

The Draft Convention on Crimes Against Humanity: What to do with the Definition?

Darryl Robinson

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1. Executive Summary

A centrally important and influential feature of the Draft Convention on Crimes Against Humanity will, obviously, be its definition of the crime. For reasons that will be canvassed below, it is most likely that the Draft Convention will use the definition from Article 7 of the Rome Statute. There are however significant legitimate concerns about aspects of Article 7, most particularly the “policy element”. Accordingly, it is highly desirable that the commentary to the Draft Convention mitigate the concerns by explaining some key terms in accordance with pertinent authorities.

This chapter proposes some such clarifying commentary. The proposed commentary draws on national jurisprudence and other authorities, as well as the logical structure of Article 7, showing that the policy element is an *in limine* filter screening out situations of unconnected ordinary crimes. It draws attention to neglected but helpful national judicial contributions, which not only help harmonize the seemingly-fractured international sources, but do so in a way that promotes a workable definition.

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2. Introduction

The Draft Convention is a welcome initiative for many reasons. War crimes and genocide are the subject of treaty obligations, whereas the third core crime – crimes against humanity – lacks the same clarity of enforcement obligations. This is particularly regrettable given that crimes against humanity are of the greatest contemporary relevance (as they do not require armed conflict or special genocidal intent). A convention would remove ambiguities about the obligation to prosecute and about jurisdictional rules. It would “tighten the net” by creating and strengthening a network of cooperation and prevention. Given that governmental authorities have accepted strong obligations in relation to financial crimes, it would be ironic and unacceptable that we do not establish similar obligations in relation to, for example, the extermination of hundreds of human beings. A convention would complement the Rome Statute system by emphasizing the “horizontal” obligations of states to respond to crimes against humanity and to assist each other in doing so. And most elusively but perhaps most importantly, it could help instill a sense of responsibility to prevent, in the same vein as UN member states recognize in connection with crimes of genocide.

The definition of crimes against humanity has been a matter of great uncertainty and fluctuation, largely because there has not yet been a general convention on crimes against humanity. Since the 1990s, there has been a convergence around the notion of a “widespread or systematic attack directed against any civilian population”. But instruments still differ in subtle ways. For example, the ICTY Statute, adopted in 1993, requires the presence of armed conflict. The ICTR Statute, adopted in 1994, drops the requirement of armed conflict but requires discriminatory motive. The ICC Statute, adopted in 1998, drops both the requirement of armed conflict and of discriminatory motive, but it requires a “state or organizational policy”.

The most plausible options for the Draft Convention are either to adhere to the Rome Statute definition or to advance a new definition. Both options have advantages and disadvantages. The advantage of a new definition is that it would allow international lawyers to remove or rewrite the aspects of Article 7 that they regard as the most

problematic. The most frequently-mentioned candidate for rewriting is the “policy element”, which is seen by many scholars and jurists as an unnecessary impediment to prosecution. Some lawyers would also seek to make other changes, such as removing the term “civilian”, in order to include crimes against combatants, or remove the requirement of awareness of the surrounding context.

At this time, the arguments for crafting a new definition are widely seen to be outweighed by the benefits of using the established definition in Article 7. First, to re-open and re-negotiate the definition would take an indeterminate amount of time and would have unforeseeable results. Indeed, a definition negotiated in the current international climate may be more restrictive, rather than more progressive, which is contrary to the aim of most of those who might prefer a new definition. Second, the Rome Statute definition was developed by states with broad participation, and thus is familiar to them and more likely to be accepted by them. Third, many states have already incorporated the Rome Statute definition into national laws; adhering to that definition thus simplifies implementation of the new convention. Fourth, to introduce another definition would increase the problems of fragmentation. It is desirable to avoid the complication of having one definition for some obligations and another definition for other obligations. Fifth, Article 7 is already regarded in some authorities as having the status of customary international law.¹ Accordingly, it seems highly likely that the Draft Convention will simply use the Article 7 definition.

Adopting the Article 7 definition does not mean however that the legitimate and widely shared concerns about the policy element should be neglected. On the contrary, the concerns about the definition should be addressed in accompanying commentary. This approach reaps the benefits of using the established definition while also seizing the opportunity to mitigate the main concerns. There are at least four advantages to this

¹ See examples cited in Leila Sadat, “Crimes Against Humanity in the Modern Age”, in *American Journal of International Law*, 2013, vol. 107, no. 2, p. 334 at 373. For other examples, see England and Wales Court of Appeal (Civil Division), *SK (Zimbabwe) v. Secretary of State for the Home Department*, [2012] EWCA Civ 807, [2012] 2 Cr App R 28, Judgment, 19 June 2012; European Court of Human Rights (Grand Chamber), *Case of Streletz, Kessler and Krenz v. Germany*, Judgment, 22 March 2001, Application nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II, p. 409, concurring opinion of Judge Loucaides at p. 453; International Criminal Court (Trial Chamber II), *Prosecutor v. Germain Katanga*, Jugement rendu en application de l’article 74 du Statut, 7 March 2014, ICC-01/04-01/07-3436, para 1100 (“*Katanga Judgment*”).

approach. First, commentary can facilitate acceptance by those who are concerned about the dangers of mis-interpretation or over-extension of the policy element. Second, the commentary can facilitate prosecution and make the convention more effective, by demonstrating how the policy element has been understood and applied. Third, by drawing on national and international authorities, many of which are not well known, the commentary can help show that there is considerable harmony in the different authorities, and thus reduce the current fragmentation in the law. Fourth, as ILC commentary is often used to aid in interpretation and as a guide to customary law, it will be of assistance not only in relation to the convention but also for national and international courts applying crimes against humanity law for any reason.

This chapter will focus only on contextual elements, and in particular, the policy element. There are other aspects of the definition that could arguably benefit from clarification. For example, in my view, it would be desirable to clarify that the term “civilian” includes all persons no longer taking part in hostilities.² Others might want to clarify the term “organization”.³ However, it could well be argued that these matters are best left to jurisprudence. Commentary should be parsimonious. Accordingly, the proposed commentary will focus on the policy element, because (1) it is the element which has raised the most concerns, (2) it is the most frequently mis-understood, and (3) it is the subject of quite consistent yet little-noticed jurisprudence. Thus, it is the issue for which it is most beneficial to highlight and draw attention to the authorities.

² The ICTY has interpreted “civilian” as having the same meaning as in Article 50 of Additional Protocol I, and thus as excluding prisoners of war and persons *hors de combat*. There are reasons to doubt this transplant from the detailed international humanitarian legal regime of the Geneva Conventions. The ICTY approach means, for example, that large-scale torture of prisoners of war would not constitute a crime against humanity. This departs from important international case law. Arguably, “civilian” should be given its previous and broader meaning of any person no longer participating in hostilities, since the purpose of the term is to exclude lawful attacks on military objectives. The ICTY relied on the principle of distinction, but the principle of distinction would also prohibit the massacre of prisoners of war. For discussion see Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014, pp. 240-242.

Arguably it would also be desirable to recall the proposition that in peacetime, all persons are “civilians”.

³ There is currently a debate about the meaning of “organization”, and whether the organization must be “state-like” or whether it more broadly encompasses non-state organizations with capacity to inflict harm. ICC jurisprudence is converging on the latter view. Both views have merit, although I also incline to the latter view. It is possible that better and more refined tests for “organization” are yet to be discovered, and thus I would not seek to entrench any test at this point.

This chapter will: touch lightly on the issue of the customary law status of the policy element (primarily to explain that the proposed commentary are apt regardless of one's view on that question) (Part 3); examine the problem with the policy element and the desirability of commentary (Part 4), and then explain the proposed comments along with their supporting authorities (Part 5). The proposed comments are that:

- The term “policy” is not equivalent to the term “systematic”. “Policy” does not necessarily require deliberate planning, direction or orchestration; it requires only that some state or organization must have at least encouraged the attack, either actively or passively.
- The purpose of the policy element is to screen out “ordinary crime”, ie. acts of individuals on their own unconnected criminal initiatives.
- A policy need not be expressly stated or formalized, and need not involve the highest levels of a state or organization. A policy may be implicit. The existence of a policy can be inferred from the manner in which the acts occur. In particular, it can be inferred from the implausibility of coincidental occurrence.
- While a policy will typically be manifested by the actions of a state or organization, it may also be manifested by a deliberate failure to act which is consciously aimed at encouraging an attack.

