocs/PIDS/other/Gbagbo-Sec4-Eng.pdf>

<sup>9</sup> Transcript of 15 January 2019, ICC-02/11-01/15-T-232-ENG ET WT.

## Statement of the problem

The International Criminal Court has the jurisdiction to determine matters related to these grievous offences in accordance with the Rome Statute.<sup>10</sup> However, the provision on crimes against humanity does not clearly set out what exactly qualifies to be a common plan in the organisational policy. Does the accused person(s) have to be present during the commission of the crime? Does the fact that they are in control of the entity accused automatically mean that they are guilty?

The lack of a clear definition has led to varied interpretations by different judges in the courts. There is the wide and the stringent approach. The wider approach entails there being low standard of proof in showing the nexus between the perpetration of the crime with the larger group or organisation. The stringent approach, on the other hand, requires that evidence of the formal adoption of the policy of the organisation be adduced. The majority in the case against Gbagbo and Ble Goude, ruled that the prosecution must adduce direct evidence to prove that the indeed there was a common plan and the accused were acting in its furtherance.

This is a clear sign of an inconsistency in the interpretation of the law.

## Hypothesis

This study postulates that the impact of the decision is:

1. That the conceptions of the common plan policy will be narrowed down.
2. That the narrow conception impedes on the access to justice of the aggrieved parties.

## Research Questions

1. What are the facts that must be proven in establishing a common plan policy?
2. What effect does the lack of a single definition of a common plan have on the organisational policy and the determination of related cases thereof?

## Research objectives

The aim of this study is:

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<sup>10</sup> Article 1, Rome Statute of the International Criminal Court.

1. To study the conceptualisation of the common plan policy in International Criminal Law
2. To determine the extent of standard of proof in proving that the common plan element was in existence
3. To analyse the impact of the acquittal of Gbagbo and his co-accused on the organisational policy

### **Significance of the study**

This study seeks to add to the literature that is present in the legal framework on the organisational policy. This will be achieved through the study of the case against Gbagbo and Ble Goude whose determination is recent and the effects that the ruling will have in the legal regime.

### **Theoretical framework**

In order to effectively study the common plan policy and factors that must be proven to establish it, the command theory propounded by John Austin will be studied first. This theory is a basis for individual criminal responsibility as part of a larger group. This ‘command’ is established where there is a superior, an obligation to obey failure to which, a sanction is imposed.<sup>11</sup> The individuals that could be held responsible are not only the superiors themselves, but also the subjects working under the superior.

From this theory we then delve into the provision of the law and the necessity of there being a clear provision. This is to avoid handing the judges too much discretion in the determination of cases due to the gaps that exist in the law. Discretion raises a concern of the considerations that the judges may have when making decisions as they may be personal or political and not to the best interest of the parties.

This framework shall then be concluded by looking at Dworkin’s theory of the law. He critiques the view of legal positivists that judges should have strong discretion in determining cases. One of the reasons for this critique is because the law created by judges in exercise of their discretion

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<sup>11</sup> Herbert Morris, Verbal Disputes and the Legal Philosophy of John Austin, 7 UCLA Law Review, 27 (1960), 29.

is akin to the retroactive application of the law. He later goes on to suggest what could constitute an ideal judge in decision making who draws a balance of all the factors material to the case.<sup>12</sup> These factors are the law, institutions, the moral standards and the goals of the society.

These theories will be discussed in-depth in the second Chapter of this study

## Literature Review

This common plan policy has been the subject of various writings and judicial considerations. This is as a result of the lacuna that is present in proving this policy therefore leaving room for varied interpretations.

Antonio Cassese notes that a crime against humanity must be an instance of a repetition of similar crimes or that it should be a manifestation of a plan of violence worked out by state authorities, leading officials of a *de facto* political authority or part of an organised political group.<sup>13</sup>

This notion was upheld in the Weller case. The judge here stated that for a crime to qualify as that against humanity, it must have been systemically organised by the government or with its approval.<sup>14</sup> In this case, Weller and his co-accused persons had committed the offence out of the line of duty as they were drunk and they admitted to committing it out of racist intentions.<sup>15</sup>

Judge Kaul in his dissenting opinion of the case of *The Prosecutor v Francis Muthaura, Uhuru Kenyatta and Mohammed Ali*, was of the view that an organisation could be private but have elements that would give it a state-like character enough to qualify it under a crime against humanity.<sup>16</sup> Of these established, the key elements related to the issue in question include a

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<sup>12</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' Volume 3, ( Issue 2), Mizan Law Review, 2009, 371 - 372.

<sup>13</sup> Cassese A, International Criminal Law, 3rd ed, Oxford University Press, United Kingdom, 2013, 91.

<sup>14</sup> The Prosecutor v Weller (1940), District Court of Monchengladbach.

<sup>15</sup> The Prosecutor v Weller (1940), District Court of Monchengladbach.

<sup>16</sup> In this case, Francis Muthaura, Uhuru Kenyatta and Mohammed Ali were the accused persons. They had allegedly committed crimes against humanity during the 2007-2008 post -election violence through the police and the Mungiki criminal sect.

group of persons within an entity that has been established and acts for a common purpose and to whom the policy may be imposed.<sup>17</sup>

Additionally, in *The Prosecutor v Klaus Barbie*, the accused had been found guilty of the commission of crimes against humanity which were committed as part of a common plan to deport and persecute members of the French resistance.<sup>18</sup> The defense, on appeal, argued that the moral element of the accused was not present. The Court quashed the appeal on the grounds that the execution of a common plan constituted a crime against humanity considering that the acts were performed in a systemic manner.<sup>19</sup>

However, the judge in the Enigster case in Tel Aviv was of a different opinion on the common plan as an essential element constituting a crime against humanity.<sup>20</sup> He states that the perpetrators of the crime should not have to identify with the policy of an organisation.<sup>21</sup> This contrasts with a war crime in which he was of the opinion that the common plan element is fundamental in persecuting the crime.

