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RESEARCH PAPER

IS 'THE POLICY ELEMENT' A LEGAL REQUIREMENT UNDER INTERNATIONAL
CRIMINAL LAW FOR CRIMES AGAINST HUMANITY?



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DECLARATION

I, Chiwala Wanangwa Chipeta, declare that *“Is the ‘Policy Element’ a Legal Requirement under International Criminal Law for Crimes Against Humanity?”* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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‘Vielen Danke.’



DEDICATION

To my grandmother, late Prisca ‘Nyazimba’ Mwale.



LIST OF ABBREVIATIONS

ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
PTC	Pre-Trial Chamber



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ABSTRACT

The precise legal definition of crimes against humanity has always been elusive since their first codification in the IMT Charter in 1945. Jurisprudence applying the definition has reflected the uncertainty especially with regard to the contextual element that requires that crimes against humanity should be committed pursuant to some form of a policy of a state or organisation: The Policy Element. In the 1990s the ICTY in its early Decisions exhibited an inclination to broaden the scope of the application of crimes against humanity by downgrading the Policy Element to cover states and non-state actors in asymmetric armed conflicts. In 2002, this tendency culminated in the complete abandonment of the Policy Element requirement. Eminent international criminal law scholars are divided whether the ICTY was correct or not. At the same time, Article 7(2) (a) of ICC Statute has expressly provided for a downgraded Policy Element that somehow resonates with the ICTY as it covers states and organisations. In 2010, the *Situation in the Republic of Kenya* presented the ICC with a question whether the concept of organisation in Article 7(2) (a) of the Statute covers organisations generally or only state-like organisations. The Majority Decision resonated with the more recent jurisprudence of the ICTY and held that it covered all organisations. The Dissenting Opinion, however, restricted the Policy Element to only state-like organisations. This Research agrees with the recent ICTY position that has been reflected by the Majority Decision and postulates that the Policy Element should not be a requirement for crimes against humanity.

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE RESEARCH

1.1 INTRODUCTION

1.1.1 The Concept and Relevance of the Policy Element for Crimes against Humanity

The term ‘Policy Element’ for crimes against humanity does not have a precise legal definition.¹ There is very little in the literature – and even less in practice – as to what the Policy Element exactly means. One attempt at a definition goes follows:

‘An agreement, plan or practice pursued by or on behalf of a government, authorities, or bodies, official or nonofficial, for the purpose or with a view to commit, aid or support criminal activities.’²

The above definition, though admittedly not the most precise, generally captures the essence of the Policy Element in crimes against humanity. Understood as defined above, the Policy Element seems to be grounded on the idea that for ordinary crimes to amount to crimes against humanity they must be part of a plan or agreed scheme of some authorities.³ The Policy Element does not focus on the individual ordinary crimes but provides a favourable environment for the perpetration of such crimes on a

¹ Mettraux, G. ‘The Definition of Crimes against Humanity and the Question of a “Policy” Element,’ in Sadat, L. (Ed), *Forging a Convention for Crimes against Humanity* (2011), 142; Robinson, D., ‘Defining ‘Crimes against Humanity’ at the Rome Conference,’ (1999) *American Journal of International Law*, vol. 93, 44; and Jalloh, C., *What makes a Crime against Humanity a Crime against Humanity*, (2013), vol. 28, 392.

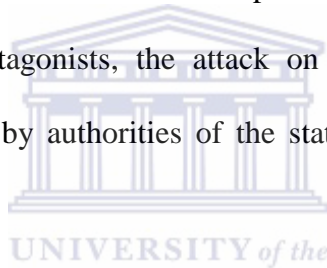
² Mettraux, G. (2011:143).

³ Mettraux, G. (2011:143).

massive scale.⁴ The ordinary crimes comprise killings and extermination of civilian populations, enslavement through forced labour, expulsion of people from their native regions, arbitrary imprisonment or torture of political opponents, rape of defenceless women, and persecution through discriminatory laws and measures, among others.⁵

In defining crimes against humanity, protagonists of the existence of the Policy Element requirement argue that the Policy Element provides a legal linkage between otherwise unconnected ordinary crimes committed in the context of an attack against a civilian population.⁶

Generally, crimes against humanity envisage the commission of any of the ordinary crimes listed above in the context of a widespread or systematic attack on a civilian population.⁷ For the protagonists, the attack on a civilian population has to be instigated or encouraged by authorities of the state or otherwise, in form of some discernible policy.



Hence, the Policy Element is vital in that it transcends ordinary crimes into crimes against humanity. As a result, the Policy Element requirement is further argued to have evidentiary consequences for those engaged in the prosecution of crimes against humanity: The Judges, Prosecutors and the Defence.

There are antagonistic arguments that firmly hold that the Policy Element is not a requirement for crimes against humanity. This has resulted into several debates concerning the existence or non-existence of the Policy Element requirement for crimes against humanity. The debates are still unsettled to date.

⁴ Mettraux, G. (2011:143).

⁵ Werle, G. (2009:288). For a more comprehensive list of acts covered as crimes against humanity see Article 7(1) of the ICC Statute.

⁶ Mettraux, G. (2011:143); and Werle, G., (2009:288).

⁷ Werle, G. (2009:292).

1.1.2 The Policy Element Debates

The Policy Element requirement for crimes against humanity is in a state of flux currently. There are two distinct but interconnected debates raging on. The first one relates to the divergent views as regards whether it is a legal requirement for crimes against humanity in international criminal law. On the one hand, the ICTY⁸ and some eminent international criminal law scholars firmly hold the position that the Policy Element is not a legal requirement for crimes against humanity under customary international law.⁹ On the other hand, equally eminent scholars firmly advocate the existence of such a legal requirement.¹⁰

The second debate concerns only the protagonists of the existence of the Policy Element requirement. There is divergence as to whether the Policy Element envisaged is only that of the state and state-like entities or can be extended to other entities generally.¹¹ Under the ICC Statute, for example, where the Policy Element is expressly provided for as a legal requirement, a debate currently rages on as to whether the required Policy Element covers states and organisations in general or states and only state-like entities.¹²

⁸ *The Prosecutor vs. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic ICTY A. Ch. 12.6.2002 para. 98.*

⁹ Halling, M., 'Push the Envelope-Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity,' (2010), *Leiden Journal of International Law*, Volume 0, Issue 4, 831; and Mettraux, G., 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and Rwanda' (2002), 43 *Harvard International Law Journal*, 237,271-83.

¹⁰ Kress, C., '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,' (2010) *Leiden Journal of International Law*, 23, 855-873; Schabas, W., 'State Policy as an Element of International Crimes,' (2008), *The Journal of Criminal Law and Criminology*, Volume 98, No. 3, 953-982; and Bassiouni, C., *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011), 17.

¹¹ Kress, C.,(2010: 855-873); Schabas, W.,(2008:953-982); and the dissenting opinion of Judge Hans Kaul in *The Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Republic of Kenya*, No ICC-01/09, 31 March 2010; Cf. Werle, G., and Burghardt, B., 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' *Journal of International Criminal Justice* 10 (2012), 1151-1170; and Bassiouni, C., (2011:17).

¹² Werle, G., and Burghardt, B.,(2012:1151-1170).

This state of flux and uncertainty has profound legal ramifications especially in delineating the specific scope of crimes against humanity and the discharging of evidentiary burdens by those involved in the prosecution of crimes against humanity.

1.1.3 History of the Debates

Crimes against humanity are amongst the four core crimes under international law at present. Like the other core crimes, crimes against humanity first came into the spotlight at the end of the Second World War.¹³ Since then, various definitions of crimes against humanity have been developed and used in different national, internationalised and international contexts over the years. The variance in the definitions has entailed a number of challenges concerning the precise definition of crimes against humanity as should be understood at present.¹⁴ This has impacted on the precise elements that comprise crimes against humanity. It is the genesis of the question whether the Policy Element is a legal requirement or not for crimes against humanity.

Historically, national jurisprudence that has dealt with crimes against humanity after the Second World War is available.¹⁵ However, it is hard to ascertain whether the Policy Element was regarded as a legal requirement or not as there is no legal

¹³ The offence was included in Article 6 (c) of the IMT Charter, Article 5 (c) of IMTFE Charter and Article II (1) of Control Council Law No. 10. See Werle, G., (2009:64).

¹⁴ The notion of crimes against humanity is challenged as being vague, over-inclusive and thereby in violation of the fundamental criminal law principle of *nullum crimen sine lege*. See DeGuzman, M., 'Crimes Against Humanity' in Schabas, W.A. & Bernaz, N. (Eds.) *Routledge Handbook of International Criminal Law*, (2011), 127; See also Nilsson, J., 'Crimes Against Humanity' in Cassese, A., *The Oxford Companion to International Criminal Justice*,(2009),28.

¹⁵ See *The United States of America vs. Alstötter et al. ("The Justice Case")* 3 T.W.C. 1 (1948), 14 Ann. Dig. 278; *The United States of America vs. Karl Brandt et al.* US Military Tribunal Nuremberg, Judgment of 19 July 1947; *The Public Prosecutor vs. Menten* 75 ILR 331, 362-363; *France vs. Klaus Barbie* 78 ILR 124, Court of Cassation, 6 Dec 1983 (France); *R vs. Finta* [1994] 1 SCR 701, 814 (Canada); *Ivan Timofeyevich Polyukhovich vs. The Commonwealth* 172 CLR 501 (Australia); and *R vs. Bow street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147(UK).

consensus to that effect.¹⁶ The protagonists for the non-existence of the Policy Element claim that the national jurisprudence available did not state that the Policy Element is a requirement but merely highlighted the context within which the crimes against humanity in issue occurred. On the other hand, the antagonists to this position argue that the jurisprudence represents proof for its existence.

In the 1990s jurisprudence from the ICTY and ICTR introduced the ‘widespread and systematic’ test for crimes against humanity that required that an attack so qualified should be directed, instigated or encouraged by the state or an organization.¹⁷ The *Tadic* Decision was very instrumental in entrenching the Policy Element as formulated above as a requirement for crimes against humanity.

However, the ICTY later on started expressing doubt on the relevance of the Policy Element requirement for crimes against humanity.¹⁸ The doubts culminated in a succinct, albeit controversial, pronouncement by the Appeals Chamber of the ICTY in the *Kunarac* Decision¹⁹ discarding the Policy Element altogether in crimes against humanity as a requirement under customary international law.

The holding of the ICTY has drawn support from some eminent international criminal law scholars like Guenael Mettraux²⁰ and Goran Sluiter²¹ who argue that there is nothing in customary international law to suggest the existence of the Policy Element as a legal requirement for crimes against humanity.

¹⁶ Mettraux, G., (2011: 162).

