

Strict Construction and the Rome Statute

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The principle of strict construction of criminal law is set out in article 22(2) of the *Rome Statute*: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' It has been rarely cited and even more rarely applied. For example, the entry on article 22(2) in the third edition of the *Triffterer Commentary*, does not cite a single reference to the provision in the case law of the International Criminal Court.¹ The very limited references to article 22(2) are vastly outnumbered by the systematic recourse in decisions and judgments of the Court to articles 31 and 32 of the Vienna Convention on the Law of Treaties.

The most significant consideration of article 22(2) by the Court appears in the separate opinion of Judge Van den Wyngaert in the *Ngudjolo case*, where she rejected a broad reading of article 25 by which an additional mode of liability was incorporated by interpretation into the *Rome Statute*:

I attach the greatest importance to Article 22(2) of the Statute, which obliges the Court to interpret the definition of crimes strictly and prohibits any extension by analogy. There can be little doubt that this fundamental principle applies with equal force in relation to the definition of criminal responsibility. Indeed, I believe that this article overrides the conventional methods of treaty interpretation, as defined in the Vienna Convention on the Law of Treaties, particularly the teleological method. Whereas these methods of interpretation may be entirely adequate for interpreting other parts of the Statute, I consider that for interpreting articles dealing with the criminal

1. Bruce Broomhall, 'Article 22', in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 3rd edn., Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2015, pp. 939-57.

responsibility of individuals, the principles of strict construction and *in dubio pro reo* are paramount.²

Judge Van den Wyngaert signalled the ‘express inclusion of the *in dubio pro reo* standard’ in article 22(2), describing it as ‘a highly significant characteristic of the Statute’.³ She said that by including the principle in Part III, ‘the drafters wanted to make sure that the Court could not engage in the kind of “judicial creativity” of which other jurisdictions may at times have been suspected’.⁴ She explained that the principle ‘is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law’.⁵

There are only a few other applications of the provision in the case law of the Court. In the *Bemba* judgment, Judge Ozaki relied upon article 22(2) when she construed article 28(a) so as to require a *nexus* between the failure of the commander and the actual crime. ‘In the circumstances, I consider that the principle of strict interpretation established in Article 22(2) of the Statute requires the Chamber to favour the interpretation which links the failure on the part of the commander to exercise control properly to the commission of the crimes’, she wrote.⁶ The majority made a rather formalistic acknowledgement of article 22(2), along with all of the other relevant provisions, insisting that all of these had been taken into account and that none of them had been breached.⁷ The *Bemba* Pre-Trial Chamber had also invoked article 22(2), in the confirmation decision. It held that article 30 of the Statute does not encompass *dolus eventualis*, recklessness or any lower form of culpability, basing its restrictive interpretation on the need ‘to ensure that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in article 22(2) of the Statute’.⁸ In the same decision, the principle was also invoked with respect to article 28(a) of the Statute. The Pre-Trial Chamber noted that the *ad hoc*

2. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 18. See also: *Katanga* (ICC-01/04-01/07), Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 278.

3. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 19.

4. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 19.

5. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 19.

6. *Bemba* (ICC-01/05-01/08), Separate Opinion of Judge Ozaki, 21 March 2016, para. 12 (internal references omitted).

7. *Bemba* (ICC-01/05-01/08), Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 86.

8. *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 369.

tribunals had not imposed a causality requirement with respect to command responsibility. Nevertheless, said the Pre-Trial Chamber, the chapeau of article 28(a), which uses the phrase ‘as a result of’, imposes an element of causality between a superior’s dereliction of duty and the underlying crimes. ‘This interpretation is consistent with the principle of strict construction mirrored in article 22(2) of the Statute which, as a part of the principle *nullum crimen sine lege*, compels the Chamber to interpret this provision strictly’, said the Pre-Trial Chamber.⁹

