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Crime Against Humanity

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1. Introduction

Crimes against humanity are an uncertain and elusive category of global crimes. Even though the scope and meaning of this international crime has been significantly defined in the legal theory of the *International Criminal Tribunal for former Yugoslavia (ICTY),* there are still fundamental questions that remain.[1] A key issue that has been continuously debated in judicial practice as well as academia is related to the requirement of incorporating a policy in the umbrella of crimes against humanity, along with the scope and desired form of such requirement[2]. Such debate indicates a specific disagreement among scholars regarding characterisation of policy requirement in the concept of crimes against humanity.

These opposing perceptions regarding the attributes of policy requirement in the concept of crimes against humanity are also reflected in the *International Criminal Court (ICC)* and the ICTY jurisprudence.[3] It has been held by the ICTY that the presence of a policy that underlies the committed crimes cannot be regarded as an autonomous characteristic of crimes against humanity, and it may be significant evidentially in the evaluation of the systematic characteristic of crimes against humanity.[4] In the Rome Statute of the ICC, an organisation or state policy has been explicitly incorporated as an autonomous component of crime under the Article 7(2).

The aim of this essay is to discuss the limit to which there is a policy requirement pertaining to crimes against humanity.

2. ICTY Statute on Crimes against Humanity

In the ICTY Statute, under Article 5, a policy requirement is not explicitly incorporated by criminalisation of crimes against humanity.[5] However, in the judgment of the Tadic´ Trial Chamber, the ICTY regarded that the wish of excluding random and isolated acts of individuals from the concept of crimes against humanity results in restricting the concept to crimes that have been committed under a systematic or widespread attack directed against humanity, implying that there has to be a certain type of organisational or governmental policy for restricting these acts.[6]

The subsequent jurisprudence critically observed and increasingly questioned the recognition of the policy in the form of a crucially implicit requirement of the concept of crimes against humanity. Further ahead, the policy requirement was explicitly rejected in the judgment of the Kunarac Appeals Chamber. Later judgments continuously affirmed the characterisation of the policy that underlies the committed crimes as a mere relevant factor or evidentiary relevant substance.[7]

In the Rome Statute, Article 7(2)(a) has stipulated the preconditioning of crimes against humanity on the presence of an attack on humanity in furtherance or pursuant to an organisational or state policy for committing such attack. As indicated by Peter Burns, an extremely cryptic element is introduced to crimes against humanity through the reference of organisational or state policy.[8] Due to clear disagreements in the current literature and inconsistent case law, there are crucial questions that arise in context with the extent to which there is requirement of policy for dealing with crimes against humanity.

While elaborating the attribute of policy factor, it was held by the ICTY that the policy related to crimes should consider commissioning multiplicity of criminal activities against human population.[9] This does not indicate that the policy has to be declared or adopted formally either in a precise or express manner. The entirety of the factual circumstances may infer the policy. In this respect, the Blaškić Trial Chamber considered that there may be deduction of a plan from inter alia:[10]

- The overall political background and the general historical circumstances
- Establishing and implementing autonomous political structures
- General content of the political programme
- Media propaganda
- Establishing and implementing autonomous military structures
- Mobilising armed forces
- Executing geographically and temporally co-ordinated and repeated military offensives
- Existing links between the political structure and the military hierarchy and its programme

[1]Haan, Verena. "The development of the concept of joint criminal enterprise at the international criminal tribunal for the former Yugoslavia", pp. 168.
[2] Kress, Claus. "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC," pp. 855.
[3]Haan, Verena. *International Criminal Law Review* 5, no. 2 (2005): 167.
[4]Akhavan, Payam. "Reconciling crimes against humanity with the laws of war: human rights, armed conflict, and the limits of progressive jurisprudence", pp. 21.
[5] Kress, Claus. *LJIL* 23 (2010): 855.
[6] Swart, Mia. "Tadic revisited: Some critical comments on the legacy and the legitimacy of the ICTY," pp. 985.
[7]Sassòli, Marco, and Laura M. Olson. "The judgment of the ICTY Appeals Chamber on the merits in the Tadic case," pp. 733.
[8]Saif-Alden Wattad, Mohammed. "The Rome Statute & (and) Captain Planet: What Lies between Crime against Humanity and the Natural Environment," pp. 265.
[9] Jalloh, Charles Chernor. "What makes a crime against humanity a crime against humanity," pp. 381.
[10]Obokata, Tom. "Trafficking of human beings as a crime against humanity: Some implications for the international legal system," pp. 445.

