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## ARTICLES

### WHAT MAKES A CRIME AGAINST HUMANITY A CRIME AGAINST HUMANITY

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## I. INTRODUCTION

Despite extensive debates surrounding the scope of the contextual element of crimes against humanity during the 1998 negotiations leading up to the formal establishment of the permanent International Criminal Court (ICC), the meaning of the so-called State or organizational policy requirement contained in Article 7(2)(a) of the Rome Statute remains unsettled over a decade later.<sup>1</sup> The origins of this ambiguity can be traced to its earliest legal use in the Nuremberg International Military Tribunal immediately after World War II, and the corresponding vagueness of its subsequent interpretation and uncertain status in customary international law.<sup>2</sup> This lack of clarity has persisted throughout the more recent history of international criminal law.

Part of the problem is that, unlike the crime of genocide, which has a widely accepted definition in the 1948 Genocide Convention, or war crimes, which are codified in the 1949 Geneva Conventions and their additional protocols, there is no single treaty addressing crimes against

1. See Darryl Robinson, *The Elements of Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57, 57–80 (Roy S. Lee ed., 2001) (detailing the concerns of States Parties during the course of negotiations on language pertaining to crimes against humanity in the Rome Statute and the ICC’s Elements of Crimes).

2. See Larissa van den Herik & Elies van Sliedregt, *Removing or Reincarnating the Policy Requirement of Crimes Against Humanity: An Introductory Note*, 23 LEIDEN J. INT’L L. 825 (2010) (highlighting that “[o]f the three existing core crimes in international criminal law, crimes against humanity is the most elusive one, a chameleonic crime that can change colour over time, since it does not possess an unambiguous conceptual character.”).

humanity.<sup>3</sup> Thus, despite the centrality of the offense to modern international prosecution efforts,<sup>4</sup> various definitions of the crime and its contextual and other elements have been developed and used in different national<sup>5</sup> and international<sup>6</sup> contexts over the years.

3. See FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila N. Sadat ed., 2011) (presenting a Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, along with a number of related academic articles, based on the collaboration of some 250 scholars). It is only recently that an attempt has been made to codify crimes against humanity in a single convention. While a significant step forward, this effort was undertaken by leading experts, not by States. It is hoped that the instrument will at least serve as a template for a convention and that States will eventually see the light and adopt a crimes against humanity treaty. *Id.*

4. See Leila N. Sadat, *Emerging from the Shadow of Nuremberg: Crimes Against Humanity in the Modern Age*, WASH. UNIV. IN ST. LOUIS SCH. OF LAW, at 16–18 (Wash. Univ. in St. Louis Legal Studies Paper Ser. No. 11-11-04, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2013254](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013254) (observing that only a “handful” of States, most notably Israel and France, have incorporated crimes against humanity into their domestic law, while prosecutions for crimes against humanity have been highly significant in the work of the recent international tribunals for the former Yugoslavia, Rwanda, Sierra Leone, East Timor, and Cambodia).

5. See, e.g., Attorney General of Israel v. Demjanjuk, Trial Judgment, District Court of Jerusalem (Apr. 18, 1988); CrimA 347/88, Demjanjuk v. State of Israel, Isr. SC 221 (1993); Attorney General of Israel v. Eichmann, Trial Judgment, District Court of Jerusalem (Dec. 12, 1961); Appeals Judgment, Supreme Court of Israel (May 29, 1962); *Nazis and Nazi Collaborators -Punishment- Law- 5710-1950*, ISR. MINISTRY OF FOREIGN AFFAIRS, [http://www.mfa.gov.il/MFA/MFA\\_Archive/1950\\_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571](http://www.mfa.gov.il/MFA/MFA_Archive/1950_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571) (last visited Sept. 30, 2012) (defining crimes against humanity as “any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds”).

6. See, e.g., Statute of the Special Court for Sierra Leone art. 2, Jan. 16, 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJJeW%3d&tabid=176> (giving the Special Court power to prosecute individuals responsible for murder; extermination; enslavement; deportation; imprisonment; torture; rape sexual slavery, forced prostitution or pregnancy, or other form of sexual violence; political, racial, or religious persecution; and “other inhumane acts” in the course of a “widespread or systematic attack” against a civilian population); Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 6, 1994, U.N. Doc. S/RES/955 [hereinafter ICTR Statute] (empowering the Tribunal to prosecute persons responsible for murder; extermination enslavement; deportation; imprisonment; torture; rape; political, racial, or religious persecution; and “other inhumane acts” in the course of a “widespread or systematic attack” against a civilian population based on nationality, politics, ethnicity, race, or religion); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, May 25, 1993, U.N. Doc. S/RES/827 [hereinafter ICTY Statute] (granting the

Another problem is that, although crimes against humanity are a core part of the Rome Statute, there appears to be a lack of conceptual consensus on what makes a crime against humanity a crime against humanity as opposed to a common offense under domestic law. The predominant view, at least in the ICC formulation of the crime, requires the commission of certain underlying prohibited acts such as murder or rape as part of a widespread or systematic attack directed against any civilian population. The multiple commissions of the impugned acts against civilians will give rise to crimes against humanity when carried out pursuant to, or in furtherance of, a State or organizational policy.

But even the Rome Statute definition does not resolve the problem. For example, Professor Darryl Robinson has identified about four theories associated with the State or organizational policy requirement that serve as a key component of the ICC definition of the offense.<sup>7</sup> The starting point is the plain textual requirement that there must be a State policy to commit the attacks. That said, he shows that some scholars argue that no policy element is required, while others insist that there must be a policy.<sup>8</sup> Similarly, regarding the organizational aspect, some theorists claim that in the absence of a State policy there must be an organization, but only a “State-like” organization having some type of policy would qualify.<sup>9</sup> Finally, there is the even broader pro-human rights suggestion that crimes against humanity should encompass any entity with the capacity to

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Tribunal power to prosecute individuals responsible for murder; extermination; enslavement; deportation; imprisonment; torture; rape; political, racial, or religious persecution; and “other inhumane acts” directed against a civilian population during an armed conflict); G.A. Res. 57/228, ¶ 5, U.N. Doc. A/RES/57/228 (Dec. 18, 2002) (referring to “crimes against humanity committed during the regime of Democratic Kampuchea”); UNTAET, On the Amendment of UNTAET Regulation No.2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No.2000/30 on the Transitional Rules of Criminal Procedure, § 9, U.N. Doc. UNTAET/REG/2001/25 (Sep. 14, 2001) (granting the East Timor District Court in Dili exclusive jurisdiction to try crimes against humanity, not further defined, committed between Jan. 1 and Oct. 25, 1999).

7. Darryl Robinson, *Essence of Crimes Against Humanity Raised at ICC*, BLOG OF THE EUR. J. OF INT'L L. (Sept. 27, 2011), <http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc> (drawing the theories from the text of the Rome Statute, recent ICC cases relating to violence in Kenya, the jurisprudence of international tribunals, and scholarly literature).

8. *Id.*

9. *Id.*

carry out crimes against humanity.<sup>10</sup> The latter category would presumably include some of the judges at the ICC who have advanced, in a seminal decision that will be discussed later, the so-called Basic Human Values Test as the determinative criterion for the classification of a prohibited act as a crime against humanity.

As Professor Margaret deGuzman has rightly observed, “because of its disorganized history, important normative and doctrinal questions remain unanswered” about this offense.<sup>11</sup> Indeed, as she rightly noted, “the context required to qualify an inhumane act as crimes against humanity is subject to considerable controversy.”<sup>12</sup> She went on to uncover several normative visions competing with each other as rationales purporting to explain the categorization crimes against humanity: as addressing a threat to international peace and security, gravity and the conscience of humanity, State involvement and action, and as prohibition in respect of group-based harm.<sup>13</sup>

In other words, despite its frequent invocation in contemporary legal and popular discourse, it is not entirely clear what is the distinguishing characteristic or feature of a crime against humanity that moves it from the realm of the domestic to the international, such that its commission would attract the interest and condemnation of the international community as a whole. Is it because of State or organizational involvement in perpetrating or condoning the underlying heinous acts? Or is it the widespread or systematic scale of the attacks against ordinary civilians that constitutes such an affront to human dignity that catapults the offense into the stratosphere of crimes against *all of* humanity? Perhaps it is the combination of each of these factors that gives the crime its essential character and transforms the entirety of humanity into victims?

This article does not propose to offer a full-blown theory to

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10. *See id.* (favoring such an approach over the “State-like” organization theory for its flexibility of potential applications in the still-developing doctrine of crimes against humanity).

11. Margaret M. deGuzman, *Crimes Against Humanity*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 121, 121 (William A. Schabas & Nadia Bernaz eds., 2011).

12. *Id.* at 121.

13. *Id.* at 127–30.

respond to these fundamental questions—as others have done.<sup>14</sup> Instead, its goal is more modest in seeking to contribute to the nascent debate on these and related issues by, firstly, exposing the curious lack of a consensus theory for the international offense that has such a simple label that it easily captures the popular imagination and, secondly, highlighting the difficulties that the absence of a common conceptual mooring poses for status quo definitions of the crime and its interpretation and application by judges.

The paper does so by focusing on the State or organizational policy requirement as a contextual element of crimes against humanity, as set out in Article 7(2)(a) of the Rome Statute. I examine this issue for several reasons. First, although the ICC's seminal first trial in the Thomas Lubanga case was based on war crimes instead of crimes against humanity, there is a growing and important body of jurisprudence from the various chambers of the Court fleshing out the meaning of crimes against humanity. A review of the case law discussion of the *chapeau* elements of that offense, in particular the origins of the controversial State or organizational policy requirement, allows us to take stock of where we are in terms of the practical application of this novel body of Rome Law to concrete ICC situations and cases. This becomes even more important because, compared to war crimes and genocide, crimes against humanity is the broadest and so far only residual offense available in the category of so-called "core international crimes."

Second, while there is a respectable body of literature on the debate, significance, and ambiguities in the definition of crimes against humanity agreed to by States during the Rome Statute negotiations,<sup>15</sup> there is a relatively sparse body of published works

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14. See, e.g., David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L., Winter 2004, at 85, 90 (arguing, after locating five key characteristics of crimes against humanity, that what sets crimes against humanity apart from other international crimes is that it represents politics gone horribly wrong).

15. E.g., M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW chs. 5, 7 (2d ed. 1999); Margaret de Guzman, *Crimes Against Humanity*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 121 (William A. Schabas & Nadia Bernaz eds., 2011); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity in the Rome Statute*, 10 DUKE J. COMP. & INT'L L. 307 (2000); Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457 (1998); Guénaél Mettraux, *Crimes*

assessing exclusively whether or not the judges of the Court are interpreting the crime in the manner in which States mandated them to do in Article 7 of the ICC treaty.<sup>16</sup> Ten years after the Rome Statute's entry into force, it seems timely to make such an evaluation.

Third, at the heart of the recent debates about the State or organizational policy requirement in the Rome Statute are differing conceptions of the origins, rationale, and ultimate future of international criminal law—as would be applied by the ICC, its 121 States Parties as of the time of this writing, as well as by national criminal jurisdictions. The latter are, of course, especially important because they are supposed to incorporate the treaty into their national laws, thereby supplying the legal framework to act as the first lines of defense against impunity.

Fourth is a pressing question that will probably demand an answer as the ICC regime evolves alongside, and as part of, a broader and deeper international peace and security architecture. That is: how might we transpose the classic definition of crimes against humanity, frozen as it is in the State-centered logic of the interstate World War II conflict context, and apply it to the modern non-State actor-driven conflicts? This appears particularly significant given the increasing

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*Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 44 HARV. INT'L L.J. 237, 278–82, 285 n.247 (2002); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43 (1999); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 841–46, 850 (1999).

16. See, e.g., LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (2004); Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections of the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT'L L. 855, 861 (2010); Matt Halling, *Push the Envelope—Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 LEIDEN J. INT'L L. 827 (2010); William A. Schabas, *Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes*, 23 LEIDEN J. INT'L L. 847 (2010); Thomas O. Hansen, *The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya*, 43 GEO. WASH. INT'L L. REV. 1 (2011); Sadat, *supra* note 4; Robinson, *Essence of Crimes Against Humanity Raised at ICC*, *supra* note 7; Guénaél Mettraux, *The Definition of Crimes Against Humanity and the Question of a "Policy" Element*, in *FORGING A CONVENTION*, *supra* note 3, at 142 (2011); Charles C. Jalloh, *Case Report: Situation in the Republic of Kenya*, 105 AM. J. INT'L L. 540 (2011).

recognition among scholars of the need to resuscitate *jus post bellum* (i.e., justice after war), as a foundational third pillar, to supplement the traditional *jus ad bellum* (when it is just to use force) and *jus in bello* (how it is just to fight in war). Indeed, given the international community's human rights-driven preoccupation with ascribing individual criminal responsibility for the top wrongdoers who foment mass crimes, it seems much more necessary to establish a firm structural foundation for long-term peace in the aftermath of conflict and mass atrocity.

In this regard, Professor Larry May has rightly suggested, for instance, that it is nowadays imperative to reestablish a rule of law that gives pride of place to protecting human rights, so as to create a just peace after war ends.<sup>17</sup> A just peace is simply impossible if a measure of justice is not meted out to at least those deemed to bear the greatest responsibility for the mass crimes committed in a given conflict. The concern with whether crimes against humanity ought to be redefined or at least tweaked to meet the pressing challenges of the twenty-first century, as opposed to those of the twentieth century, would thus seem consistent with the centrality of the idea of more prosecutions to the second of May's six proposed normative principles for a *jus post bellum* system. Under his principle of retribution, the top layer responsible for gross human rights violations should either be prosecuted within the national jurisdiction, or be extradited to international penal tribunals.<sup>18</sup> He assumes prosecutions as a given for the persons properly indicted by the latter courts, carving out only a limited non-prosecution exception in circumstances where, on balance, it can be demonstrated that indicting or prosecuting a particular leader would adversely affect human rights protection.<sup>19</sup>

Other scholars hold similar views. For example, Professor Brian Orend, even as he cautioned us to think of the justice in a *jus post bellum* setting in a richer way than the traditional just war theory approach limiting it solely to the trial and punishment of war criminals, has also suggested that at least the *leaders* of aggressor

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17. LARRY MAY, AFTER WAR ENDS: A PHILOSOPHICAL PERSPECTIVE 16 (2012).