The most extensive discussion of article 22(2) is found in an *obiter dictum* to the separate decision of Judge Eboe-Osuji in the *Ruto et al. case*. He did not rely upon article 22, however. Quite the contrary, Judge Eboe-Osuji concluded that the rule ‘does not enjoy a right of precedence over purposive interpretation’.¹⁰ He explained: ‘To begin with, it is to be remembered that article 22(2) itself is a provision in the *Rome Statute*. As such, it, too, is subject to construction, in light of the object and purpose of the *Rome Statute*.’¹¹ In effect, he gave article 22(2) a strict interpretation, making it a victim of the very principle it espouses. Describing it as the ‘rule of lenity’, he said ‘jurists of the highest pedigree’ have agreed that it is ‘not the first port of call in statutory construction. It only comes into play when other applicable rules of construction have failed to settle the doubt that has troubled the meaning of a given provision.’¹² In the same spirit, but far more summary, is the allusion (in a footnote) by Judge Ušacka, sitting in the Appeals Chamber, to the prohibition on the extension of a definition of a crime by way of analogy found in the second sentence of article 22(2).¹³ She also cited article 22(2), but in order to disregard it: ‘Moreover, in my view, article 22(2) of the Statute is not a convincing justification for the application of the contextual element, as this provision refers to the definition of the crime. The legal definitions of the crimes are espoused in the Statute alone.’¹⁴

Otherwise, there are only a handful of perfunctory references to article 22(2). The Appeals Chamber has mentioned article 22(2), but dismissed its application to the question before the court: ‘The Appeals Chamber notes that the principle *in dubio pro*

9. *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 423.

10. *Ruto et al.* (ICC-01/09-01/11), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, para. 437.

11. *Ruto et al.* (ICC-01/09-01/11), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, para. 431.

12. *Ruto et al.* (ICC-01/09-01/11), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, para. 434.

13. *Bemba et al.* (ICC-01/05-01/13 OA 2), Dissenting Opinion of Judge Anita Ušacka, 11 July 2014, para. 18, fn. 39.

14. *Bashir* (ICC-02/05-01/09), Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 18.

reo is encapsulated in article 22(2) of the Statute as a general principle of criminal law to be employed, where ambiguity arises, in the interpretation of the definition of a crime. Leaving aside whether this principle applies to the circumstances at hand...¹⁵ When it held that the doctrine of co-perpetration was not inconsistent with the *Rome Statute* – in effect, challenging the position taken by Judge Van Den Wyngaert – it said this did not breach article 22 and the *in dubio pro reo* principle.¹⁶ In the authorization decision in *Situation in Kenya*, the majority cited article 22 in general, without specific reference to paragraph 2. It said that ‘in light of article 22 of the Statute, caution is warranted to broaden article 7(2)(a) of the Statute infinitely beyond its conceptual confines’.¹⁷ A footnote added that ‘one may argue that article 22 of the Statute does not have as a sole purpose the protection of persons prosecuted before the Court. It has also the purpose of imposing a strict interpretation in the jurisdictional ambit of the Court.’¹⁸

There is no comparable provision to article 22(2) in the statutes of the *ad hoc* tribunals, where the broad Vienna Convention rules have been applied without any textual obstacles. Indeed, as Judge Van den Wyngaert suggested, the drafters of the *Rome Statute* may have introduced article 22(2) so as to recalibrate the jurisprudence of the *ad hoc* tribunals. The 1994 Yearbook of the International Criminal Tribunal for the former Yugoslavia observed that ‘[i]n drafting the Rules of Procedure and Evidence, the judges of the Tribunal tried . . . to strike a balance between the strictly constructionist and the teleological approaches in the interpretation of its *Statute*’.¹⁹ Arguably, some of the broad interpretations of the definitions of crimes in the statutes of the *ad hoc* tribunals, such as the ‘interpretative expansion of one of the elements of the notion of genocide’,²⁰ the enlargement of ‘laws or customs of war’ so as to encom-

15. *Gbagbo et al.* (ICC-02/11-01/15 OA 8), Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, para. 83.

16. *Lubanga* (ICC-01/04-01/06 A 5), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, para. 471.

17. *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 55 (reference omitted).

18. *Ibid.*, para. 55, fn. 61.

19. International Criminal Tribunal for the former Yugoslavia, Yearbook 1994, The Hague: United Nations Publications, 1994, para. 53.

20. The words are those of the Darfur Commission (Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, UN Doc. S/2005/60, para. 501), with reference to *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998.

pass crimes committed in non-international armed conflict,²¹ and the invention of the 'joint criminal enterprise' theory of liability,²² would be incompatible with article 22(2).