3. Differing Plausible Views on Customary Status

The customary law status of the policy element is hotly debated, and credible arguments are available on all sides. Scholarly opinion as to the customary status of the element has gone through cycles. Prior to the 1990s, the comparatively few scholars interested in crimes against humanity seemed to regard policy as a requirement.⁴ In the 1990s, as the element was recognized in the *Tadic* decision and the Rome Statute, popular scholarly opinion moved quite decisively against the element.⁵ More recently, there has been a resurgence, with scholars such as Luban, Schabas, Kress, Ambos and Wirth arguing

⁴ Joseph Keenan and Brendan Brown, *Crimes Against International Law*, Public Affairs Press, Washington, 1950; M. Cherif Bassiouni, *Crimes Against Humanity in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1992.

⁵ Margaret McAuliffe deGuzman, “The Road From Rome: The Developing Law of Crimes Against Humanity”, in *Human Rights Quarterly*, 2000, vol. 22, no. 2, p. 335; Phyllis Hwang, “Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court”, in *Fordham International Law Journal*, 1998, vol. 22, no. 2, p. 457; Guénaél Mettraux, “Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, in *Harvard International Law Journal*, 2002, vol. 43, no. 1, p. 237.

that the element has support in precedents and is conceptually important.⁶ At this time, it is difficult to ascertain which is the minority and majority view.

For the purposes of this chapter, it is not necessary to resolve the customary law question. This chapter starts from the premise that the Rome Statute definition will likely be used in the Draft Convention, and asks what commentary should be included to ameliorate concerns about the policy element.

Nonetheless, I must at least lightly touch on the question, because some readers may feel that the policy element is so clearly against customary law that the decision to use Article 7 will seem incomprehensible. In particular, I must briefly address the ICTY *Kunarac* case, because many scholars and jurists regard that case as determinative of the customary law question. In *Kunarac*, the ICTY Appeals Chamber declared rather categorically that there is “nothing” in customary law that required a policy element and an “overwhelming” case against it.⁷ An assertion by the ICTY Appeals Chamber is always entitled to great weight as an indicator of custom. I would however advocate some caution in this instance. As many scholars have noted, that assertion appeared only in a thinly-reasoned footnote; the authorities it cited are actually either silent on or indeed contrary to the Chamber’s assertion; and many authorities in favour of the policy element are simply ignored.⁸ Furthermore, there is more to customary law than just ICTY/ICTR jurisprudence. For example, the Rome Statute, reflecting a simultaneous statement of a great many states

⁶ See e.g. Claus Kress, “On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision”, in *Leiden Journal of International Law*, 2010, vol. 23, no. 4 p. 855; William Schabas, “State Policy as an Element of International Crimes”, in *Journal of Criminal Law and Criminology*, 2008, vol. 98, no. 3, p. 953; M. Cherif Bassiouni, “Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining—The Need for a Specialized Convention” in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge University Press, 2011, p. 43; Kai Ambos and Steffen Wirth, “The Current Law of Crimes Against Humanity” in *Criminal Law Forum*, 2002, vol. 13, no. 1, p. 1; David Luban, “A Theory of Crimes Against Humanity” in *Yale Journal of International Law*, 2004, vol. 29, no. 1, p. 85.

⁷ International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), *Prosecutor v. Kunarac et al*, Judgment, 12 June 2002, IT-96-23 & IT-96-23/1-A, para. 98. The reasoning of the Chamber is almost identical to that in Mettraux, 2002, pp. 270-82, see *supra* note 5.

⁸ For scholarly commentary critical of the Chamber’s claims about the past authorities, see Schabas, 2008, see *supra* note 6; Kress, 2010, pp. 870-71, see *supra* note 6; Bassiouni, 2011, p. xxxiii see *supra* note 6 (describing it as a “gross misstatement of precedent”); Charles Jalloh, “What Makes A Crime Against Humanity A Crime Against Humanity” in *American University International Law Review*, 2013, vol. 28, no. 2, p. 381 at 397–40; Matt Halling, “Push the Envelope—Watch It Bend: Removing the Policy Element and Extending Crimes Against Humanity” in *Leiden Journal of International Law*, 2010, vol. 23, no. 4, p. 827 at 829–31.

purporting to reflect customary law, is also entitled to some weight.⁹ There is also a long tradition of national and international case and other expert bodies that must be taken into account.¹⁰

My own view is that, given the paucity, inconsistency and frequent vagueness of previous authorities, a fair observer will not find the authorities at this time decisively conclusive one way or the other. Many national cases, international cases, and other expert bodies indicate that a policy is needed, and many do not. Looking at this pattern of sparse authorities, a capable jurist could plausibly highlight those passages that seem to require a policy, or those passages that seem not to. Speaking for myself, I incline to the view that the element *is* custom. For me, given the indeterminacy of the “ascending” analysis (the sources), what tilts the balance in favour is the conceptual, “descending” analysis, ie. that the element is valuable for the coherence of the concept, as discussed in Part 5.2.

However, you do not need to agree with me on the custom question for the purposes of this chapter. For example, you might be agnostic, and agree that the case against the policy element is not so overwhelming as to warrant the disadvantages of re-opening and re-negotiating the definition, risking support, and increasing the fragmentation of the law.

⁹ Richard Baxter, “Multilateral Treaties as Evidence of Customary International Law”, in *British Yearbook of International Law*, 1965, vol. 41, p. 275.

¹⁰ I review some of the authorities in Darryl Robinson, “Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience”, in Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Volume I, il Sirente, Fagnano Alto, 1999, p. 139 at 152–64. Some relevant cases include: Nuremberg Military Tribunal, *United States v. Brandt et al.* (the Medical Case), Judgment, 19 August 1947, 2 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 p. 171 at 181 (crimes must be “ordered, sanctioned or approved”); Nuremberg Military Tribunal, *United States v. Altstötter et al.* (the Justice Trial), Judgment, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, p. 954 at 982 (“organized or approved”); Dutch Court of Cassation, *Public Prosecutor v. Menten*, (1987) 75 International Law Reports 331 at 361, Judgment, 13 January 1981 pp. 362-63 (“concept of crimes against humanity requires... consciously pursued policy”); Supreme Court of Canada, *R. v. Finta*, [1994] 1 S.C.R. 701, Judgment, 24 March 1994, p. 814 (“what distinguishes a crime against humanity from any other criminal offence...is... pursuance of a policy”); High Court of Australia, *Polyukhovich v Commonwealth (“War Crimes Act case”)*, [1991] HCA 32; (1991) 172 CLR 501, Judgment, 14 August 1991, para. 53 (exclude “isolated acts ... unconnected with a larger design”); as well as expert bodies, such as Commission of Experts for Yugoslavia, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, United Nations, 1994, para. 84 (“must be part of a policy”); Commission of Experts for Rwanda, *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994)*, United Nations, 1994, para. 135 (“official policy”); Gay J. McDougall, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*; Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, United Nations, 1998, para. 39 (“policy, plan or design”).

Alternatively, you may be firmly convinced that the element is not custom and that it is a legislative imposition. In that case, the fact remains that the element appears in the ICC Statute, in the national legislation of many countries, and will likely appear in the Draft Convention, and thus must be interpreted. Thus, you should be all the more supportive of clarifications intended to prevent the element from being interpreted as a major obstacle. Accordingly, regardless of our respective positions on the customary law question, we have an overlapping interest in commentary to clarify the element.

4. The Problem with “Policy” and the Desirability of Commentary

A recurring and persistent problem with “policy” is that one of the best-known connotations of the term implies something highly formal and official. In this connotation, it conveys something adopted at a high level, such as by a Cabinet or board of directors, and then promulgated to lower levels. In this sense, the word implies something more than mere orders or deliberately turning a blind eye to crimes: it suggests something special, momentous, deliberate and sanctified, more akin to a manifesto, programme or platform. However, that is not the only ordinary meaning of the term. Indeed, the ‘chief living sense’ of the term simply connotes ‘a course of action adopted as expedient’.¹¹ It is something the state or organization is deliberately doing (or encouraging others to do).