18. *Id.* pt. 1.

19. *Id.* at 31–32.



rights-violating regimes ought to be tried in fair, public, and international trials.<sup>20</sup> He essentially used deterrence, rehabilitation, retribution, and related theories of punishment to further justify why all the soldiers from different sides to an armed conflict ought to be investigated and prosecuted.<sup>21</sup> His argument, especially when connected with his excellent proposal for a Geneva Convention regulating post-war justice matters, reflects a current trajectory emphasizing the greater individual criminal responsibility that we see for certain situations in modern international criminal justice discourse. It therefore appears to bolster my proposal for an expanded definition or understanding of crimes against humanity in the world's only permanent international criminal tribunal, which has a crucial role to play in that regard.

For his part, Professor Carsten Stahn, in making a compelling case for the acknowledgement of an explicit body of “post-conflict law” to guide post-conflict peace arrangements, has sketched out six starting principles in an important article.<sup>22</sup> He linked two of those rules—the norm of individual criminal responsibility and the creation of criminal justice and reconciliation mechanisms—to an increasing practice of the international community.<sup>23</sup> Another goal of this article then is to help build an explicit link between these recent *jus post bellum* discussions to how crimes against humanity are defined, interpreted, and applied to concrete situations and cases in the ICC. This is important because it essentially affects the range and reach of the primary international institution that virtually all the mentioned theorists, as well as many others, agree should be supported to ensure the crucial individual criminal accountability component is available and deployable in any modern post-conflict justice dispensation within its jurisdiction.

More specifically, in this article I will attempt to show that, by narrowly limiting crimes against humanity for the purposes of ICC prosecutions through the establishment of the State or organizational

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20. Brian Orend, *Jus Post Bellum: The Perspective of a Just War Theorist*, 20 LEIDEN J. INT'L L. 571, 574, 591 (2007).

21. *Id.* at 580.

22. Carsten Stahn, ‘*Jus ad Bellum*’, ‘*Jus in Bello*’, . . . ‘*Jus post Bellum*’? *Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921, 938 (2006).

23. *Id.* at 937–38.

policy as the key trigger for the offense, the international community might have chosen to give a free pass to the many who could otherwise be prosecutable if we had defined the crime more broadly by focusing on the gravity and scale of the human rights violations and their devastating impact on the victims. If this hunch is correct, the effect appears perverse because it may exclude common types of modern violence by non-State actors who do not exhibit any apparent State or organizational policy links. This undermines the objectives of enhancing human rights protection through prosecutions and perhaps even the presumed deterrence and retributive value of international criminal law. It straightjackets crimes against humanity in such a way that the prospects for prosecuting the most responsible leaders are dimmed. In turn, that diminishes the likelihood that we will achieve accountability and a just and sustainable peace in conflict-post-conflict societies.

As part of a close review of the ICC case law, I will show that there is a split in the interpretations offered by two main judicial camps at the ICC. The first camp is the majority view in a series of decisions primarily arising from the Kenya Situation, which offered a broad interpretation of crimes against humanity, while a second and relatively narrower conception, was offered by a lone but powerful dissenter. As each of the two approaches seems equally plausible, and therefore equally defensible, I suggest that the ICC should make a policy choice on which understanding to embrace, as each interpretive stance carries significant implications for the Court's caseload and equally significant implications for the obligations of its States Parties.

The question that then arises is who must make that policy decision. I argue that while it is acceptable for the judges to decide, and they have done so by default through the dominant position that has emerged in the case law, given the implications of a broader jurisdictional coverage for the Court, it is more pragmatic, more defensible, and ultimately more legitimate for the choice to be made by the States Parties to the Rome Statute through a formal amendment of the current crimes against humanity definition.

As a preliminary matter, I recognize that some will likely object that the ICC does not need an expanded crimes against humanity jurisdiction to cover non-State actors, lest it be overwhelmed by a

flood of situations and cases, especially given its finite resources. Yet others might counter that my call for a statutory amendment at this relatively early stage of the Court's life, when it is only ten years old, is perhaps somewhat premature. This is all the more so because we are yet to have any successful crimes against humanity prosecutions from the ICC.

But such objections would ignore the fact that States themselves provided a mechanism for amendments to the Rome Statute crimes only seven years after its entry into force under Article 121. Further, given that I consider the Court is at a crossroads regarding what interpretive direction to take crimes against humanity and perhaps even the ICC itself, I believe that the proposed amendment, while not the ideal solution, is the better one in the range of choices that the Court currently faces. It, in any event, seems infinitely better than a judicially led change, because it takes the heat of criticism away from the judges who will face allegations of judicial activism and would certainly enjoy greater legitimacy than reliance on the works of select scholars.

This article is organized as follows. Part II examines the origins of the State or organizational policy requirement at Nuremberg and the narrow conception of crimes against humanity it advanced. Part III turns to the uncertain customary international law status of the *ad hoc* international tribunal conclusion that no such policy is required for proof of the existence of crimes against humanity. Part IV considers the relevant ICC jurisprudence to show the way the judges have to date interpreted the State or organizational policy requirement in the Rome Statute. The article concludes with a tentative assessment of what my amendment proposal implies for the ICC in particular and international criminal law more broadly.

## II. ORIGINS OF THE STATE OR ORGANIZATIONAL POLICY REQUIREMENT

### A. EARLY DEFINITIONAL CHALLENGES

The lack of clarity in customary international law about the proper scope of crimes against humanity has persisted since 1915, when Russia, Britain, and the United States issued a joint statement condemning the "crimes of Turkey against humanity and

civilization” committed during the Armenian genocide.<sup>24</sup> This language has been traced to the Martens Clause of the Convention on the Law and Customs of War on Land (Hague II), which referred to the “laws of humanity and the dictates of the public conscience.”<sup>25</sup>

Following the Armenian genocide, the governments allied in World War I signed the Treaty of Sevres. While that treaty would have required the Ottoman Empire to assist in the arrest and prosecution of those responsible for these crimes, it was never ratified, and no international prosecution of the perpetrators of the Armenian genocide ever occurred.<sup>26</sup> The absence of an effective international penal response to those crimes thus limited the significance of the phrase to an acknowledgement that customary international law arguably recognized certain crimes against humanity, though not explicitly called as such, while also leaving the substantive content of the crime unclear.

Although there were several other developments along the way, most notably within the framework of the United Nations War Crimes Commission created in London on October 20, 1943, it was not until the establishment of the International Military Tribunal (“IMT”) at Nuremberg in 1945 that a clear legal specification of crimes against humanity began to take shape. Although it furnished a basic definition of the offense, the IMT failed to clarify its exact scope.<sup>27</sup> The Charter of the International Military Tribunal (IMT

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24. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 101–02 (2d ed. 2008) (noting that the originally proposed formulation was “crimes against Christianity,” rather than “humanity,” but that the three countries went with the latter term mainly out of sensitivity to Turkey’s Muslim population).

25. Laws and Customs of War on Land (Hague II) pmbl., July 29, 1899, 32 Stat. 1803, 1805, T.S. No. 403.

26. See Treaty of Peace Between the Allied and Associated Powers and Turkey Signed at Sèvres arts. 228, 230, Aug. 10, 1920, reprinted in TREATIES OF PEACE 1919–1923 787, 862–63 (Lawrence Martin comp., 1924) (referring to “massacres committed during the continuance of the state of war” on the territory of the former Turkish Empire); A.E. Montgomery, *The Making of the Treaty of Sèvres*, 15 HIST. J. 775 (1972) (finding that the treaty failed not only due to the rebellion leading to the establishment of the Turkish Republic in 1923, but also to conflicting interests among the European Allies).

27. See Hwang, *supra* note 15, at 460 (pointing out that because the Tribunal prosecuted other offenses alongside crimes against humanity, it did not, for example, differentiate the latter from war crimes or define the term “any civilian population”).

Charter) established the laws and procedures to be followed in that ad hoc special court.<sup>28</sup> In addition to setting out the elements for crimes against peace and war crimes—the other two offenses within the tribunal’s subject matter jurisdiction—Article VI(c) of the IMT Charter defined crimes against humanity as follows:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated.<sup>29</sup>

The absence of a specific policy requirement in the IMT Charter definition can most plausibly be attributed to the fact that a State plan or policy was a basic underlying presumption of all the prosecutions at Nuremberg, since the crimes involved were inextricably linked to the Nazi state itself.<sup>30</sup> Indeed, as various scholars such as Professor William Schabas have rightly observed, the *chapeau* of Article VI of the IMT Charter specifically gave the special tribunal competence to try and punish the persons who committed crimes against peace, war crimes, and crimes against humanity, while acting “in the interests of the European Axis countries, whether as individuals or as members of organizations.”<sup>31</sup>

A year later, the International Military Tribunal for the Far East enacted the core elements of the IMT Charter as the basis for prosecuting Japanese leaders responsible for atrocities committed during the war.<sup>32</sup> These prosecutions were patterned on the same logic as that for Germany’s trials. They included very few counts of crimes against humanity in the indictment based on the same definition created at Nuremberg, albeit with some minor changes.<sup>33</sup>

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28. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

29. *Id.* 82 U.N.T.S. at 288 (emphasis added).

30. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 961–62 (2008).

31. *Id.* at 961.

32. Establishment of an International Military Tribunal for the Far East art. 1, Jan. 19, 1946, TIAS 1589, 4 Bevens 20.

33. *See id.* art. 5(c), 4 Bevens at 23 (leaving out religious grounds for persecution and adding that “[l]eaders, organizers, instigators and accomplices

The focus again was on devising a workable definition that would permit the determination and apportionment of the individual criminal responsibility for the leaders, instigators, and organizers, among others, who had participated in the formulation or execution of a common plan or conspiracy to commit the underlying prohibited acts in the Asian theatre.

The need for a new category of crimes at Nuremberg and Tokyo resulted from the fact that traditional international law only prohibited certain acts of war when in conflict with other States, not atrocities committed by a government against its own citizens. The latter type of conduct was deemed to be an internal affair of the concerned State, not the business of other States, mostly because of the influence of strong nineteenth-century positivist notions of sovereignty. Because the IMT Charter was the first clear statement of the law governing crimes against humanity, without the war nexus, it opened the door to the potential argument that prosecutions at Nuremberg were based on *ex post facto* laws. As Professor deGuzman put it, “linking crimes against humanity to the ostensibly treaty-based war crimes and crimes against peace provided a shield against charges that the prosecutions for these crimes violated the principle of legality or *nullum crimen sine lege*.”<sup>34</sup> There was in fact contention to that effect, but the argument was roundly rejected by the Tribunal on the basis that the principle did not apply to that situation. Similarly, although the IMT determined that “no crime without law” was a general principle of justice that militated in favor of trials rather than a limitation on sovereignty, it claimed, perhaps dubiously given the doctrine’s seemingly settled nature, that there was not yet universal consensus under customary international law on the illegality of *ex post facto* laws.<sup>35</sup>

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participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan”). Very few crimes against humanity charges were brought against the defendants as an overwhelming majority were for crimes against peace.

34. deGuzman, *supra* note 11, at 122.

35. Cf. ANTONIO CASSESE ET AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 354–55 (2002) (“Immediately after World War II, the *nullum crimen sine lege* principle could be regarded as a moral maxim designed to yield to superior exigencies whenever it would have been contrary to justice not to hold persons accountable for appalling atrocities. The strict legal

In the end, mostly as a result of the Allied countries' unease with the first legal use of the concept of crimes against humanity, many of the Nuremberg convictions actually emphasized the legally required linkage between the offense and violations of the laws and customs of war and crimes against peace. To prove crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The IMT declined to declare all the Nazi acts before 1939 crimes against humanity, but after the war had begun, in so far as the inhumane acts charged in the indictment did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity. That said, despite the IMT's willingness to additionally convict some of the defendants for crimes against humanity on top of war crimes and crimes against peace, these limitations contributed to the restricted development of the case law on this offense, as the focus of the final judgment was more on interpretation and application of the other two crimes. This thereby gave rise to greater uncertainty later on as to the concept's status in customary international law, although the 1945 definition was subsequently formally endorsed by the international community.<sup>36</sup>

Crimes against humanity, similarly defined as in the Nuremberg and Tokyo Tribunals, also found its way into Article II(2)(a) of Allied Control Council Law No. 10.<sup>37</sup> Under that law, which

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prohibition of *ex post facto* law had not yet found expression in international law; at least, it did not appear to comprise a general principle of law generally accepted by all States.”).

36. See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(1), at 188, U.N. Doc. A/64/Add. 1 (Dec. 11, 1946) (directing the formulation, for purposes of a codification of international offenses, of the principles recognized in the IMT Charter and the Nuremberg Tribunal's judgments); Special Rapporteur, *Report on the Formulation of Nürnberg Principles*, Int'l Law Comm'n, U.N. Doc. A/CN.4/22 (Apr. 12, 1950) (by J. Spiropoulos), reprinted in [1950] 2 Y.B. INT'L L. COMM'N 181, 191-95, U.N. Doc A/CN.4/22 (presenting the International Law Commission's proposed formulation of said principles).