In *Ngudjolo*, Judge Van den Wyngaert referred to the case law of the European Court of Human Rights, where strict construction of criminal law statutes has been associated with more general notions like the principle of legality, the rule of law and the *nullum crimen sine lege maxim*.²³ In one decision of the European Court, a Chamber held that '[i] résulte de l'interdiction d'application extensive de la loi pénale que, faute au minimum d'une interprétation jurisprudentielle accessible et raisonnablement prévisible, les exigences de l'article 7 ne sauraient être regardées comme respectées à l'égard d'un accusé'.²⁴ According to a recent ruling of the Grand Chamber of the European Court of Human Rights dealing with the crime of genocide, article 7 of the Convention supports 'the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy'.²⁵

1. Drafting history of article 22(2)

The reference to strict construction in article 22(2) was only added to the Statute of the International Criminal Court at the Rome Conference. The International Law Commission draft, submitted to the General Assembly in 1994, contained a provision entitled 'Principle of legality' but it did not mention the rule of strict construction.²⁶ Perhaps members of the Commission would have considered this to be implied, in the same way as judges of the European Court of Human Rights have deemed it comprised within articles 6 and 7 of the European Convention. A reference to the unacceptability of 'a process of analogy' was added to the draft at the August 1996 session of the Preparatory Committee.²⁷ In the final stages, at the last session of the

21. *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 137.

22. *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 193.

23. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 20.

24. *Dragotoniū and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, § 43, 24 May 2007.

25. *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 154, 20 October 2015. Also: *C.R. v. the United Kingdom*, 22 November 1995, § 33, Series A no. 335-C; *Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-IV; *Ashlarba v. Georgia*, no. 45554/08, § 33, 15 July 2014; *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions 1996-V*; *Del Río Prada v. Spain* [GC], no. 42750/09, § 38, 21 October 2013; *Jorgić v. Germany*, no. 74613/01, § 100, ECHR 2007-III.

26. ILC 1994 Final Report, pp. 55–6. Also: ILC 1993 Working Group Report, p. 119.

27. Proposed new Part [III bis] for the Statute of an International Criminal Court, UN Doc. A/AC.249/CRP.13, 26 August 1996, p. 2; Report of the Preparatory Committee on the Establish-

Preparatory Committee, in April 1998, an explicit reference to 'strict construction' appeared, although in a footnote rather than a square-bracketed proposal as such:

- It was generally agreed that consistency with internationally recognized human rights would require that interpretation by the Court be consistent with the principle of *nullum crimen sine lege*. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 15. For example, article 15 (2) could be reformulated as follows: "The provisions of article 5 shall be strictly construed and shall not be extended by analogy to, or be interpreted to proscribe, conduct not clearly criminal under it."²⁸

At the outset of the Rome Conference, the Chairman of the Working Group on General Principles proposed the following text: "The definition of a crime shall be strictly construed and shall not be extended by analogy or be interpreted as proscribing conduct not clearly criminal under it."²⁹ This formulation was adjusted slightly and a text very close to the final version was adopted by the Working Group a few days later: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, it shall be interpreted in favour of the person being investigated or prosecuted."³⁰ A few minor and essentially technical changes were made by the Drafting Committee.³¹

In several respects the Rome Statute built upon the progressive developments in international criminal law that were attributable to judicial activism at the International Criminal Tribunals. The most significant development, beyond any doubt, is the enlargement of the subject-matter jurisdiction on international criminal law by extending war crimes to non-international armed conflict and removing the nexus with international armed conflict that limited the ambit of crimes against humanity.³² In some cases, the diplomats at the Rome Conference appear to have considered

ment of an International Criminal Court, Vol. II (Compilation of Proposals), UN Doc. A/51/22, p. 80; Chairman's Text, UN doc. A/AC.249/1997/WG.2/CRP1, 13 February 1997, p. 1; Decisions taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, 12 March 1997, p. 19; Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13, p. 51.

28. UN Doc. A/CONF.183/2/Add.1, p. 47, fn. 63. Also UN Doc. A/AC.249/1998/CRP8, 2 April 1998, p. 39, fn. 61.

29. Chairman's suggestion for articles 21, 26 and 28, UN Doc. A/CONF.183/C.1/WGGP/L.1, 15 June 1998.

30. Report of the Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGGP/L.4, 18 June 1998.

31. Report of the Drafting Committee, UN Doc. A/CONF.183/13 (Vol. III), pp. 149-183, at p. 150.

32. *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

that the judges in The Hague had taken things too far. They enacted provisions in the *Rome Statute* that clawed back some of the developments in the case law of the Yugoslavia Tribunal. One example is the enigmatic provision on national security information, article 72 of the *Rome Statute*, enacted in response to a bold ruling of the Appeals Chamber of October 1997 that gave international judges and not governments the last word in deciding whether production of documents could be resisted.³³ Another is the rejection of the Appeals Chamber decision that made a defence of duress inadmissible with respect to charges of crimes against humanity.³⁴ Article 31 of the *Rome Statute* allows the defence under certain conditions. Both provisions of the *Rome Statute*, article 31 and article 72, were reworked at the final Preparatory Committee sessions and at the Diplomatic Conference, after the Appeals Chamber of the Yugoslavia Tribunal had issued its controversial rulings, and beyond any doubt in reaction to them.