William Schabas also states that in the case where there is no actual proof of orders being given by the commander of being responsible, it would be difficult for judges to convict the accused based solely on the circumstantial evidence presented.<sup>22</sup> This was a contributing factor to the ruling in favor of Laurent Gbagbo and Ble Goude for their release. Schabas goes further to state that under command responsibility, the accused is prosecuted for the crime committed by the subordinate and not just for the distinct offence of negligence when in the position of authority.<sup>23</sup>

From this we can clearly see the inconsistency in the interpretation of the legal provision.

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<sup>17</sup> Prosecutor v Francis Kimithi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Dissenting opinion of Judge Hans-Peter Kaul, ICC-01/09-02/11, 15 March 2011.

<sup>18</sup> The Prosecutor v Klaus Barbie (1983), Supreme Court (Criminal Law Chamber) of France as cited in *The Rome Statute of the International Criminal Court: A commentary*, Vol 1A, Oxford University Press, University of Oxford, 2009, 362.

<sup>19</sup> The Prosecutor v Klaus Barbie (1983), Supreme Court (Criminal Law Chamber) of France as cited in *The Rome Statute of the International Criminal Court: A commentary*, Vol 1A, Oxford University Press, University of Oxford, 2009, 362.

<sup>20</sup> Enigster (1951), District Court of Tel Aviv, Israel as cited in Cassese A, *International Criminal Law*, 93.

<sup>21</sup> Enigster (1951), District Court of Tel Aviv, Israel as cited in Cassese A, *International Criminal Law*, 93.

<sup>22</sup> Schabas W, *An introduction to the International Criminal Court*, 4th ed, Cambridge University Press, United Kingdom, 2014, 232.

<sup>23</sup> Schabas W, *An introduction to the International Criminal Court*, 233.

## Research Design

This research shall be conducted using the case study design. The element of a common plan shall be studied with the focus being on the recent case against Laurent Gbagbo in the ICC. It shall then look at the impact of the decision to acquit the accused persons on the organisational policy. The reason for using the case study approach is to analyze the issue in detail and therefore easier to weight the various variables in relation to the circumstances in the case. This will finally assist in coming up with an analysis of the impact of the case study.

The method to be used mainly to gather information on the topic shall be through desktop research on the same. This cuts across various forms of literature from court decisions, to books, reports, articles and journals on the same.

## Limitations

The foreseeable limitations could be in relation to time constraints

## Chapter breakdown

The objectives of the proposed dissertation will be met within five chapters.

**Chapter 1** will be an introduction to the topic of discussion. This will include a background of the study which will involve an in-depth analysis of the facts of the case and the resultant ruling of the same.

**Chapter 2** will then study the theoretical framework surrounding the topic. This will involve an analysis of the command theory propounded by John Austin which will lay the foundation of what constitutes culpability as part of the larger collective criminality and will later look at Ronald Dworkin's theory of law.

**Chapter 3** will delve into the common plan policy. This will involve investigating the facts that need to be proven by the prosecutor in order to establish that indeed there was a common plan in the organisational policy by looking at precedent.

**Chapter 4** will then look specifically at the ruling on the release of Gbagbo and Ble Goude. This will involve an analysis of the effect that the ruling will have in the legal regime whose attempt may be to come up with a single criterion for proving the common plan.

**Chapter 5** will then be a conclusion on the findings from the study and recommendation on the same.

## **Timeline**

Assuming the absence of any significant impediments, the research is expected to be conducted within the following timeline:

<b>CHAPTER</b>	<b>DUE DATE</b>	<b>FEEDBACK</b>
<b>Chapter 1</b>	22 <sup>nd</sup> February	31 <sup>st</sup> May
<b>Chapter 2</b>	28 <sup>th</sup> June	28 <sup>th</sup> July
<b>Chapter 3</b>	30 <sup>th</sup> August	30 <sup>th</sup> September
<b>Chapter 4</b>	31 <sup>st</sup> October	29 <sup>th</sup> November
<b>Chapter 5</b>	7 <sup>th</sup> January 2020	31 <sup>st</sup> January 2020
<b>Final dissertation</b>	February 2020 (1 <sup>st</sup> week)	

## CHAPTER 2: THEORETICAL FRAMEWORK

This study is grounded on the common plan policy required to be proven for the commission of crimes against humanity. International criminal law has its basis on individual criminal responsibility as it deals with the culpability of an individual for their actions.<sup>24</sup> For an individual to be found guilty of committing a crime, it must be proven that he or she was part of the common plan of the organisation. In the case of *The Prosecutor v Dusko Tadic*, the prosecution in its cross-appeal argued that there are three categories in which an individual would be found to be guilty as part of a larger group.

The first category is where all co-defendants possess the same criminal intention in pursuant to a common plan. The second category focuses on the concentration camps where alleged perpetrators are seen to have done so as they are members of the military or administrative units who are charged with guarding the camps. The final one involves the person committing an act outside the common design but was a natural and foreseeable consequence of effecting the common purpose.<sup>25</sup>

To aid in this discussion, this study will look into the command theory propounded by John Austin which will lay the foundation of what constitutes criminal culpability as part of the larger collective criminality and will later look at Ronald Dworkin's theory of law.

### Command theory

In this theory, John Austin propounds that the theory of 'command' encompasses the concepts of 'a superior' 'an obligation' and 'a sanction'.<sup>26</sup> A command is a signification of a desire in which the party to whom is directed is liable to evil from the other in the case of non-compliance.<sup>27</sup> Subjects of the society have a duty to obey the command of the sovereign within the society.<sup>28</sup> Austin argues that the sovereign is identifiable by two characteristics: habitual obedience from

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<sup>24</sup> Individual criminal responsibility is a philosophy that is concerned with trying and punishing individuals and not States. Crimes against international law are committed by men and not abstract entities, and by punishing these men, the provisions of international law are enforced. It is provided for under Article 25 of the Rome Statute of the ICC.