Among the understandable concerns raised about the policy element are that it might get interpreted to require direct proof of internal machinations and secret plans, or that it might be equated with “systematic”, contradicting the disjunctiveness of the threshold test. All of these concerns are legitimate. Indeed, the dangers have even come to pass in some particular decisions (see Parts 5.1 and 5.3 below).

The concerns can be resolved if the policy element is interpreted in accordance with the national and international authorities, including those on which it was based. The problem, however, is that many of those authorities – including national cases and

¹¹ *Oxford English Dictionary*, 2nd ed., vol. XII, Oxford University Press, Oxford, 1989, p. 27. The *Katanga* judgment of the ICC helpfully refers as well to the ordinary meaning in French dictionaries; such as « manière concertée de conduire une affaire ». *Katanga* Judgment, para. 1108, see *supra* note 1.

international expert bodies – are not well known. Thus, the very real risk is that judges, at the ICC or in national courts, will inject their own assumptions and reactions to the word “policy”, and thereby inadvertently create new and onerous requirements. Thus commentary, drawing attention to the often overlooked but highly informative web of authorities on the modest role of the policy element, can help to maintain the consistency and effectiveness of the law.

As I will strive to demonstrate below, the term ‘policy’ is a juridical term of art, adopted from *Tadić* and other sources. Its modest purpose is to screen out “ordinary crime”, ie. unconnected crimes committed by diverse individuals acting on their own separate criminal initiatives. The element does this by making explicit the logical corollary of excluding unprompted individual crimes: to wit, they must be directed or encouraged by something *other than isolated individuals*, ie. a state or organization. It delineates the minimum required degree of “collectivity”, so that the acts can be described in the aggregate as an “attack”.

Four important features of the policy element, which have been consistently emphasized in the jurisprudence, help to underscore and serve this modest purpose. I will expand on these features below. First, the term ‘policy’ is not used in a bureaucratic sense: a policy *need not be formalized*, need not be stated expressly, and need not be defined precisely.¹² In other words, it may be implicit. Second, a policy *need not implicate the highest levels* of a state or organization, although it does require more than the acts of one or two agents acting against instructions.¹³ Third, a policy may be manifested by state or organizational action or by *deliberate inaction* to encourage crimes where a state or organization has a duty to intervene.¹⁴ Fourth, and most importantly, a policy *may be inferred* from the manner in which the acts occur. It is satisfied by showing the improbability that the acts were a random, coincidental occurrence.¹⁵ These four features

¹² See *infra* Part 5.3 for authorities.

¹³ See e.g. International Criminal Tribunal for the former Yugoslavia (Trial Chamber), *Prosecutor v. Dragan Nikolić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, IT-94-2-R61, para. 26; International Criminal Tribunal for the former Yugoslavia (Trial Chamber), *Prosecutor v. Blaškić*, Judgment, 3 March 2000, IT-95-14-T, para. 205 (*‘Blaškić’*).

¹⁴ See below, Part 5.4 for authorities.

¹⁵ See *infra* Part 4.1 for authorities.

are mutually connected and consistent with the purpose of excluding ordinary random crime. Numerous scholars have noted these features of the policy element.¹⁶ Some of the jurisprudence will be reviewed below.

The term “policy”, for all its faults, helps to convey a subtle difference from mere “attribution”. Under the normal rules of attribution in international law, acts would still be attributed to the state or organization, even if they were carried by one or two agents acting against the instructions and against the wishes of their state or organization.¹⁷ Crimes against humanity, by contrast, require slightly *more* involvement or implication of the state or organization. The degree to which the state or organization must be implicated has not yet been perfectly delineated in jurisprudence. We do know at least that it is intermediate between two points. At one end, the requisite link is more than just the acts of one or two agents acting against orders. At the other end, it does not require the involvement of the highest levels of the state or organization.¹⁸ And, of course, claims by a state or organization that acts are purely a matter of ‘rogue’ agents or ‘a few bad apples’ must be scrutinized with care. One would look at repetition or patterns of similar acts, a failure to respond to the acts, and so on, in order to deduce the true state of affairs.¹⁹

¹⁶ Machteld Boot, Rodney Dixon and Christopher Hall, “Article 7” in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C. H. Beck, München, 2008, p. 236 (‘policy need not be formalised, and can be deduced from the manner in which the acts occur. . . In essence, the policy element only requires that the acts of individuals alone, which are isolated, uncoordinated, and haphazard, be excluded’); Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford 2001, pp. 97–8 (excludes individuals acting on own initiative without direction or encouragement from a state or organization, not formal, not express, not highest level, infer from circumstances); Cryer et al, 2014, pp. 235–39, see *supra* note 2 (exclude random criminality of individuals, infer from manner); Ambos and Wirth, 2002, pp. 30–4, see *supra* note 6 (policy excludes ordinary crimes, may be implicit and may be passive); Sadat, 2013, p. 354 and p. 372, see *supra* note 1 (exclude uncoordinated, haphazard, random acts); Simon Chesterman, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, in *Duke Journal of Comparative & International Law*, 2000, vol. 10, no. 2, p. 307 at 316 (‘policy requirement reiterates the position that isolated and random acts cannot amount to crimes against humanity’); Yoram Dinstein, “Crimes Against Humanity After Tadić”, in *Leiden Journal of International Law*, 2000, vol. 13, no. 2, p. 373 at 389 (need policy element to exclude spontaneous, fortuitous crimes).

¹⁷ ILC Draft Articles on State Responsibility, Articles 4 and 7.

¹⁸ Nikolić, see *supra* note 13; Blaškić, see *supra* note 13.

¹⁹ Commission of Experts for Yugoslavia, 1994, paras. 84–85, see *supra* note 10; Special Court for Sierra Leone (Appeals Chamber), *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (RUF Case), Judgment, 26 October 2009, SCSL-04-15-A, para. 723, finding declared norms of the Revolutionary United Front (RUF) prohibiting rape, unauthorised looting, killings or molestation to be ‘a mere farce intended to camouflage’ the planned atrocities.

Note that I am not advancing a “progressive”, “liberal” or creative interpretation of the policy element.²⁰ The points I would highlight are *already established* in national and international authorities with significant consistency, and these are the authorities on which Article 7 was based. Because many of the authorities are often unknown or overlooked, it is valuable to highlight them.

5. Proposed commentary

5.1 The term “policy” must not be conflated with “systematic”

The first proposed clarification is as follows: *The term “policy” is not equivalent to the term “systematic”. “Policy” does not necessarily require deliberate planning, direction or orchestration; it requires only that some state or organization must have at least encouraged the attack, either actively or passively.*

The confusion between the terms “policy” and “systematic” is a recurring and quite understandable problem, seen both in jurisprudence and in scholarly discourse. The confusion is understandable, because Article 7 is a rather complex provision. Article 7 refers both to ‘policy’ and to ‘systematic’, which certainly sound similar. Both terms deal with the *collective* dimension of the crimes (ie. the connectedness, coordination or orchestration of the crimes). The confusion is all the more understandable given that a few passages in early authorities have even equated ‘policy’ with ‘systematic’.²¹

²⁰ Of course, such terms are always admittedly relative, as they depend on one’s view of the *lex lata*. For one who is convinced of a more restrictive and formalistic concept of ‘policy’, the propositions here will indeed appear ‘progressive’ or ‘liberal’ interpretations. However, the argument here is for an affirmation of the existing authorities.

²¹ The ILC draft Code refers to ‘systematic’ as referring to a ‘preconceived plan or policy’. International Law Commission, “Draft Code of Crimes against the Peace and Security of Mankind with commentaries”, in *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, United Nations, New York, 1998, p. 47 (‘ILC draft Code’). That understanding has been echoed in some cases; see e.g. International Criminal Tribunal for Rwanda (Trial Chamber II), *Prosecutor v. Kayishema and Ruzidana*, Judgment, 21 May 1999, ICTR-95-1-T, para. 123.