Perhaps the ultimate example of a last-minute 'correction' of the case law of the Appeals Chamber of the Yugoslavia Tribunal is article 22(2) of the *Rome Statute*. It is presented as being a measure aimed at enshrining fundamental rights, a measure to protect the accused person, as it is in the domestic legal order, and to the extent that it reflects provisions like article 7 of the European Convention on Human Rights this cannot be denied. But many of those involved in drafting the *Rome Statute* were more concerned about the interests of States than they were of the accused. Their motivation in adopting article 22(2) may well have been intended to restrain the judicial activism manifested by Judges Cassese and Abi-Saab in approaches to the definition of crimes that might well, after all, be attributed to governments as much as to rogue individuals and outlaws. Although the Rome Conference embraced the progressive legal development in the subject-matter jurisdiction of the celebrated *Tadić Jurisdictional Decision*, it seemed to be saying: 'Don't ever do this again!'

As if to ensure that judges didn't misunderstand the message in article 22(2), the diplomats who negotiated the Elements of Crimes in the two years following adoption of the *Rome Statute* repeated the same message. The Introduction to the Elements of Crimes with respect to crimes against humanity states: 'Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized

33. *Blaškić* (IT-95-14-AR108bis), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

34. *Erdemović* (IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997; *Erdemović* (IT-96-22-A), Separate and Dissenting Opinion of Judge Li, 7 October 1997.

by the principal legal systems of the world.' Curiously, no similar paragraph appears with respect to the Elements of Crimes for articles 6, 8 and 8 *bis*. Like article 22(2), the 'must be strictly construed' phrase in the Elements of Crimes was added at the last minute. It was not present in the early working drafts of the Preparatory Commission,³⁵ and only appeared in the final text submitted to the Commission for adoption at its June 2000 session.³⁶

The strict construction reference in the Elements of Crimes has been cited even more occasionally than article 22(2). Judge Herrera Carbuccion referred to the phrase 'must be strictly construed' in *Ruto et al.*, noting that the Elements must be interpreted, according to articles 9 and 21 of the Statute, in a manner consistent with both the Statute and internationally recognised human rights. Thus, said the judge, the requirement of strict construction must not reach the point where it would be contrary to the object and purpose of the Statute or to internationally recognised human rights.³⁷ The Judge did not mention article 22(2) of the *Rome Statute* as such. It may seem counter-intuitive that the Prosecutor would invoke strict construction, but in her report on the preliminary examination with respect to the situation in Honduras she referred to the 'strictly construed' reference in the Elements of Crimes as an introduction to her explanation for her decision not to pursue the examination.³⁸

The text of article 22(2) indicates that the rule of strict construction is to be applied to '[t]he definition of a crime'. However, the limited references to this provision in the case law of the Court do not generally address articles 6, 7, 8 and 8 *bis*, where crimes within the jurisdiction of the Court are defined. Nor is there a holding that article 22(2) also applies to 'offences against the administration of justice', which are governed by article 70. Rather, the strict construction jurisprudence is concerned with other provisions of the *Rome Statute* that clearly relate to the charges themselves, in particular those concerning participation in crimes (art. 25), command or superior responsibility (art. 28) and the mental element (art. 30).

35. Annex III, Elements of Crimes, PCNICC/2000/L.1/Rev.1/Add.2, pp. 8-9.

36. Report of the Working Group on Elements of Crimes, PCNICC/2000/WGEC/L.1/Add.1, p. 2.

37. *Ruto et al.* (ICC-01/09-01/11), Dissenting Opinion of Judge Herrera Carbuccion, 5 April 2016, para. 36.