<sup>25</sup> *The Prosecutor v Dusko Tadic*, Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia (1999)

<sup>26</sup> Herbert Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 *UCLA Law Review*, 27 (1960), 29.

<sup>27</sup> Herbert Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 *UCLA Law Review*, 27 (1960), 29.

<sup>28</sup> Herbert Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 *UCLA Law Review*, 27 (1960), 29.

the bulk of the population, and habitual noncompliance with the commands of any other human superior.<sup>29</sup> A failure to do so would result in the imposition of sanctions.

Relating this to the organisation accused of committing crimes against humanity, in order to establish that there was indeed a common plan, the above-mentioned needs to be present. It must be proven that the organisation was under a common leader. This leader would be the source of the command to its subjects who are obliged to adhere to the same. Where it is discovered that one of its subjects have acted contrary to the command, it must be determined whether a sanction can be imposed on them. This command element is what makes up the common plan. It is a show of a common objective of the subjects of the organisation.

Therefore, in line with this theory, where it can be proven that the entity is under the direct authority of the leader, it is immaterial as to whether the leader was in the physical presence during the commission of the crime. This is because the subjects are seen to be acting in furtherance of the intentions of the leader which brings us back to the presence of a common plan.

The law that establishes the common plan is not clear as how it should be proven as earlier mention in Chapter one of this study. There are many various conceptions of the law. For instance, formalists believe that a law is complete and provides answers to every case, leaving no room for judicial discretion or for political maneuvering.<sup>30</sup> However, it is evident as shall be seen in the following two chapters that this is not the case with Article 7 of the Rome Statute, as it does not provide a clear-cut list or criteria that should be met in order to satisfy the court that the accused was part of the common plan which actually existed. This leaves the judges in the various cases with a lot of room to exercise their discretion. H.L.A Hart states that the heart of the law is constituted by a highly constraining core which leaves no room for discretion.<sup>31</sup>

The existence of a gap in the law encourages judicial activism and in specific, substantive judicial activism. This is defined as a judicial philosophy which motivates judges to depart from

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<sup>29</sup> Wilfrid E. Rumble, *Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 *Cornell Law Review* 986 (1980-81), 991.

<sup>30</sup> Zarbiyev F., 'Judicial Activism in International Law – A Conceptual Framework for Analysis' Volume 3 (Issue 2) *Journal of International Dispute Settlement*, 2012.

<sup>31</sup> Zarbiyev F., 'Judicial Activism in International Law – A Conceptual Framework for Analysis'.

the traditional precedents in favor of progressive and new social policies.<sup>32</sup> Hugh Thirlway states that where there is a dissatisfaction with existing law or a lacuna in the existing law, a judge that is involved in judicial activism will be ready to indulge in what could be considered as open law-creation in order to base his decision.<sup>33</sup> This however raises concerns of whether the decisions made by the judges are actually based on the law which should be the primary concern, or are actually based on personal or political considerations. Formalists, whose beliefs have been mentioned above, do not make sense of the notion of judicial activism. They are of the view that, either judges apply legal prescriptions and there is nothing to say about this scenario given that they are supposed to have no room for doing anything else, or they do not follow legal prescriptions, in which case they are not doing law but something else.<sup>34</sup> Despite this being the case, international judges are inevitably lawmakers by necessity, filling in the gaps and clarifying ambiguities, which no legal instrument in the international plane can be drafted without.<sup>35</sup>

### Ronald Dworkin's Theory of the law

Dworkin is a critique of the positivists' view of judges having strong discretion in the determination of cases. According to him, he believes that positivists maintain that in certain 'hard cases' where there is no pre-existing rule that governs the outcome of the case, the judges have a 'strong discretion' to adjudicate and make new law.<sup>36</sup> He is against this great power given to judges. This is because the new law that is created by the judges, when applied to a case in its determination, would be considered as it being applied retrospectively.<sup>37</sup> This means that the parties would be bound to a law that did not exist *ab initio*, that is, they had no guide as to what constitutes an offence or its elements. Using this view *vis a vis* the common plan policy, the parties of the case are left at the mercy of the judges. The office of the prosecution does not have a clear-cut criterion as to the extent in which they must prove that the common plan existed. Should they adduce evidence in which the common plan can be clearly inferred from or should

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<sup>32</sup> Black's Law Online Dictionary

<sup>33</sup> Zarbiyev F., 'Judicial Activism in International Law – A Conceptual Framework for Analysis'.

<sup>34</sup> Zarbiyev F., 'Judicial Activism in International Law – A Conceptual Framework for Analysis'

<sup>35</sup> Zarbiyev F., 'Judicial Activism in International Law – A Conceptual Framework for Analysis'

<sup>36</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' Volume 3, ( Issue 2), Mizan Law Review, 2009, 371.

<sup>37</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' 372.

they adduce evidence which spells out the common plan which is the intricate information on the operations of the organisation? This therefore creates an unfair situation as they do not know the extent of proof since it is not stated in the Rome Statute. Furthermore, it is not expressed by the judges who at the same time expect them to meet their criteria during the determination. As regards to the accused persons, he or she has the right to a fair trial.<sup>38</sup> Particularly, the equality of the parties. Clear stipulation of the law and facts to be proven ensures this; the absence of which places the parties at an irregular footing as the judge is vested with the powers.

Dworkin further asserts that the law clearly cannot be made up of rules only but also other standards.<sup>39</sup> These standards include principles and policies which differ in character from the rules but are as important and effective as the rules themselves in the legislative framework.<sup>40</sup> He further posits that the working of these rules together with the suggested standards of policies and principles would create a moral fabric in the determination of cases.<sup>41</sup> This moral fabric will ensure the valuable interests of a society are protected.