Nonetheless, the terms cannot be equivalent. Equating the terms would generate a contradiction within Article 7. Article 7(1) provides that “widespread” and “systematic” are disjunctive alternatives. Since Article 7(2)(a) requires “policy” in all cases, to equate policy with systematic would amount to requiring systematicity in all cases, thereby contradicting the disjunctive test. It is a basic tenet of contextual interpretation that we try to read provisions coherently, ie. avoid unnecessary contradictions. In this instance, contradiction is very easily avoided if “policy” is understood to be a more modest test. That understanding also conforms to the bulk of national and international authorities on the policy element, as well as the intent of the drafters.

To equate the terms not only creates a contradiction within Article 7 but also within other authorities as well. The very same authorities that introduced the now-hallowed ‘widespread or systematic’ test (for example, the Tadić decision and the ILC draft Code) also expressly coupled it with a policy element as an additional requirement.²² We should not lightly adopt an interpretation that renders those authorities self-contradictory as well. We should strive to understand them coherently.

The non-contradictory interpretation is also supported by the bulk of national and international authorities, which reveal a much more modest threshold for the policy element. “Systematic” requires active orchestration, planning and directing the crimes; cases have referred to factors such as recurring patterns, use of resources, and involvement of high-level authorities.²³ By contrast, “policy” does not require active orchestration; it is also satisfied by implicit support or encouragement, including deliberate inaction to encourage crimes.²⁴ Policy does not require high level involvement, can be implicit, and can be inferred from the improbability of random occurrence.²⁵ The delineation between

²² See Part 5.2.

²³ More recent Tribunal cases are settling on the test of ‘organized nature of the acts of violence and the improbability of their random occurrence’. See e.g. International Criminal Tribunal for Rwanda, *Prosecutor v. Nahimana*, Judgment and Sentence, 28 November 2008, ICTR-99-52-A, para. 920; International Criminal Tribunal for the former Yugoslavia (Trial Chamber), *Prosecutor v. Kunarac et al*, Judgment, 22 February 2001, IT-96-23-T & IT-96-23/1-T, para. 429; *Blaškić*, see *supra* note 13, para. 203.

²⁴ As Kai Ambos and Steffen Wirth have noted, a key to distinguishing “policy” from “systematic” is that policy does not require active orchestration but can include encouragement through deliberate passivity. Ambos and Wirth, 2002, pp. 28 and 31-4, see *supra* note 6.

²⁵ Tribunal jurisprudence recognizes ‘improbability of random occurrence’ as part of the definition of ‘systematic; however, as I argue here, improbability of random occurrence must be part of all crimes against

“policy” and “systematic” will be further specified in future jurisprudence.²⁶ In addition to the differing degrees of planning and engagement, there may also be differences in the involvement of high-level authorities²⁷ or the responsibilities of the organization.²⁸

Many scholars have noted that ‘policy’ must be a lower threshold than ‘systematic’, (1) in order to follow the authorities, (2) in order not to negate the disjunctive test, and (3) in order not to negate the position of the vast majority of delegations at the Rome Conference, who accepted only a moderate limitation to the disjunctive test.²⁹

Early ICC experience has demonstrated the value of the proposed commentary. Some early ICC decisions have described the policy element in the same terms as the ‘systematic’ threshold. Some decisions have suggested for example that the policy element requires that the attack be ‘thoroughly organized’, follow a regular pattern, and involve public or private resources.³⁰ That, however, is the early test for ‘systematic’ from Tribunal

humanity, since truly random crime is not a crime against humanity. Thus, the remainder of the systematic test (e.g. organized nature of the acts) is doing the real work and must be fleshed out.

²⁶ As I argue here, ‘improbability of random occurrence’ must be not merely part of ‘systematic’, but part of all crimes against humanity, since truly random crime is not a crime against humanity. Thus, the “organized nature” requirement remains to be fleshed out.

²⁷ *Blaskic*, see *supra* note 13, para. 203.

²⁸ It is arguable that the ‘systematic’ test should require a ‘state-like’ entity, with some power or authority; This would absorb some of the insights of scholars such as Claus Kress and William Schabas. Any organization committing widespread crimes would fall within the definition, whereas non-widespread crimes would reach the threshold only where systematically organized by a State or organization with a responsibility to protect civilians. This argument will be developed in a future work.

²⁹ Ambos and Wirth, 2002, pp. 28 and 31-4, see *supra* note 6; Hwang, 1998, p. 503, see *supra* note 5 (need for future ICC judges to recall ‘policy’ is not ‘systematic’, but merely requires state or organizational involvement; not formal and can be inferred); deGuzman, 2000, pp. 372-4, see *supra* note 5 (interpreting ‘policy’ as ‘systematic’ would contradict Art. 7 and erase the position of the vast majority of states); Timothy McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 186-9; David Donat-Cattin, “A General Definition of Crimes Against Humanity Under International Law: The Contribution of the Rome Statute” in *Revue de Droit Pénal et des Droits de l’Homme*, 1999, vol. 8, p. 83; Wiebke Rückert and Georg Witschel, “Genocide and Crimes Against Humanity in the Elements of Crimes”, in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag Arno Spitz, Berlin, 2001, p. 71; Sadat, 2013, p. 359, see *supra* note 1.

³⁰ International Criminal Court (Pre-Trial Chamber I), *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 396 (‘*Katanga* Confirmation Decision’); International Criminal Court (Pre-Trial Chamber I), *Situation in the Republic of Côte d’Ivoire*, Decision Pursuant to Article 15 of the Rome Statute of the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 3 October 2011, ICC-02/11-14-Corr, para. 43; International Criminal Court (Pre-Trial Chamber III), *Prosecutor v. Gbagbo*, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo (Public redacted version), 30 November 2011, ICC-02/11-01/11-9-Red, para. 37 (‘*Gbagbo* Arrest Warrant Decision’).

jurisprudence.³¹ Fortunately, more recent cases have been more clear in distinguishing the test for “attack” from the “widespread or systematic” character of the attack, and thus that “policy” must be a lower threshold than “systematic”.³² The ICC’s early experience shows how the confusion is understandable, and supports the view that other courts, including national courts, could benefit from the educative function of the proposed commentary.

5.2 The purpose of the policy element is simply to screen out ordinary crime

The second proposed comment recalls the narrow purpose of the element: *“The purpose of the policy element is to screen out ‘ordinary crime’, ie. haphazard or uncoordinated acts of individuals on their own unconnected criminal initiatives.”*

History and Purpose

It is widely accepted that the concept of crimes against humanity does not include ‘ordinary’ patterns of crime—the random, unconnected acts of individuals carrying out their own criminal designs.³³ The policy element delivers on this assurance, by excluding the haphazard, coincidental crimes of individuals, carried out without any source directing or encouraging them.

Different deliberative bodies have noticed over the years that the ‘widespread or systematic’ test does not actually suffice to exclude ordinary crime. At the Rome Conference, a significant number of states, including the P-5 and many Asian and Arab states, raised precisely this concern about the disjunctive ‘widespread or systematic’ test.³⁴ The concern arises because ‘widespread or systematic’ is disjunctive, and “widespread”

³¹ See e.g. International Criminal Tribunal for Rwanda (Trial Chamber I), *Prosecutor v. Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T, para. 580 (*‘Akayesu’*).

³² Helpful cases such as the *Gbagbo* Confirmation Decision and the *Katanga* Judgment, see *supra* note 1 are discussed below in Part 5.3.

³³ The proposition that isolated or random acts of individuals do not constitute a crime against humanity is so frequently noted that it hardly needs a citation, but a few examples include: International Law Commission draft Code, 1996, p. 47, see *supra* note 21; *Kunarac*, Trial Judgment, 2001, see *supra* note 23; International Criminal Tribunal for the former Yugoslavia (Trial Chamber), *Prosecutor v. Tadić*, Judgment, 7 May 1997, IT-14-94-1-T, para. 648 (*‘Tadić Trial Judgment’*).

³⁴ See e.g. Herman von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court”, in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 79, 92–8.

does not necessarily imply any connection between crimes. Crimes in a city or region could easily be ‘widespread’ but unconnected; this would be ‘rampant crime’, not a crime against humanity. Like-minded delegations responded that an aggregate of truly random, unconnected crimes would not constitute an ‘attack’. Agreement was reached to retain the disjunctive ‘widespread or systematic’ test, provided that the definition of ‘attack’ explicitly deliver on the assurance that unconnected crimes are excluded.