37. *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Control Council Law No. 10, 20 December 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50 (1946), reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 xvi-xix (1949) (defining crimes against humanity as “[a]trocities and offenses, including but not limited to murder, extermination,

provided the uniform legal basis for the allies to prosecute war criminals and other similar offenders in their respective zones of occupation, the definition of crimes against humanity grew to encompass additional prohibited acts and also eliminated the war nexus. These prosecutions later faced criticism for alleged non-compliance with the legality principle. The inconsistent case law emanating from the judgments for those cases added a layer of confusion to an already incoherent and contested offense.

B. THE ROAD TO HEAVEN IS PAVED WITH GOOD INTENTIONS:  
ELIMINATING THE STATE POLICY REQUIREMENT  
IN THE ICTY AND ICTR

Like the IMT Charter, the Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), which was the next major attempt to create an *ad hoc* tribunal since the end of World War II, does not include an explicit policy requirement in its definition of crimes against humanity.<sup>38</sup> However, the early jurisprudence of that court adopted the view that such a policy was an implicit element of crimes against humanity under customary international law.<sup>39</sup> In the seminal first case, *Tadic*, the ICTY Trial Chamber found in 1997 that customary international law did require that crimes against humanity be committed pursuant to a policy but that the policy was not required to originate from the State.<sup>40</sup> This

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enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated”).

38. See ICTY Statute, *supra* note 6, art. 5 (“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”).

39. See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Judgment, ¶ 653 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4027812b4> (finding that crimes against humanity have traditionally been understood to entail “some form of policy to commit [the] acts” given that they are the result of “a deliberate attempt to target a civilian population”).

40. See *id.* ¶¶ 654–55 (holding that customary international law has evolved to recognize that such policies may be pursued by non-government forces with de facto control over, or free movement within, a defined territory and that this could



assessment, which actually had arisen out of a foray into the meaning of “attack directed against the civilian population,” was emphatically rejected by the Appeals Chamber of the ICTY in the *Kunarac* judgment of 2002. The appeals court held that a review of the status of the State or organizational policy requirement under customary international law overwhelmingly supported the conclusion that neither State action nor a policy of any kind was required to establish crimes against humanity.<sup>41</sup> The judges concluded that the existence of a plan or policy may prove to be evidentially relevant, but ultimately they deemed that it was not a required legal ingredient of the crime.

The opinion in the *Kunarac* case, which was rendered only about five years after *Tadic*, has been cited widely in subsequent cases in both the ICTY and its sister court, the International Criminal Tribunal for Rwanda (“ICTR”), for this proposition.<sup>42</sup> However, this reliance seems to be attributable more to the clarity of its conclusion than the strength of the case law cited in support of it. As has been noted by many prominent scholars, of whom Professors Bassiouni and Schabas are two examples, a careful review of the sources that the judges used to support their conclusion in this famous footnote of international criminal law reveals that the role of the policy requirement for crimes against humanity rests more on quicksand than on solid ground.<sup>43</sup> At its best, the status of the requirement was

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emanate from a governmental, organizational, or group policy).

41. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.unhcr.org/refworld/docid/3debaafe4.html>.

42. See Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 120 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004), <http://www.unhcr.org/refworld/publisher,ICTY,,,4146f0eb4,0.html> (citing *Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98) (“The Appeals Chamber agrees that a plan or policy is not a legal element of a crime against humanity, though it may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic.”); Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgment, ¶ 269 (May 20, 2005), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48abd53e1a> (also citing *Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98) (“Contrary to the submissions of the Appellant, the Prosecution did not have to prove the existence of a high-level policy against the Tutsi: although the existence of a policy or plan may be useful to establish that the attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element.”).

43. See Schabas, *supra* note 30, at 959–64 (finding the ICTY’s conclusion as to

more unclear at the time of the *Kunarac* decision than was initially suggested. This is especially so considering that the ICTY completely ignored opposing authorities, such as the Rome Statute definition of the crime, which arguably is more indicative of the views of States and perhaps even reflective of customary international law.

Despite this acknowledgement, the ICTY expressed some uncertainty about what role that policy element should play. The trial court in the *Kupreškić* case, for example, held that even though crimes against humanity necessarily implied the existence of a policy, it was probably more of a useful threshold to be considered rather than a requirement of crimes against humanity as such.<sup>44</sup> It held that crimes against humanity need not be State-sponsored, but that they must at least be condoned or tolerated by the State. The organizational policy element could also be satisfied by an entity or group that possessed *de facto* authority over a territory, according to the Tribunal.<sup>45</sup> The *Kupreškić* chamber then qualified these statements with the concession that crimes against humanity are usually committed pursuant to a criminal government policy.<sup>46</sup> While rejecting the argument that crimes against humanity could only be committed pursuant to State-sponsored policy, the *Kupreškić* decision seemed to express uncertainty about exactly what role the policy requirement should play, or what type of group would be necessary, to implement that policy. It was a clear signal of judicial discomfort with the requirement.

A year later, another ICTY Trial Chamber further weakened the significance of the plan or policy requirement in the *Kordić* case by adopting and perhaps even extending the reasoning in *Kupreškić*. It determined that crimes against humanity were not required to be committed pursuant to an explicit policy, but that the existence of a policy was an important indicative factor to take into account in

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the lack of a policy requirement to be a “results-oriented political decision” based on a “very summary discussion”); Bassiouni, *supra* note 15, at 24–26.

44. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 552 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

45. *Id.*

46. *Id.* ¶ 553 (observing that national case law tends to emphasize this aspect of the offense).

evaluating whether crimes against humanity had in fact occurred.<sup>47</sup> This group of judges arguably went a bit further when they held in *Kordic* that it would “not be appropriate” to impose a definite policy requirement or to adopt a strict view of it for the purposes of discerning crimes against humanity.<sup>48</sup>

Following the *Kordic* trial ruling, the ICTY appeals judges attempted to resolve the policy requirement debate definitively in the *Kunarac* case. In a simple footnote whose relatively short length belies the moral and legal ambition of its conclusion, the Appeals Chamber rejected the assertion that a plan or a policy was even a necessary element to consider in evaluating crimes against humanity under customary international law.<sup>49</sup> In support of this assessment,

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47. Prosecutor v. Dario Kordic, Case No. IT-95-14/2-T, Judgment, ¶¶ 181–82 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41483e9be>.

48. *Id.* ¶ 182. The Appeals Chamber did not have to revisit this point because both the Prosecution and the Defense did not ultimately contest the policy requirement, with the ICTY Prosecutor assuming that the matter had been settled by the *Kupreškić* appeals ruling. *Id.*

49. The footnote is as follows:

There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1945, in particular, pp 84, 254, 304 (*Streicher*) and 318-319 (*von Schirach*); Article II(1)(c) of Control Council Law No. 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General v Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al. v Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; *Moreno v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, 1994g 1 F.C. 298, 14 September 1993; *Sivakumar v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, 1994g 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43<sup>rd</sup> session, 29 April - 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46<sup>th</sup> session, 2 May - 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47<sup>th</sup> session, 2 May - 21

the Tribunal cited ample case law from the national courts of the Netherlands, Canada, and Yugoslavia, as well as to the Nuremberg Tribunal, among other sources.<sup>50</sup> However, the strength of these sources in supporting this assertion is open to serious doubt. A review of the case law cited in the *Kunarac* footnote, as well as the authorities that preceded that decision, appears to more reliably support the conclusion that the role of the policy requirement for crimes against humanity was never settled prior to that decision.<sup>51</sup>

Essentially, the judges in *Kunarac* waved the magic wand in an attempt to wish away the State or organizational policy requirement, perhaps because of the normative belief that such an approach was better for the more effective criminalization of gross human rights violations. But that effort appears to have been unsuccessful for various reasons. For instance, in respect to some of the jurisdictions cited, the appeals judges cited immigration cases that had only incidentally touched on the meaning of crimes against humanity instead of the more applicable criminal law authorities.<sup>52</sup> Similarly,

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July 1995, 47, 49 and 50; its 48<sup>th</sup> session, 6 May-26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (Jelisić Appeal Judgement, para. 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see, e.g., *Public Prosecutor v Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 *ILR* 331, 362-363). Other references to a plan or policy which has sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, *ILR* 14/1947, 278 and 284 and comment thereupon in *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 *CLR* 501, pp. 586-587). *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 98 n.114 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.unhcr.org/refworld/docid/3debaafe4.html>.

50. *Id.*

51. See Schabas, *supra* note 30, at 959-64 (demonstrating that a number of the authorities cited in the footnote did not support the ICTY's conclusion, and pointing to contrary authorities the Tribunal failed to consider, in particular Article 7(2)(a) of the Rome Statute).

52. For example, this is evident from a perusal of the Canadian case law cited, which ignored relevant Supreme Court of Canada authority. Yet, in fairness, there is an intersection between immigration and criminal law, especially in the denial of

as already observed, they ignored the significant Rome Statute contextual element requiring State or organizational policy and other contrary authorities. Nevertheless, *Kunarac* has been extensively cited by the ICTY in support of the proposition that neither a plan nor a policy of any kind is required for a crime against humanity under customary international law. It immediately became the darling of international prosecutors for lifting a heavy evidentiary burden off their shoulders.

The decision has also been cited with approval by the sister ICTR.<sup>53</sup> Like the ICTY, the Statute of the ICTR makes no explicit reference to a plan or policy requirement for crimes against humanity.<sup>54</sup> And, although its definition of the crime against humanity offense differs from that of the ICTY in requiring that attacks be committed on certain discriminatory grounds, given their shared appeals chamber under Article 12(2), which was established

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asylum to suspects of international crimes through the exclusion clauses of the UN Refugee Convention. For the first thorough book-length analysis of the intersection of refugee and criminal law in national and international case law, see JOSEPH RIKHOF, *THE CRIMINAL REFUGEE: THE TREATMENT OF ASYLUM SEEKERS WITH A CRIMINAL BACKGROUND IN INTERNATIONAL AND DOMESTIC LAW* (2012).

53. See *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, ¶ 43 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=469de5652> (citing *Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 58) (“The crime ‘need not have been planned or supported by some form of policy’”); *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment, ¶ 269 (May 20, 2005), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48abd53e1a> (citing *Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98) (“Contrary to the submissions of the Appellant, the Prosecution did not have to prove the existence of a high-level policy against the Tutsi: although the existence of a policy or plan may be useful to establish that the attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element.”); *Prosecutor v. Bradanin*, Case No. IT-99-36-T, Judgment, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4146fd744> (citing *Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 98–101) (“There is no requirement under customary international law that the acts of the accused need to be supported by any form of policy or plan.”).

54. See ICTR Statute, *supra* note 6, art. 3 (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts.”).

to help ensure a coherent body of law, the ICTR jurisprudence on point has largely paralleled the ICTY case law in rejecting an implicit plan or explicit policy element as a requirement for crimes against humanity. In *Prosecutor v. Semanza*,<sup>55</sup> for example, the tribunal relied on the *Kunarac* case for its “clarification” that the existence of a plan or policy may be evidentially relevant in a determination of whether crimes against humanity have occurred, but that it is not a legal requirement.<sup>56</sup> Subsequent cases, such as *Sylvestre Gacumbitsi v. The Prosecutor*,<sup>57</sup> have reiterated this position, again invoking *Kunarac* as sound authority for the proposition that a policy element is not required for a finding that a crime against humanity had taken place.

In sum, while both the ICTY and the ICTR jurisprudence have gradually rejected and ultimately abandoned the need for a State or organizational plan or policy element for crimes against humanity, and in the process of doing so influenced the direction of some national case law on this particular issue, it seems apparent from the above review, as well as that of other scholars, that the decisions of both tribunals are based on legally weak or at least legally questionable foundations.

### III. THE UNCERTAIN CUSTOMARY INTERNATIONAL LAW STATUS OF THE STATE OR ORGANIZATIONAL POLICY REQUIREMENT

#### A. PROSECUTIONS OF CRIMES AGAINST HUMANITY IN NATIONAL COURTS

Customary international law is considered a primary source of international law.<sup>58</sup> In a classical sense, custom consists of the general practices of States that are carried out because of a sense of

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55. *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (May 15, 2003), <http://www.unhcr.org/refworld/publisher,ICTR,,,48abd5a30,0.html>.

56. *Id.* ¶ 329.

57. *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 299 (June 17, 2004), <http://www.unhcr.org/refworld/publisher,ICTR,,,48abd5220,0.html> (citing *Semanza* as citing *Kunarac*).

58. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (mandating that the Court apply “international custom, as evidence of a general practice accepted as law”).

legal obligation (*opinio juris*). As a general rule, evidence of customary international law can be found both in the consistency of State practice and in how widespread and dense that State practice is. In the context of international criminal law, this State practice seems most evident in the case law of national courts, which, like the ICTY and the ICTR jurisprudence, reveals the difficulty courts face in coming to a solid determination of the role of the policy requirement of crimes against humanity under customary international law.

The French trial of Klaus Barbie provides a clear example of this ambiguity.<sup>59</sup> Barbie was a notorious Gestapo leader who was stationed in Lyon during World War II. He was captured in Bolivia in 1983 and extradited to France to face charges of crimes against humanity that were based on the same definition of the offense used at Nuremberg.<sup>60</sup> The French Court of Cassation defined crimes against humanity in *Barbie* as inhumane acts committed “in the name of a State practicing a hegemonic political ideology.”<sup>61</sup> The Court further stated that these crimes must be committed “against the adversaries of this [State] policy, whatever the form of their opposition.”<sup>62</sup> In this way, the tribunal suggested that a State policy or governmental involvement is, at a minimum, an element to take into account in evaluating whether crimes against humanity had occurred if indeed it was not a formal legal requirement.