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- Occurring alterations in the ethnic composition of civilian population
- Imposing discriminatory measures
- Scale of the perpetrated violence

In addition, it was consistently held by the ICTY that it is not necessary for the established policy to be of de jure or de facto state. Even without being part of the legitimate government, forces which have de jure control or the ability of moving freely in the defined territory may be equally capable as states to implement a policy that results in commissioning crimes against humanity.[11] Hence, they can be equally held criminally responsible for such crime. Whether the implementation of the policy is done by a de factor power or a de jure state, it does not have to be conceived at the highest level of hierarchy. The development of the policy may be any level of the organisation or state exercising de jure control over the territory.

3. Systematic Attack-Requirement for Crimes against Humanity

As the policy is not considered by the ICTY as an autonomous component of crimes against humanity, the policy is not evaluated individually. Rather, there has been analysis and evaluation of the policy factor with respect to the systematic attack-requirement.[12] For assessing the systematic character of attack, the factual circumstances used by the ICTY either implicitly or explicitly, differ. They can be categorised into three different sections:[13]

- Circumstances that concern preparation of attack
- Circumstances that concern characteristics of attack
- Contextual circumstances

In context with the first section, it is referred to inter alia:[14]

- Preparatory meetings between citizens and officials for discussing the possibility of an attack
- Pre-emptive warnings regarding an imminent attack given to citizens by the officials of their ethnic group for providing them with the opportunity of leaving the area prior to the attack
- Training military personnel
- Enhanced control or presence of military troops
- Unusual movement of troops
- Distribution and purchase of arms
- Deployment of barricades and roadblocks that lead to villages
- Imposition of discriminatory measures and curfew

In context with the second section, the factual circumstances are associated with the characteristics of the attack. Firstly, these characteristics associate with the methods and means of attack. In this context, attention can be laid on the organised character and complexity of the attack; coordination between and amongst the various troops engaged in the attack; and the amount and type of armaments used.[15] Secondly, the consequences of the attack have been referred to. In a more specific sense, evidence that indicate the discriminatory and devastating consequences of the attack can be regarded as relevant to establish the organised, and the systematic attack character. Thirdly, the factual circumstances differ from the earlier circumstances mentioned in the aspect that they are not limited to a single specific attack.[16] Rather, the overall context of violence has been described by them. The political background that led to the attack is entailed in this context.

In this context, reference can be made to:[17]

- the issue of a declaration of independence by a party to the conflict
- the concentration of military and political power in particular institutions, and their enhanced control on daily life
- the issue and expiration of ultimatum forcing specific ethnic groups in disarming or/and being subject to the power of other
- the reflection of nationalistic calls or statements for violence by political leaders during meetings or in media
- the incorporation of discriminatory measures that possible result in changes in ethnic composition of the region

In the third section, the contextual element refers to the relations between the different attacks or/and crimes committed. The contextual element does not describe much about the character of the context that led to the attack, but instead helps in determining the scope of the context.[18] Based on the relation between the attacks or/and individual crimes, a pattern of crimes may be established that comprise similar criminal conduct for defining the wider context of violence where the individual crimes were executed. The relationships between the attacks or/and crimes may be assesses in context with their geographical and temporal scope; the method and means of attack; the troops engaging in the attack; the type of committed crimes; and the overall consequences.[19]

4. Policy Requirement as per the ICC

On the contrary to the ICTY Statute, a policy element is explicitly incorporated in the Article 7 of the Rome Statute of ICC in the crimes against humanity chapeau. The article is as follows:[20]

(1) For this Statute, crime against humanity indicates the acts committed as a constituent of systematic or widespread attack against any population group with information about the attack.

(2) Attack against any population indicates a course of conduct that involves the multiple committed acts against any

[11] Bultz, Ariel. "Redefining apartheid in international criminal law," pp. 205.
[12] Swart, Mia. *Goettingen J. Int'l L.* 3 (2011): 985.
[13] Haan, Verena. *International Criminal Law Review* 5, no. 2 (2005): 200.
[14] Haan, Verena. *International Criminal Law Review* 5, no. 2 (2005): 199.
[15] Cupido, Marjolein. "The policy underlying crimes against humanity: practical reflections on a theoretical debate," pp. 275.
[16] Bultz, Ariel. In *Criminal Law Forum*, vol. 24, no. 2, pp. 230.
[17] Bultz, Ariel. In *Criminal Law Forum*, vol. 24, no. 2, pp. 229.
[18] Agbor, Avitus A. "18 A Reflection on the Phrase "Widespread or Systematic" As Part of the Definition of Crimes Against Humanity," pp. 360.
[19] Agbor, Avitus A. In *Shielding Humanity*, pp. 361.
[20] Schabas, William A. *The international criminal court: a commentary on the Rome Statute*. Oxford University Press, 2017.