38. Situation in Honduras, Article 5 Report, October 2015, para. 76.

2. The 'organizational policy' debate and strict construction

The lack of any reference to article 22(2) in the judicial application of articles 6, 7, 8 and 8 *bis* does not, however, mean that judges have not applied it and other rules of interpretation to the definition of crimes. Clearly, they undertake an interpretative exercise even if they do not fully explain the principles and rules that apply. For example, there is now a considerable body of case law dealing with article 7(2)(a) of the *Rome Statute*. This provision, in conjunction with article 7(1)(a), sets out the contextual elements that generally distinguish crimes against humanity from so-called 'ordinary' crimes, which is to say those that are not considered to be 'international crimes'. The interpretation of article 7(2)(a) often involves much more than the *in dubio pro reo* issue, as it can be central to jurisdictional issues, given its crucial role in identifying whether or not any given act really is a crime against humanity. This is important not only at the Court itself but also in domestic jurisdictions, where qualifying an act as an international crime relates to such matters as the availability of universal jurisdiction, the application of immunities and the effects of statutory limitation. It is also an issue of considerable importance because of the glaring difference in the approach to crimes against humanity taken by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.³⁹

Article 7(1)(a) requires that crimes against humanity be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Article 7(2)(b) states: "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 organizational policy to commit such attack.' When it authorized the Prosecutor to proceed with an investigation in the *Situation in Kenya*, the Pre-Trial Chamber divided with respect to the interpretation of the term 'organizational policy' in article 7(2)(b). The majority decision made the usual nod to articles 31 and 32 of the Vienna Convention on the Law of Treaties, at the beginning of the judgment.⁴⁰ The majority discussed the 'organizational policy' issue under the heading 'The law and its interpretation'.⁴¹ It then conceded that 'the Statute is unclear as to the criteria pursuant to which a group may qualify as an "organization" for the purposes of article 7(2)(a) of the Statute'.⁴² This might have invited some discussion about the rules and principles

39. *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 98, fn. 114.

40. *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 19.

41. *Ibid.*, immediately above para. 77.

42. *Ibid.*, para. 90.

to be applied in dealing with the ‘unclear’ definition of crimes, including the one set out in article 22(2) of the *Statute*, but at no point did the majority of the Pre-Trial Chamber endeavour to do this. Instead, it said that whether or not a given organization qualified under the provision would be assessed on a ‘case by case basis’ without begin fettered by what it called a ‘a rigid legal definition’.⁴³

In dissent, Judge Hans-Peter Kaul adopted what might be described as a ‘strict construction’ of the term ‘organizational policy’ in article 7(2)(a). It was most certainly much narrower than the interpretation adopted by the majority. He too used a heading entitled ‘The Law and its Interpretation’.⁴⁴ Within that section was a sub-heading: ‘Interpretation of Article 7(2)(a) of the Statute according to Article 31 of the Vienna Convention on the Law of Treaties’.⁴⁵ It, in turn, had three distinct sub-sub-headings: ‘Ordinary Meaning’;⁴⁶ ‘Contextual Interpretation’;⁴⁷ ‘Object and Purpose’.⁴⁸ Judge Kaul even looked at the different language versions of article 7 in reaching his conclusion.⁴⁹ It is one of the longest discussions of a definitional element of a crime within the jurisdiction of the Court in the entire corpus of its jurisprudence. Yet nowhere did Judge Kaul refer to article 22(2), the only provision in the *Statute* specifically addressed to the interpretation of definitions of crimes.

The discussion of the ‘organizational policy’ issue that comes close to that of Judge Kaul, in terms of length, appears in the separate opinion of Judge Eboe-Osuji in the epilogue of the *Ruto et al.* case. Judge Eboe-Osuji gave the title ‘Interpreting “Organizational Policy”’ to a discussion of some 165 paragraphs about an issue that was not even before the Court for decision.⁵⁰ He spoke of an interpretation to article 7(2)(a) ‘that is more fit for purpose, in light of the context, object and purpose of the Rome Statute. That, after all, is the cardinal principle of treaty interpretation as codified under article 31 of the Vienna Convention on the Law of Treaties.’⁵¹ Judge Eboe-Osuji explained further that ‘[t]he rule of treaty interpretation codified in article 31 of the VCLT amply justifies the purposive or teleological interpretation in appropriate cases, in order to avoid miscarriage of injustice [sic]’.⁵² He went on to

43. *Ibid.*, para. 93.

44. *Situation in the Republic of Kenya* (ICC-01/09), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, immediately above para. 21.

45. *Ibid.*, immediately above para. 33.

46. *Ibid.*, immediately above para. 45.

47. *Ibid.*, immediately above para. 54.

48. *Ibid.*, immediately above para. 56.