¹⁷ See *The Prosecutor vs. Dusko Tadic* ICTY T. Ch. II 7.5. 1997 para. 644; and *The Prosecutor vs. Ignace Bagilishema* ICTR. T. Ch. I 7.6.2001 para. 78.

¹⁸ See *The Prosecutor vs. Kunarac et al* ICTY T. Ch. II. 22.2.2001 para. 432; *The Prosecutor vs. Kupreskic* ICTY T. Ch. II 14.1.2000 paras. 554-5; *The Prosecutor vs. Kordic* ICTY T. Ch. 26.2. 2001 paras. 181-2; *The Prosecutor vs. Krnojelac* ICTY T. Ch. II 15.3.2002 para. 58.

¹⁹ *The Prosecutor vs. Kunarac et al* (2002) para. 98.

²⁰ Mettraux, G., (2011:162).

²¹ Sluiter, G., ‘Chapeau Elements of Crimes against Humanity of the United Nations Ad Hoc Tribunals,’ in Sadat, L. (Ed), *Forging a Convention for Crimes against Humanity* (2011), 129.

Despite the *Kunarac* Decision and its obvious support by some eminent scholars, Article 7 (2) (a) of the ICC Statute expressly provides for the Policy Element as a required contextual element for crimes against humanity covered under the Statute. In fact, in a recent decision on the authorisation to commence investigations into the post-election violence in Kenya,²² the ICC adopted an expansive interpretation of the Policy Element requirement under Article 7(2) (a) to authorise investigations for alleged crimes against humanity.

There are also other scholars who assert that under existing customary international law crimes against humanity do require the Policy Element. For these scholars, there exists sufficient state practice and *opinio juris* since the inception of the concept of crimes against humanity that the Policy Element is a requirement for crimes against humanity.

For instance, William Schabas,²³ Cherif Bassiouni²⁴ and Claus Kress²⁵ advocate for the existence of the Policy Element requirement for crimes against humanity under customary international law. These scholars agree that discarding the Policy Element outright has the potential to makes crimes against humanity applicable to, as Schabas argues: serial killers, the Mafia, motorcycle gangs and small terrorist bands. The Policy Element is, therefore, the requirement that transcends common waves of crime into the international criminal law arena in the form of crimes against humanity.

After the ICC Statute was negotiated in 1998 another debate was birthed when the ICC interpreted Article 7(2) (a) of the ICC Statue in the *Decision on the Authorisation*

²² *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, No: ICC-01/09 31 March 2010.

²³ Schabas, W., (2008: 953-982).

²⁴ Bassiouni, C., (2011:17).

²⁵ Kress, C., (2010: 855-873).

*of Investigations in Kenya*²⁶ in 2010. Despite the express provision of the Policy Element as a requirement, Judges of the ICC that presided over the matter and scholars that have commented on it are divided as to whether the term ‘organisational policy’ covers states and only organisations that are ‘state-like’ or covers states and organisations in general.

The Majority Decision adopted an interpretation of the Policy Element under Article 7(2) (a) that covers states and organisations in general. The late Judge Peter-Hans Kaul dissented and instead opted for a stringent interpretation of the Policy Element that covered states and only ‘state-like’ organisations.

The reasoning underlying the Dissenting Opinion is supported by Claus Kress. Kress argues that the state practice and *opinio juris*, as observed since Nuremberg, indicates the existence of customary international law requiring the Policy Element envisaged being either that of a state or state-like organisation.

On the other hand, Gerhard Werle and Boris Burghardt²⁷ advocate for an approach that focuses on the ordinary meaning of the term ‘organisational policy’ in interpreting the Policy Element in the ICC Statute. According to Werle and Burghardt the ordinary meaning of phraseology employed to manifest the Policy Element in article 7(2) (a) covers any organisation with sufficient capacity to carry out the widespread or systematic attack on a civilian population.

The above exposition evidences the debates concerning the Policy Element requirement in crimes against humanity at present. In light of the above, it is clear that some uncertainty lingers in international criminal law at present as to whether the

²⁶ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya, 31 March 2010.*

²⁷ Werle, G., and Burghardt, B., (2012:1151-1170); and Bassiouni, C., (2011:17).

Policy Element is a legal requirement in crimes against humanity and the precise limits of Policy Element under the ICC Statute.

1.2 OVERVIEW OF THE RESEARCH

1.2.1 Research Questions

The debate over the Policy Element is as much a debate over whether it does or does not form part of the definition of crimes against humanity, as it is a debate over whether it should or should not be part of it.²⁸

In light of the above, the research question cannot be reduced to one: It has several constituent questions. The over-arching questions that the research intends to survey are: Whether the Policy Element is a legal requirement for crimes against humanity? Whether the Policy Element should be a requirement for crimes against humanity at all?

Inherent in the overarching questions are the following questions, the survey of which will help to delineate the scope of the research: what are the justifications for the divergent views from the ICTY, the ICC and eminent scholars regarding the Policy Element requirement? What are the legal ramifications of having or not having the Policy Element requirement in international criminal law? Is it necessary that the Policy Element should be a requirement at all?

1.2.2 Significance of the Research

As seen above, the Policy Element requirement in crimes against humanity is in a state of flux currently. This research intends to survey the debate at present and to

²⁸ Mettraux, G. (2011:145)

analyse the justifications for and ramifications of the opinions advanced so far. This research will also attempt to provide a comprehensive understanding of the nuances involved and the profound legal ramifications the state of flux in which the Policy Element requirement in crimes against humanity is at present has in international criminal law.

The research will further attempt recommendations as to whether the Policy Element should be a legal requirement for crimes against humanity.

1.3 CONCLUSION

To surmise the above, the Policy Element requirement in crimes against humanity is in a state of flux at present as evidenced by the uncertainty as to whether it is a legal requirement in international criminal law or not. Two distinct but interconnected debates are raging on at present regarding the Policy Element. Firstly, it is not settled whether the Policy Element is a requirement for crimes against humanity at customary international law or not. Secondly, there is also divergence as to whether the term ‘organisational policy’ under the ICC Statute envisages any organisation or only an organisation that is state-like.

Consequently, this research intends to provide a comprehensive understanding of the debates concerning the Policy Element for crimes against humanity. Further, it will attempt recommendations that would potentially minimise divergence.

CHAPTER TWO

THE PROTAGONIST ARGUMENT FOR THE NON-EXISTENCE OF THE POLICY ELEMENT REQUIREMENT

2.1 INTRODUCTION

In the 1990s, the jurisprudence from the ICTY and ICTR suggested that crimes against humanity required not only that an attack against a civilian population should be widespread or systematic but should also be directed, instigated or encouraged by a state or an organization.²⁹ This position was heralded as being supported by international instruments and a plethora of international and national jurisprudence concerning crimes against humanity.³⁰

The above position changed in 2002 when the Appeals Chamber of the ICTY, in its *Kunarac* Decision, held that the Policy Element was not a legal requirement for crimes against humanity. The reasoning for the holding was that the Policy Element was neither a requirement under the statute of the ICTY nor was it existent at customary international law. There are some eminent legal scholars in support of this position.

This chapter will firstly survey and engage the Appeal Chambers holding in the *Kunarac* Decision, concentrating on the reasoning of the ICTY in discarding the Policy Element as a requirement for crimes against humanity. Secondly, the chapter will survey and engage arguments of scholars in support of the above position

²⁹*The Prosecutor vs. DuskoTadic* ICTY T. Ch. II 7.5. 1997 para. 644; and *The Prosecutor vs. Ignace Bagilishema* 2001 para. 78.

³⁰ See *The United States of America vs. Alstötter et al. ("The Justice Case")* 3 T.W.C. 1 (1948), 14 Ann. Dig. 278; *The United States of America vs. Karl Brandt et al.* US Military Tribunal Nuremberg, Judgment of 19 July 1947; *The Public Prosecutor vs. Menten* 75 ILR 331, 362-363; *France vs. Klaus Barbie* 78 ILR 124, Court of Cassation, 6 Dec 1983 (France); *R vs. Finta* [1994] 1 SCR 701, 814 (Canada); *Ivan Timofeyevich Polyukhovic vs. The Commonwealth* 172 CLR 501 (Australia); and *R vs. Bow street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147(UK).

2.2 THE *KUNARAC* DECISION

2.2.1 Brief Background

The relevant facts of the *Kunarac* Decision concern an armed conflict between Bosnian Serbs and Bosnian Muslims from 1992 to 1993 in the area of Foca, a municipality in Bosnia and Herzegovina. In 1992 Foca fell under the control of Serbian paramilitaries. As a result non-Serb civilians were killed, raped or otherwise abused by the Serbian paramilitaries.

In 2001, the appellants, Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, who took active part in the armed conflict as members of the paramilitaries, were charged with crimes against humanity and war crimes in the Trial Chamber of the ICTY. They were convicted on all charges and sentenced to 28 years, 20 years and 12 years respectively.³¹

The appellants appealed to the Appeals Chamber against both their convictions and the sentences. They lodged several grounds of appeal including alleged errors by the Trial Chamber with respect to: (i) its finding that Article 3 of the ICTY Statute applies to their conduct; (ii) its finding that Article 5 of the Statute applies to their conduct; (iii) its definitions of the offences charged; (iv) the cumulative charging; and (v) the cumulative convictions entered by the ICTY.³²

Of particular importance to this discussion, the appellants contended that the crimes against humanity as defined under the statute of ICTY required that crimes against humanity against the non-Serb Muslim women should be committed in furtherance of a plan or a policy. The appellants therefore had to have requisite knowledge of that

³¹ *The Prosecutor vs. Kunarac et al* (2002) paras. 10, 18 and 22.

³² *The Prosecutor vs. Kunarac et al* (2002) para. 24.

plan or policy and a demonstrable willingness to participate in its furtherance. With that premise, the appellants contended that the charges of crimes against humanity could not hold since the crimes they were accused of were disparate and there was no proof that the appellants had been in contact during the armed conflict. In essence, they argued that there was no evidence of any common plan or common purpose to commit the crimes against the non-Serb Muslim women.³³

The Appeals Chamber rejected this argument and held that the statute of the ICTY does not require the Policy Element for crimes against humanity. The Chamber went further to hold that there is no such requirement under customary international law. Below is the reasoning of the ICTY.

2.2.2 The Requirement of a Policy Element

The Appeals Chamber of the ICTY held that since neither the ICTY Statute nor customary international law at the time of the alleged acts required proof of the existence of a plan or policy to commit the said acts, it could not justify a finding that the Policy Element was a requirement for the charges of the crimes against humanity. The ICTY further held that the legal elements for crimes against humanity included: proof of an attack against a civilian population; and that the said attack should be widespread or systematic. However, to prove these elements, it was not necessary to establish that they were the result of the existence of a policy or plan. The existence of a plan or policy could be useful to establish these two elements. However, it was entirely possible to establish the said elements without reference to any plan or policy.