The Canadian case of *Regina v. Finta* of 1994 also offers useful insight into the status of crimes against humanity in customary international law, although the ICTY Appeals Chamber chose not to mention it in *Kunarac*, presumably because it was unfavorable to its position. Imre Finta was in charge of a Nazi investigation unit in Hungary in which thousands of Jews were confined and deported to

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59. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 20, 1985, Bull. crim., 1985, No. 407, obs. Le Guehec (Fr.).

60. See Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1324–30 (1989) (summarizing Barbie’s life story and explaining how, due to technical reasons, at the time of his trial he could only be prosecuted in France for crimes against humanity).

61. Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289, 342 (1994).

62. *Id.* (stating the additional elements of perpetration in a systematic fashion against persons on account of their racial or religious group).

concentration camps.<sup>63</sup> After the war, he fled to Canada, where his identity was eventually discovered, and he was charged with war crimes as well as crimes against humanity.<sup>64</sup> In addressing the elements of the latter crime, as in the *Barbie* case, the Supreme Court of Canada placed heavy emphasis on the importance of a State policy for crimes against humanity.<sup>65</sup> Although the Criminal Code did not specify that a State plan or policy was an element of crimes against humanity for the offense to be prosecutable under Canadian law, the judges relied on expert testimony by a noted international criminal law scholar, Professor Bassiouni, for their finding that a State action or policy was a prerequisite to finding that crimes against humanity had occurred.<sup>66</sup>

A noteworthy exception to the extensive reliance on the policy element of crimes against humanity is *In re Ahlbrecht*.<sup>67</sup> Notable in the Dutch Special Criminal Court's decision is the absence of any reference to a plan or policy element at all. In contrast, the Dutch opinion focused on the widespread or systematic nature of the attacks in determining whether they should be characterized as crimes against humanity. According to the Court, rather than the defining character being the involvement of the State, it is the magnitude and scope of crimes that raise them to the level of concern to the international community as a whole.<sup>68</sup>

In a nutshell, according to these judicial interpretations, the primary distinction between this class of international compared to domestic crimes was whether the offenses were isolated acts of violence or whether the attacks were widespread or systematic or massive in scale such that they "shocked the conscience of mankind."<sup>69</sup> It follows that while the role of a State plan or policy is

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63. *R. v. Finta*, [1994] 1 S.C.R. 701, 725 (Can.).

64. *Id.* at 791–92.

65. *Id.* at 814 (distinguishing crimes against humanity from common criminal offenses in that the elements of the former are "undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race").

66. *Id.* at 823 (finding therefore that the trial judge properly instructed the jury to consider whether the defendant knew he was "assisting in a policy of persecution").

67. *In re Member Ahlbrecht* (Special Court of Cassation 1947), summarized in 14 ANN. DIG. & REP. OF PUB. INT'L L. CASES 196 (1951) (Neth.).

68. *Id.*

69. *Id.*



generally acknowledged in some domestic prosecutions of crimes against humanity, its treatment varies widely among national courts. It is sometimes viewed as a requirement, as the *Barbie* and *Finta* cases in France and Canada suggested, and sometimes ignored completely, as in the *Ahlbrecht* case in the Netherlands.

B. THE SLOW EVOLUTION  
OF A CLEAR CRIMES AGAINST HUMANITY DEFINITION  
AT THE INTERNATIONAL LAW COMMISSION

It was at the International Law Commission (“ILC”), between 1950 and 1996, that most of the legal work was done trying to sort out the essence of crimes against humanity.<sup>70</sup> While not without some serious ambiguity on a range of controversial issues relating to the justification for the offense, and some steps forward and sometimes backwards on aspects like the conflict nexus, the ILC’s definitions of crimes against humanity and attempts to isolate the inner core that make them proper subjects of international instead of domestic jurisdiction eventually converged to the view that the hallmarks of such offenses lie in their widespread or systematic nature.<sup>71</sup> By their very nature, such crimes are frequently undertaken on the instigation, at the behest and support of or toleration of State authorities implementing some type of deliberate policy or plan while being targeted, wholly or partially, at the civilian population.<sup>72</sup> Nevertheless, in the final analysis, the public or private nature of the organization—that is, whether it is a State-like or non-State-like entity that is behind the perpetration of the crimes—was less material to the prerequisite condition for a finding that crimes against humanity have in fact occurred. This seems evident from a review of the ILC’s admittedly progressive codification effort.

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70. For a thorough overview of the historical pedigree of crimes against humanity, including the progress and evolution of the ILC’s work, see the background section of Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 144 (2004). An excellent book-length treatment is also available: M.C. BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 42 (2011).

71. See *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session*, [1997] II(2) Y.B. INT’L L. COMM’N, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), art. 21, para. 14.

72. *Id.*

In its 1954 *Draft Code of Offences Against the Peace and Security of Mankind*, the ILC offered a definition of crimes against humanity describing them as “inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.”<sup>73</sup> Although this formulation was rightly criticized by some scholars at the time for introducing some problematic new aspects, as Mohamed Badar has explained,<sup>74</sup> on its face and as the ILC commentary helpfully clarified, this conception envisaged that crimes against humanity could be committed by any State authorities or even private individuals.<sup>75</sup>

In 1991, the ILC considered yet another definition of this offense. It obliquely emphasized that the ultimate mischief of these crimes is that they are committed on a systematic or massive scale.<sup>76</sup> While noting that the mass nature of the crimes often necessarily implies a plurality of victims, plurality of perpetrators as well as the plurality of the means employed, Special Rapporteur Doudou Thiam was only willing to go so far as to say that this suggests that crimes against humanity would more likely take place in the context of individuals taking advantage of a State or organizational apparatus to implement their objective.<sup>77</sup> Importantly, in offering examples of circumstances of apartheid (wherein the State itself is the entity behind the violations) and “major financial groups” (that finance *genocidaires* and mercenaries for example), he did not consider the character of the group behind the attacks as determinative of the question whether

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73. See *Report of the International Law Commission to the General Assembly, Draft Code of Offences Against the Peace and Security of Mankind*, U.N. Doc. A/2691; U.N. GAOR, 9th Sess., Supp. No. 9, ch. 3, art. 2, para. 11, (1954).

74. Badar, *supra* note 70, at 85.

75. *Id.* at 84 n.53.

76. See Special Rapporteur, *Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, ¶¶ 60–61, U.N. Doc. A/CN.4/419 and Add.I (1989) (by Doudou Thiam) [hereinafter *Seventh Report on the Draft Code*] (asking and answering the question whether an act needs to affect a mass of people to constitute a crime against humanity); see also *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session*, art. 21, U.N. Doc. A/46/10; U.N. GAOR, 46th Sess., Supp. No. 10 (1991).

77. *Seventh Report on the Draft Code*, *supra* note 76, ¶ 61.

crimes against humanity may be found to have taken place.<sup>78</sup> What mattered in either scenario was that they had the capability to commit the offenses. Thiam was even comfortable with the notion that a single massive act may give rise to crimes against humanity provided that it takes place in the context of a larger coherent system.<sup>79</sup> But again, his concern was not to delineate that only State organs can commit such crimes; to the contrary, he implied that while they are more likely to be the ones behind it, there is nothing to preclude others from being originators of the crime.

When it adopted a third definition of the offense in 1996, the ILC conception of crimes against humanity had matured and contained the core elements that later laid the initial basis for discussions of an ICC definition. This time, the Draft Code characterized crimes against humanity as the commission of certain prohibited acts, such as murder, extermination, torture or enslavement, “when committed in a *systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.*”<sup>80</sup> The accompanying commentary noted that two predicate conditions had thus been introduced for an act to be deemed a crime against humanity.<sup>81</sup> Firstly, the act must have been committed systematically or on a large scale. Systematicity implied that the inhumane acts must have occurred pursuant to a preconceived plan or policy leading to the continuous commission of the crimes—a factor that was included to exclude random acts that were not part of a broader policy or plan.<sup>82</sup> The large scale character of the acts expressed the idea that they must also be directed against a “multiplicity of victims,”<sup>83</sup> thereby eliminating the inhumane acts committed by a lone perpetrator against a sole victim but that are not part of a broader criminal system.

As to the second condition, which mandated that the act be

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78. *Id.* ¶ 61.

79. *Id.* ¶ 62.

80. See *Draft Code of Crimes Against the Peace and Security of Mankind*, art. 18, U.N. Doc. A/CN.4/L.532; U.N. GAOR, 48th Sess. (July 8, 1996) (emphasis added).

81. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, ch. 2, art. 18, ¶ 3, U.N. Doc. A/51/10; U.N. GAOR, 51st Sess., Supp. No. 10 (1996).

82. *Id.*

83. *Id.* art. 18, ¶ 4.

instigated by a government or by an organization or group, the ILC commentary affirmed what should already be plain from the ordinary text above: that such action may be authored by any type of group—again, irrespective of its qualification as a public or private entity. This requirement was introduced so that crimes against humanity would exclude the situation wherein an individual commits an inhumane act solely on his own initiative.<sup>84</sup> The instigation or direction of either a government or an organization or a group, which “may or may not be affiliated with a government”, is what “gives the act its great dimension and makes it a crime against humanity imputable to *private persons* or *agents of a State*.”<sup>85</sup>

#### IV. THE STATE OR ORGANIZATIONAL POLICY REQUIREMENT IN THE INTERNATIONAL CRIMINAL COURT CASE LAW

##### A. JUDICIAL DISSENSION IN THE INTERNATIONAL CRIMINAL COURT

Unlike the definition of crimes against humanity in the ICTY and ICTR Statutes and the ILC formulations for its Draft Code, the definition of the offense in the Rome Statute does include an explicit policy requirement for the purposes of qualification as crimes against humanity. Article 7 specifies that a crime against humanity refers to a list of underlying prohibited acts such as murder, extermination, torture, rape, apartheid, deportation or forcible transfer of a population, among others, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” This part of the provision endorses the mass crime prevention rationale of crimes against humanity that is evident from prior ILC iterations. Article 7(2)(a) then captures the so-called contextual element, explicitly clarifying that an “‘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.”<sup>86</sup> This part of

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84. *Id.* art. 18, ¶ 5.

85. *See id.* art. 18, ¶ 5 (emphasis added).

86. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, 93-94 [hereinafter Rome Statute].

the clause again underscores that the social harm that gives crimes against humanity its essence are the massive nature and scale of the crimes, but as a qualifier, limits them in the last part of the sentence to those of such offenses carried out using State or organizational means. This endorses the criminal State conception of this crime that is rooted in the IMT Charter, which tried to punish the criminal mischief of the entire Third Reich.

The above textual review of Article 7 of the Rome Statute reveals the schizophrenia of the definition that at once nods to both the mass crime and the predatory State rationales for the offense. It is therefore not surprising that this would create space for interpretive schism among the judges once the Court received concrete cases. In both the decision authorizing an investigation into the situation in Kenya,<sup>87</sup> and the subsequent decisions issuing joint summonses for the appearances of William Ruto, Francis Muthaura,<sup>88</sup> and four other Kenyans, the ICC Pre-Trial Chamber found that it had jurisdiction over the violence that occurred following the announcement of the contested results of the East African nation's presidential elections of December 27, 2007, based on its conclusion that the crimes appeared to have been committed pursuant to an organizational policy.

According to the majority's interpretation, the "State or organizational policy" required by Article 7(2)(a) can be implemented by any organization that is capable of committing widespread or systematic attacks against a civilian population.<sup>89</sup>

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87. Situation in the Republic of Kenya, Case No. 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 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> (containing a seminal ruling regarding the scope of crimes against humanity) [hereinafter Kenya Authorization Decision].

88. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Mar. 8, 2011), <http://www.icc-cpi.int/NR/exeres/E0EB838E-59AA-4F92-9B6D-E66DD194050E.htm> (summoning six Kenyans to appear before the ICC for their alleged crimes against humanity, with the suspects including high-ranking civil servants and distinguished politicians) [hereinafter Ruto Decision]; Situation in the Republic of Kenya, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>.

89. Ruto Decision, Case No. ICC-01/09-01/11, ¶ 20 (implying that if a systematic attack occurs, that very fact should be evidence of the existence of a

Whether the group is capable of committing such an attack would be examined with certain non-required criteria in mind, and the understanding that the policy need not be formal or, for that matter, emanate from the State or entities belonging to it.<sup>90</sup> In a way, this view tends to assert the primacy of the mass crime rationale for the textual definition of the offense.

In all three cases, Judge Hans-Peter Kaul offered compelling dissenting opinions directed at reaffirming the criminal State justification for crimes against humanity. In contrast to the majority, the respected German judge would require the group to have certain State-like characteristics, a position that seems consistent with the IMT experience after World War II. In his view, the crucial contextual elements would include whether there was a collectivity, sharing in a common purpose, operating over a prolonged time period, with a recognized hierarchy or command structure including a policy-making level, the capacity to impose the policy and to sanction its members that fall out of line, and, crucially, the means to attack civilians on a wide scale.<sup>91</sup>

Underlying these competing views over how to correctly interpret Article 7(2)(a) of the Rome Statute are contrasting broad and narrow normative visions of the role of international criminal law and differing concerns over the implications of possibly expanding the jurisdiction of the ICC beyond the intent of the framers of the Rome

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State or organizational policy).

90. *Id.* ¶ 24–25 (examining the specific ground in which the Ruto-led group was held to be capable of committing a widespread systematic attack on a civilian population living in the Rift Valley).

91. *See* Kenya Authorization Decision, *supra* note 87, ¶ 51 (dissenting opinion):

even though the constitutive elements of statehood need not be established those “organizations” should partake of some characteristics of a State. Those characteristics eventually turn the private “organization” into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.