49. *Ibid.*, para. 38.

50. *Ruto et al.* (ICC-01/09-01/11), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, immediately above para. 298.

51. *Ibid.*, para. 303.

52. *Ibid.*, para. 305.

consider principles of interpretation included in the Vienna Convention as well as some that are not, such as the rule against a statutory interpretation that would lead to an absurd result.⁵³ He argued in favour of a teleological approach to interpretation favouring 'broad and liberal construction to maximise protection of beneficiaries'.⁵⁴ Judge Eboe-Osuji referred to common law statutory interpretation principles, citing the 'mischief rule', the 'golden rule', and the 'literal rule'.⁵⁵ In his erudite discourse about principles of interpretation, eventually Judge Eboe-Osuji's tongue turned to the aching tooth. He considered the application of article 22(2). But 'does article 22(2) apply in cases where the crime is already provided for in the Rome Statute', he asked, without answering the question.⁵⁶ Citing Judge Shahabbuddeen of the International Criminal Tribunal for the former Yugoslavia, he said the 'old rule of lenity has been held to be only a rule of construction, which applies when there is "real ambiguity" following the application of other rules of construction'.⁵⁷

The opinions of Judge Kaul and Judge Eboe-Osuji are polar opposites in terms of their understanding of the 'organizational policy' requirement of article 7(2)(a) of the *Rome Statute*. Yet ironically they seem to be entirely aligned as far as article 22(2) is concerned. Judge Eboe-Osuji explicitly dismissed the application of article 22(2) while Judge Kaul simply ignored it. Both favoured a teleological or purposive approach. Both would appear to reject entirely the pronouncement of Judge Van den Wyngaert that article 22(2) 'overrides the conventional methods of treaty interpretation, as defined in the Vienna Convention on the Law of Treaties, particularly the teleological method'.⁵⁸

3. Purposive conviction in action: the Al Mahdi case

The 27 September 2016 conviction of Ahmad Al Faqi Al Mahdi by a Trial Chamber of the International Criminal Court for the crime of directing an attack against buildings dedicated to religion and historic monuments which were not military objectives, pursuant to article 8(2)(e)(iv) of the Rome Statute, provides a stunning example of judicial activism in the construction of definitions of crimes. Pundits heralded the trial with clichés reserved for such occasions – 'landmark', 'historic judgment', 'breakthrough' – and it seemed as if it was a long-awaited tonic for the struggling

53. *Ibid.*, paras. 308-314.

54. *Ibid.*, para. 328.

55. *Ibid.*, para. 350.

56. *Ibid.*, para. 431.

57. *Ibid.*, para. 433.

58. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 18.

institution. It was an easy win for the Court: an expeditious trial of a few days for a contrite defendant previously linked to the global pariah, the 'deviant people' of Al Qaeda.⁵⁹

Al Mahdi admitted responsibility for acts relating to the destruction of several mausoleums and the door of a mosque in Timbuktu, Mali, buildings that had been traditionally used by the local population for religious observance. In 2012, when a rather complex civil war erupted in Mali, the government abandoned the northern provinces and religious extremists associated with Ansar Dine seized control of Timbuktu. The Prosecutor of the International Criminal Court observed that '[t]he Ansar Dine leadership is able to control and govern parts of the territory through local councils established in towns that fell under its control. Additionally, the group reportedly set up a specialized police force in Timbuktu in order to enforce the Sharia law.'⁶⁰ As an eminent religious personality who had joined the rebels, Al Mahdi delivered a sermon condemning worship at the mausoleums. Subsequently, the rebel administration ordered that the mausoleums be destroyed. Al Mahdi, who presided over a morality tribunal known as the *Hisbah*, played a crucial role in implementing the decision to destroy the buildings or structures in question, which at the time were classified by UNESCO as 'world heritage'.⁶¹

Essentially identical provisions of the Rome Statute, one applicable to international armed conflict and the other to non-international armed conflict, govern the crime of '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'. Al Mahdi pleaded guilty to article 8(2)(e)(iv), the text that applies to non-international armed conflict. That the structures targeted by Al Mahdi were 'buildings dedicated to religion' or that they were 'historic monuments' does not seem to be controversial. It was precisely because of their religious significance, something that did not suit the beliefs of the regime with which Al Mahdi was associated, that they were destroyed.⁶² Clearly they did not amount to a 'military objective'. Although civil war continued in the country, Timbuktu seems to have been securely in the hands of the rebels at the time the monuments were destroyed and would remain so until the first months of the following year. Indeed, based on the record before the Court it does not seem that there was any activity that could remotely be called 'military' or 'combat' at the

59. These were the words of Al Mahdi himself in his statement to the Court: *Al Mahdi* (ICC-01/12-01/15), Transcript, 22 August 2016, p. 9, line 3.