³³ *The Prosecutor vs. Kunarac et al* (2002) para. 75.

In sum, therefore, the existence of a policy or plan could merely be of probative value in appropriate circumstances, but in the legal scheme of the ICTY it was not a required element for crimes against humanity.³⁴

The ICTY further attested to the existence of a debate in the jurisprudence of the tribunal as to whether a policy or plan constituted an element of the definition of crimes against humanity. However, the ICTY, in a single footnote, categorically dismissed the existence of the Policy Element thus: ‘The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law.’³⁵

In its assessment the ICTY cited the following as buttressing the conclusion that the Policy Element is non-existent under customary international law: The absence of the Policy Element as a requirement under Article 6(c) of the Nuremberg Charter and Article II (1)(c) of Control Council Law No 10; The dearth of an express pronouncement of its existence in the Nuremberg Judgement and a plethora of other judgments from international or national fora in which crimes against humanity featured; The non-inclusion of an express Policy Element requirement in the United Nations Supplements on crimes against humanity;³⁶ And the fact that the Appeals Chamber in the *Jelusic* Decision³⁷ found that the Policy Element was non-existent for purposes of the crime of Genocide.

³⁴ *The Prosecutor vs. Kunarac et al* (2002) para. 98.

³⁵ *The Prosecutor vs. Kunarac et al* (2002 :30) footnote 114.

³⁶ These included: Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96.

³⁷ *The Prosecutor vs. Goran Jelusic* Case No. IT-10-95-T 14 December 1999.

The ICTY made attempts to distinguish some prior judgments that had been used in support of the existence of the Policy Element requirement. Firstly, the ICTY distinguished the Decision of the Dutch Supreme Court in *The Public Prosecutor vs. Menten*.³⁸ The *Menten* Decision held that Article 6(c) of the Nuremberg Charter required that a crime against humanity be committed in connection with some plan or policy. The *Menten* Decision was distinguished on the basis that the court clearly went beyond the text of the applicable statute since the express wording of the Charter does not contain such a requirement.

Secondly, the ICTY distinguished *The Supreme Court of the British Zone Decisions*.³⁹ The ICTY held that the reference to a policy or plan in the Decisions was merely to highlight the factual circumstances, and not recognition of an independent legal requirement.

Finally, the ICTY looked at the *In re Alstötter* Decision.⁴⁰ This Decision is often quoted in support of the Policy Element requirement. The ICTY, however, found that the *ratio decidendi* of this case lending support to the existence of the Policy Element requirement does not constitute an authoritative statement of customary international law.

2.2.3 Observations

This Research finds that the *Kunarac* Decision represented a fundamental shift on the treatment of the Policy Element in crimes against humanity. That aside, it is noteworthy, however, that the reasoning for the conclusion reached by the ICTY does

³⁸ *The Public Prosecutor vs. Menten* 75 ILR 331, 362-363.

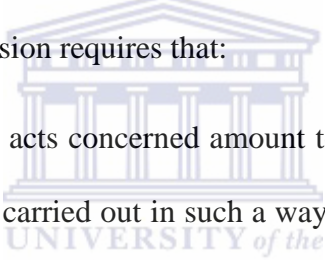
³⁹ OGH br. Z., vol. I, 19.

⁴⁰ *The United States of America vs. Alstötter et al. ("The Justice Case")* 3 T.W.C. 1 (1948), 14 Ann. Dig. 278, 284.

not come out clearly in the decision. The ‘overwhelming practice’ that the ICTY reviewed to discard the Policy Element requirement is found in a single footnote.⁴¹

Further, the analysis that led to concluding that the Policy Element is not a requirement under customary international law falls far short of the requirements set out in Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ); international custom can be verified by surveying evidence of general practice accepted as law.⁴² Regardless of the conclusion reached, the ICTY ought to have dedicated a fair amount of attention to methodically assess the state practice and *opinio juris* regarding the existence or non-existence of the Policy Element.

An assessment of the presence of international custom is spelt out in the *Continental Shelf* Decision.⁴³ The Decision requires that:



‘Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’

A more expansive test is provided for in the *Nicaragua* Decision.⁴⁴ In the Decision, the ICJ expanded the sources used to assess international custom to include its own previous decisions and also less directly to statements made by the ILC. It is only after engaging itself in an assessment as enunciated in these two Decisions that the ICTY could make a plausible finding of the existence or non-existence of as rule of customary international law. The lack of such an elaborate and methodical assessment

⁴¹ *The Prosecutor vs. Kunarac et al* (2002:30) footnote 114.

⁴² Article 38 is taken here as the starting point, on the basis that it is generally recognized as a statement of sources of international law, without its applicability being limited to the work of the ICJ.

⁴³ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment 20 February 1969, I.C.J. Reports (1969) para. 77.

⁴⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The United States)*, Judgment 27 June 1986, I.C.J. Reports 1986, 14 para. 190 and 202. See also Leopard, D., *Customary International Law: A New Theory with Practical Applications* (2010), at 132.

thus presents a major weakness in the reasoning of the finding by the ICTY in the *Kunarac* Decision that the Policy Element is non-existent under customary international law.⁴⁵

2.2.4 Legal Ramifications

The Research opines that the finding that the Policy Element was not a requirement for crimes against humanity at customary international law meant that the acts committed in Foca that qualified as crimes against humanity included the otherwise disparate acts of the Appellants as long as they comprised a widespread or systematic attack against the civilian population. There need not have been a plan or policy in furtherance of which the appellants must have been acting.

This served as an expansion of the ambit of crimes against humanity as acts not connected through a plan or policy could now be considered as crimes against humanity as long as they were committed in a widespread and systematic manner. The appellants, who had carried out disparate crimes not connected with any policy or plan, could be held responsible for crimes against humanity.

Further, the finding mitigated the evidential burden for the prosecution. There was no need for the prosecution to prove the existence of the Policy Element.

Lastly, being a decision of the Appeals Chamber, the Research opines the Decision had authoritative value to determine direction of jurisprudence in the ICTY and the ICTR with particular regard to crimes against humanity.⁴⁶

⁴⁵ Mettraux, G. (2011:143); and Sluiter, G., (2011: 129).

⁴⁶ *The Prosecutor vs. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment, 181–82 (Feb. 26, 2001). The ICTY concluded that ‘the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crime against humanity’ rather than as an independent, additional element of the definition of this crime. For jurisprudence in the ICTR that relied on the *Kunarac* Decision see *The Prosecutor vs. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (May 15, 2003); and *Sylvestre Gacumbitsi vs. The Prosecutor*, Case No. ICTR-2001-64-T, Judgment, (June 17, 2004).

2.3 SCHOLARLY ARGUMENTS

There are scholars who advocate for the position similar to that in the *Kunarac* Decision. The discussion will not focus on specific scholars but rather the heads of argument propounded. Unlike the *Kunarac* Decision above, the arguments of the scholars are detailed and demonstrably methodically assessed. The arguments below have been gleaned from discussions of several scholars including Guenael Mettraux, Goran Sluiter, Charles Jalloh and Mark Osiel. The dominant voice will be that of Mettraux as he has tackled almost all the arguments looked at by the other scholars.

2.3.1 No Evidence of the Policy Element Requirement in Jurisprudence and Instruments

This argument propounds that a survey of the national and international jurisprudence and instruments on crimes against humanity, overwhelmingly supports the non-existence of the Policy Element for crimes against humanity than its existence.⁴⁷ This argument retraces the historical path of crimes against humanity to ascertain whether the Policy Element requirement was expressly or impliedly provided for in legally binding instruments and other instruments that have informed international criminal law and also jurisprudence applying the said instruments.

2.3.1.1 Instruments

The starting point for this argument is the end of the Second World War in 1945 when crimes against humanity were for the first time explicitly included in article 6 of the IMT Charter.⁴⁸ They were later also included in article 5 (c) of the IMTFE Charter,

⁴⁷ Mettraux, G., (2011: 145); and Sluiter, G., (2011: 129).

⁴⁸ Sluiter, G., “*Chapeau Elements*” of Crimes against Humanity of the United Nations Ad Hoc Tribunals, in Sadat, L. (Ed), *Forging a Convention for Crimes against Humanity* (2011), 105-6.

and thereafter in article II (1) of Control Council Law No. 10 in 1946, albeit with some variations.⁴⁹

In 1950 the definition of crimes against humanity as formulated in the IMT Charter was affirmed in the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Decision of the Tribunal adopted by the International Law Commission.⁵⁰

In the early 1990s crimes against humanity were also incorporated into the constitutive statutes of the ICTY⁵¹ and the ICTR.⁵² Similarly, as was the case with the IMT, the IMTFE and Control Council Law No. 10 above, the definitions of crimes against humanity in these statutes varied considerably.⁵³

The argument asserts that a survey of the various formulations of the definition of crimes against humanity in all the instruments reveals that not once was the Policy Element expressly referred to as a requirement.⁵⁴

The absence of the express reference to the Policy Element in the pre-ICC Statute instruments is argued to be proof for the non-existence of the general requirement for Policy Element. The reasoning behind is that, if indeed the Policy Element was a legal requirement then it would have been so central as to be expressly provided for in any of the instruments defining crimes against humanity.

⁴⁹ While the IMT and IMTFE Charters required a nexus between crimes against humanity and other crimes within said Charters, this requirement was discarded in Control Council Law No. 10. See Werle, G. (2009:289 para 783); Sluiter, G., (2011:106); and Schabas, W., (2011:108).

⁵⁰ See Principle VI (c) of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal adopted by the International Law Commission and presented to the United Nations General Assembly, U.N. GAOR, 5th Sess. Supp. No. 12 U.N. Doc. A/1316 (1950).

⁵¹ Article 5 of the ICTY Statute.

⁵² Article 3 of the ICTR Statute.

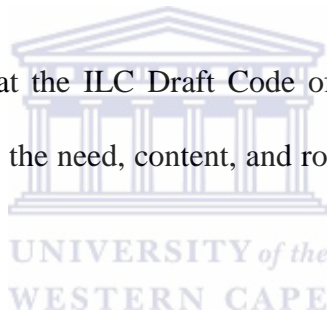
⁵³ While the ICTY requires a nexus between crimes against humanity and an internal or international armed conflict, the same is not required by the ICTR. On the other hand the ICTR requires that crimes against humanity be committed with a discriminatory intent. See Werle, G., (2009:291 para 787); Sluiter, G., (2011:106); and Schabas, W., (2011:109).

⁵⁴ Mettraux, G., (2011: 157).