The Rome Conference was not the first time that the over-inclusiveness problem had been noticed. Both the *Tadić* decision of the ICTY and the 1996 ILC draft Code of Crimes suggested a solution. The *Tadić* decision employed the term ‘policy’ to explain the idea that an attack is not composed of ‘isolated, random acts of individuals’,³⁵ and ‘cannot be the work of isolated individuals alone’.³⁶ The *Tadić* decision equated the policy element with the requirement recognized by the ILC in the 1996 draft Code of Crimes, that an attack must be ‘instigated or directed by a Government or by any organization or group’.³⁷ Both *Tadić* and the ILC draft Code described this requirement as *additional to* the ‘widespread or systematic’ test. At the Rome Conference, a Canadian compromise proposal advanced Article 7(2)(a), explicitly based on and footnoting to these passages in *Tadić* and the ILC draft Code.³⁸

The purpose of the policy element has been well-articulated by the Supreme Court of Peru in the *Fujimori* case. The policy element

requires only that *the casual acts of individuals acting on their own, in isolation, and with no one coordinating them, be excluded . . .* Such common crimes, even when committed on a widespread scale, do not constitute crimes against humanity, unless they are at least *connected in one way or another* to a particular State or organizational authority: they must at least be tolerated by the latter.³⁹

³⁵ *Tadić* Trial Judgment, see *supra* note 33, para. 653.

³⁶ *Ibid.*, para. 655.

³⁷ *Ibid.*, para. 655; ILC draft Code, see *supra* note 21, at 47 (Art. 18).

³⁸ Darryl Robinson, “Defining “Crimes Against Humanity” at the Rome Conference”, in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 43.

³⁹ Sala Penal Especial de la Corte Suprema (Peru), *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases*, Case No. AV 19-2001, Judgment, 7 April 2009, para. 715 (citing Kai Ambos); translation available in *American University International Law Review*, 2010, vol. 25, no. 4, p. 657(emphasis added).

Elaboration on the inadequacy of widespread or systematic

It is worthwhile to pause a moment here to examine a common counter-argument. It is frequently asserted that the “widespread or systematic” test is by itself sufficient to exclude random, isolated crime,⁴⁰ and thus that the policy element is not needed to perform that function.⁴¹ Appreciating the gap in the “widespread or systematic” test will help illuminate the role and purpose of the policy element, which is to fill that gap.

While the “systematic” branch succeeds in excluding random criminal activity, because it requires that the crimes be organized, the problem is that the alternative branch, ‘widespread’, merely requires scale. Consider for example a state with high crime, such as South Africa today, which faces thousands of murders each year. The number of crimes (thousands) easily satisfies the ‘widespread’ requirement. Murders satisfy the base crime requirement. The crimes are committed against ‘civilians’, satisfying another element. Recall that *a single crime* committed within the requisite context qualifies as a crime against humanity.⁴² Thus, any person committing a single murder within that context satisfies the act and linkage requirements. The perpetrators are also aware of the surrounding context (ie. widespread crime against civilians).

Thus, if we do not have a policy element or some equivalent, and we apply the elements for crime against humanity, we will find that all elements are met. If we apply the tests literally, then each and every serious crime committed in a context of rampant serious crime would constitute a crime against humanity.⁴³ The test fails to delineate crimes

⁴⁰ See e.g. International Criminal Tribunal for Rwanda (Trial Chamber I), *Prosecutor v. Bagilishema*, Judgment, 7 June 2000, ICTR-95-1A-T, para 78; International Criminal Tribunal for Rwanda (Trial Chamber II), *Prosecutor v. Kayishema and Ruzindana*, Judgment, 21 May 1999, ICTR-95-1-T, para 123; Mettraux, 2011, pp. 153-5, see *supra* note 40; Halling, 2010, pp. 840-41, see *supra* note 8; Boot, Dixon and Hall, 2008, pp. 179-80, see *supra* note 16.

⁴¹ Halling, 2010, p. 841, see *supra* note 8 (“redundant check”), Boot, Dixon and Hall, 2008, p. 179, see *supra* note 16 (“superfluous”); Guénaél Mettraux, “The Definition of Crimes Against Humanity and the Question of a “Policy” Element”, in Leila Nadya Sadat (ed.), *Forging A Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, p. 142 at 153 (“redundant and unnecessary”).

⁴² Thus, the common argument that no ordinary perpetrator could commit crimes on a “widespread” scale, and thus that “widespread or systematic” suffices to exclude ordinary crime, misses the point. “Widespread” only applies to the contextual element. Committing a single crime within that context is all that is needed.

⁴³ There are solutions other than a policy element. For example, one could require that the population be targeted on prohibited grounds, which would exclude most random “ordinary” crimes; however the re-introduction of specific grounds, motives or special intents also raises difficulties.

against humanity from ordinary crimes and fails to delineate the scope of international jurisdiction.

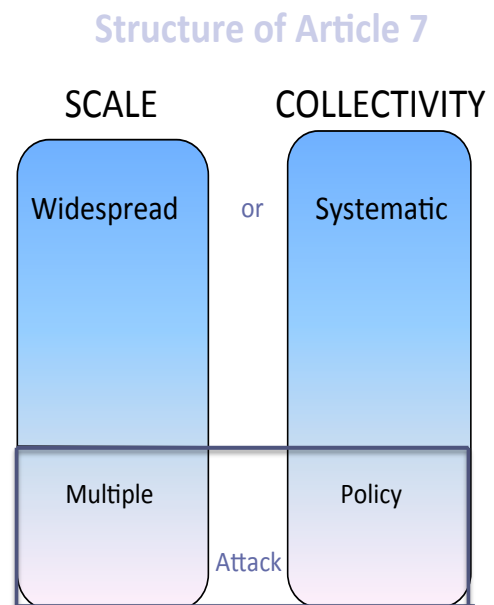
Most jurists will agree that the “high crime rate” scenario is not a crime against humanity. The most typical rejoinder to this example would be that unconnected crimes are not an “attack directed against the civilian population”. That reaction is correct. But then the next question is, “Can you articulate the specific requirement within your definition of ‘attack’ that actually excludes those unconnected acts?” The answer to that question is the first key to the riddle of crimes against humanity. Some legal element is needed to actually do the job of screening out unconnected ordinary crime. The solution adopted in Article 7 (and *inter alia* the ILC draft Code of Crimes) is the policy element. There may conceivably be other solutions. But understanding the problem helps (1) to understand the purpose of the policy element and (2) to avoid inflating it beyond its narrow purpose.

The resulting concept of CAH

The foregoing discussion sheds light on the concept of a crime against humanity. The hallmarks are *atrociousness* (the prohibited acts), *scale* and *collectivity*.⁴⁴ It is well-recognized that there must be a high degree of *either* scale (‘widespread’) *or* collectivity (‘systematic’). The more subtle and less-appreciated feature is that there must at least be *some minimal degree of both* scale and collectivity before we can sensibly say that there was an ‘attack’ on a civilian population. Where there is insignificant scale (i.e. not even “multiple” crimes), then there is no crime against humanity. And where there is no collectivity (i.e. coincidental, haphazard crimes), then there is no crime against humanity.

⁴⁴ On the conceptual importance of this collective or ‘associative’ element, see Luban, 2004, *supra* note ##; Kirsten Fisher, *Moral Accountability and International Criminal Law*, Routledge, Abingdon, 2012, pp. 22-5; Richard Vernon, “Crimes Against Humanity: A Defence of the Subsidiarity View”, in *Canadian Journal of Law & Jurisprudence*, 2013, vol. 26, no. 1, p. 229.

The task of Article 7(2)(a) is to fulfil this less-obvious, less-recognized, yet still important function. It is an *in limine* test, screening out contexts that lack the minimum necessary scale and collectivity. Article 7(2)(a) avoids the absurdities of a purely disjunctive approach to scale and collectivity. The ‘multiple acts’ requirement screens out crime that has no scale. The policy requirement screens out crime that has no collectivity. Once these minimal standards are both met, then a prosecutor must prove a *high degree* of *either* scale (widespread) or collectivity (systematic).