He further goes on to create what could be considered as the ideal judge, the super-human judge. This is the decision maker in a case that would be able to draw what could be considered a *perfect* balance of all the factors that are material to a case. These factors include taking into account the totality of the legal provisions on the issue, institutions, moral standards and the goals of the society and interpret the same in their best political moral light, to achieve the most appropriate decision that will settle the question with the single right answer.<sup>42</sup>

With these theories and concepts in mind, Chapter three will then delve into an analysis of what the various international criminal courts and tribunals have held on the elements required in proving the existence of a common plan as part of the larger organisation.

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<sup>38</sup> Kremens K., The Protection of the Accused in International Criminal Law according to the Human Rights Law Standard, Wroclaw Review of Law, Administration & Economics (2011), 32.

<sup>39</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' 372.

<sup>40</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' 372.

<sup>41</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' 372.

<sup>42</sup> Nalbandian E., 'Notes on Ronald Dworkin's Theory of Law' 372.

## CHAPTER THREE

### An analysis of the definition of the common plan under the Organisational Policy

The Rome Statute of the International Criminal Court provides for contemporary elements that must be proven in support of an allegation of the commission of a crime against humanity.<sup>43</sup> It goes on to state under Article 7(1), that the inhumane acts must be committed as part of a ‘widespread or systematic attack directed against a civilian population’.<sup>44</sup> Digging further into what constitutes an *attack directed against a civilian population*, it is provided that it should be done in furtherance of a State or organisational policy.<sup>45</sup> For this policy to be executed, the existence of a common plan must be proven. This element of a common plan is also captured in the Charter of the International Military Tribunal in Nuremberg.<sup>46</sup> It is provided that the leaders, organizers, instigators and accomplices participating in the execution of a common plan to commit the inhuman crimes shall be responsible for the acts performed by persons in execution of the same.<sup>47</sup> In order for this plan to be effected, there need be the existence of a political objective of the act, which is to destroy, persecute or weaken a community.<sup>48</sup> This plan is usually borne in the mind of the instigator who is the person that influences the mind of another by encouraging, urging and prompting the person instigated to commit the crime.<sup>49</sup>

Article 25 of the Rome Statute provides for criminal responsibility of persons. This provision states that a person shall be held responsible when they commit a crime within the jurisdiction of the court not only as an individual but also jointly.<sup>50</sup> Furthermore, where a person contributes to the commission of a crime with a common purpose, their contribution shall be intentional and

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<sup>43</sup> Article 7(2), Rome Statute of the International Criminal Court

<sup>44</sup> Article 7(1), Rome Statute of the International Criminal Court

<sup>45</sup> Article 7(2) (a), Rome Statute of the International Criminal Court

<sup>46</sup> Article 6, Charter of the International Military Tribunal of Nuremberg

<sup>47</sup> Article 6(c), Charter of the International Military Tribunal of Nuremberg

<sup>48</sup> *The Prosecutor v Blaskic* (2000), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

<sup>49</sup> Agbor A, ‘Instigation to Crimes against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chamber of the International Criminal Tribunal for Rwanda’, Martinus Nijhoff Publishers, Leiden, 2013, 63.

<sup>50</sup> Article 25(3)(a), Rome Statute of the International Criminal Court

either be made with the aim of furthering the common purpose of the group or be made in the knowledge of the intention of the group.<sup>51</sup>

The non-clarity nature of what constitutes the ‘common plan’ and the requirements of proving its existence is what has brought about a disparity in its interpretation by the different learned judges in various cases.

In this chapter, we shall endeavour to do an in-depth analysis of what constitutes a common plan, which is the standard of proof in support of the existence of an organisation policy. This shall be done on a case-to-case basis that shall vary from the decisions of tribunals, ad hoc tribunals and that of the International Criminal Court. The ICC has varied standards of proving the commission of crime at the different stages of the proceedings. There are three main standards that must be fulfilled by the Prosecution throughout the proceedings for a favourable judgment.<sup>52</sup>

In order for investigations to be carried out and warrants of arrest to be issued, there should be reasonable grounds to believe that there was indeed a commission. Once this has been satisfied, in order for the charges to be confirmed, there should be substantial grounds of belief. This standard is lower than that required for a conviction which is that it should be beyond reasonable doubt. Substantial grounds to believe can be met by adducing documentary evidence, there is no need to call the witnesses expected to testify at the trial.<sup>53</sup>

In the case of this study, the focus shall be greatly on the requirement of ‘beyond reasonable doubt’ that has been raised in recent cases.

As the term suggests, the element of a common plan denotes that the commission of this crime need not be effected by an individual but by a group of people. In an attempt of defining crimes against humanity, the ICC Preparatory Committee in 1996 took into consideration that the planning aspect was what would distinguish this crimes from ordinary crimes under the national

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<sup>51</sup> Article 25(3)(d), Rome Statute of the International Criminal Court

<sup>52</sup> Klamberg M, ‘Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events’, 136- 144.

<sup>53</sup> Klamberg M, ‘Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events’, 140.