The only exception is article 7(2) (a) of the ICC Statute which came into being only in 1998. It expressly provides for the contextual element of crimes against humanity that requires that a “widespread or systematic” attack on a civilian population must be done in pursuance or furtherance of a ‘state or organizational policy’. Other than this provision, none of the earlier constitutive instruments providing for definitions of crimes against humanity had included this requirement.

The scholars have also looked at some non-binding instruments which have informed the discourse on crimes against humanity in international criminal law. The most important of such instruments are the ILC Draft Codes of Offences against the Peace and Security of Mankind (ILC Draft Codes).⁵⁵

The scholars observed that the ILC Draft Code of 1954 and its successors show a contradictory pattern as to the need, content, and role of the Policy Element in crimes against humanity.⁵⁶



Article 2(11) of the 1954 Draft provided that crimes against humanity had to be committed ‘by the authorities of a State or by private individuals *acting at the instigation or with the toleration of such authorities.*’ Essentially, there had to be some encouragement or condonation by the state which could be in form of a plan or policy. It is argued that this was meant to transcend an ordinary crime from the domestic realm onto the international one. Thus, the instigation and toleration by the state was the defining factor.

In the 1991 version of the Draft Code, however, there was no such requirement.⁵⁷ The Commentary to the Draft Code merely suggested that the systematicity of the attack

⁵⁵ ILC Draft Codes may indicate the state of the law as they reflect the trending legal position at a particular time.

⁵⁶ Mettraux, G., (2011: 171).

on a civilian population may consist of a ‘constant practice *or* ... a methodical plan to carry out such violations.’ The plan serves to exemplify the systematicity required but cannot be said to be a requirement on its own.

Similarly, there was no Policy Element requirement in the 1995 ILC Draft Code.⁵⁸ However, in the 1996 Draft, article 18 required that crimes against humanity should be “instigated or directed by a Government or by any organization or group.” Ostensibly, this is a clear manifestation of the requirement of the Policy Element.

With the premises above, the scholars argue that the absence of the Policy Element in all the notable instruments providing for crimes against humanity save for the ICC Statute and the inconsistent featuring in the ILC Draft Codes only serves to impress that the Policy Element is not a requirement for crimes against humanity in international criminal law.

This Research finds merit in the above argument. The absence of the Policy Element as a requirement in all notable instruments starting from the IMT Charter to the Statutes of the ICTY and the ICTR casts doubt on whether the Policy Element was intended to be a requirement for crimes against humanity. Additionally, it has been seen above, that the definitions of crimes against humanity under the IMT Charter, the IMTFE, Control Council Law No. 10, the ICTY and the ICTR all differed in certain respects. However, the Policy Element requirement was absent in all of them. This fortifies the plausibility that the Policy Element was not envisaged to be a legal requirement for crimes against humanity.

The only exception is the requirement of some Policy Element in the ILC Draft Code and its inclusion in the ICC Statute. The Research acknowledges this development but

⁵⁷ See Article 21 of the ILC Draft Code 1991.

⁵⁸ See Article 21 of ILC Draft Code 1995.

refers to the non-binding nature of the ILC Draft Codes. The Draft Codes merely indicated developments envisaged in international criminal law but were not law themselves. They were useful to that extent. The inclusion of the Policy Element as a requirement in the ICC Statute provides significant evidence that at the time of its negotiation the consensus had shifted. However, it remains a plausible argument that the inclusion of the Policy Element as a requirement under the ICC Statute does not change the historical path of crimes against humanity which indicates that the Policy Element was not envisaged as a requirement in all the notable instruments.

2.3.1.2 Jurisprudence

The scholars looked at the Nuremberg Trial and other Second World War trials in which crimes against humanity featured. They also looked at some selected national jurisprudence that concerned crimes against humanity.

With particular regard to the Nuremberg Trial, they observed that nowhere in the Trial⁵⁹ did the Nuremberg Tribunal require a nexus between the crimes against humanity and some form of policy or plan.⁶⁰ This was regardless the fact that invariably the crimes against humanity were most certainly linked to such a policy or plan in practice.

In relation to other Second World War trials, the scholars focused on trials based on Control Council Law No. 10 in the occupied zones.

Some Decisions in the Supreme Court in the British Zone referred to the need for a nexus between the constitutive acts of crimes against humanity and the Nazi policy or

⁵⁹ In the Nuremberg Trial, sixteen of the twenty-four defendants were convicted for crimes against humanity.

⁶⁰ Mettraux, G., (2011: 160).

plan. However, like argued above in the *Kunarac* Decision, the scholars emphasise that the court merely highlighted the context in which the constitutive acts of crimes against humanity occurred and not stating that it is a legal requirement.⁶¹ Therefore, the definition of crimes against humanity adopted during the Second World War cases did not include the Policy Element as a legal requirement.⁶²

Extrapolating the argument further, they argue that the focus of the definitions of crimes against humanity adopted during this era was on the scale or systematicity of the crimes: that was the distinguishing feature from ordinary isolated crimes.⁶³ They stress that the definitions for crimes against humanity adopted in the Decisions did not require the Policy Element.

The scholars looked at some national jurisprudence which antagonists claim affirm the existence of the Policy Element. Firstly, they looked at the *Menten* Decision.⁶⁴ The Decision essentially held that Article 6(c) of the Nuremburg Charter required that a crime against humanity must be committed in connection with some plan or policy. They argue that the Court clearly went beyond the text of the Charter since the express wording of the statute does not contain such a requirement. Further, they point out that the Court did not provide authority in form of precedent for the inclusion of the Policy Element as a legal requirement.

Secondly, the protagonists analyse the *Alstötter* Decision.⁶⁵ The Decision was decided in the United States Military Tribunal in occupied Germany. It applied Control Council Law No 10. The Tribunal held that crimes against humanity as defined under

⁶¹ Mettraux, G., (2011: 162).

⁶² The Decisions looked at include: the *Flick*, the *Ministries*, and the *Einsatzgruppen* Decisions.

⁶³ Mettraux, G., (2011: 162). The decision rendered by a Dutch Special Criminal Court *In re Ahlbrecht* (No. 2) on September 22, 1948 is a fair summary of the jurisprudence under Control Council Law No. 10 on that point.

⁶⁴ *The Public Prosecutor vs Menten et al* 75 ILR 331, 362-363.

⁶⁵ *The United States of America vs. Alstötter et al. ("The Justice Case")* 3 T.W.C. 1 (1948), 14 Ann. Dig. 278 ,284

the applicable law had to be strictly construed to exclude isolated cases of atrocities or persecutions committed by private individuals or with the blessing of government. The Tribunal stressed that the ‘conscious participation in systematic governmentally organised or approved procedures,’ was key for the atrocities or persecutions to be qualify as crimes against humanity.⁶⁶

The scholars argue that the essence for including a requirement of the Policy Element in the Decision was to help the Court distinguish between crimes against humanity and ordinary crimes. It is argued that the Court had erroneously delineated the scope of crimes against humanity to crimes committed by Germans against German nationals only. Thus, it became imperative to distinguish between the crimes against humanity and ordinary crimes committed, as both were committed by Germans against German nationals. An inventive way of distinguishing was the inclusion of the Policy Element, which separated crimes committed in pursuance and furtherance of the Nazi Policy and ordinary crimes. They conclude that the inclusion of the Policy Element requirement was therefore erroneous.

Further, the scholars caution that the Allied and German courts, applying Control Council Law No 10, were domestic courts that primarily applied domestic law. The domestic law applied included provisions from the occupation authorities that would have permeated into the application and interpretation of Control Council Law No. 10 through the Courts.⁶⁷ The Policy Element might have permeated through as part of such a provision since Control Council Law No. 10 did not expressly include the Policy Element requirement for crimes against humanity.

⁶⁶ Mettraux, G., (2011: 163)

⁶⁷ Mettraux, G., (2011: 164)

Apart from the above cases, the scholars have further looked at two Decisions from France relied on as authorities for the existence of the Policy Element: *Papon* and *Touvier*.⁶⁸ They criticise the French Courts for adopting a highly political definition of crimes against humanity. It is argued that the Courts were careful to include members of the French Resistance as victims of crimes against humanity but then excluded the agents of the pro-Nazi French Vichy regime as perpetrators. Mark Osiel describes the French definition of crimes against humanity as very telling of ‘moral evasion’ on behalf the French regime that did not want to accept responsibility for the role it played in the atrocities and persecution of its own Jewish community.⁶⁹

Finally, the scholars looked at the Canadian Supreme Court’s Decision in *R vs. Finta*⁷⁰. In *Finta* the Court held that where crimes against humanity are alleged, it is imperative for the trial judge to make a finding as to whether the acts alleged constituted ‘practical execution of state policy’. The scholars, however, argue that the criminal code applied by the Court did not include any Policy Element requirement. Further, the Court did not provide precedents that had informed its decision. One of the protagonists, Mettraux,⁷¹ even suggests that the Decision seems to have relied exclusively on the opinions of Cherif Bassiouni who is a one of the staunch protagonists of the existence of the Policy Element as will be seen later on.

All in all, the protagonists of the non-existence of the Policy Element requirement for crimes against humanity hold that a survey of the international instruments, jurisprudence from the international tribunals and some national jurisprudence reveals that the only plausible conclusion is that there is no such requirement generally: Save

⁶⁸ *The Prosecutor vs. Maurice Papon*, Cour de Cassation, Chambre Criminelle, France, Judgement, 11 June 2004; and *France vs. Paul Touvier*, Cour de Cassation, Chambre Criminelle, France, Judgement, 27 November 1992.

⁶⁹ Mettraux, G., (2011: 164); See also Osiel, M. *Mass Atrocity, Collective Memory and the Law* (1997), 157.

⁷⁰ *R. v. Finta* [1994] 1 S.C.R. 701 (La Forest, J., dissenting) (Canada); See also Mettraux, G., (2011: 166)

⁷¹ Mettraux, G., (2011: 166)

for the ICC Statute. This conclusion informs the position taken as regards the Policy Element requirement under customary international law.

This Research also finds merit in this argument. Jurisprudence connected with the international instruments will invariably mirror the provisions of the instruments with specific regard to elements of crimes. That is to say, where an instrument does not expressly provide for an element, there has to be sufficient justification to allow an inference that such an element is required. With this reasoning, it is a plausible argument that the absence of the Policy Element requirement in the instruments is an indication that the element in issue is not a requirement at all.

2.3.2 No sufficient State Practice and *Opinio Juris* to justify the existence of the Policy Element under Customary International Law

As highlighted above, the conclusion that there is no proof in the relevant international instruments and jurisprudence casts doubt on the customary nature of the requirement. As required in the *Nicaragua* Decision, evidence of international custom must entail sufficient state practice and *opinio juris*. It is argued that the survey reveals that there is no requirement for the Policy Element for crimes against humanity.