60. Office of the Prosecutor, Situation in Mali (Art. 53(1) Report, 16 January 2013, para. 82.

61. *Al Mahdi* (ICC-01/12-01/15), Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2015, para. 49.

62. *Ibid.*, paras. 41-2.

time the structures were demolished. For this reason it is not at all evident that the implementation of the administrative decision to destroy the structures, carried out 'with a variety of tools, including pickaxes and iron bars',⁶³ constituted an 'attack' as the term is used in article 8 of the Rome Statute. And if it was not an 'attack' as the term is meant in article 8(2)(e)(iv), then Al Mahdi did not commit the offence.

In ordinary usage, the term 'attack' is not the word that would be used to describe the demolition or destruction of structures, using implements that are not weapons or military in nature, and where armed adversaries are not to be found within hundreds of kilometres. The word 'attack' is also used in the crimes against humanity definition, article 7 of the Rome Statute. However, the meaning of 'attack' in article 7 is not the same as in article 8. In fact, the Elements of Crimes define in some detail the 'attack directed against a civilian population' of crimes against humanity, specifying that '[t]he acts need not constitute a military attack'.⁶⁴

Several decisions of Chambers of the Court rely upon article 49(1) of Additional Protocol I in order to construe the word 'attacks' as it is used in the nine sub-paragraphs of article 8 of the Statute that contain the words 'intentionally directing attacks'.⁶⁵ In *Abu Garda*, a Pre-Trial Chamber justified recourse to article 49(1) by noting the reference in article 8(2)(e) to 'the established framework of international law' as well as that in article 21(2) to applicable treaties and the principles and rules of international law, including the established principles of 'the international law of armed conflict'.⁶⁶ The International Criminal Tribunal for the former Yugoslavia, referring to article 49(1) of Additional Protocol I, has consistently confirmed the technical meaning to be given to the term 'attack' of acts of violence, committed during combat using 'armed force' in a 'military operation'.⁶⁷ This view is also supported by authoritative

63. *Ibid.*, para. 37.

64. Elements of Crimes, Introduction to Article 7 of the Statute, paragraph 3.

65. *Katanga et al.* (ICC-01/04-01/07), Decision on the confirmation of the charges, 30 September 2008, para. 267; *Abu Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010, para. 64; *Banda et al.* (ICC-02/05-03/09), Corrigendum of the 'Decision on the Confirmation of Charges', 7 March 2011, para. 61; *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, para. 109; *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 45.

66. *Abu Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010, para. 64.

67. *Galić* (IT-98-29-T), Judgment, 5 December 2003, para. 52; *Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 47; *Strugar* (IT-01-42-T), Judgment, 31 January 2005, para. 282; *Milošević, Dragomir* (IT-98-29§ 1-T), Judgment, 12 December 2007, para. 943; *Perišić* (IT-04-81-T), Judgment, 6 September 2011, para. 91; *Prlić et al.* (IT-04-81-T), Judgment, 6 September 2011, para. 91; *Karadžić* (IT-95-5/18-T), Public Redacted Version of Judgment Issued on 24 March 2016, 24 March 2016, para. 451.

academic writings.⁶⁸ The commentary of the International Committee of the Red Cross on article 49 of Additional Protocol I confirms that ‘the term “attack” means “combat action”’.⁶⁹ Finally, even the Office of the Prosecutor, in its report on the *Gaza flotilla incident*, said ‘that an attack for the purposes of this discussion must include a forcible boarding operation, by analogy with other areas of international humanitarian law in which an attack includes all acts of violence *against an adversary*’.⁷⁰

There is a fundamental distinction between war crimes that involve ‘attacks’, where there is a battle or military action between combatant forces, and war crimes that are directed at persons under the control of one of the parties but that take place away from the actual battlefield. According to a Pre-Trial Chamber,

[t]he war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as ‘conduct of hostilities crimes’). Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.⁷¹