Statute.<sup>92</sup> As Professor Claus Kress has argued, the majority approach in the Kenya decision can be seen as favoring a teleological understanding of crimes against humanity that views the goal of international criminal law as promoting basic human values, and a broader or more expansive understanding of the State or organizational policy requirement as an ideal method of accomplishing that goal.<sup>93</sup> This approach tends to view customary international law as evolving to allow the ICC's jurisdiction to cover an expanding category of mass crimes that perhaps could eventually include even purely private organizations.<sup>94</sup>

On the other hand, Judge Kaul's more traditional approach could be seen as focusing the ICC on the narrower path of preventing impunity for *truly* international crimes sponsored by the State or its organs. His conception of crimes against humanity would seemingly keep the jurisdictional reach of international criminal law within the narrow confines of a set of strictly delineated core crimes and factual circumstances that are not necessarily punishable within the domestic legal system in which they occur, and would additionally ensure that the Court does not infringe on State sovereignty by overstepping the boundaries of its jurisdiction.<sup>95</sup> This perspective perhaps reflects a realist view to the effect that the challenge of fighting impunity necessarily implies a reasonable burden sharing between States and

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92. See M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT* 151–52 (2005):

Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7.

93. See Kress, *supra* note 16, at 861.

94. See Kenya Authorization Decision, *supra* note 87, ¶ 90:

[A]s others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values: the associative element, and its inherently aggravating effect, could eventually be satisfied by “purely” private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by “territorial” entities or by private groups, given the latter’s acquired capacity to infringe basic human values.”

95. See Kress, *supra* note 16, at 861 (“The contextual requirement of crimes against humanity reflects the wish of states that these (and other) rather heavy restrictions on their sovereignty only apply in particular instances of human rights violations.”)

international criminal tribunals possessing limited jurisdiction and resources like the ICC. Under this view, the contours of the core crimes would presumably be clearly defined, interpreted narrowly, and applied precisely to situations so obviously within the parameters of the Court's jurisdiction as to be uncontroversial.

In his dissent, Judge Kaul explained that his understanding of the State or organizational policy requirement would require that there be an organization for proof of the contextual element of crimes against humanity—and not just any organization, but crucially one possessing State-like qualities.<sup>96</sup> In the subsequent *Ruto* decision, Kaul clarified this and the other criteria he had set forth by carefully reviewing the material relied on by the majority in evaluating the Kenyan post-election violence.<sup>97</sup> He concluded that the evidence as a whole failed to establish the existence of an organization. He reasoned that it seemed hard to substantiate the claim that the groups responsible for the attacks had a hierarchical structure. This lack of structure meant that the requirement of a responsible command was therefore lacking.<sup>98</sup> Also, these were groups organized on an *ad hoc* basis for a specific purpose and were temporary instead of permanent organizations.<sup>99</sup>

In the final analysis, according to Judge Kaul, although the attacks were seemingly planned and organized, the evidence that the Prosecution proffered did not reliably demonstrate that they were part of an organizational policy as defined by Article 7(2)(a).<sup>100</sup> The dissent also expressed serious concerns about the implications of a possibly indefinite expansion of the ICC's jurisdiction, including a potentially unmanageable caseload, an infringement on the State

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96. Kenya Authorization Decision, *supra* note 87, ¶¶ 51, 66–67 (dissenting opinion) (rejecting the majority's threshold question of whether a group is able to act in a way that infringes on fundamental human values).

97. *Ruto* Decision, Case No. ICC-01/09-01/11, ¶¶ 48–50 (dissenting opinion) (opining, for example, that an ethnically based assembly of perpetrators engaged in the planning and coordination of brutality in itself does not equate a State-like organization).

98. *Id.* ¶ 46 (coordinating activities taking place at a horizontal level cannot substitute for a vertical hierarchical structure).

99. *Id.* ¶¶ 12, 47 (concluding that the creation of the Network was to assist political leaders in their plight for power during the presidential elections).

100. *Id.* ¶ 50 (containing an *expressis verbis* legal requirement of a State or organizational policy).



sovereignty of those countries that more legitimately have jurisdiction, and the possible erosion of the Court's legitimacy that these issues could entail.<sup>101</sup>

The problem is that, though hard to prove definitively, both the majority and Judge Kaul's interpretation of the contextual element of crimes against humanity in Article 7(2)(a) may be correct from the standpoint of the text and perhaps even the legislative intent of the Rome Statute. We have already seen above that the text of Article 7 endorses at least two differing understandings of the core thrust of the crime, presumably to appease States on different sides of the issue during the negotiations. Nonetheless, the unofficial reports of academics involved in negotiating Article 7 offer helpful but sometimes conflicting information in terms of which of these views ought to prevail. Some, like Professor Robinson, suggest that the provision was the result of several pressures that had to be worked through to achieve political compromise between the countries that worried that crimes against humanity could be used as a backdoor to intrude into national sovereignty and those that sought a workable definition that reflected positive developments in the law.<sup>102</sup>

On the other hand, others like Professor Bassiouni, the chair of the drafting committee of the Rome Statute negotiations, have weighed in on this particular debate only to assert that the organizational policy requirement was intended to apply only to organs of the State such as the police, military, intelligence, or other similar organizational units.<sup>103</sup> In his view, Article 7(2)(a) will therefore not

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101. *Id.* ¶¶ 4–7 (expanding the number of cases would not only increase scepticism as to the interests served by the court but would also blur the lines of what crimes actually constitute a threat to humanity).

102. See Robinson, *The Elements of Crimes Against Humanity*, *supra* note 1, at 57:

The definition of crimes against humanity in the Rome Statute was shaped by at least three different negotiating pressures. First, many states were concerned that the law of crimes against humanity might be used to intrude on national sovereignty. These states therefore pressed for a more cautious, or even restrictive, approach to crimes against humanity, with high thresholds and narrow definitions. Second, in contrast to the first pressure, many other states were committed to a broad, workable definition reflecting the positive developments recognized in various authorities. Third, because of the broad potential applicability of the ICC Statute definition, there was considerable pressure for a high level for precision and clarity.

103. Bassiouni, *supra* note 15, at 24 (arguing further that those, including the

extend to other organizations that are purely non-State actors.<sup>104</sup> For this reason, in his view, the Kenya Authorization majority decision is a serious cause for concern because it distorts the intention behind having the State or organizational policy requirement as a jurisdictional trigger by broadening its ambit further than was initially envisaged.<sup>105</sup>

The reports of these scholars involved in the ICC treaty negotiations processes are all helpful. Yet a cursory examination of the plenary records of the final July 1998 Rome Statute negotiations regarding crimes against humanity appears to suggest that the bulk of the States focused more on the magnitude and scale of the crime as the core justification of the internationality of the offense as opposed to the organizational nature and character of the entity behind its commission. This point is implicit in the plain text of the provision itself, which adopts the widespread or systematic criteria. There is also evidence that the State or organizational policy requirements were embedded as limiting criteria to help define the appropriate circumstances under which to trigger international involvement. This was one way to distinguish attacks of a widespread or systematic nature, rather than acts carried out by some random persons or bands of criminals acting on their own initiative for their own purely selfish motives.

The trouble is that, as is usually the case with treaty negotiations, many delegates did not actually appear to address the specific State or organizational policy requirement. On the other hand, there were three delegates that expressed strong objections to the prospective inclusion of the requirement in the Rome Statute. Jamaica's delegate was unhappy that the crimes against humanity definition confined the concept to attacks directed against civilians in furtherance of a State or organizational policy.<sup>106</sup> Congo's delegate sounded more

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Pre-Trial Chamber in the Kenya cases, who have advocated a broadened definition of crimes against humanity to encompass non-State actors would effectively gut the essence that converts crimes against humanity from a domestic to an international crime).

104. *Id.*

105. Bassiouni, *supra* note 15, at 208.

106. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, *Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 328, U.N. Doc. A/CONF.183/13 (Vol. II), June 15-

blunt. To him, the inclusion of the element “constituted an unacceptable threshold that in no way reflected contemporary realities or international law.”<sup>107</sup> He did not elaborate, but keeping in mind the types of non-State actor conflicts that we see in that region of Africa today, it is not far-fetched to speculate that the “contemporary realities” to which he referred were those of modern warfare in which more conflicts are of an *intra*-state rather than *inter*-state nature and feature rebel groups and other non-State actors as key perpetrators.

Be that as it may, it was the Sri Lankan delegate, Ambassador Palihakkara, who appeared to be the most consistent and outspoken and most on point for this particular issue. Foreshadowing the debate that the Court was to be mired in many years later in the Kenya Situation, he kept insisting that the crimes against humanity draft definition be made clear that the State or organizational policy requirement was “also intended to cover the policy of non-governmental entities.”<sup>108</sup> His statement, perhaps motivated by his home country’s experience with the Tamil Tiger rebels, and those of the Congolese and Jamaican delegates, while reflecting an obvious minority of the States present, are still significant for what they said. Equally importantly, his understanding did not draw fire from any of the other States. It would be too much to claim that the silence by the other countries constituted endorsement of the Sri Lankan, Congolese, and Jamaican positions, since it is possible that some delegates might not even have had strong views on the issue. That said, there seems to be a measure of acquiescence in the circumstances though his position was also not adopted. In any event, the three delegates’ statements, at a minimum, prove that, for the few States that turned their minds to the issue, the contention that the State or organizational requirement could not have been intended to cover the activities of private groups or organizations seems to now be in some doubt.

However, as can be seen by the strident debate between the majority of the Pre-Trial Chamber and the dissenting judge in the

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17 July, 1998. The delegate was later elected to serve as a judge at the International Criminal Tribunal for the Former Yugoslavia, where he is currently in the Appeals Chamber.

107. *See id.* at 344–45.

108. *Id.* at 287–88.

Kenya Authorization decision, the required characteristics of the States or organizations outside of the formal State structure that are capable of developing and implementing policies to attack civilians remain contentious among the judges, despite the relative specificity of the Rome Statute definition and the position of some of the State negotiators unearthed above.<sup>109</sup> The crucial issue turns on whether the policy requirement encompasses not only the policies of States, which may be adopted at the highest levels or by regional or even local organs, but also those of any organizations and, if so, whether they may also include non-State entities that are capable of infringing on basic human values by adopting and implementing a policy to commit widespread attacks against a civilian population.

The Basic Human Values Test that the majority propounded focuses less on the nature of the group and more on the harm and the capabilities of the group engaging in the proscribed conduct. It implicitly assumes that the existence of a State, State-like organization, or another type of organized entity would suffice to trigger crimes against humanity. This conclusion, from a purposive perspective of wanting to extend the reach of the ICC to cover any organized non-State actors, seems reasonable even if in practice it may pose other types of new challenges. The benefit is that reading the organization requirement liberally might be more realistic in a non-Western European setting. This is important given that, in certain parts of the world such as Africa where all of the Court's current caseload is from, the State may be so weak that it is incapable of asserting effective control over the territory and in some instances may even be on the verge of collapse. In such settings, informally organized armed groups or rebels may have already played a role in undermining the State or could come together at the last minute to fill the vacuum left by the State and, in so doing, act for a common

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109. See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: COMMENTARY ON THE ROME STATUTE* 152 (2010):

The reference to "State or organizational plan or policy" should probably be construed broadly enough to encompass entities that act like States, even if they are not formally recognized as such. But an interpretation of the word "organizational" by which it refers to any group of individuals, brought together for whatever purpose, is an absurdity. In a literal sense, an organization could include a social club, a charitable organization, a motorcycle gang, an organized crimes syndicate, and a terrorist cell. This is obviously not what Article 7(2) (a) contemplates.

nefarious purpose.

To fill the gap, these private actors could decide to carry out widespread or systematic attacks on the local civilian population, sometimes though not necessarily on purely ethnic or other such discriminatory grounds. This raises some concern whether the debate between the majority and dissenting judges on how to properly classify the actor as a State or a State-like entity before fulfilling the threshold for crimes against humanity is merited and, if so, whether it is or should be deemed a generally applicable standard or assessed on a situation-specific basis. Indeed, considering the proliferation of small arms and light weapons in many modern armed conflicts, it is possible to envision many situations where private entities or individuals who have no connection with the State or a governmental authority would decide and possess the capacity to carry out mass attacks against civilians. These could rise to such a level of disquiet for other States as to constitute a crime against humanity and even a grave threat to regional or international peace and security.

The majority's interpretation of the organizational policy requirement, in the absence of definitive legislative history showing the actual intention of the drafters, therefore seems defensible, contrary to Judge Kaul's suggestion. Indeed, a reasonably strong argument can be made that what the Pre-Trial Chamber majority did was nothing more than flesh out and apply a vague word or phrase in a treaty provision to the specific circumstances arising from the Kenya Situation wherein private militia with less strong links to the State seemed to have been part of the organized campaign of post-election violence. This interpreter function is the type of role that we expect from international judges, including those at the ICC, who States often entrust with the responsibility of applying the broad text of a multilateral treaty to specific cases in specific situations against specific individuals. If this position is correct, it seems arguable that what is going on at the Court is merely part of the natural and organic process of the development of statutory provisions and their purposive interpretation and application to concrete situations and cases.