Further, the definition of crimes against humanity contained in the Nuremberg Charter is generally considered to be the authoritative definition under customary international law.⁷² As already seen, it makes no explicit reference to a plan or a policy. Therefore the protagonists for the non-existence of the Policy element conclude that there is no such requirement under customary international law.

⁷² See IMT Judgement, Nuremberg, 14 November 1945 – 1 October 1946, at 254, 461 (1947–1949): ‘The Charter ... is the expression of international law existing at the time of its creation.’ See also The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, 35, U.N. Doc. S/25704 (May 3, 1993) that provides that the Nuremberg Charter is part of customary international law.

This Research also finds merit in this argument in that there is inconsistent state practice to support an inference of the existence of international custom requiring the Policy Element for crimes against humanity.

It also stands to reason that the debate whether the Policy Element requirement is existent at customary international law or not serves to fortify the conclusion that it is not existent. This is so because as required in Article 38 of the Statute of the ICJ, international custom is verifiable by state practice of rules accepted as law. The divergence in the treatment of the Policy Element requirement as exemplified by the current debate, serves to fortify the reasoning that the Policy Element is not generally accepted as a requirement and hence not part of customary international law.

2.3.3 Legal Ramifications

The view that the Policy Element is not a requirement for crimes against humanity at customary international law has several legal ramifications in international criminal law.

The Research observes that the first ramification concerns the ambit of cases of crimes that could qualify as crimes against humanity. As observed earlier in this paper, the Policy Element is seen by some, as the factor that transcends ordinary crimes to crimes against humanity in international criminal law. Thus, without the Policy Element requirement, crimes committed by serial killers, the Mafia, motorcycle gangs and terrorist bands could qualify as crimes against humanity so long as they are committed in a widespread and systematic manner.⁷³

⁷³ For instance, the violence on civilians perpetrated by recent terrorist bands such as Boko Haram in Nigeria, Al-Shabab in Somalia and ISIS/ISIL in Syria and parts of Iraq could be covered as crimes against humanity where no Policy Element is required. See Schabas, W., (2008: 960)

This can be seen a desirable consequence especially in the wake of proliferation of asymmetric warfare where the capacity of non-state entities to orchestrate and carry out attacks on the civilian population rivals, and at times, supersedes that of states.

Further, the non-existence of the Policy Element requirement at customary international law mitigates the evidential burden for the prosecution generally. There would be no need for the prosecution to prove the existence of the Policy Element.

2.4 CONCLUSION.

To surmise, the ICTY, in the *Kunarac* Decision, is heralded as having expressly discarded the Policy Element for crimes against humanity on the basis that it did not exist under customary international law. However, the ICTY did not elaborate adequately on the basis of such a monumental finding.

Legal scholars also render their support to the finding of the ICTY. In essence, they argue that there is no proof in the instruments and the jurisprudence since the inception of crimes against that the Policy Element is a requirement. This Research finds merit in this argument.

The Research further observes that the non-existence of the Policy Element requirement at customary international law has legal ramifications in international criminal law: Widespread and systematic crimes committed by private entities could qualify as crimes against humanity; and mitigating the evidential burden for the prosecution generally.

CHAPTER THREE

THE PROTAGONIST ARGUMENT FOR THE EXISTENCE OF THE POLICY ELEMENT REQUIREMENT

3.1 INTRODUCTION

There are scholars who assert that under existing customary international law, crimes against humanity do require the Policy Element. For these scholars, there exists sufficient state practice and *opinio juris* since the inception of the concept of crimes against humanity that the Policy Element is a requirement for crimes against humanity.

For instance, William Schabas,⁷⁴ Cherif Bassiouni⁷⁵ and Claus Kress⁷⁶ fervently advocate for the existence of the Policy Element requirement for crimes against humanity under customary international law.

This chapter intends to survey the arguments advanced by the scholars and assess the legal ramifications of the existence of the Policy Element. The scholars looked at both international instruments and available jurisprudence to ascertain the existence of the Policy Element. The approach employed by these scholars is similar to the scholars that support the non-existence of the Policy Element at customary international law discussed above. However, their analysis leads to a different conclusion. The starting point is scholarly arguments with respect to international instruments concerning crimes against humanity.

⁷⁴ Schabas, W., (2008: 960).

⁷⁵ Bassiouni, C., (2011:17).

⁷⁶ Kress, C., (2010: 855-873).

3.2 SCHOLARLY ARGUMENTS

3.2.1 The Policy Element Requirement is implied in the Definition of Crimes against Humanity in Instruments

The scholars on this side of the debate also assert that since the first codification of crimes against humanity in the IMT Charter in 1945 up to the advent of ICTY Statute in 1993, no legally binding instrument expressly provided for the Policy Element as a requirement for crimes against humanity.⁷⁷ The only exception came later on in 1998 in Article 7 (2) (a) of the ICC Statute.

Bassiouni also looked at the constitutive instruments of recent mixed-model tribunals⁷⁸ that have provided for definitions of the crimes against humanity.⁷⁹ He concluded that none of the constitutive instruments for the mixed-model tribunals expressly provides for the Policy Element requirement as well.

Bassiouni argues that the Policy Element requirement has always been implied in the definitions of crimes against humanity since its first codification in the IMT Charter. He derives his argument from the premise that all modern formulations of crimes against have their genesis in the Article 6 (c) of the IMT Charter.

Article 6 of the IMT Charter defines the subject-matter jurisdiction of the IMT as comprising crimes against peace, war crimes and crimes against humanity. The ‘chapeau’ to Article 6 (c) of the IMT Charter requires that persons accused of crimes against humanity should have been acting in the interests of the European Axis countries whether as individuals or as members of organisations. Additionally, Article

⁷⁷ Bassiouni, C., (2011:3); Schabas, W., (2008: 960).

⁷⁸ They are sometimes referred to as ‘Hybrid’ or ‘Internationalised’ courts’. They are a recent creation comprising a blend of international and domestic aspects to deal with violations of human rights on ad-hoc basis during or after transitional periods of governments. See Dickinson, L. A. ‘The Promise of Hybrid Courts’, (2003) *The American Journal of International Law* Vol. 97 No. 2 295-310.

⁷⁹ The mixed-model tribunals looked at include: The Special Court for Sierra Leone (SCSL); The Extraordinary Chambers in the Courts of Cambodia (ECCC); The Special Panels of the Dili District Court for Timor-Leste; and The Serbian War Crimes Tribunal (for Kosovo). See Bassiouni, C., (2011:6)

6 (c) requires that crimes against humanity should be committed ‘in connection with any crime within the jurisdiction of the Tribunal,’ namely war crimes and crimes against peace. It is, therefore, argued that by implication crimes against humanity under the IMT Charter had to be associated with a state plan or policy, since the accused persons would have been acting in the interests of states comprising the European Axis.⁸⁰ Further, the linkage between crimes against humanity and other crimes within the jurisdiction of the IMT implied an association with a state plan or policy since the other crimes were associated with a state plan or policy themselves.⁸¹

Thus, extrapolating the argument further, definitions of crimes against humanity, being modelled after Article 6(c) of the IMT Charter, invariably presuppose state involvement in form of a plan or policy. Essentially, the argument is that for all the instruments that do not expressly provide for the Policy Element for crimes against humanity, the Policy Element is a requirement that is implied from the very nature of crimes against humanity as defined in Article 6 of the IMT Charter.

Secondly, it is argued that Article 7 (2) (a) of the ICC Statute represents a fundamental step in entrenching the previously implied Policy Element requirement. The gravamen of the argument is that the protagonists for the non-existence of the Policy Element at customary international law have neglected to factor in the significance of the express inclusion of the Policy Element requirement in Article 7 (2) (a) of the ICC Statute.⁸² Thus, the express inclusion of the Policy Element in Article 7 (2) (a), to a large extent, signifies consensus that the Policy Element is a requirement for crimes against humanity.

⁸⁰ See Bassiouni, C., (2011:3); Schabas, W., (2008: 954).

⁸¹ Schabas, W., (2008: 961).

⁸² Bassiouni, C., (2011:7); Schabas, W., (2008: 962).

Lastly, it is argued that the ILC Draft Codes, though not binding, support the existence of the Policy Element requirement.⁸³ The 1954 ILC Draft Code's definition of crimes against humanity is in the following terms:

‘Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.*’

The italicised portion is argued to have been inserted into the definition after members of the ILC realised that after reformulating the Nuremberg definition of crimes against humanity by removing the requirement for a nexus to an armed conflict, it became difficult to distinguish crimes against humanity and ordinary crimes.⁸⁴

The ILC Draft Codes were not significantly revised for approximately four decades until 1996. As already observed earlier on, Article 18 of the 1996 Draft Code provided for some form of Policy Element as a requirement for crimes against humanity. The commentary in the Draft Code stated that ‘the instigation or direction of a Government or any organisation or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a state’.⁸⁵ Essentially, the argument is that the Policy Element, whether that of a state or an organization, transcends ordinary crimes into crimes against humanity.

Therefore, it is argued that the inclusion of the Policy Element requirement, in whatever formulation, in the ILC Draft Codes supports its existence rather than non-existence.

⁸³ Schabas, W., (2008: 964).

⁸⁴ Schabas, W., (2008: 964).

⁸⁵ Schabas, W., (2008: 965); Bassiouni, C., (2011:10).

The Research finds merit in the argument that the Policy Element requirement is implied in all the definitions of crimes against humanity since they are modelled on Article 6(c) of the IMT Charter. However, there is a reservation.

The Research finds the implication made not very persuasive. There have been several formulations of the definition of crimes against humanity since the IMT Charter. The formulations had varied requirements.⁸⁶ Despite the variations, save for the ICC Statute, the Policy Element requirement is consistently absent in all the instruments. This serves to fortify that the Policy Element is not a general requirement for crimes against humanity. If it were, a few formulations should have included it expressly.

Further, assuming the argument that the Policy Element transcends ordinary crimes into crimes against humanity holds true, then it is implausible to have such an important element merely as an implied requirement. Therefore, the Research finds the argument that the Policy Element is an implied requirement not very persuasive.

The Research also finds merit in the argument that the express inclusion of the Policy Element requirement in Article 7(2) (a) of the ICC Statute signifies a consensus that it is a general requirement for crimes against humanity. The ICC has 139 signatories and 122 ratifications at present.⁸⁷ This represents a significant portion of all the 195 states in the world.⁸⁸ Therefore it is indeed an indicator for some consensus to the effect that the Policy Element is a requirement. However, it has to borne in mind that negotiating a treaty is based on so many considerations including political

⁸⁶ Different definitions of crimes against humanity required different elements: a nexus with an armed conflict like in the ICTY Statute; a discriminatory intent under the ICTR Statute; and a nexus with other crimes under the IMT and IMTFE Charters.