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population, in furtherance of or pursuant to organisational or state policy for committing such attack.

In the draft negotiations, it was agreed upon by the delegates that crimes against humanity have to be limited to crimes committed in wider context of organised violence. However, there were disagreements between them regarding the manner of accomplishing the objective.[21] Arguments were placed by certain delegations that the systematic attack-test or disjunctive widespread may result in including a spontaneous set of unrelated crimes in the concept of crimes against humanity. As this is in contrast to the objective of excluding criminal conduct committed randomly from the scope of the concept of crimes against humanity, it was considered necessary by the delegates to develop a cumulative relation among the qualifiers of the attack.[22] However, another group of delegates presented arguments that the systematic or widespread attack, and the requirements of civilian population sufficiently assures excluding isolated and random acts from the concept of crimes against humanity.

In the Rome conference, the appropriate meaning and definition of the policy element was mostly undecided. While it was argued by certain scholars that a policy is something that is similar to systematicity, others indicated the flexibility of the policy element and argued that it does not need the high extent of orchestration and organisation characteristic of the systematic-attack requirement.[23] Further clarity is provided by the emerging legal theory of the ICC regarding the character of the policy element. In its decision regarding confirmation of charges against Katanga and Ngudjolo Chui, it was held by the Pre-Trial Chamber I that the policy element:[24]

> *Makes sure that the attack, even if directed against numerous victims or carried out in a massive geographical area, has to be organised in a thorough manner and follows a regular pattern. It is also to be conducted in addition to a common policy that involves private and public resources. This criterion will be satisfied by an attack that has been organised, directed or planned, and in contrary to isolated or spontaneous acts of violence.*

The assessment of policy element is perceived as introduction of a specifically high threshold.[25] It was also debated that the policy element was interpreted by the Pre-Trial Chamber I in this manner as having synonymy with the systematic attack requirement, and hence effectively replaces the alternative systematic or widespread attack requirement with a cumulative systematic and widespread attack requirement. The interpretation of the Pre-Trial Chamber of the term systematic confirms the synonymous meaning of the systematic attack requirement and the policy element.[26]

> *The term systematic can be perceived as an organised plan furthering from a common policy that adopts a regular pattern and leads to continuous execution of patterns of crimes or acts in a manner that the crimes comprise of a non-accidental repetition of identical criminal conduct in regular basis.*

In the Rome Statute, Article 7(2) recognises state as well as organisations explicitly as potential entities following a policy in furtherance of, or pursuant to, which there was commission of crimes against humanity. The scope and meaning of the terminology organisation can be regarded as controversial and it has been debated in an extensive manner. It was held by Pre-Trial Chamber II that:[27]

> *The formal attributes and organizational level of a group must not be treated as a definitive criterion. Rather, it is necessary to distinguish between the facts if a group has the ability of performing acts that can result in infringement of human values.*

Majority members in the Pre-Trial Chamber hence, considered the inclusion of private organisations as the ones capable enough to set up and carry out a policy for an attack that can be conceptualized as crime against humanity.[28] However, this perception of organisation remains to be highly controversial. It is anticipated that the judgements of ICC in the future will be able to offer certain clarity in this aspect.

5. State or Organisational Policy for Genocide Crimes

In context with genocide, it can be stated that nothing in the definition of genocide is able to explicitly identify the presence of a policy or state plan as a component of the genocide crime.[29] Even though genocide was initially defined in the 1948 Genocide Convention under Article II, an important identical provision is indicated in modern instruments like the Rome Statute, the ICTR Statute, and the ICTY Statute. In 1948 while the Genocide Convention was drafted, proposals for including an explicit requirement of planning genocide by any government authorities were rejected.[30] While theoretical exceptions cannot be excluded, it is not possible to consider genocide that is not organised and planned, either by a State-like organisation or the State, or by some associated clique. In the *Prosecutor v.Kayishema* case, it was indicated by the ICTR Trial Chamber that even though a particular plan to destroy is not comprised of a component of genocide, it may seem that carrying out genocide can be difficult without an organisation or