An interesting theory that can aid in understanding the policy element has been advanced by David Luban. Luban argues that crimes against humanity concern our human nature as social and political animals. We live socially and we form organizations. Crimes against humanity are when our organizational nature turns against us, and people work together to commit atrocities; they are ‘politics gone cancerous’.⁴⁵ Whereas genocide focuses on the group nature of the victims, the law of crimes against humanity is engaged by the group nature of the perpetrators. The link to a state or organization reflects the minimum requisite ‘associative’ dimension.

5.3 A policy may be implicit, and can be inferred from the manner in which the acts occur

The third proposed commentary is as follows: *A policy need not be expressly stated or formalized, and need not involve the highest levels of a state or organization. A policy may*

⁴⁵ Luban, 2010, *supra* note ##.

be implicit. The existence of a policy can be inferred from the manner in which the acts occur. In particular, it can be inferred from the implausibility of coincidental occurrence.

These propositions recur consistently in the authorities. They are essential to address the concerns that the policy element might require proof of secret plans or some formalistic adoption. Some early ICC cases demonstrate the dangers of precisely these misinterpretations, although fortunately more recent ICC cases are reflecting the global jurisprudence.

The seminal *Tadić* decision, on which Article 7(2)(a) was based, emphasized that the ‘policy need not be formalized and can be deduced from the way in which the acts occur’.⁴⁶ Indeed, this very passage was part of the proposal at the Rome Conference introducing Article 7(2)(a) and explaining its terms. Other Tribunal cases have repeatedly affirmed these features. Cases affirm that the ‘policy need not be explicitly formulated’⁴⁷ and that it need not be conceived at the highest levels.⁴⁸ The *Blaškić* decision is particularly instructive. In addition to confirming that ‘[t]his plan ... need not necessarily be declared expressly or even stated clearly and precisely’,⁴⁹ the decision provides a valuable list of factors from which one may infer a policy, including *inter alia* repetition of the acts, the scale of the acts, and the overall political background.⁵⁰

Similarly, ICTR cases consistently held that a policy need not be adopted formally,⁵¹ and the Sierra Leone Special Court had little difficulty inferring a policy from the manner in which the acts occurred. Of course, after the *Kunarac* decision, these Tribunals now hold

⁴⁶ *Tadić* Trial Judgment, see *supra* note 33, para. 653.

⁴⁷ See e.g. International Criminal Tribunal for the former Yugoslavia (Trial Chamber), *Prosecutor v. Kupreškić*, Judgment, 14 January 2001, IT-95-16, para. 551; International Criminal Tribunal for the former Yugoslavia (Trial Chamber), *Prosecutor v. Kordić and Čerkez*, Judgment, 26 February 2001, IT-95-14/2-T, para. 181.

⁴⁸ *Blaškić*, see *supra* note 13 at para. 205.

⁴⁹ *Ibid.*, para. 204.

⁵⁰ *Ibid.*

⁵¹ See e.g., *Akayesu*, see *supra* note 31, para. 508; International Criminal Tribunal for Rwanda (Trial Chamber I), *Prosecutor v. Rutaganda*, Judgment and Sentence, 6 December 1999, ICTR-96-3-T, para. 68; International Criminal Tribunal for Rwanda (Trial Chamber I), *Prosecutor v. Musema*, Judgment and Sentence, 27 January 2000, ICTR-96-13-T, para. 204. *Akayesu* and later cases note that a policy need not be adopted formally by a State. It is now well accepted that a policy may also be that of a non-state organization.

that the policy element is not required.⁵² Nonetheless, the earlier cases are helpful statements about the features of the policy element, especially as they in turn are based on other national and international jurisprudence.⁵³

Expert bodies and national cases, many of which are not as well known as the Tribunal cases, can valuably enrich our picture of the global approach. For example, the 1994 Commission of Experts on crimes in former Yugoslavia recognized the policy element.⁵⁴ The Commission inferred the policy from the circumstances:

‘There is sufficient evidence to conclude that the practices of “ethnic cleansing” were not coincidental, sporadic or carried out by disorganized groups or bands of civilians who could not be controlled by the Bosnian-Serb leadership.’⁵⁵

Notice here that policy is deduced by assessing the alternative hypothesis of coincidental, sporadic, uncontrolled crimes. Even more valuably, the Commission noted:

It should not be accepted at face value that the perpetrators are merely uncontrolled elements, especially not if these elements target almost exclusively groups also otherwise discriminated against and persecuted. Unwillingness to manage, prosecute and punish uncontrolled elements may be another indication that these elements are, in reality, but a useful tool for the implementation of a policy of crime against humanity.⁵⁶

National courts have also recognized that a policy may be implicit and can be inferred from circumstances. An Argentine court in the famous *Junta* trial demonstrates with admirable clarity how policy is inferred from the improbability of coincidence:

The operative system put in practice ... was substantially identical in the whole

⁵² *Kunarac* Appeal Judgment, see *supra* note 7, para. 98; International Criminal Tribunal for Rwanda (Trial Chamber III), *Prosecutor v. Semanza*, Judgment and Sentence, 15 May 2003, ICTR-97-20-T, para. 329 (citing *Kunarac*); Special Court for Sierra Leone (Trial Chamber I), *Prosecutor v. Fofana*, Judgment, 2 August 2007, SCSL-04-14-T, para. 113 (citing *Kunarac*).

⁵³ As was correctly noted in International Criminal Court (Pre-Trial Chamber II), *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09, para 86. The early ICTY jurisprudence on policy was a helpful summation of other national and international jurisprudence. See also Sadat, 2013, pp. 372-3, see *supra* note 1.

⁵⁴ Commission of Experts for Yugoslavia, 1994, para. 84, see *supra* note 10.

⁵⁵ *Ibid.*, para. 142. See also para. 313, inferring policy behind ethnic cleansing, rape and sexual assault, based on frequency of occurrence and the consistent failure to prevent or punish such crimes.

⁵⁶ *Ibid.*, para. 85.

territory of the Nation and prolonged over time. It having been proved that the acts were committed by members of the armed and security forces, vertically and disciplinarily organized, *the hypothesis that this could have occurred without express superior orders is discarded*.⁵⁷

Similarly, a more recent case against Jorge Rafael Videla held:

It having been proved that the events were directly committed by members of the army, the State Intelligence Secretariat, the Buenos Aires Provincial Police . . . organised vertically and disciplinarily, it does not appear probable—in this stage—that they could have been committed without orders from hierarchical superiors.⁵⁸

The same approach of inferring policy was also taken in the recent Guatemalan case against General Rios Montt.⁵⁹

A court in Bosnia and Herzegovina, applying a provision identical to Article 7(2)(a) in a crime against humanity case, provided a helpful list of factors from which to infer policy:

The following factual factors are considered with regard to establishing the existence of a policy to commit an attack: *concerted action* by members of an organization or State; *distinct but similar acts* by members of an organization or State; *preparatory acts* prior to the commencement of the attack; prepared acts or steps undertaken during or at the conclusion of the attack; the existence of political, economic or other strategic *objectives* of a State or organization furthered by the

⁵⁷ Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires, '*Causa No. 13/84 (Juicio a las Juntas Militares)*', Sentencia, 9 December 1985, Second Part, paragraph 3(c) available at <<http://www.derechos.org/nizkor/arg/causa13/cap20.html>> (last accessed 28 April 2014) (emphasis added).

⁵⁸ Juzgado Federal de San Isidro, *Causa N° 1.285/85, 'Videla, Jorge Rafael y otros s/ presunta infracción a los arts. 146, 293 y 139, inc. 2do. del Código Penal'*, Judgment, 13 July 1998.