⁸⁷ See 'Ratification of the Rome Statute' available at www.coalitionfortheicc.org/?mod=romeratifications (accessed 15 October 2014).

⁸⁸ See 'Independent States of the World' available at www.nationsonline.org/oneworld/states.htm (accessed 15 October 2014).

compromises, therefore, membership to a treaty in itself does not necessarily entail total consensus of all the states parties but rather political compromise. In that vein, the Research finds that the express inclusion of the Policy Element requirement in the ICC Statute in itself cannot justify the conclusion that it is a general requirement.

As for the inclusion of the Policy Element requirement in Article 18 of the 1996 ILC Draft Code, the Research notes that its non-binding nature vitiates its essence in setting the Policy Element as a requirement. Further, the inconsistent featuring of the Policy Element since the first ILC Draft Code in 1954 renders support to the plausibility of the argument that the Policy Element is not a requirement for crimes against humanity generally.

3.2.2 Jurisprudence Supports the Existence of the Policy Element

The protagonists for the existence of the Policy Element requirement have surveyed international and national jurisprudence on crimes against humanity. In the main, they argue that despite the *Kunarac* Decision, the evidence gleaned from the jurisprudence generally supports the existence of the Policy Element requirement for crimes against humanity.

The first case in which crimes against humanity were charged, the Nuremberg Decision, did not discuss whether the Policy Element is a requirement for crimes against humanity or not. However, the protagonists for the existence of the Policy Element requirement argue that the reason the IMT did not discuss the issue pertaining to the Policy Element is obvious: The whole Nuremberg Trial was

grounded on the Nazi plan and policy to wage aggressive war and to exterminate the Jews of Europe.⁸⁹

The protagonists of the existence of the Policy Element requirement also rely on the Decision of *The Public Prosecutor v Menten*.⁹⁰ As already highlighted above, the *Menten* Decision held that Article 6(c) of the Nuremberg Charter required that a crime against humanity should be committed in connection with some plan or policy.

Further support for the existence of the Policy Element requirement can be garnered from cases under Control Council Law No. 10. For instance, cases decided in the Supreme Court of the British Zones⁹¹ held that crimes against humanity required the Policy Element. In the same vein, the case of *In re Altstötter* held that the ‘conscious participation in systematic governmentally organised or approved procedures,’ was key for the atrocities or persecutions to qualify as crimes against humanity.⁹²

In 1995, the ICTY in the *Tadic* Decision⁹³ made a decisive step in entrenching the Policy Element requirement in international criminal law. It is argued that the ICTY essentially held that crimes against humanity could be committed pursuant to a policy of either a state or a non-state actor in asymmetric armed conflicts. Similar reasoning was employed in the ICTR in the *Bagilishema* Decision.⁹⁴

Support for the existence of the Policy Element was weakened in the *Kunarac* Decision in 1998. As highlighted earlier, the Appeals Chamber of ICTY discarded the Policy Element requirement at customary international law in this Decision. The protagonists of the existence of the Policy Element argue that the Appeals Chamber

⁸⁹ The same reasoning has been advanced for the absence of a discussion concerning the Policy Element requirement for crimes against humanity in *Attorney General for the Government of Israel vs. Adolf Eichmann* Criminal Case No. 40/61, Judgment, 11 December 196. See also Schabas, W., (2008: 962)

⁹⁰ *The Public Prosecutor vs Menten* 75 ILR 331, 362-363.

⁹¹ OGH br. Z., vol. I, 19.

⁹² Mettraux, G., (2011: 163)

⁹³ See *The Prosecutor vs. Dusko Tadic* ICTY T. Ch. II 7.5. 1997 para. 644.

⁹⁴ *The Prosecutor vs. Ignace Bagilishema* ICTR. T. Ch. I 7.6.2001 para. 78.

erred on the bases that: It relied on the literal reading of the Article 6 of the ICTY Statute which does not provide for the Policy Element requirement;⁹⁵ It overlooked the history and theoretical underpinnings of crimes against humanity;⁹⁶ It ignored the drafting histories of crimes against humanity and the ILC Draft Codes;⁹⁷ It selectively picked precedents and commentaries in support of the non-existence of the Policy Element;⁹⁸ and it ignored altogether Article 7(2)(a) of the ICC Statute in the analysis of whether the Policy Element is a requirement or not.⁹⁹

The protagonists for the existence of the Policy Element argue that the error made by the Appeals Chamber in the *Kunarac* Decision was an attempt by the ICTY to deal with the legal quagmire presented by asymmetric warfare in the former Yugoslavia and Rwanda: The participation of non-state actors in armed conflicts.¹⁰⁰ The ICTY was faced with question of how to deal with the appellants in the matter being members of paramilitaries rather than soldiers for the state. The charges of crimes against humanity could not hold if it were a requirement that the crimes be committed pursuant to a state policy. Hence, as Schabas argues, the ICTY took a ‘results-oriented political decision’ to hold that state policy was not a requirement for crimes against humanity.¹⁰¹ That way, the crimes by the appellants, though not connected to a state policy, could still qualify as crimes against humanity as defined under the ICTY Statute.

⁹⁵ As argued above, the Policy Element requirement is implied in all instruments providing for crimes against humanity save for the ICC Statute. See Schabas, W., (2008: 958)

⁹⁶ Schabas, W., (2008: 959)

⁹⁷ The ILC Draft Codes support the existence of the Policy Element requirement. See Schabas, W., (2008: 960)

⁹⁸ The Decision only referred to three Canadian cases from the lower courts but ignored the then leading case on crimes against humanity from the Supreme Court of Canada, *Regina vs. Finta*. The *Finta Case* required the Policy Element for crimes against humanity. See Bassiouni, C., (2011:8)

⁹⁹ As argued above, the express inclusion of the Policy Element in article 7 (2) (a), to a large extent, signifies consensus that the Policy Element is a requirement for crimes against humanity. See Bassiouni, C.,(2011:8)

¹⁰⁰ Bassiouni, C., (2011:7)

¹⁰¹ Schabas, W., (2008: 959)

For the same reason above, it is argued that the jurisprudence of the ICTY and the ICTR preferred the ‘widespread or systematic’ attack requirement.¹⁰² This requirement was deemed more practical as it focussed on the quantity and quality of the crimes committed regardless of whether there was a state policy or not. However, it is argued that the use of the ‘widespread or systematic’ attack requirement can also be challenged on the same basis as the use of the Policy Element requirement: Both requirements are not expressly provided for in the statutes of the ICTY and the ICTR.¹⁰³ In other words, the ‘widespread or systematic’ attack requirement is equally implied. Therefore, its preference over the Policy Element requirement is quite implausible. It is either both are legal requirements or both are not.

The Research finds some merit in the argument above. Indeed, ‘widespread or systematic’ attack requirement is equally implied in the instruments, save for the ICC Statute. The Research, opines that the focus of the Policy Element and the ‘widespread or systematic’ attack requirements is essentially the same: the scale of harm against a civilian population.

The Policy Element requirement serves to transcend ordinary crimes onto crimes against humanity as the harm envisaged to be orchestrated in furtherance of a policy will invariably be of remarkable magnitude. This is akin to harm resulting from ‘widespread or systematic’ attack. Therefore, the argument above is quite plausible.

However, the Research still maintains that the non-inclusion of the Policy Element requirement in the instruments vitiates the argument that it is a legal requirement.

To surmise, the protagonists of the existence of the Policy Element requirement for crimes against humanity argue that their position is supported by international and

¹⁰² Bassiouni, C., (2011:7)

¹⁰³ The ‘widespread or systematic’ test was also not expressly required as an element of crimes against humanity in the Nuremberg Judgment. See Schabas, W., (2008: 962)

national jurisprudence. Jurisprudence suggesting otherwise is thus deemed based on erroneous considerations. This argument is quite plausible.

3.2.3 Sufficient State Practice and *Opinio Juris* to Justify the Existence of the Policy Element Requirement at Customary International Law

It is argued that the Policy Element is a requirement for crimes against humanity at customary international law. The reasoning for this argument is that Article 7(2) (a) of the ICC Statute represents the culmination of all considerations in the development of crimes against humanity since the inception of the crime at the end of the Second World War. As argued above, tracing the historical path of crimes against humanity reveals that the Policy Element was an implied requirement in all instruments until it found expression in Article 7(2) (a) of the ICC Statute. This history, so the argument runs, combined with the large membership of the ICC Statute manifests proof that states generally regard the Policy Element as a requirement for crimes against humanity at customary international law.

Kress¹⁰⁴ has emphatically argued that the ‘historical-teleological’ reasoning employed by the late Judge Kaul in his dissenting Opinion in the *Decision on Authorization of Investigations in Kenya*, strongly suggests that the Policy Element, albeit strictly construed, is a requirement at customary international law. Despite the possibility that there may be instances where customary international law may go beyond the definitions of crimes contained in Articles 6 to 8 of the ICC Statute as envisaged by Article 10, Kress further argues that there is a strong presumption that the said definitions do not exceed existing customary international law based on the following reasons.¹⁰⁵

¹⁰⁴ Kress, C., (2010: 867).

¹⁰⁵ Kress, C., (2010: 867).

Firstly, reference is made to the Preamble of the ICC Statute that describes the crimes referred to in article 5(1) of the Statute as ‘the most serious crimes of concern to the international community as a whole’. Implicitly, this signifies some sort of consensus by states generally of the collective abhorrence towards the crimes.

Secondly, Kress refers to Articles 12 (3) and 13 (b) of the ICC Statute where the ICC is allowed to apply Articles 6 to 8 regardless of whether the state concerned has ratified the ICC Statute.¹⁰⁶ Impliedly, so he argues, this signifies the *opinio juris* for states to be bound by the definitions generally.

Lastly, it is argued that there is ‘well-recorded intention of the drafters of the ICC Statute not to create new law, but to codify customary international law’.¹⁰⁷ Hence, it is more plausible that the Policy Element requirement in Article 7 (2) (a) was mere codification of existing customary international law at the time.

To surmise, therefore, it is argued that there is ample proof to justify the existence of the Policy Element requirement at customary international law.

The Research has already dealt with reservations to the conclusion that the express inclusion of the Policy Element requirement in the ICC Statute fortifies the existence of the requirement at customary international law. The ICC Statute is a result of political compromises and not a code of absolute rules of customary international law. The size of its membership is significant, but does not necessarily entail state practice and *opinio juris* to justify existence of customary international law.

¹⁰⁶ Kress, C., (2010: 867).

¹⁰⁷ Kress, C., (2010: 868).