This is so as to protect the witnesses who should testify on a rightly founded prosecution and to save the resources of the court.

laws of a State.<sup>54</sup> Furthermore, the random acts of individuals are not sufficient; there must be a thread of connection between the acts.<sup>55</sup> This is what creates the phenomenon of a joint criminal enterprise where there are various actors who play different roles at different times of the commission of the attack. This perpetration constitutes the materialisation of the attack contained in the policy.<sup>56</sup>

This joint criminal responsibility is distinguished from conspiracy and aiding and abetting by a renowned ICL scholar, Cherif Bassiouni.<sup>57</sup> Distinguishing it from a conspiracy, he states that they both require an agreement. However, the former requires the parties to act in furtherance of the agreement, which is contrary to the requirements of the latter that does not require an overt act. A conspiracy can serve as a substantive crime.<sup>58</sup>

He goes on to explain the distinguishing factor of the plan and mere aiding and abetting. In order to be held criminally liable for committing a crime against humanity, the accused needs to possess not only the *actus reus* but also the *mens rea* required for the crime.<sup>59</sup> They are considered as co-perpetrators of the crime. An aider and abettor only contribute to the commission of the crime but do not have to possess the *mens rea* required.<sup>60</sup>

This was reiterated in the case of *The Prosecutor v Menten* where it was stated that, the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.<sup>61</sup>

Cryer R *et al* admit that the hallmark of the term ‘systematic’ is in line with the general interpretation of the word.<sup>62</sup> This means that there should be a high degree of organisation that includes patterns, continuous commission, use of resources, planning and political objectives.

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<sup>54</sup>Sadat L, ‘Crimes Against Humanity in the Modern Age’ Washington University in St. Louis, Paper No. 11-11-04, 2012, 41, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2013254](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013254) on 09 August 2019

<sup>55</sup> Cryer R, Friman H, Robinson D and Wilmshurst E, ‘An Introduction to International Criminal Law and Procedure’, 3<sup>rd</sup> Ed, Cambridge University Press, United Kingdom, 2014, 236

<sup>56</sup> Agbor, *Instigation to Crimes Against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda* 106.

<sup>57</sup> Bassiouni C, ‘Introduction to International Criminal Law’, 2<sup>nd</sup> Ed, Martinus Nijhoff Publishers, Leiden, 2013, 375

<sup>58</sup> Bassiouni C, *Introduction to International Criminal Law*, 375

<sup>59</sup> Bassiouni C, *Introduction to International Criminal Law*, 375

<sup>60</sup> Bassiouni C, *Introduction to International Criminal Law*, 375

<sup>61</sup> *The Prosecutor v Menten* (1981), Supreme Court of Netherlands

<sup>62</sup> Cryer R *et al*, *An Introduction to International Criminal Law and Procedure*, 235.

There arises the disparity in what constitutes the plan as there is the stringent approach, which raises the level of standard of proof, and the wider approach.

The broad or wider approach used in interpreting the common plan policy entails there being low standard of proof in showing the nexus between the perpetration of the crime with the larger group or organisation. All that is required is that there was the commission of a prohibited act as provided for in the Rome Statute and that this act objectively falls within the broader attack of the group of which the accused was aware of.<sup>63</sup> A broad conception of the term organisation brings in the question of why the International Criminal Court was created yet the crimes of these non-state actors could be dealt with by existing national justice systems.<sup>64</sup>

On the other hand, the stringent approach requires for there to be proof of the formal adoption of the policy of the organisation or group. This could be done by adducing evidence of how, when and by whom the alleged plan to attack was formed.

In the case of the *Prosecutor v Dusko Tadic*, the trial bench was of the opinion that the common plan policy need not be formalised.<sup>65</sup> It was stated that:

“... such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.”<sup>66</sup>

In this case, it could not be proven that he had played a role in the killings and he was therefore acquitted.<sup>67</sup> On appeal by the Prosecution, the Appeals Chamber relied on Customary International Law and took the broad approach in that an individual can be convicted on the proof of a common purpose.<sup>68</sup>

In *the Prosecutor v Akayesu*, the broad approach of the policy was adopted. The tribunal stated that:

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<sup>63</sup> Cryer R et al, *An Introduction to International Criminal Law and Procedure*, 242.

<sup>64</sup> Schabas W, ‘*The Crimes Against Humanity: The State Plan or Policy Element*’, P. 361

<sup>65</sup> *The Prosecutor v Dusko Tadic* (1997), ICTY

<sup>66</sup> *The Prosecutor v Dusko Tadic* (1997), ICTY

<sup>67</sup> *The Prosecutor v Dusko Tadic* (1997), ICTY

<sup>68</sup> *The Prosecutor v Dusko Tadic* (1997), ICTY

“The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.”<sup>69</sup>

Similarly, in the case of *The Prosecutor v Blaskic*, the majority of the trial bench was of the opinion that the common plan need not be declared expressly or formally, but it could be inferred from a series of events.<sup>70</sup> A robust list of the events was provided. They include:

the general historical circumstances and the overall political background against which the criminal acts are set, the establishment and implementation of autonomous political structures at any level of authority in a given territory, the general content of a political program (as it appears in the writings and speeches of its authors) media propaganda, the establishment and implementation of autonomous military structures, the mobilisation of armed forces, temporally and geographically repeated and coordinated military offensives, links between the military hierarchy and the political structure and its political program, alterations to the “ethnic” composition of populations, discriminatory measures, whether administrative or other and the scale of the acts of physical violence perpetrated or the destruction of non-military property.<sup>71</sup>

In the case of *The Prosecutor v Thomas Lubanga Dyilo*, it was held that direct evidence of the common plan would assist in the demonstration of existence but was not a legal requirement. This plan could be inferred from circumstantial evidence.<sup>72</sup>

To the contrary, in the case of *The Prosecutor v Callixte Mbarushimana*, the stringent approach was adopted.<sup>73</sup> The Prosecution had adduced evidence in the form of witnesses and transcripts showing the commands given by attacking forces, FOCA, in the form of messages and communication over radio. The content of the command was an incitement to war. However, in the decision of the majority at the Pre-trial stage, it was held that the evidence adduced by the Prosecution could be qualified as indirect evidence, which does not outweigh the information

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<sup>69</sup> The Prosecutor v Jean-Paul Akayesu (1998), International Criminal Tribunal for Rwanda.