⁵⁹ '[T]he army carried out these massacres using the same pattern of conduct, which is verified by the actions carried out in each of the communities. This circumstance is very important because it is evidence of prior planning and the implementation of that planning. Why do we say this? It is important because, as has been shown, the violent acts against the Ixil [people] was not a spontaneous action but the concretization of previously prepared plans which formed part of a state policy towards the elimination of that group.' *Tribunal de Alto Riesgo A, Sentencia C-01076-2011-00015 (Rios Montt, Rodriguez Sanchez) Of. 2o*, Judgment, 2 May 2011, Folio 697 available at <<http://paraqueseconozca.blogspot.com/>> (last accessed 28 April 2014); judgment annulled pending appeal against the rejection of a defence motion to recuse two trial judges: Corte de Constitucionalidad, 20 May 2013, decision available at <<http://www.right2info.org/resources/publications/constitutional-court-judgment-5.20.2013>> (last accessed 28 April 2014).

attack; and in the case of omissions, *knowledge of an attack or attacks and willful failure to act*.⁶⁰

Similarly, in *Sexual Minorities Uganda v. Scott Lively*,⁶¹ a US court upheld the contrast between isolated or sporadic acts versus policy: ‘one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty or wickedness’.⁶² While this was a civil law case, it relied on criminal law authorities, and on this point the court referred to the late Antonio Cassese.

As can be seen, the available authorities draw the contrast between (a) crimes with state or organizational support or encouragement versus (b) crimes that are ‘haphazard’, ‘coincidental’, ‘random’, ‘sporadic’, and carried out by ‘uncontrolled and uncontrollable elements’. They have not required direct proof of formal adoption of policy or internal workings of organizations. They have quite easily inferred policy where the events speak for themselves. It can usually be seen readily that the crimes are not a mere crime wave but rather must have involved behind-the-scenes direction, support or encouragement.

The Gbagbo Adjournment Decision shows the value of clarification

An early ICC cases shows the potential dangers of neglecting this jurisprudence. The case against Laurent Gbagbo, the former President of the Ivory Coast, concerned large-scale killings, assaults and rapes, committed by pro-Gbagbo state forces and youth militia, against civilians who were perceived to support the rival candidate to Gbagbo.⁶³ The case presented by the Prosecutor focused on four incidents, involving over 294 crimes against civilians, and also referred to 41 other incidents.

⁶⁰ Court of Bosnia and Herzegovina, *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. X-KR/06/275, Verdict, 28 February 2008, available at <<http://www.legal-tools.org/en/doc/6a28b5/>> (last accessed 28 April 2014) (emphasis added).

⁶¹ United States District Court for the District of Massachusetts, *Sexual Minorities Uganda v. Lively*, 2013 U.S. Dist. LEXIS 114754, Order, 14 August 2013.

⁶² See also United States District Court for the Eastern District of California, *Doe v. Alvaro Rafael Saravia*, 348 F. Supp. 2d 1112, Judgment, 23 November 2004, para. 260 (same quote).

⁶³ See International Criminal Court, “Document amendé de notification des charges”, 13 July 2012, ICC-02/11-01/11-184-AnxI-Red (available in French only) (*‘Gbagbo DCC’*). The attacks overall involved over 1300 victims; the four charged incidents involved over 294 crimes against civilians.

To establish the policy element, the Prosecutor had offered a significant amount of direct evidence (witnesses, police records, photographs, videos) as well as indirect evidence. The evidence attested to: repeated attacks by pro-Gbagbo forces against civilians supportive of his political opponent; the failure of police to intervene; the participation of police in crimes; preparation for atrocities, such as policemen bringing condoms to the site where they raped female protestors; measures to identify supporters of the opposition; public statements of leaders of the pro-Gbagbo inner circle; internal instructions; prior warnings that unarmed demonstrators would be killed; and witness reports that perpetrators indicated that they were targeting victims because of their opposition to Gbagbo.⁶⁴

Nonetheless, the majority was not satisfied of a policy from this evidence. In June 2013, a majority of Pre-Trial Chamber I adjourned the confirmation hearing to allow the Prosecutor to collect and present additional evidence.⁶⁵ The majority requested additional evidence about specific meetings at which the policy was adopted and its internal promulgation; for example:

How, when and by whom the alleged policy/plan to attack the ‘pro-Outtara civilian population’ was adopted, including specific information about meetings at which this policy/plan was allegedly adopted, as well as how the existence and content of this policy/plan was communicated or made known to members of the ‘pro-Gbagbo forces’ once it was adopted.⁶⁶

The majority also requested additional evidence about the coordination, structure and operating methods of the ‘inner circle’ of the pro-Gbagbo forces.⁶⁷

By requesting such specific evidence, after declaring the proffered evidence to be inadequate, the majority appears to have in mind heightened legal and evidentiary requirements for the policy element. There are three main concerns with the majority approach.

⁶⁴ See *ibid*, paras. 21, 37, 40, 44, 50, 81-4, see *supra* note 63.

⁶⁵ See International Criminal Court (Pre-Trial Chamber I), *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013 ICC-02/11-01/11-432 (*Gbagbo* Adjournment Decision).

⁶⁶ *Ibid*, para. 44, see *supra* note 65.

⁶⁷ *Ibid*. For the evidence that was provided on the pro-Gbagbo forces, the inner circle, its membership, its control, and its meetings, see *Gbagbo* DCC, paras. 59-86, see *supra* note 63.

First, the majority's approach appears to reflect a formalized, bureaucratic conception of the policy element. The requests relate to specific *meetings* at which a policy was *adopted*, dates of such meetings,⁶⁸ inner workings and internal communication of the policy to the rank and file. That conception is somewhat understandable, given that one common sense of the word 'policy' does indeed connote something official and formally adopted, perhaps by a Cabinet or board of directors, and then promulgated to the levels below. But it contradicts the meaning of the juridical term 'policy' as elaborated in the authorities, which emphasize that it need not be formalized, express, formally adopted, and so on.

Second, the majority approach is not only in conflict with past jurisprudence, it is also undesirable practically and normatively. Practically, direct proof of formal adoption would usually be difficult to obtain. In the absence of written minutes, which will surely be rare, the approach almost mandates insider testimony for any crime against humanity case. Normatively, there does not seem to be a good principled reason to restrict crimes against humanity to crimes that were bureaucratically endorsed at the highest level. Doing so is not required by any available theory of crimes against humanity. Indeed, the paradigm of adopting policies at meetings seems to reflect a culturally specific concept of organizations, and does not reflect the diverse types of human organizations that may orchestrate mass crimes.

Third, another problem with the majority's approach is that it is epistemologically over-cautious and rarified. The majority indicated its reservations about the inferences it was asked to draw,⁶⁹ and thus requested direct evidence of formal adoption. However, the crucially important point is that a policy will *almost always be a matter of inference*. This is why past jurisprudence emphasizes that a policy can be inferred from the manner in which the acts occur. It is understandable for a diligent judge to ask, 'How can I be sure there is a state or organizational policy unless I have proof of the adoption of the policy?' The answer is that we don't need the 'smoking gun'. *We can prove 'P' (policy) by proving the implausibility of 'not-P'*. In other words, we can infer the policy element from the sheer

⁶⁸ *Gbagbo* Adjournment Decision, para. 44, see *supra* note 65.

⁶⁹ *Ibid.*, para. 36.

absurdity of the rival hypothesis, which is that these hundreds of crimes, committed by pro-Gbagbo forces against anti-Gbagbo forces, with perpetrators making statements indicative of a common purpose and coordination, were actually just a coincidence. It is implausible that this was a simple ‘crime wave’ of individual acts occurring without any state or organizational coordination or at least encouragement.

Subsequent ICC cases adhere to global jurisprudence

Happily, the *Gbagbo* adjournment decision was not the last word in that case. After assessing the additional evidence proffered by the Prosecutor, Judge Hans Peter Kaul sided in favour of confirmation, thereby forming a new majority. Moreover, as the majority confirmation decision shows, Judge Kaul appears to have reconsidered and modified some of his views on the policy element. The result is one of the most careful and helpful discussions of the policy element to date in ICC jurisprudence, reflective of the approach of other national and international authorities. The confirmation decision will be one of the most important aspects of the valuable legacy left by Judge Kaul.

The *Gbagbo* confirmation decision affirms that the requirements of “attack” are less demanding than the requirements of “widespread or systematic”, and thus that policy is less demanding than “systematic”.⁷⁰ It also holds that “there is no requirement that a policy be formally adopted” and that evidence of planning is relevant but not required.⁷¹

Subsequently, the *Katanga* trial chamber judgment provided an even more careful and thorough analysis of Article 7(1), 7(2)(a) and the policy element. *Katanga* correctly distinguished between the test for “attack” and the test for “widespread or systematic”.⁷² The decision notes that a policy need not be formalized⁷³ and can be manifested by action or deliberate inaction to encourage crimes.⁷⁴ The chamber rightly noted that that it would be relatively rare that a state or organization intending to encourage an attack would adopt

⁷⁰ International Criminal Court (Pre-Trial Chamber I), *Prosecutor v. Laurent Gbagbo*, Decision on confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656, paras 208 and 216.