Of course, it is also possible to view the majority position differently. Judge Kaul, who clearly endorses the criminal State thesis of crimes against humanity, intimates that the majority adopted

a progressive and broad interpretation of the crimes against humanity offense by shifting the goal posts beyond States or State-like entities in a way that permits the ICC to expand its jurisdiction infinitely to cover any massive or heart-rending human rights violations.<sup>110</sup> Such expansion, which perhaps is driven by the substantiality of the crimes committed, may reflect the moral outrage that we naturally feel—the kind of push that compels many international criminal lawyers to want to ensure that someone pays for the heinous crimes committed in a given situation. If such an argument is correct, then it can be continued that no matter how well intentioned, an interpretive technique that extends the Court's subject matter reach in respect to crimes against humanity comes with some danger. It would either be seen as acceptable and therefore a good change to the law or be deemed unacceptable and thus open to contestation. If the latter, the question might arise whether that judicial position might not generate pushback from States that could undermine the current and future direction of the permanent international penal court.

Why? The issue is that a perceived judicial widening of the scope of crimes against humanity might be viewed by some States Parties, who subscribe to the predatory State justification of the offense, as a violation of the carefully crafted compromise that Article 7(2)(a) was predicated upon. Considering the large number of States Parties to the Court, at writing numbering 121, it may even plausibly be said that the current ICC definition of the crime is more reflective of customary international law.<sup>111</sup> Still, Article 10 of the Rome Statute does clarify that the permanent Court's definitions should not be interpreted as limiting or prejudicing in any way existing or developing rules of international law.<sup>112</sup> Any derogation from that standard, considering that States had the option to adopt an ICTY–ICTR inspired definition of the same offense eliminating the policy requirement, but chose not to do so, would presumably require some

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110. Kenya Authorization Decision, *supra* note 87, ¶¶ 10, 44, 55, 67 (dissenting opinion) (providing justification for upholding a high threshold for international crimes, so as not to confuse serious crimes against humanity with other crimes).

111. deGuzman, *supra* note 11, at 126 (noting that, due to the sharp divergences among States, the Rome Statute itself does not purport to be a codification of a customary international law definition of crimes against humanity).

112. *Id.* at 126 (observing that, as more and more States use the ICC definition of crimes against humanity, it is possible that it could one day be seen as indicative of customary international law).

explanation. This is all the more so given that the ad hoc tribunal case law reading out the State-organizational policy requirement for crimes against humanity also purported to be applying customary international law. On this logic, it can be suggested that any judicial interpretation of a crime that is not strictly construed, as pro-human rights as it might otherwise be, would carry several troubling implications for the cooperation with and perception of the ICC in the international community. This is especially so given the edict in Article 22(2) of the Rome Statute explicitly mandating that ICC crimes be not only strictly interpreted, but that they should also not be extended by any form of analogy.

In addition to these points, two related observations seem warranted. First, as Judge Kaul obliquely warned in his dissent to the Kenya Authorization decision, removing what the negotiating countries agreed to in good faith arguably infringes on the principles of State consent and sovereignty by interfering with the competence of legal systems that more appropriately have jurisdiction over crimes that have occurred within their own territory.<sup>113</sup> Proof of the Rome Statute preference for national action to combat international crimes is amply confirmed by the limited set of core crimes included in the statute and the endorsement of the principle of complementarity—as opposed to that of primacy, which obtains in the *ad hoc* tribunals—as the cornerstone upon which the entire ICC system was founded.<sup>114</sup>

Second, like other international criminal tribunals, in the absence of independent enforcement mechanisms, the ICC is not only founded on State cooperation but is also extremely dependent upon it.<sup>115</sup> A key implication of Judge Kaul's argument was that having a looser conception of State or organizational policy widens the boundaries of crimes against humanity in such a way that it would likely require the Court to be involved in infinitely more situations than a narrower interpretation would. In this view, the expectations of victims that the international community will intervene to render

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113. See Kenya Authorization Decision, *supra* note 87, ¶ 10 (dissenting opinion) (stating that the limited resources of the court must be taken into account when determining the extent to which jurisdiction reaches).

114. See Rome Statute *supra* note 86, art. 1 (“[The Court] shall be complementary to national criminal jurisdictions.”).

115. See *id.* arts. 98–111.

justice on their behalf would be heightened. But if victims' hopes are raised and dashed, because the ICC cannot realistically investigate or prosecute in every possible crime base within its jurisdiction, there would be even greater pressure on the Court to justify why it is choosing to get involved in some situations but not others. This could lead to arbitrary situation and case selection, on the part of the prosecutor, which might in turn leave the institution vulnerable to the perception that it is not capable of rendering justice for all, thereby hurting its legitimacy.

In any event, despite the apparent specificity of the requirements of crimes against humanity in Article 7 of the Rome Statute, there has been some debate surrounding its meaning even in the ICC jurisprudence. A brief look at other cases demonstrates this. On September 30, 2008, the Pre-Trial Chamber issued its confirmation of the charges in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.<sup>116</sup> In that case, the chamber determined that the contextual element of Article 7(2)(a):

ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organized and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. *Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population.* The policy need not be explicitly defined by the organizational group. Indeed, an attack which is planned, directed organized — as opposed to spontaneous or isolated acts of violence — will satisfy this criterion.<sup>117</sup>

As in the *Ahlbrecht* case, when discussing the type of attack, the judges focused on whether the crimes against civilians were sufficiently widespread or systematic to constitute crimes against humanity. They also established the policy threshold to be low, and the type and level of organization required somewhat minimal. By allowing any type of de facto policy to satisfy the contextual element of crimes against humanity, regardless of whether it is “explicitly defined,”<sup>118</sup> and by bringing within its ambit any group or

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116. *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgement, ¶ 396 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

117. *Id.* (emphasis added).

118. *Id.* (adopting the threshold for what constitutes a policy simply as the attack



organization, whether public or private, the *Chui* decision linked the State or organizational policy element with the oft-discussed requirement that the attacks be widespread or systematic, rather than simply spontaneous or isolated incidents. This point lines up with the concerns of the ILC experts over the past few decades as well as those of many ICC negotiators of this crime. Under this judicially endorsed approach, the widespread and systematic concepts play a screening role to demarcate or isolate the type of violence that should attract the interest, condemnation, and action of the international community. This approach also seems to comport with the ICTY reasoning in the *Tadic* case.<sup>119</sup>

In a subsequent ICC decision, another Pre-Trial Chamber adopted the same type of logic. Citing to the *Chui* decision, the Court held in its confirmation of the charges against Jean-Pierre Gomba that the mandate that crimes against humanity be committed pursuant to a State or organizational policy only requires that the offenses follow a regular pattern.<sup>120</sup> Much like the foregoing case, and those from the ICTY post-*Kunarac*, the policy can be formulated by a “group of persons who govern a specific territory or by *any organization* with the capacity to commit a widespread and systematic attack against a civilian population.”<sup>121</sup>

#### B. THE MEANING OF “STATE” AND “STATE POLICY”

Understanding what would constitute a State or organizational policy under Article 7(2)(a) seemingly requires an understanding of what constitutes a “State” and a “State policy” under the Rome Statute. The ICC treaty does not define either of these terms. Article 31 of the Vienna Convention on the Law of Treaties provides the

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must be something more than spontaneous, isolated, or random acts of violence, based mostly from endorsement of the views taken on other occasions by the ICC Pre-Trial Chambers).

119. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 653 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4027812b4> (emphasizing that no formal policy is required but instead can be deduced from notable acts even if they only occur on a widespread or systematic basis).

120. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Confirmation of the Charges, ¶ 81 (June 15, 2009).

121. *Id.* (emphasis added) (distinguishing that the attacks need only be widespread or systematic, not both).

rules governing the interpretation of a treaty and states that a treaty must be interpreted in good faith, in light of its object and purpose.<sup>122</sup> In addition to the ordinary text of the treaty, subsequent agreements and State practice in application of the treaty may be taken into account to understand its text.<sup>123</sup> Also, the ordinary language of the treaty may be superseded by a special meaning given to its text, if it can be established that this was the intent of the drafters.<sup>124</sup>

The ordinary meaning of a *state* found in standard dictionary definitions denotes a politically organized group of people with a permanent population occupying a specific territory.<sup>125</sup> However, although this term was taken as somewhat obvious in the ICC's Kenya decisions, there is a measure of ambiguity in some of the important words in Article 7(2)(a) that harkens back to other debates about what types of entity may constitute a State in public international law. The assumption that their requirements have been met in the government entities that have been the subject of international prosecution has arguably contributed to the vagueness of the use of the term in international criminal law.

Whatever the case, the generally accepted legal elements of statehood indicate a more technical definition than the ordinary dictionary meaning suggested here. It would basically require a permanent population, having control over a defined territory, the existence of a government, and the capacity to engage in formal relations with other States<sup>126</sup>—all criteria that are now said to be part

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122. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

123. *Id.* art. 31(3)(a)–(b).

124. *Id.* art. 31(4).

125. *See State*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/state> (last visited Sept. 22, 2012) (defining a state as “a politically organized body of people usually occupying a definite territory”).

126. Although the formal requirements of statehood were classically stated in Article 1 of the 1933 Convention on the Rights and Duties of States (the Montevideo Convention), which initially applied only to its sixteen parties in the Western hemisphere, the criteria it laid down are deemed to be universally applicable today because of their crystallization into general customary international law. As to how these norms have been incorporated in U.S. practice, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1965):

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such

of customary international law.

Even if these minimal public international law criteria are met, of particular uncertainty in the criminal law context of crimes against humanity is how to recognize the existence of a formal State policy and, in turn, who would have the authority of implementing that policy. As Judge Kaul explains it in his dissent to the Kenya decision:

acts of the central government and of any other organ at the regional or local level may be imputable to a State; however, considerations of attribution do not answer the question of who can establish a State policy. . . . [C]onsidering the specific circumstances of the case, a policy may also be adopted by an organ which, albeit at the regional level, such as the highest official or regional government in a province, has the means to establish a policy within its sphere of action.<sup>127</sup>

This entails a fairly broad approach to the definition of a State policy by creating potential legal responsibility on the part of central governments for the actions of subsidiary regional or local governments. That, in and of itself, is not too solid a critique since it is settled in international law that the conduct of an organ of the State, or a territorial unit of a State, irrespective of whether it carries

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entities.

*a. Definition of state.* While the definition in this section is generally accepted, each of its elements may present significant problems in unusual situations. In the absence of judicial or other means for authoritative and consistent determination, issues of statehood have been resolved by the practice of states reflecting political expediency as much as logical consistency. The definition in this section is well-established in international law; it is nearly identical to that in Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

*b. Defined territory.* An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state. An entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily.

The Montevideo Convention similarly provides in Article 1 that “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881.

127. Kenya Authorization Decision, *supra* note 87, ¶ 43 (dissenting opinion).

out legislative, judicial, executive, or other functions, is attributable to it. It does, however, highlight an important distinction made between the actions of private actors from those of State actors or organs pursuing an official policy. As a general rule, whereas State actors or organs may author a policy and can consequently be held responsible for it, the conduct of private actors is not generally attributable to a State. The uncontroversial exception would be if the private entity or actor is engaging in the wrongful conduct on the instructions of the State or under its influence, direction, or control.

In *Tadic*, the Appeals Chamber of the ICTY got the first opportunity to adapt and apply a general principle of State responsibility in the context of determinations of individual criminal responsibility. The judges confirmed that private action pursued in coordination with a State should be attributed to the State itself in order to be punishable.<sup>128</sup> In that case, the Tribunal held that the crucial factor in determining whether paramilitary activities could be imputed to the State is whether the State is effectively in control of the group.<sup>129</sup> This control can be demonstrated by evidence that the State not only equipped and financed the group, but also by whether it was instrumental in planning and coordinating the attacks.

In other words, in circumstances where the State exercises overall control, the conduct of auxiliary bodies can be attributed to the State—even if they are private persons or entities formally separate and apart from it. It need not have ordered the attacks directly. Rather, the key element in *Tadic* appears to be, having regard to the factual circumstances in each case, whether there is overall State control over the policy of the group. If there is, then the group policy can rightly be considered to be the de facto policy of the State itself.

The cases at the ICC seemed to mesh the requirements for a State policy with the requirements for an organizational policy, because of the belief that the latter would include organs of the State. Discussing

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128. See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 144 (July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>:

[P]rivate individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs. In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.

129. *Id.* ¶ 131.

the requirements of an organizational policy, in *Prosecutor v. Germain Katanga*, the ICC Pre-Trial Chamber held that an attack that is part of an organizational policy must be organized and follow a consistent pattern.<sup>130</sup> In addition, the attack must be designed to promote a common policy that involves either public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or, more crucially, by any organization with the capability to commit a widespread or systematic attack against a civilian population. On this view, the vital distinction between a State and organizational policy is whether either public or private resources are marshaled or used to implement it and the capability of the group in carrying it out. However, the reference to both public and private resources within the discussion of an organizational policy could also be read as affirming that a group can be characterized as an organization for the purposes of Article 7(2)(a) with or without the involvement of the State.

Part of the ambiguity surrounding what constitutes a State or organizational policy seems to stem from the uncertainty over whether the discussion of its requirements is implicitly in reference to the level of connection that the *organization* must have with the State, or whether it surrounds the distinction between a *State policy* and an *organizational policy*, with States and organizations construed as entirely separate entities under the statute. Further complicating a coherent understanding of what amounts to a State policy under Rome Statute Article 7(2)(a) is the fact that the ICC has specified that State inaction amounting to willful blindness can be interpreted as effectively promoting a policy to commit crimes against humanity. The ICC's Elements of Crimes specifies that a "policy to commit such an attack" requires that the State or organization actively promote or encourage such an attack against a civilian population."<sup>131</sup> In a footnote, this is further clarified by the statement that:

[a] policy which has a civilian population as the object of the attack would

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130. See *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgement, ¶ 396 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

131. Int'l Criminal Court, Elements of Crimes, ICC-PIDS-LT-03-002/11, art. 7, ¶ 3 (2011), available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

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be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.<sup>132</sup>

The failure of a State to take measures to stop crimes against humanity can be an important factor in evaluating whether a State or organizational policy exists. The rationale for this approach is most likely that the State is or would presumptively be aware of the existence of the prohibited acts amounting to crimes against humanity due to their organized, widespread, or systematic scale. This awareness of the perpetration of crimes makes the State complicit only if the intent behind the inaction is to further the attack, not if the State is unable to prevent it.