<sup>70</sup> The Prosecutor v Blaskic (2000), ICTY

<sup>71</sup> The Prosecutor v Blaskic (2000), ICTY

<sup>72</sup> The Prosecutor v Thomas Lubanga Dyilo (2012), International Criminal Court

<sup>73</sup> The Prosecutor v Callixte Mbarushimana, International Criminal Court, ICC-01/04-01/10.

contained in the direct evidence gathered from insider witnesses.<sup>74</sup> It was considered that the information obtained from the witnesses on the orders provided was not provided directly and spontaneously, it came out on direction of the Prosecution.<sup>75</sup> This ruling can be considered to be a paradox to an admission by the majority of the bench on paragraph 263, that the policy need not be formalized.<sup>76</sup>

In the pre-trial stage of the Gbagbo case, a similar approach was used. As earlier mentioned in Chapter one of this study, the Court held that the prosecutor had failed to establish the existence of a common plan, yet the accused were alleged to be in authority and control over the pro-Gbagbo forces. This therefore resulted in a majority decision for the adjournment of the hearing for various reasons. The blanket reason was that the Prosecution failed to provide sufficient evidence to establish substantial grounds to belief there was the commission of the crime by the accused persons pursuant to Article 67(7) (c) (i) of the Rome Statute.<sup>77</sup> The aforementioned provision states that:

‘The Pre-trial chamber shall adjourn the hearing and request the Prosecutor to consider:

- (i) Providing further evidence or conducting further investigations with respect to a particular charge...’<sup>78</sup>

The court went further into requesting further evidence with respect to the following issues:

- ‘1. The position(s), movements and activities of all armed groups opposed to the “pro-Gbagbo forces” in Cote d’Ivoire including specific information about confrontations between the armed groups and the pro-Gbagbo forces.
2. The organisational structure of the pro-Gbagbo forces including how the different sub-groups interacted within the overall structure and how the “inner circle” coordinated, funded and supplied the means for the activities.
3. How, when and by whom the alleged policy/plan to attack the “pro-Outtara civilian population” was adopted.

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<sup>74</sup> The Prosecutor v Callixte Mbarushimana (2011), International Criminal Court

<sup>75</sup> The Prosecutor v Callixte Mbarushimana (2011), International Criminal Court

<sup>76</sup> The Prosecutor v Callixte Mbarushimana (2011), International Criminal Court

<sup>77</sup> The Prosecutor v Laurent Gbagbo (2013), International Criminal Court ICC-02/11-01/11

<sup>78</sup> Article 67(7)(c)(i), Rome Statute of the ICC

4. For each of incidents allegedly constituting the attack against the “pro-Outtara civilian population”:
  - a) Whether the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy.
  - b) To which sub-group(s) of the pro-Gbagbo the several alleged physical perpetrators belonged. If different sub-groups were involved in the same incident, identify to which of these the alleged physical perpetrators belonged and to what extent they are alleged to have cooperated in the perpetration of the crimes.
  - c) Information as to the number of victims, the harm they suffered as well as their perceived political, ethnic, religious or national allegiance(s)
  - d) Information as to the links between the several incidents inside and outside Abidjan.
5. In relation to the alleged compound incidents, more specific evidence for each of the sub-incidents, including more detailed evidence for the alleged cases of sexual violence.
6. In relation to the alleged incidents, any forensic or other evidence indicating who fired the ammunitions and what their alleged target was.<sup>79</sup>

The main reason to be discussed in this study was that the Prosecutor needed to adduce further evidence or conduct further investigations on the issue of how, when and by whom the alleged plan to attack the population in favour of the newly elected president, Ouattara, was adopted.<sup>80</sup> They went further to state that it should include specific information on the meetings of the pro-Gbagbo forces; how the existence and content of the plan was communicated to its members once it was adopted.<sup>81</sup> This is what is referred to the formal adoption of the plan. Further along in the court proceedings, in the Trial Chamber, the majority of the bench was of the opinion that the Prosecution had yet again failed to prove the existence of a common plan and therefore led to the acquittal of the two accused persons.<sup>82</sup>

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<sup>79</sup> The Prosecutor v Laurent Gbagbo (2013), International Criminal Court ICC-02/11-01/11

<sup>80</sup> The Prosecutor v Laurent Gbagbo (2013), International Criminal Court ICC-02/11-01/11

<sup>81</sup> The Prosecutor v Laurent Gbagbo (2013), International Criminal Court.

<sup>82</sup> <https://www.icc-cpi.int/pages/item.aspx?name=PR1016> on 6 February 2019

Monitoring the progress of the decisions of the court, it is apparent that there is a departure from the broad interpretation of the policy to the stringent approach as is evident in the ruling in the most recent case against Gbagbo as earlier discussed. Chapter four will endeavour to study the effect that this lack of a consistency in the interpretation of the common plan has on the determination of similar cases and in general.

This case is the focal point of the study as this paper seeks to analyse the effect that the ruling in the pre-trial stage will have on the interpretation of the common plan policy. This will be discussed in depth in the following chapter.

## CHAPTER FOUR

### The effect of a lack of consistency in the interpretation of a Common Plan Policy

The element of the common plan policy has brought many variances in its interpretation in the adjudication of cases on crimes against humanity in the International Criminal Court. As earlier discussed in chapter three, the common plan policy is that which must be proven to show that the alleged perpetrators were indeed working as part of a larger group which had a common purpose therefore an indicator of the common intention. The case law and literature have paid little attention to the definition of the attack, leaving an important lacuna in the interpretation of the elements of these crimes.<sup>83</sup> Cherif Bassiouni admits that the omission of the material elements of the crime has created a problem.<sup>84</sup> He further discloses that an article defining these material elements was dropped from the Statute because some delegations could not agree on its content.<sup>85</sup> It was left to the determination by the courts whose effects are being experienced in the different determinations of the cases

One of the issues of interpretation stems from the form of organisation; whether it must be a state policy or, a non-state organisation qualifies to be rightfully brought prosecuted. Schmid E. comments on this issue stating that the crimes do not only have to be in furtherance of a state policy, but also a policy arising from any other organisation.<sup>86</sup> She further states that the object and purpose of the policy is to ensure that the random and unconnected acts are excluded from

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<sup>83</sup> Schmid E, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, United Kingdom, 2015, 76.