3.2.4 Legal Ramifications

The Research has discussed arguments that the Policy Element and the ‘widespread or systematic’ attack requirements are implied. Holding the argument true, the existence of the Policy Element requirement for crimes against humanity does not change much. The Research has opined that the both the Policy Element and ‘widespread or systematic’ attack requirements focus on the scale of harm on a civilian population. Therefore, where the Policy Element requirement is existent both requirements would serve to establish the magnitude of harm on a civilian population to qualify as crimes against humanity.

Further, the existence of the Policy Element at customary international law increases the evidential burden that the prosecution must discharge generally. Thus, the prosecution is legally enjoined to prove one element more than where the Policy Element is not a legal requirement.

3.3 CONCLUSION

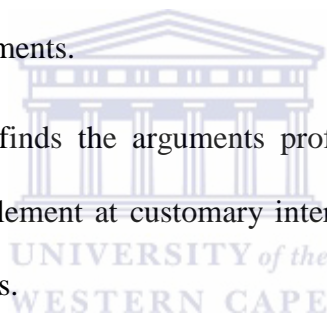
In the main, the protagonists of the existence of the Policy Element requirement argue that the international instruments and jurisprudence support the existence of the Policy Element requirement at customary law.

The argument is that since the first codification of crimes against humanity the Policy Element requirement is implied in all the definitions of crimes against humanity as they are modelled on Article 6 (c) of the IMT Charter which presupposes that the Policy Element is an integral part of crimes against humanity. Although this argument seems plausible, it is vitiated by the non-inclusion of the Policy Element in the notable instruments.

The protagonists have argued that the existence of the Policy Element is gleaned from the express inclusion of the Policy Element under Article 7(2) (a) of the ICC Statute as a significant indicator of the thinking and understanding of the majority of states as to what elements constitute crimes against humanity. The Research finds this argument not very persuasive on the basis that the ICC Statute is a result of political compromises of the membership and hence not a very reliable indicator of a consensus regarding crimes against humanity.

The Research opines that the existence of the Policy Element requirement for crimes against humanity would entail the increasing of the evidential burden to be discharged by the prosecution as there would be need to prove both the Policy Element and the widespread attack requirements.

Generally, the Research finds the arguments proffered by the protagonists of the existence of the Policy Element at customary international law less persuasive than those antagonist arguments.



CHAPTER FOUR

THE 'ORGANISATIONAL POLICY' DEBATE UNDER THE ICC STATUTE

4.1 INTRODUCTION

The advent of the ICC Statute in 1998 witnessed another dimension to the debate on the Policy Element requirement. Article 7(2) (a) of the ICC Statute expressly provided for the Policy Element requirement. As highlighted earlier, according to Article 7(2) (a) widespread or systematic crimes would qualify as crimes against humanity only after being committed pursuant to or in furtherance of a state or organisational policy.

The *Decision on the Authorization of Investigations in Kenya*¹⁰⁸ in 2010 spawned a new debate regarding the Policy Element under Article 7(2) (a). The Judges of the ICC that presided over the matter and scholars that have commented on the Decision are divided as to whether the Policy Element envisaged in Article 7(2)(a) of the ICC Statute, covers states and only organisations that are 'state-like' or is more expansive to cover states and organisations in general.

This chapter intends to survey the arguments proffered by protagonists of these divergent positions and the legal ramifications of the positions.

¹⁰⁸ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, 31 March 2010.

4.2 THE DECISION ON THE AUTHORISATION OF INVESTIGATIONS INTO THE SITUATION IN KENYA OF 31 MARCH 2010.

4.2.1 Brief Background

The Decision concerns the request by the Prosecutor of the ICC for authorisation to investigate the violence that ensued after the national elections in Kenya held on 27 December 2007.

On 30 December 2007, the Electoral Commission of Kenya declared that the then incumbent President, Mwai Kibaki, of the Party of National Unity had been re-elected into power. This was heavily contested by the main opposition candidate Raila Odinga of the Orange Democratic Movement. This impasse resulted into violence on perceived rival communities in six out of eight Kenyan regions by groups of sympathisers and zealots of the two parties. The sympathisers and zealots were divided based mainly on tribal lineage and had the support of local leaders, politicians and even businessmen associated with the parties. The groups were neither as organised as state-like entities with some form of territorial control, nor did they have an organisational structure like that of a party to an asymmetric armed conflict.

The violence that erupted resulted into thousands of cases of killings, rapes, and serious injury. There was also massive looting and wanton destruction of property and displacement of about 350,000 persons.

The Prosecutor of the ICC requested the PTC II of the ICC to authorise the commencement of an investigation into the situation.¹⁰⁹ The PTC II authorised the

¹⁰⁹ Office of the Prosecutor, *Request for Authorisation of an Investigation Pursuant to Article 15*, ICC-01/09, 26 November 2009, para. 56.

commencement of an investigation by majority with the late Judge Hans-Peter Kaul dissenting.¹¹⁰

In the dissenting opinion Judge Kaul opined that the authorisation to investigate alleged crimes against humanity should not have been granted because the groups that perpetrated the violence did not fit in the category of organisations as envisaged by Article 7(2) (a) of the ICC Statute since they were not state-like in nature.¹¹¹

The divergence between the Majority Decision and Dissenting Opinion has raised fundamental questions of substance and method.¹¹² Firstly, it has spawned the debate regarding the ambit of entities envisaged to be covered under Article 7 (2) (a) of the ICC Statute. Secondly, it has also raised concerns as to the methodology employed in determining the ambit of entities envisaged.

4.2.2 The Policy Element Requirement as Construed by the Majority Decision

Article 7(2) (a) of the ICC Statute expressly provides that crimes against humanity require that an attack against any civilian population must be committed ‘pursuant to or in furtherance of a state or organisational policy to commit such attack’. The Decision further held that ‘a policy adopted by regional or even local organs of the state could satisfy the requirement of a state policy’.¹¹³

The Decision noted that the ICC Statute does not provide definitions of the terms ‘policy’ or ‘state or organisational’. However, the Decision referred to earlier decisions that addressed the Policy Element requirement for crimes against humanity.

¹¹⁰ Office of the Prosecutor (2009) paras 67,68

¹¹¹ Office of the Prosecutor (2009) paras 72, 73, 74, 75, 80.

¹¹² Kress, C., (2010: 856).

¹¹³ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, 31 March 2010 para. 89.

For instance, in the case against *Katanga and Ngudjolo Chui*,¹¹⁴ PTC I found that this requirement:

‘[...] ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. 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’.¹¹⁵

In line with the interpretation of the Policy Element requirement above, the Decision interpreted the ‘organisational policy’ under Article 7(2) (a) as follows:

‘Whereas some have argued that only State-like organisations may qualify, the Chamber opines that the formal nature of a group and the level of its organisation should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values’.¹¹⁶

Clearly the Decision advocates for an approach that focuses on the capacity of a group to perpetrate crimes that infringe on basic human values and not its character and

¹¹⁴ *The Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07 30 September 2008.

¹¹⁵ PTC I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, para. 396

¹¹⁶ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, 31 March 2010 para. 90.

level of organisation. To identify whether a particular group falls within the ambit of organisation as envisaged under Article 7 (2) (a) the Decision provided the following considerations:

‘In the view of the Chamber, the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the aforementioned criteria’.¹¹⁷

The Decision stressed that the considerations listed above were merely meant to help in identifying groups that qualified as organisations for purposes of article 7(2) (a) of the ICC Statute. However, the considerations needed not be satisfied exhaustively in each case.¹¹⁸

With the reasoning highlighted above, the Decision held that the ‘various groups including local leaders, businessmen and politicians associated with the two leading parties, as well as with members of the police force’ acting in Kenya at the material

¹¹⁷ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, 31 March 2010 para.93

¹¹⁸ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, 31 March 2010 para.93

time constituted organisations within the meaning of Article 7(2)(a) of the Statute.¹¹⁹ Therefore, the crimes committed in furtherance of policies, express or implied, of groups above could qualify as crimes as crimes against humanity.

4.2.3 Legal Ramifications

The Research notes that the Decision resonates with the downgrading of the Policy Element requirement akin to the *Kunarac* Decision. Following the reasoning of the Decision would entail that the organisations capable of formulating a policy to orchestrate a widespread or systematic attack against a civilian population envisaged under Article 7 (2) (a) of the ICC Statute include private groups such as businessmen, local leaders and politicians. In other words, the determining factor for organisations envisaged under Article 7(2) (a) is the capacity of such organisations to infringe on basic human values.

Further, being a Majority Decision, the Decision reflects the position tenable in the ICC at the moment regarding the organisations envisaged under Article 7(2) (a). The ICC will surely have recourse to this Decision when faced with an issue of interpretation of organisational policy in future cases.¹²⁰

The Decision also affects the evidential burden to be discharged by the prosecution with respect to organisational policy. The evidential burden required is more stringent than in the *Kunarac* Decision where the Policy Element requirement was discarded altogether. What is required is evidence that an organisation with sufficient capacity to orchestrate widespread and systematic attacks against a civilian population formulates a policy to attack and follows the policy through. However, the burden of

¹¹⁹ *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, 31 March 2010 para.117

¹²⁰ The ICC is allowed to apply principles and rules of law as interpreted in its previous decisions. See Article 21(2) of the ICC Statute

proof is mitigated slightly by the allowance given that the Policy Element can be inferred from circumstances.¹²¹

Lastly, the Decision also affects the evidential burden to be discharged with respect to state policy. The Decision holds that evidence of ‘a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy’. Thus, the prosecution need not prove that the policy was adopted at the highest echelons of public power. This also mitigates the evidential burden to be discharged by the prosecution.

4.2.4 The Policy Element Requirement as Construed by the Dissenting Opinion

The late Judge Kaul questioned whether the ICC was the right forum to deal with the perpetrators of the post- election violence in Kenya.¹²² Kaul made it clear that the determinative legal question was the proper ‘demarcation line between crimes against humanity pursuant to Article 7 of the Statute, and crimes under national law’.¹²³

The Dissenting Opinion cautioned that the interpretation of organisational policy adopted in the Majority Decision had the potential of infringing on state sovereignty as crimes which would ordinarily be within the purview of domestic courts would transcend onto that of the ICC Statute.¹²⁴

According to the Dissenting Opinion, an organisation as envisaged by Article 7(2) (a) of the ICC Statute must have some characteristics of a state. The Opinion lists down the following characteristics:

¹²¹ *The Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, Case No. ICC-01/04–01/07–717, PTC I, 30 September 2008 para. 396

¹²² *Decision on the Authorization of an Investigation into the Situation in Republic of Kenya*, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010 para.6

¹²³ Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010 para.9

¹²⁴ Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010 para.10

‘(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale’.¹²⁵

Hence, the Dissenting Opinion held that the groups that perpetrated the post-election violence in Kenya did not satisfy the above characteristics and thus were not the organisations envisaged under Article 7(2) (a) of the ICC Statute.