Deliberate inaction could be a particularly relevant factor when evaluating the existence of crimes against humanity, especially if the State and the organization's interests are interlinked. However, conclusively establishing that inaction is deliberate could be problematic. Something more than a failure to act is required. The implication is that the State or organization would somehow have a measure of knowledge and be connected to the entity as a way of encouraging the impugned conduct. All this adds to the uncertainty about the scope and limits of the ICC formulation of crimes against humanity.

There is credible evidence in the status of customary international law leading up to the Rome Statute supporting the assertion that a group can pursue an organizational policy with no connection to the State whatsoever. In addition to the *Kunarac* case, and the questionable national case law cited within it, the ILC's Draft Code anticipated that crimes against humanity can be pursued by purely private groups. Article 18 defined crimes against humanity as perpetration of enumerated acts constituting crimes against humanity "in a systematic manner or on a large scale and instigated or directed by a Government or *any organization or group*."

As discussed earlier, the commentary to Article 18 explicitly clarified that two conditions must be fulfilled for a prohibited act to

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132. *Id.* art. 7, ¶ 3 n.6.

be deemed a crime against humanity. Firstly, it must be committed systematically (i.e., pursuant to a preconceived plan or policy) or, alternatively, on a large scale (meaning that the acts are directed against a multiplicity of victims). Secondly, it must be instigated or directed either by a government or “any organization or group.” There was no requirement that the organization be tied to the State whatsoever or that it should possess any specific (including State or State-like) characteristics. The ILC further explained that this condition was intended to exclude isolated or random violent acts carried out by a lone individual based on his own criminal plan toward his own criminal objective. In the result, it is the actual instigation or direction from a government or any organization or group, whether it is affiliated or unaffiliated to a government that makes the act an international crime imputable to private persons or agents of a State.<sup>133</sup>

This suggests that, to the ILC, as for other scholars such as Professor Luban, it is the collective nature of the actors and their victims that is the defining feature of crimes against humanity.<sup>134</sup> That the Draft Code was adopted in 1996, three years after the Statute of the ICTY, which contained no explicit textual policy requirement but developed one jurisprudentially only to subsequently amend it, underscores the general inconsistency of the international bodies on the State or organizational policy requirement. This, therefore, necessitates a closer examination of the meaning of an organization in customary international law.

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133. See *Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 80, art. 18, ¶ 5:

The second condition requires that the act was “instigated or directed by a Government or by any organization or group.” The necessary instigation or direction may come from a Government or from an organization or a group. This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity.

134. David Luban, *A Theory of Crimes Against Humanity*, 29 *YALE L.J.* 85, 90 (2004) (arguing that this represents “politics gone cancerous”).

C. THE MEANING OF “ORGANIZATION”  
AND “ORGANIZATIONAL POLICY”

The concept of an “organization” and an “organizational policy” is clearly much broader than either a “State” or a “State policy.” Used in a loose way, a “State” could be considered an “organization,” and an “organization,” in the sense of its composite organs, could certainly be part of a “State.” This raises questions about the intent of the drafters of the Rome Statute in including both categories in Article 7(2)(a) and whether they should have offered answers to some of the questions that arose later by offering specific definitions for those terms. Since they did not, perhaps because it did not occur to the drafters or they wanted to leave those types of details to the Court’s judges, resolving some of the difficulties merits a brief review of the ordinary meaning of an organization and an organizational policy.

Standard dictionary definitions of the term “organization” usually refer to an administrative or functional structure,<sup>135</sup> a group of people sharing a particular purpose, “as in a business, a government department, a charity, etc.,”<sup>136</sup> or a group of people who work together in a structured way for a shared purpose.<sup>137</sup> This definition is suggestive of a modest and loose, rather than rigid and ordinary, standard of what an organization is. The crucial elements of the term appear to involve some type of group acting in pursuit of a common purpose and exhibiting some form of structure or hierarchy.

Examining these elements in the context of the object and purpose of the Rome Statute, which according to the preamble includes ending impunity for international crimes while at the same time respecting State sovereignty and allowing the jurisdiction of national courts to have primacy, signifies a fairly broad scope to the term that perhaps better accords with the majority in the Kenya Authorization

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135. See *Organization*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/organization> (last visited Oct. 2, 2012).

136. See *Organization*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/132452?redirectedFrom=organization#eid> (last visited Oct. 1, 2012) [hereinafter OED Organization Definition].

137. See *Organization*, CAMBRIDGE DICTIONARIES ONLINE, [http://dictionary.cambridge.org/dictionary/british/organization\\_1?q=organization](http://dictionary.cambridge.org/dictionary/british/organization_1?q=organization) (last visited Oct. 2, 2012).



decision.<sup>138</sup> The fact that the 1998 draft of the Rome Statute did not include any type of explicit policy requirement in its definition of crimes against humanity also falls in line with this reasoning.<sup>139</sup>

Largely relying on tribunal decisions that have endorsed the *Kunarac* tribunal's rejection of the requirement of a policy or plan for crimes against humanity, the trend in the ICC prior to the Kenya decisions had been to focus on whether the organization had the capacity to commit a widespread and systematic attack on a civilian population. In *Prosecutor v. Jean-Pierre Gomba*, for example, the Court found that an organizational policy can be pursued by any groups "who govern a specific territory or by any organization with the capability to commit a widespread and systematic attack against a civilian population."<sup>140</sup> In the same vein, in *Prosecutor v. Katanga*, the judges held that an organizational policy may be pursued by "any group with the capability to commit a widespread or systematic attack against a civilian population." These decisions seem to rely on the three generally accepted qualities of any organization, specifically that it consists of (1) a group (2) with a defined structure and (3) shared purpose.

This reliance on the extensive international penal tribunal case law that has rejected the requirement that the organization have State-like qualities is understandable in light of the consistency of the ICTY and ICTR judgments following the *Kunarac* case. However, as I have argued earlier on in this article, and others have also done elsewhere, considering the ultimately shaky pillars upon which the *Kunarac* judgment rested, whether it reflects an international consensus as to the normative vision of crimes against humanity under customary international law remains open to question.

Nevertheless, even if the concept is kept within the limitation that the organization involves a State-like structure, much like Professor Bassiouni has suggested in several of his publications, similar or new

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138. See Rome Statute, *supra* note 86, pmb1.

139. See Preparatory Comm. on the Establishment of an Int'l Criminal Court, Rep. from the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Addendum) art. 5, June 15–17, 1998, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

140. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Confirmation of the Charges, ¶ 81 (June 15, 2009) (stating that these types of widespread or systematic attacks exhibit a regular pattern).

questions would still arise. Whether a tribe, for example, is a sufficiently State-like structure to constitute an organization within the meaning of Article 7(2)(a) is open to debate. Considering that a tribe is more akin to a group and does not necessarily have the legal capacity to enter into formal relations with other States, and that it may or may not be organized into a “recognizable government,” it would at first blush seem that a tribe would potentially not have some of the legally recognized characteristics of a State as defined by, for example, the Restatement on Foreign Relations Law. However, many tribes would almost certainly fall within the ordinary customary international law understanding of an organization, body, or group with State-like characteristics, as they can be entities with a permanent population, occupying a specific territory, and having their own internal government.

Similarly, once denuded of its Euro-centric underpinnings, it is apparent that tribes or ethnic groupings in Africa or other parts of the world usually have the ability to enter into relations with other tribes or groups that may or may not also occupy a specific geographic area or have control over it. Thus, a case can be made that, at least certain types of tribes, bear a sufficient degree of “organization” to constitute State-like entities, even if they do not meet the classical customary international law definition of a State. Regardless of how State-like or un-State-like a tribe is, the potential that you have a group that will be capable of committing atrocities against civilians without international accountability still remains.

This difficulty is apparent in the *Muthaura* decision. The majority’s conclusion that the evidence provided a reasonable basis to believe that the ethnicity-based group *Mungiki* constituted an organization within the meaning of Article 7(2)(a) was based on a finding that the group operated within a large and complex hierarchical structure featuring various levels of command, and that obedience within the group was achieved through strict disciplinary measures. In addition, the majority found that the group employed a trained militant wing that it used to carry out violent operations and to sustain power over many societal activities in and around Nairobi.<sup>141</sup> This was sufficient to satisfy the criteria the judges had

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141. See Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear ¶ 22 (Mar. 8, 2011),

provided in the Kenya Authorization decision that the group exist within an established hierarchy under a responsible command, possess the means to carry out a widespread or systematic attack on a civilian population, have a criminal objective as a primary purpose, and articulate either implicitly or explicitly an intention to attack a civilian population, amongst other things.<sup>142</sup> On this approach, the group should qualify as sufficiently organized to fall within the parameters of crimes against humanity, as understood on its plain meaning in Article 7(2) of the Rome Statute.

This argument would appear consistent with the views of other scholars, like Professor Robinson, who has offered a compelling theoretical defense for the majority decision by advocating for a “modest standard” for “organization.” In his view, “[a]s long as there is some organized entity directing, instigating or encouraging crimes, then we are no longer confronted with mere spontaneous ‘crime waves’ and unconnected acts of individual wrongdoing.”<sup>143</sup> That is to say, excluding random acts, it does not so much matter which type of public or even private organization is carrying out the crimes in question. A similar position has been advanced by Professor Leila Sadat, a leading scholar, regarding the concomitant policy

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<http://www.icc-cpi.int/NR/exeres/D99DEB2B-E48B-4942-8546-515B792F2297.htm>. The Court relied on evidence that:

the Mungiki (i) control and provide social services such as electricity, water and sanitation; (ii) administer criminal justice through local chairmen who act as judges in their communities; and (iii) control the transport sector and other business activities, where they provide informal employment for members. The material shows that to support such activities, the Mungiki collect informal taxes in the areas under their control. In light of the foregoing, the Chamber is of the opinion that the material submitted provides reasonable grounds to believe that the Mungiki qualify as an organization within the meaning and for the purposes of article 7(2) (a) of the Statute.

142. See Kenya Authorization Decision, *supra* note 87, ¶ 93. The considerations that the majority specified in their entirety were whether:

(i) the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfills some or all of the above mentioned criteria.

143. See Robinson, *Essence of Crimes Against Humanity Raised at ICC*, *supra* note 7.

requirement, that “[w]hile the policy element is clearly part of the ICC Statute, overemphasis on its application will result in limiting the scope and applicability of [crimes against humanity] so severely that it becomes, like genocide, a crime so difficult to prove that its overall utility becomes severely limited.”<sup>144</sup>

It follows that, if readers accept Robinson’s and Sadat’s proposals, as I do, we would confer greater interpretative flexibility to the ICC judges by lowering the threshold of what constitutes an *organization* as far down as possible, in the same way that we would lower the threshold required to find that a *policy* is in place. In this way, we make large-scale and systematic crimes that take place in a wide variety of situations deserving of international investigation and prosecution if the concerned State fails to act or is unwilling or unable to do so. I endorse this view, especially keeping in mind the remarks about the crucial role of this residual category of international crime and the importance of extending prosecutions to non-State actors for human security reasons in a *jus post bellum*-conscious world. Even Professor Bassiouni, who seemingly opposes the extension of Article 7(2)(a) to non-State actors, appears to accept, in his most recent work, that the Rome Statute could expand crimes against humanity to explicitly cover non-State actors, presumably even if they are not possessing the traditional State or State-like organizational characteristics, through “its future jurisprudence.”<sup>145</sup>

The irony of the debate at the ICC is that, even using Judge Kaul’s preferred criteria, it could be argued that the *Mungiki* constitutes an organization for the purposes of Article 7. This would ordinarily be the case, but it is particularly so in the circumstances of the low *reasonable basis to believe* evidentiary threshold applicable at the authorization to investigate stage.<sup>146</sup> In his dissenting opinion, Judge Kaul argued that organization for the purposes of Article 7(2)(a) must include a collectivity of persons, acting with a common

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144. See Sadat, *supra* note 4, at 90.

145. BASSIOUNI, *supra* note 70, at 42.

146. See Rome Statute, *supra* note 86, art. 15(3):

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

purpose, and having a responsible command or hierarchical structure that includes some kind of policy-making level. The capacity to impose the policy on its members and to sanction was also necessary, as was the organization's ability to attack a civilian population on a large scale and its existence for a prolonged time period.<sup>147</sup>

The *Mungiki* seems to be a collectivity of persons, acting with a common purpose. Considering that the evidence suggested that it was a large criminal organization with the capacity to impose taxes in a geographic area within its control, as well as the power to sanction its members, it would seem, contrary to Judge Kaul's conclusion in the Kenya Authorization decision, that some type of hierarchy can be presumed. Of course, this determination would partly depend on exactly how the *Mungiki* is able to sanction its members—evidence that will likely come out during the course of the trials in the Kenya cases. While definitive conclusions cannot be drawn until then, threats of or actual use of force, in a militia like that, would appear integral to the ability to sanction. These modes of discipline should not be discarded lightly, especially if the fear of extreme violence or perhaps even loss of life to self or family members living in a particular community is sufficient to bring members back in line.