<sup>84</sup> Bassiouni C, *Negotiating the Treaty of Rome on the Establishment of the International Criminal Court*, Cornell International Law Journal 32, 1999, 454, [https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/cintl32&id=451&men\\_tab=srchresults](https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/cintl32&id=451&men_tab=srchresults) on 30 October 2019.

<sup>85</sup> Bassiouni C, *Negotiating the Treaty of Rome on the Establishment of the International Criminal Court*, Cornell International Law Journal 32, 1999, 454, [https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/cintl32&id=451&men\\_tab=srchresults](https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/cintl32&id=451&men_tab=srchresults) on 30 October 2019.

The main reason that the delegations could not agree on the content is that there were many varying opinions as to what should indeed constitute these elements and they could not be narrowed down to a clear robust list.

<sup>86</sup> Schmid E, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, 84.

the definition of crimes against humanity and that the jurisdiction for international crimes is limited to those crimes for which the territorial state is likely to fail to establish accountability.<sup>87</sup> The other issues stems from the inner strings of that organisation that need to be proven. In other terms, the elements must be proven with regards to a common plan in order to successfully sustain a claim.

As was clearly observed in the foregoing, there has been a disparity in the determination of the elements of the common plan that must be proven. There has been a move away from the wide approach of this phenomenon to the stringent approach which is the formal adoption that was required of the Prosecutor in the case against Gbagbo and Ble Goude. The majority required for there to be provided specific information on the working of these organisation in furtherance of their plan to commit the crimes at the pre-trial stage.<sup>88</sup>

However, what effect does this high threshold have on the particular case at hand and on the consequent cases? Does this interpretation impede on the population's right to access justice for the harm suffered as a result of the alleged commission of the acts? Does the acquittal of the accused persons pose a threat to the population? These are some of the questions that run through one's mind and this study seeks to answer.

The precedence that touches on the common plan policy does have a high value in the determination of the subsequent cases. Will this create a trend whereby a majority of the accused persons are acquitted at an early stage of the proceedings as a result of the failure to meet the high threshold? Is there a proper determination on balancing the interests of the population that has been harmed and of the accused persons?

Judge Herrera Carbuccia respectfully disagrees with the decision of the majority bench in her written dissenting opinion of *The Prosecutor v Laurent Gbagbo and Charles Ble Goude*<sup>89</sup>. One of the reasons of her disagreement is on the basis of the conclusion that there was no evidence to sustain a conviction.<sup>90</sup> This case was at the mid-trial stage and the standard used by the majority

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<sup>87</sup> Schmid E, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, 84 – 85.

<sup>88</sup> *The Prosecutor v Laurent Gbagbo* (2013), International Criminal Court ICC-02/11-01/11

<sup>89</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019.

<sup>90</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, Para 1.

is one that should sustain a conviction, which is what J. Herrera disagrees with. She quotes *The Prosecutor v Goran Jelusic*, which provides that at that stage, the question should not have been whether in fact a conviction will be arrived at beyond reasonable grounds but whether they could.<sup>91</sup> This implies that the determination of whether the evidence adduced is sufficient to convict beyond reasonable doubt is left to the end of the trial.

In Gbagbo and Goude, the trial chamber authorised the submission of evidence on record that included over 4500 items of evidence and witness statements.<sup>92</sup> However, they deferred the analysis of each of these items of evidence to the end of the trial with an aim of preventing multiple determinations on one item of evidence made at different stages of the trial.<sup>93</sup> In spite of this, the bench went ahead to deliver an oral ruling for the acquittal of the accused persons without sufficient proof that they considered each item of evidence before arriving at this.<sup>94</sup> How could they reasonably foresee that the common plan could not be proved through the evidence submitted at the final stages of the trial?

The Prosecution filed a Notice of Appeal on the 17<sup>th</sup> of September 2019 against the majority decision on the acquittal.<sup>95</sup> In this they claim that on acquittal, the majority had not yet reached a conclusion as to what relevant standard and approach they would assess the claim by the defence of a ‘no case to answer’. This alleged lack of a proper notice on the standard to be applied impeded on the right to a fair hearing of the prosecuting party.<sup>96</sup>

How were they reasonably expected to prove a formal adoption of the plan if they did not know the standard which they should meet as they claim, and further, if the evidence was to be analysed at the end of trial?

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<sup>91</sup> *The Prosecutor v Goran Jelusic*, International Criminal Tribunal for the Former Yugoslavia

<sup>92</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, para 46.

<sup>93</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, para 46.

<sup>94</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, para 47.

<sup>95</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Corrected version of “Prosecution Notice of Appeal”, 16 September 2019, ICC02/11-01/15-1270

<sup>96</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Corrected version of “Prosecution Notice of Appeal”, 16 September 2019, ICC02/11-01/15-1270, Para 12.

Paying attention to the ruling in the Gbagbo case, the continued use of the stringent approach in the mid-trial stages may lead to a continued trend of acquittal of accused persons. This is because the defence in subsequent cases may heavily rely on this as it serves as precedence in the determination of such cases. Not only the defence, but also the judges of these cases. In cases where an accused person is a reputable person in his or her society over which he has a great influence over it, gathering of information by the OTP may be a difficult task.