The Pre-Trial Chamber distinguished such ‘conduct of hostilities crimes’ from other war crimes that apply once the victims have ‘fallen into the hands’ of the adverse party. The same assessment of article 8 was made by a Pre-Trial Chamber in *Ntaganda*: ‘The war crime of attacking civilians belongs to the category of offences committed during the actual conduct of hostilities by resorting to prohibited methods of war-

68. Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2002, pp. 134, 150-151, 156, 169, 178-179, 216, 350-351; Roberta Arnold, Elisabeth Baumgartner, Michael Cottier, Knut Dörmann, Robin Geiß, Julia Grignon, Sabine Klein, David Křivánek, Emilia Richard, Stefan Wehrenberg and Andreas Zimmermann, ‘Article 8’, in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 3rd edn, Munich: C.H. Beck; Baden-Baden: Nomos; Oxford: Hart, 2015, pp. 281-567, at p. 342 (internal reference omitted).

69. Claude Pilloud and Jean Pictet, ‘Article 49’, in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols to the Geneva Conventions*, The Hague: Martinus Nijhoff, 1987, pp. 601-608, at p. 603.

70. Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia, 6 November 2014, para. 93 (emphasis added).

71. *Katanga et al.* (ICC-01/04-01/07), Decision on the confirmation of the charges, 30 September 2008, para. 267 (internal footnotes omitted).

fare.⁷² The situation in ‘occupied’ Timbuktu belongs to this second category. To be clear, this issue involves the definitions of the crimes and should not be confused with the question of the necessary *nexus* between the impugned act and the armed conflict.

The distinction made in the case law of the Court between offences related to the conduct of the hostilities and those applicable to persons and property that have fallen into the hands of a party to the conflict was not cut from whole cloth. It finds its origins in the earliest legal instruments of the laws of armed conflict, appearing in the regulations annexed to the second Hague Convention of 1899 and the fourth Hague Convention of 1907, which are the ancestors of our modern law on war crimes. One section of the 1907 regulations governs ‘Means of Injuring the Enemy, Sieges, and Bombardments’ while another is concerned with ‘Military Authority over the Territory of the Hostile State’. Each of these two sections contains a provision on cultural property: one applicable to the conduct of hostilities, using the expression ‘sieges and bombardments’ (art. 27), and the other to military authority over the territory (art. 56), where the words ‘seizure of, destruction or wilful damage’ are used. It is article 56, not article 27, that applies to the acts of Al Mahdi in Timbuktu.

In *Al Mahdi*, the Trial Chamber quite correctly acknowledged relevant provisions in the 1907 Hague Convention, recalling ‘[t]he special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations’.⁷³ Its curiosity as to why there are two distinct provisions does not seem to have been aroused. But the drafters of the Rome Statute understood the distinction between the two articles in the Hague Regulations. In finalizing article 8, they abandoned a text based upon article 56 in favour of one used article 27 as the model. This is very clear from the *travaux préparatoires* of the *Rome Statute*.

Did *Al Mahdi* do something wrong? The acts he carried out, which he admitted, were contrary to article 56 of the Hague Regulations. But they were not a crime contemplated by the *Rome Statute* because the relevant provision is based upon article 27 and not article 56. But he was in custody in The Hague, and he had been associated with *Al Qaeda*. The NGOs and the media were chattering about the importance of cultural property and the need to prevent its destruction. The judges complied, giving a purposive reading of article 8 – the purpose being ‘fighting impunity’ and ‘protecting cultural property’ – that enlarged the relevant provision beyond directing an ‘attack’ to any act involving wrongful destruction of religious structures.

72. *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 45.

73. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 14.

4. Concluding remarks

Strict construction is a time-honoured principle of criminal justice. In the past, it may have largely served the needs of clement judges who were reluctant to impose harsh sentences, including the death penalty, for relatively trivial offences.⁷⁴ Many modern judicial systems have displaced the rule in favour of teleological or purposive interpretation. At the international level, this view has prevailed. It has enabled judges to apply relatively laconic texts, often comprising rather archaic formulations, that were adopted hastily and that proved virtually impervious to amendment. The *Rome Statute* stands as an exception, with its unambiguous dictate concerning strict construction in article 22(2). Although it is the only explicit guidance provided by the *Rome Statute* for the interpretation of articles 6, 7, 8 and 8bis, it would seem that article 22(2) has itself succumbed to 'interpretation' by activist judges. Really, only one provision of the *Rome Statute* appears to have been construed strictly, and that is article 22(2) itself!

74. Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge: Cambridge University Press, 2014, p. 194.