A hierarchy signifies a body of persons ranked in a specific order.<sup>148</sup> But if the *Mungiki's* ability to sanction stems from a shared power structure in which each member has equal authority, then there is a potential argument that the organization is not appropriately characterized as existing within a hierarchy, or even under a responsible command. However, if the ability to sanction involves a more complex chain of command, as the majority opinion seems to have found, or even if it stems from one central authority figure that is in effective control of the entire group, then the evidence would more strongly support the conclusion that the *Mungiki* are properly classified as an organization, according to

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147. See Kenya Authorization Decision, *supra* note 87, ¶ 51 (dissenting opinion) (emphasizing that only non-State actors with a State-like nature can satisfy the requirement of an organization within the meaning of Article 7(2)(a)).

148. See OED Organization Definition, *supra* note 136 (defining a hierarchy as a "body of persons or things ranked in grades, orders, or classes, one above another; *spec.* in *Natural Science and Logic*, a system or series of terms of successive rank (as *classes, orders, genera, species*, etc.), used in classification").

Judge Kaul's own criteria.

Similarly, the ability to sanction need not be formal to imply a relatively complex hierarchy, which in turn would suggest that the group has been in existence for at least a period of time and most likely has the capacity to attack a civilian population on a large scale. There is certainly general information confirming the long-term existence of ethnicity-based militia in Kenya, such as the *Mungiki*, and certainly in other African countries. This most famously includes the *Interhamwe*, who played a crucial role in the 1994 genocide in Rwanda as well. Indeed, even the ability to pursue a policy seems to imply the existence of a basic form of organization, and any organized collective group action can potentially be characterized as constituting a policy, as the *Tadic* case made clear.<sup>149</sup> Both sets of criteria seem somewhat redundant, then, perhaps showing that attempting to provide greater detail in the definition of an organization can also obscure its meaning.

The point is that all these terms seem highly malleable, leaving the status of what constitutes an organization capable of committing crimes against humanity under the Rome Statute unclear. This lack of clarity, combined with the sheer number of situations that could fall within ICC jurisdiction, in effect gives the prosecutor and the judges the not-so-easy task of evaluating, on a case-by-case basis, the features that make a collectivity of persons an organizational group for the purposes of committing crimes against humanity.

It also suggests that there has to be a measure of discretion in evaluating whether particular entities are appropriately characterized as organizations or the degree to which their activities need to be organized, and the extent to which their attacks should be widespread or systematic to fall within the scope of crimes against humanity. In any such assessments, the focus of the analysis should more appropriately hone in on the wrongful conduct that has caused international social harm or alarm and whether the members of the group have the means to commit a widespread and systematic attack

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149. Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 653 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4027812b4> (holding that "[i]f the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not").

on civilians, rather than on the proper appellation to be given to the organization in the sense of how State-like or un-State-like its qualities are. In an interesting way, it reminds one of the feckless distinction (from a human-life-protection point of view) between international and non-international armed conflict in international humanitarian law, where the evolution of the two separate regimes justified, in the former not the latter, the prosecution of those who committed grave breaches. It took international judicial intervention, in the ICTY, to render that distinction nugatory.

Similarly, we should not be wedded to the concept of which type of State or non-State organization is committing massive crimes against innocent civilians; rather, we should try to broaden the justice net and bring such entities to international prosecutions to send the symbolic message that their depredations are totally unacceptable not just to one society, but to all of human society.

## V. CONCLUSION

Considering the ambiguity surrounding the definition of crimes against humanity in customary international law leading up to the Rome Conference, and the incorporation of a version of the offense retaining a State or organizational policy requirement as codified in Article 7, the most effective reformulation of the concept would be through an amendment to the Rome Statute.

There are several advantages to this solution, only a few of which can be highlighted here. First, it allows for a more principled approach to the development of international criminal law. The difficulty judges have had in the ICTR, ICTY, and ICC with reconciling inconsistent and unsupported assessments of the requirements of crimes against humanity under customary international law and their particular instruments demonstrate the necessity of a clearer international stance on the issue. While there will always be some degree of ambiguity in the language used, and therefore the felt need for a certain level of judicial discretion in defining the exact contours of crimes against humanity (and other international crimes for that matter), the recent decisions of the ICC in response to the post-election violence in Kenya reveals deep confusion in the Rome Statute definition. This uncertainty, which was a product of the lack of normative consensus on what exactly is

the essential rationale and outer boundary of the offense, has led to inconsistent analysis among judges, scholars, and practitioners.

Most recently, this inconsistency has resulted in the creation of fuzzy criteria for evaluating the requirements of an organization within the meaning of Article 7 of the Rome Statute by both the majority and dissenting opinions in the Kenya Authorization and summonses decisions. Even though they reach opposite conclusions regarding the exact character of an organization, both the majority and the dissent have offered indefinite criteria that seem open to wide interpretation. A close examination of both sets of criteria leads to a linguistic quagmire that does little to help resolve the underlying question of what exactly ought to be the primary justification for crimes against humanity.

In some respects, stepping back to frame a bigger picture, the confusion and ambiguity may be viewed as the natural evolutionary process of customary international law, in which the judiciary's role is to expand or restrict the definition or role of crimes against humanity according to shifting objectives of the Court and its States Parties. However, the persistence of the controversy over the State or organizational policy requirement since Nuremberg, and the lack of conclusion that influential and seemingly definitive assessments like the *Kunarac* judgment provided, demonstrate that any judicial stance on the issue will be open to further attack. To avoid potentially unproductive and endless judicial and academic debates on the issue, the Rome Statute needs to be amended. This will be particularly helpful in the early years of the ICC by providing a solid position on the proper role and function of the permanent tribunal in what seems to be the beginning stage of the era of international criminal justice.

Second, change through an amendment to the Rome Statute provides for a more coherent and more consistent development of the law. In so doing, the advantages and potential repercussions of a policy shift can be thoroughly examined by parties both for and against the State or organizational policy requirement. Although this examination of the implications of the alleged expansion of the ICC's jurisdiction has been occurring among the dissenting voices in the judiciary and academia, an amendment to the Rome Statute allows for a more democratic, more participatory, more deliberative, and ultimately more principled legal process involving the States



Parties that have the ultimate responsibility to give effect to them through national prosecutions.

Third, it will also recognize the kind of separation of powers implicit in national and international law between judges, as interpreters of the law, and States, as legislators of the body of law that they apply. A settled agreement on the meaning of the State or organizational policy requirement will be especially helpful in situations such as that which occurred following the post-election violence in Kenya, where the evidence appears to, at least initially, fail to clearly demonstrate either the existence or absence of a State policy to commit crimes against humanity. That decision demonstrated that establishing an evidentiary link between State actors and a policy on the part of the State will often be difficult, problematic, and in some permutations that might arise in the future, perhaps even impossible. The police force, for example, was implicated in the Kenyan post-election violence. However, whether the police were acting at the instigation or under the direction of the State or its organs, or whether they were acting independently as hired guns for politicians acting for private purposes, or even worse in cahoots with militia organizations for ethnic reasons, seems to be unsettled.

An amendment to the Rome Statute would help provide guidance in future situations such as Kenya's by requiring an international consensus on whether a policy should be required for a finding that crimes against humanity had occurred and, if so and more importantly, what type of policy should be required and from whom. Additionally, the controversy occasioned by the willingness of the majority in the Kenya Authorization decision to interpret broadly the threshold of crimes against humanity to possibly encompass purely private and loosely constituted and amorphous groups underscores the need for a clear statutory definition of an "organization" and "organizational policy."<sup>150</sup> In other words, to enhance clarity, it may be necessary to assign specific meanings to those terms to address the predicate question of the nature, type, and characteristics of the entity that will be deemed capable of adopting and implementing a policy that could then be said to have crossed the borderline into the prohibited criminal conduct against all of humanity.

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150. Jalloh, *supra* note 16.

Of course, from the emerging *jus post bellum* perspective, which takes the imposition of punishment and retribution for leaders who oversee violence during conflict as a desirable goal to advance human rights and a just and sustainable peace, an interpretation of the Rome Statute that widens the scope of crimes against humanity to consciously include non-State actors is the most appropriate course for the ICC to take in the future. There is support for that in the *ad hoc* tribunal jurisprudence, which, with the best of intentions, effectively sought but unfortunately failed to do away with the State policy requirement before the permanent court was created.

Still, it is submitted that a change in the policy of the ICC on this scale would be contentious if undertaken by judges alone, as opposed to by legislators (i.e., States Parties), considering the principles of free consent and the multilateral treaty basis of the Rome Statute and international law more generally. As the concept is sufficiently broad to potentially apply to a nearly unlimited quantity of crimes, an international normative and legislative consensus on both the purpose of crimes against humanity in the Court's jurisprudence, and the most appropriate method of accomplishing its prohibitions, would arguably provide a more legally and more politically acceptable solution to the controversy. Yet it can already be deduced from the definitions of crimes against humanity that date back to Nuremberg that the international community condemns widespread or systematic human rights violations against unarmed civilians. The prospects for the extension of the concept therefore seem to be in favor of those wanting for the regime to explicitly cover non-State actors instead of those who oppose such a change.

While there are strong arguments both for and against an expansion in the ICC's jurisdiction over other modern gross violators of human rights, such as terrorist groups, the issue is unlikely to be effectively addressed by the judiciary. This is because the lack of consensus on the meaning of terrorism would likely make any judicial approach to bringing single massive terroristic events into the crimes against humanity fold highly controversial. But, in a security-conscious world, we may appropriately engage the policy debate whether crimes against humanity should be extended to apply to groups or other actors whose *modus operandi* may today place them at the borderline or the periphery of the offense without crossing the threshold into its prohibitions because of a strict

interpretation of the State or organizational policy requirement.

Thus, for instance, we may discuss the propriety of broadening the boundary of crimes against humanity to include single but devastating incidents such as the August 1998 Nairobi bombings in Kenya; the New York City bombings of September 11, 2001, in the United States; the March 2004 Madrid bombings in Spain; the July 2005 London bombings in England; the July 2011 Mumbai bombings in India. We might consider whether to qualify some or more of these acts as crimes against all of humanity rather than crimes of particular interest only to the directly affected countries. The amendment process would provide the right forum for this debate because it creates the space for potentially achieving a general international agreement for definitive inclusion or exclusion of such one-off but massive criminal events and whether to make them a shared responsibility for the ICC and its States Parties to prosecute should they occur elsewhere in the future.

Fourth, a coherent and balanced approach to a new definition of crimes against humanity will allow for a reasoned policy shift on the part of the ICC. The fluidity of crimes against humanity under customary international law shows that its definition in the Rome Statute is more appropriately viewed as a policy choice on the part of the ICC negotiators, rather than a codification of an accepted understanding of the crime under international law. The fact that the formulation of crimes against humanity is fundamentally a policy decision demonstrates that it is more appropriate to acknowledge its political implications in the amendment process, rather than to attempt to shift its intended meaning through judicially led change with all its attendant push back risks for the fledgling tribunal. By simultaneously acknowledging that the law regarding crimes against humanity is necessarily in a state of change, rather than being settled, while requiring an international consensus to legitimize that change, the Court will stay rooted in the treaty framework in which it was originally envisioned. In that way, it will be more effective in its loftily stated mandate in the preamble of its statute about helping put an end to the culture of impunity.

In fact, the very high threshold of consensus, or two-thirds vote, required to pass an amendment in Article 121 of the ICC statute ensures that a degree of widespread agreement is reached such that it

may be legitimately claimed afterwards that the position collectively taken by the States Parties indicates a customary international law definition of crimes against humanity. This will, in turn, pay dividends because it would decrease the likelihood that, in implementing obligations of the Rome Statute, national jurisdictions would choose to go one way or the other on the State or organizational policy issue.

Finally, moving well beyond the restrictive debates about definitions of crimes against humanity in the ICC in particular, which have been the limited focus of this article, perhaps the answer to the problem of how to re-characterize crimes against humanity may even lie elsewhere in legal philosophy. For example, Professor May has offered what he called the *security* and *international harm* principles as the essential justifications for crimes against humanity.<sup>151</sup> In his view, under the security principle, a State's involvement in perpetrating crimes against its own citizens acts as a basis for other concerned States to step in to protect the victims or offer them remedies for their harms.<sup>152</sup> This argument resonates with some of the errant State rationales modern governments have given for the establishment of international tribunals. It is also consistent with the direction that the international community is headed with the widespread endorsement of the Responsibility to Protect doctrine. Under the international harm principle that May offers, abuses directed against a group are the types of harms that serve to demarcate the cases deserving of international prosecutions versus those requiring domestic action.<sup>153</sup>

Although May's first principle returns the spotlight to State action, the practical application of which was never in issue even under the current definition in Article 7 of the Rome Statute, the second does not necessarily do so. Rather, it focuses on the protection of groups, which going by the existence of the Genocide Convention, have been of interest since at least 1948 as requiring the collective protection of the international community as a whole. It therefore offers what

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151. MAY, *supra* note 16, at 12, 21 (detailing the two main reasons people may oppose trials by international tribunals: they violate the rights of States and they fail to be tolerant of diverse State practices).

152. *Id.* at 21 (stating that the security principle is essentially a limit on State sovereignty).

153. *Id.* at 12, 21.

might be termed a new way of thinking about a principled justification for a specific international crime. Indeed, it appears self-evident that a retooling of the crimes against humanity standard in the Rome Statute would, under May's international harm principle, place the focus not so much on the character of the entity developing the policy and implementing it (whether State, State-like, organization, or organization-like), the problem we encounter under the current scheme, but rather the character of the wrongful conduct or harm visited on the victims that would trigger collective action not just by one State but by the community of States through investigation, prosecution, and punishment through the ICC and universal jurisdiction.

Keeping in mind such a theory, while not by itself sufficient to resolve the specific question considered in this article, does help to advance the conversation for States on what purpose an international offense like crimes against humanity should serve for them and the rest of humanity as human rights moves more and more to the center stage in shaping global responses to international insecurity.