[21] Mimiko, Moruf O.et al., "Unresolved Jurisprudence of Crime against Humanity under Article 7 of the Rome Statute of the International Criminal Court," pp. 420.
[22] Scheffer, David. "Corporate liability under the Rome Statute," pp. 36.
[23] Chadimová, Michala. "Legal Responsibility of the Military Commander to Prevent or Punish the Acts of Human Trafficking Under the Rome Statute," pp. 198.
[24] McIntyre, Gabrielle Louise. "The Pace of Progress: Addressing Crimes of Sexual and Gender-Based Violence in the Generation After Rome," pp. 179.
[25] Bartels, Rogier. "Balancing Prejudice: Fair Trial Rights and International Procedural Decisions Relating to Evidence," pp. 2039.
[26] Valiani, Saher. "Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir," pp. 150.
[27] Timmermann, Wibke K. "Inciting Speech in the former YugoslaviaTheŠešelj Trial Chamber Judgment," pp. 136.
[28] Timmermann, Wibke K. *Journal of International Criminal Justice* 15, no. 1 (2017): 151.
[29] Olásolo, Héctor. "Is International Criminal Law an Appropriate Mechanism to Deal with Transnational Criminal Organizations?" pp. 92.
[30] Potot-Warren, Jade. "Identifying Genocide: The Yazidi Massacre in the Context of the Convention on the Prevention and Punishment of Genocide 1948," pp. 33.

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plan.[31] Furthermore, it was indicated by the Chamber that the presence of such plan can act as strong evidence of the particular intent requirement for the genocide crime.

However, the exclusion of non-State actors is a crucial objection to this interpretation of genocide and crimes against humanity. This issue can be addressed adequately through wider construction of the State policy concept in order to be applicable to State-like actors and States, formally.[32] Organisations like the FARC, the Republika Srpska, the Palestinian authority, and possibly the Taiwan government will be addressed in this way, but not bodies like the mafia or the Hell's Angels.

Outside the aspect of customary international law, there will be occurrence of this issue in the interpretation of the Rome Statute under Article 7(2)(a) as it refers organisational or state policy as a contextual necessity of crimes against humanity. According to the definitions of dictionary, an organisation comprises of any organised group of individuals, such as a businesses, trade union, society or club.[33] Evidently, it was not intended by the drafters of the Rome Statute for Article 7 to have a broader scope, considering all earlier case laws related to crimes against humanity and all national prosecution evidences for crimes against humanity concerned atrocities supported by State. If it was really meant by them to include any form of organisation, like a theoretical organisation comprising two individuals, it was not at all needed to use these words.[34] The most significant issue for the proponents of the wider view is their inability of explaining how to qualify the term organisation.

6. Conclusion

While elaborating the attribute of policy factor, it was held by the ICTY that the policy related to crimes should consider commissioning multiplicity of criminal activities against human population. This does not indicate that the policy has to be declared or adopted formally either in a precise or express manner.[35] While it was argued by certain scholars that a policy is something that is similar to systematicity, others indicated the flexibility of the policy element and argued that it does not need the high extent of orchestration and organisation characteristic of the systematic-attack requirement.

The assessment of policy element is perceived as introduction of a specifically high threshold. It was also debated that the policy element was interpreted by the Pre-Trial Chamber I in this manner as having synonymy with the systematic attack requirement, and hence effectively replaces the alternative systematic or widespread attack requirement with a cumulative systematic and widespread attack requirement.[36] Therefore, it can be finally concluded that there is a crucial policy requirement for addressing crime against humanity. However, a number of areas have to be covered and modified for effective implementation as there are several opposing opinions in this context.

[31] The Prosecutor v. Clement Kayishema and Obed Ruzindana (2001)
[32]Agbor, Avitus A. In *Shielding Humanity*, pp. 359.
[33]Chadimová, Michala. In *Human Trafficking in Conflict*, pp. 211.
[34] Mimiko, Moruf O. et al., *Beijing L. Rev.* 7 (2016): 420.
[35] Schabas, William A. *The international criminal court: a commentary on the Rome Statute*. Oxford University Press, 2017.
[36]Timmermann, Wibke K. *Journal of International Criminal Justice* 15, no. 1 (2017): 146.

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