This paper is of a similar opinion as the Trial Chamber in *The Prosecutor v Germain Katanga*.<sup>97</sup> Katanga is a national of the Democratic Republic of Congo, who was accused of committing crimes against humanity (among other) against the people of Bogoro. In the judgment, the majority stated that in most cases the organisational policy may be inferred by discernment of repeated actions occurring according to the same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated by that organisation.<sup>98</sup> They went further to state that the policy may be realised over time:

‘Furthermore, it is important to note that in the majority of situations amenable to the Court, some aspects of the policy pursued against a civilian population will only crystallize and develop as actions are set in train and undertaken by the perpetrators. The State or organisational policy may therefore become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only in retrospect, once the acts have been committed and in the light of the overall operation or course of conduct pursued. Otherwise stated, the State or organisational policy may be part of an ongoing process whose every aspect is not always predetermined before the operation or course of conduct pursued against the targeted civilian population has commenced or even once it has started.’<sup>99</sup>

This study further postulates that it is impractical to place such high evidentiary burden on the prosecution to provide intricate details of the formal organisation of the policy. This is to do with information on issues such as the funding and supply of the means for the activities, specific

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<sup>97</sup> *The Prosecutor v Germain Katanga*, Judgment pursuant to Article 74 of the Statute on 7 March 2014, ICC-01/04-01/07

<sup>98</sup> *The Prosecutor v Germain Katanga*, Judgment pursuant to Article 74 of the Statute on 7 March 2014, ICC-01/04-01/07, Para 1108

<sup>99</sup> *The Prosecutor v Germain Katanga*, Judgment pursuant to Article 74 of the Statute on 7 March 2014, ICC-01/04-01/07, Para 1109

confrontations between the armed groups and the pro-Gbagbo forces, the interaction of different sub groups within the larger groups among others. These can be inferred from the actions of the groups as provided for in evidence adduced and from the witness statements.

The ambiguity of this legal provision creates a loophole in the justice system. We can take this lacuna and compare it to a hole on the ground where different people have different thoughts on how to fill the hole. One may choose to fill it with stones; others may just choose to cover it with wooden planks. In this imagery, the people are the judges of the International Criminal Court who chose whatever interpretation to disguise the obvious gap in the legal provision. However, this does not change the fact that indeed there is a hole.

The continued existence of the ambiguity of this provision may impede on fairness and the rule of law. Alexander Greenwalt in his article states that the development of a comprehensive, unified body of law for international law provides consistency only within the closed universe of international crimes: those accused of genocide, crimes against humanity, war crimes, and other international offenses are to be treated in the same way and become subject to the same rules no matter what their nationality or where in the world their crimes have occurred.<sup>100</sup>

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<sup>100</sup> Greenwalt A., 'The Pluralism of International Criminal Law' *Indiana Law Journal*, 2011, 1068 <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1015&context=ilj> on 31 October 2019.

## CHAPTER 5

### CONCLUSION

The aim of this study was to evaluate the impact that the ruling on the acquittal of the accused persons in *The Prosecutor v Laurent Gbagbo and Charles Ble Goude*, would have on the interpretation of the common plan policy under Article 7(2) of the Rome Statute of the ICC. This is due to the lack of clear-cut criteria to be fulfilled by the Prosecution in order to successfully prove that indeed there was a common plan. The judges are thus left with the great *power* to make their determination on what should be satisfied and this therefore varies on a case-to-case basis.

As was observed in the Chapter three of this study, there has been a gradual departure from the broad approach to the application of the stringent approach of what is required by the court in proving the common plan. Despite there being a clear trend in the interpretation, the fact remains that indeed there is the gap still present in the provisions of the legislation.

The ruling in the aforementioned case has a high precedential value in the determination of future related cases; however, judges are not bound to use the same approach. This is because it is not set out in the Statute and therefore there is no binding force towards its use. This serves as a great problem especially because it is an area of the law that has a very high impact on the livelihood of society. The society runs from the persons affected by the atrocities allegedly committed by the accused persons to the accused themselves whose punishment, when found guilty, would have serious consequences on the rest of their lives. From this, we can infer that regardless of the decisions of the different cases, the access to international criminal justice will be impeded. This is due to the fact that during the hearing of the cases, parties are not an equal footing especially the OTP who has the burden of proof but is not aware to what extent the standard of this proof stretches.

### RECOMMENDATIONS

It is clear that there is a need for the establishment of the uniform criteria. How can this be achieved? The most common recommendation to correct or include a provision in a legal instrument is its amendment. However, it may be considered as a far-fetched goal to amend a substantive provision in an international legal instrument. This is because the technicalities that are involved are vast. The process of amendment can only work for the determination of cases a couple of years from its proposal as it is a long process. However, the criteria that may be provided in proving the common plan will only apply to the State parties that have ratified it giving it a limiting character to its applicability.

Additionally, the judges could apply the principles of international criminal law in determining such related cases. An applicable principle is that of the responsibility of commanders and other superiors as provided for in Article 28 of the Rome Statute.<sup>101</sup> This provision sets out the requirements of a superior-subordinate relationship, the effective control and the link between the superior's acts/ omission and the criminal conduct of the subordinates.<sup>102</sup> Therefore where it is proven that there was indeed the relationship between the acts of the subordinates to that of the commander through circumstantial evidence and the criminal responsibility can be clearly inferred, there would be no need of proving the formal adoption of the plan.

However, the most effective means of ensuring both parties are at an equal footing, an attempt of filling the lacuna, is by the development of a draft set of elements to be proven by the Preparatory Committee. These would be of a non-binding nature but could serve as guidelines for judges to use in determination of cases in an attempt to achieving uniformity in the jurisprudence.

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<sup>101</sup> Article 28, Rome Statute of the ICC

<sup>102</sup> Case Matrix Network, *Implementing the Rome Statute of the International Criminal Court*, September 2017, 60.

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