⁷¹ *Ibid* paras. 210, 215 and 216.

⁷² *Katanga* Judgment, paras. 1097-98 and 1101, see *supra* note 1.

⁷³ *Ibid* para. 1108.

⁷⁴ *Ibid* para. 1107 and 1108.

and disseminate an established plan to this effect.⁷⁵ Thus, in most cases, it would be necessary to *deduce* the policy from, for example, the repetition of acts, preparatory activities, and orchestrated or coordinated activities.⁷⁶

These and other cases show that the ICC is aligning with the broader web of global authorities.⁷⁷ Nonetheless, the deviations in some early cases show that even an institution specializing in international core crimes may not be aware of all the nuances of national and international precedent. The challenges are even greater for national courts that deal relatively rarely with such crimes, and thus commentary would be of value.

5.4 A policy may be manifested by action or inaction

The final proposed commentary is the following: *While a policy will typically be manifested by the actions of a state or organization, it may also be manifested by a deliberate failure to act which is consciously aimed at encouraging an attack.*

Throughout the authorities since World War II, many different verbs have been used to describe the requisite link between the state or organization and the attack. Those verbs have included: *direct, instigate, promote, encourage* (including by deliberate inaction), *acquiesce, tolerate, approve, condone, countenance* and *endorse*. It is arguably premature to ascertain precisely what linkage or attitude is required. What is however crucial to convey is that the linkage can be *passive* (eg. *acquiesce, tolerate, condone, countenance, implicitly approve, encourage by inaction*). Most crimes against humanity

⁷⁵ Ibid para. 1109: “Il est relativement rare, même si on ne peut l’exclure, que l’État ou l’organisation qui entend encourager une attaque contre une population civile adopte et diffuse un projet préétabli ou un plan à cet effet.”

⁷⁶ Ibid para. 1109.

⁷⁷ Pre-Trial Chamber II held in the *Bemba* confirmation decision that the ‘policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion’. International Criminal Court (Pre-Trial Chamber II), *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 8. Pre-Trial Chamber I made the identical observation in the confirmation decision. *Katanga* Confirmation Decision, para. 396, see *supra* note 30: ‘The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion’. And Pre-Trial Chamber III held in the *Gbagbo* arrest warrant decision that a policy ‘need not be explicitly defined or formalised’. *Gbagbo* Arrest Warrant Decision, para. 37, see *supra* note 30.

prosecuted to date have involved *action*: the agents of the state or organization have directly carried out atrocities. Nonetheless, a consistent thread in the authorities is that passive encouragement or approval can suffice. Indeed, inaction can be relevant in two different ways. First, if agents of a state or organization commit crimes and the state or organization fails to respond, that is an indication of a policy of encouragement. Second, and perhaps more rarely, a state or an organization with a duty to prevent crimes may observe crimes committed by *private actors* against a target group, and deliberately refrain from responding in order to encourage further crimes.

The ICC Elements of Crimes acknowledge policies of passivity, but they do so in a circuitous manner. The introduction to the elements for crimes against humanity says that a State or organization must “actively promote or encourage” the attack.⁷⁸ A footnote again reiterates that a policy “would be implemented by State or organizational action”.⁷⁹ Only then do the Elements finally acknowledge that “such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.”⁸⁰ Thus, to read only the text, without reading the footnote, would give one an incomplete picture of the provision.

During the deliberations, some delegations had raised an understandable concern about terms like ‘tolerate’, ‘condone’ or ‘countenance’.⁸¹ The concern was that, if such terms are used too loosely, then any time a state was not succeeding in particular crimes, the court might leap to an assumption of policy, without considering other explanations, such as lack of knowledge or inability to respond. An early attempt to address this concern was to require State or organizational ‘action’.⁸² However, later deliberations revealed that this solution was too crude. A majority of delegations grew concerned about its incompatibility with authorities indicating that a deliberate failure to respond to private actors could suffice. Thus, different formulas emerged to capture state or organizational inaction, where it was not a matter of mere *ineffectiveness* but rather *deliberate* inaction in

⁷⁸ ICC Elements of Crimes, Introduction to Crimes Against Humanity, para 3.

⁷⁹ Ibid, note 6.

⁸⁰ Ibid, note 6.

⁸¹ A more detailed account of the history is available at Roy Lee et al (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 74-78.

⁸² Ibid.

order to encourage the crimes. Thus, to infer policy, one would need to consider not only the inadequacy of the state's response but also whether the state had knowledge of the crimes and capacity to respond.⁸³

The Element provision certainly has an unusual structure, with the text seemingly requiring 'action' and then a footnote acknowledging inaction. It is also unusual that the point that was of greatest importance to the majority of delegations appears in only a footnote. This was agreed on the penultimate day as a package to allow for the consensus adoption of the Elements.⁸⁴ While the format is curious, the text and the footnote, read together, are adequately consistent with other authorities.

Other national and international authorities provide additional illumination, and they are clear that state or organizational passivity can suffice. The *Kupreskic* decision of the ICTY reviewed World War II jurisprudence concerning policies of inaction. That jurisprudence referred to "explicit or implicit approval or endorsement" and required that crimes be "approved of or at least condoned or countenanced by a governmental body".⁸⁵ The 1954 ILC draft Code referred to crimes "by the authorities of a State or by private individuals acting at the instigation or *with the toleration* of such authorities".⁸⁶ The Fujimori decision, referred to above, requires that the crimes must be "*connected in one way or another* to a particular State or organizational authority: they must *at least be tolerated* by the latter."⁸⁷ The following passage from the Commission of Experts on former Yugoslavia was already cited above, but is equally pertinent and insightful with respect to encouragement by inaction:

⁸³ This is re-inforced by an additional sentence, proposed by Turkey: "The existence of such a policy cannot be inferred *solely* from the absence of governmental or organizational action" (ICC Elements, footnote 6). Thus, as noted, one must consider whether the state had knowledge and capacity to act.

⁸⁴ See Roy Lee et al, 2001, pp. 74-78, see *supra* note 81.

⁸⁵ *Kupreškić* Judgment, paras 554-5, see *supra* note 47.

⁸⁶ International Law Commission, "Draft Code of Offences Against the Peace and Security of Mankind", in *Yearbook of the International Law Commission*, 1954, vol. II, United Nations, New York, 1960, p. 112.

⁸⁷ *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases*, para. 715 (citing Kai Ambos) (emphasis added), see *supra* note 39.

Unwillingness to manage, prosecute and punish uncontrolled elements may be another indication that these elements are, in reality, but a useful tool for the implementation of a policy of crime against humanity.⁸⁸

Finally, as scholars such as Kai Ambos and Steffen Wirth have noted, the possibility of policy by inaction is not only supported by authorities, but is also important for the logical construction of Article 7, since ‘policy’ must be distinguished from ‘systematic’. ‘Systematic’ requires state or organizational action, because the crimes must be planned and orchestrated, whereas ‘policy’ includes *inter alia* passive encouragement. Thus widespread crimes committed by private actors, where State authorities deliberately fail to maintain law and order in order to encourage the crimes, can be a crime against humanity.⁸⁹

6. Conclusion

The Draft Convention is a welcome initiative. One of its many potential contributions is to help clarify and harmonize the definition. Clarifying commentary would be valuable: (1) to mitigate legitimate concerns about Article 7 and thereby bolster acceptability of the Convention; (2) to increase the effectiveness of the Convention by forestalling restrictive misinterpretations; (3) to reduce fragmentation of the law of crimes against humanity, by showing that many diverse national and international authorities converge in regarding policy as a modest test, that does what it is generally agreed that crimes against humanity should do: to exclude ordinary crimes.

⁸⁸ Commission of Experts for Yugoslavia, 1994, para. 85, see *supra* note 10.

⁸⁹ Ambos and Wirth, 2002, pp. 31–4, see *supra* note 6.