4.2.5 Legal Ramifications

The Research notes that the Dissenting Opinion advocates for a more stringent test in determining organisational policy as envisaged under Article 7(2) (a) of the ICC Statute. Only organisations that have state-like qualities are considered to be envisaged. Had this standard been applied in the Kenya Situation, crimes committed by the various groups could not have qualified as crimes against humanity under the ICC Statute.

The stringent test applied in the Dissenting Opinion would affect the evidential burden for the prosecution for charges of crimes against humanity. There would be need for proof not only that the entity that formulated the policy to orchestrate widespread or systematic crimes had the capacity to do so but also that it had specific characteristics that make the entity state-like.

¹²⁵ Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010 para.51

Lastly, the fact that it was a Dissenting Opinion relegates its use as authority. However, it is still significant as it has birthed the debate concerning the precise ambit of organisational policy as envisaged in Article 7 (2) (a) of the ICC Statute.

4.3 SCHOLARLY ARGUMENTS

4.3.1 The Narrow Approach: Policy of a State or State-like Entities

The above approach entails the stringent interpretation of the Policy Element envisaged under Article 7(2) (a) of the ICC Statute to cover states and state-like entities. This is the approach adopted by the late Judge Kaul above in the Dissenting Opinion. Claus Kress critiques the reasoning employed both in the Decision and the Dissenting Opinion. However, he comes to the same conclusion as the Dissenting Opinion.

Firstly, Kress looks at the reasoning that underlies the Majority Decision. He identifies three key arguments advanced for the interpretation of organisational policy adopted: that the drafters of the ICC Statute intended an expansive interpretation of organisational policy by explicitly including the term organisational policy in Article 7(2) (a);¹²⁶ that the ILC Draft Code affirms the possibility that ‘criminal gangs or groups’ may be covered as entities behind crimes against humanity;¹²⁷ and that the wide construction of the concept of organisation in Article 7(2)(a) of the ICC Statute is preferable as it would help to protect basic human values in general.¹²⁸

Kress dismisses the first argument that underlies the Majority Decision for being misplaced. He argues that the inclusion of the term organisational policy in Article

¹²⁶ Kress, C., (2010: 858).

¹²⁷ Kress, C., (2010: 859). See also Commentary to the ILC Draft Code 1991.

¹²⁸ Kress, C., (2010: 859).

7(2) (a) of the ICC Statute is not in dispute at all, but the precise ambit of entities envisaged under it.¹²⁹ Therefore the Majority Decision should not have relied on this argument to justify its interpretation of organisational policy.

With respect to the second argument, Kress argues that the Majority Decision did not clarify the status of recourse to ILC Draft Codes within the rubric of interpretation. Essentially, his argument is that the ILC Draft Codes reflect the position of international criminal law at a particular point and thus the Majority Decision should have elaborately discussed why it relied on the ILC Draft Code in the interpretation of organisational policy under Article 7(2) (a). Otherwise, the ILC Draft Codes are not binding on the ICC Statute.

Kress admits that the third argument is implicit in the Majority Decision. The argument is premised on the purpose of international law on crimes against humanity: the protection of basic human values. Kress criticises the manifest teleological interpretation of organisational policy under the ICC Statute on the basis that it focuses more on the protection of the victims of human rights violations regardless of the distinct nature of international criminal law and international human rights law. International criminal law is seen as a tool to protect international human rights values. Kress argues that this is a fallacy as the obligations created under the two fields of law are directed towards different players: states, for international human rights law; and individuals, for international criminal law.¹³⁰

Secondly, Kress looks at the Dissenting Opinion. Essentially, Kress agrees with the stringent interpretation of organisational policy as held by Judge Kaul on the basis

¹²⁹ Kress, C., (2010: 859).

¹³⁰ Kress, C., (2010: 861).

that such an approach is internally consistent¹³¹ and in conformity with the principle of strict interpretation as required by the preamble and Article 22 of the ICC Statute. However, he adds that the conclusion reached in Dissenting Opinion could also be justifiable on the basis of customary international law.

He argues that the ‘historical–teleological’ reasoning employed in the Dissenting Opinion very strongly suggests that the narrow interpretation of the term ‘organisation’ reflects customary international law.¹³² He surmises by suggesting that the reasoning for Dissenting Opinion would have been better phrased in this way: Under existing customary international law, crimes against humanity require a policy by a state or a state-like organisation. Therefore, the term ‘organisation’ in Article 7(2) (a) of the ICC Statute must be construed accordingly.¹³³

The Research does not find the stringent interpretation of organisational policy advanced by Kress very persuasive for the following reasons.

Firstly, it has been seen, that either the Policy Element requirement or the ‘widespread or systematic’ attack requirement has been used to distinguish whether crimes committed are crimes against humanity. The focus has always been on the scale of harm on civilian population. Article 7(2) (a) contains both requirements. It is, therefore, against this reasoning that the interpretation of the term ‘organisational policy,’ should be restricted to cover only state-like organisations. The harm as a result of crimes against humanity envisioned can equally be done by organisations that do not have any state-like characteristics. Thus, the term ‘organisational policy’ must cover organisations generally. After all, if the drafters of the ICC Statute

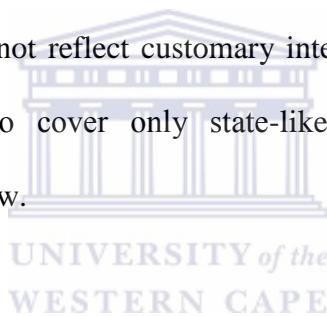
¹³¹ The internal consistency argument is in the following terms: Article 7(2) (a) of the ICC Statute refers to both states and organisations. States themselves constitute organisations, therefore, they should be seen as the *Idealtypus* of the organisations which Article 7(2) (a) envisaged. The organisations envisaged should not deviate too much from states.

¹³² Kress, C., (2010: 867).

¹³³ Kress, C., (2010: 869).

intended such a stringent interpretation they would have expressly provided for such a limitation.

Extrapolating the argument further, limiting the term organisation to state-like entities where no express provision to that effect is provided for in Article 7(2) (a) vitiates reasoning behind the requirement for such stringent test given that customary international law does not require it at all. It has been seen earlier on, that at customary international law, the most persuasive argument is that the Policy Element is not a requirement. It has been seen further that, the ICC Statute should cautiously be taken to entrench customary international law norms as it is a creature of political compromise amongst other considerations. It follows, therefore, that the inclusion of the Policy Element does not reflect customary international law. Further, restricting ‘organisational policy’ to cover only state-like organisations does not reflect customary international law.



4.3.2 The Ordinary Meaning Approach: Policy of the State or Organisations

Other Scholars like Gerhard Werle and Boris Burghardt¹³⁴ advocate for an interpretation of organisational policy in the ICC Statute that focuses on the ordinary meaning of the term ‘organisation’ in Article 7(2) (a).¹³⁵

According to Werle and Burghardt the Policy Element in Article 7(2) (a) covers any organisation with sufficient capacity to carry out widespread or systematic attack on a civilian population. The underlying reasoning for the argument is premised on the

¹³⁴ Werle, G., and Burghardt, B., (2012:1154).

¹³⁵ The meaning of a term in the ICC Statute is to be gleaned by firstly seeking its ordinary meaning in light of the context it is found and the object and purpose of the ICC Statute. Where this process derives two plausible meanings then the meaning providing the most restrictive interpretation should be preferred. See Articles 21 and 22 of the ICC Statute and Articles 31 (1) and 32 of the Vienna Convention on the Law of Treaties 1969; and Werle, G., and Burghardt, B., (2012:1157)

Tadic Decision which held that the focus should be on the protection of individuals' rights and not which entities commit the violations of the rights.¹³⁶

Firstly, Werle and Burghardt argue that the ordinary meaning of the term 'organisation' under Article 7(2) (a) of the ICC Statute encompasses organisations that have no link to the state and even do not have state-like qualities. It is argued that the ordinary meaning of the term 'organisation' is 'an association of persons possessing structures that make it possible, beyond a single concrete situation, to coordinate actions purposefully and attribute actions to the organisation.'¹³⁷ Thus the term organisation under Article 7(2) (a) of the ICC Statute should be understood to encompass all the associations of persons with the above characteristics. Notably, the definition of 'organisation' derived by Werle and Burghardt accords with the definition adopted by the Majority Decision.

It is also argued that any interpretation that limits or deviates from the above ordinary meaning of the term 'organisation' as defined above by requiring an additional qualifier, for instance that the organisation be state-like, is incorrect.¹³⁸ Werle and Burghardt argue that the fact that Article 7(2) (a) of the ICC Statute provides for a 'state or organisational policy' entails that both states and organisations share normative equality but not the same definitional characteristics: the organisations need not have state-like characteristics.¹³⁹

It is further argued that even though the attacks by states unquestionably represent the standard case in crimes against humanity, there is no valid argument to deny that similar attacks carried out by organisations should be treated as crimes against

¹³⁶ Werle, G., and Burghardt, B., (2012:1153); See also See *The Prosecutor vs. Dusko Tadic* ICTY T. Ch. II 7.5. 1997 para. 644.

¹³⁷ Werle, G., and Burghardt, B., (2012:1155)

¹³⁸ Werle, G., and Burghardt, B., (2012:1156)

¹³⁹ Werle, G., and Burghardt, B., (2012:1156)

humanity. The underlying threat to world peace would still be the same in both cases.¹⁴⁰ Thus, such teleological considerations offer support to the inclusion of organisations which are not state-like at all, for instance the ones that perpetrated the post-election violence in Kenya.¹⁴¹

Lastly, it is argued that customary international law does not require the Policy Element at all. Hence, requiring a stringent test in interpreting the organisational policy under the ICC Statute does not accord with customary international law.¹⁴²

As seen above, the Research finds merit in this argument. Article 7 (2) (a) of the ICC Statute has no qualifier to limit the term ‘organisational policy’ as has been suggested by protagonists of the stringent interpretation.

Further, the focus on the capacity of an organisation to orchestrate and carry out ‘widespread or systematic’ attack accords with the reasoning underlying both the Policy Element and ‘widespread or systematic’ attack requirements: distinguishing ordinary crimes from crimes against humanity requiring international intervention.

Arguably, the fact that ICC Statute came into being in 1998 after the ICTY and ICTR where the Tribunals had already encountered a quandary of how to deal with non-state actors in non-international armed conflicts entails that the drafters of the ICC had envisaged the organisations that were to be covered. Hence, they could have explicitly restricted the organisations within the ICC Statute and not left it open for the ICC to fill in the qualifier ‘state-like’.

¹⁴⁰ Werle, G., and Burghardt, B., (2012:1160)

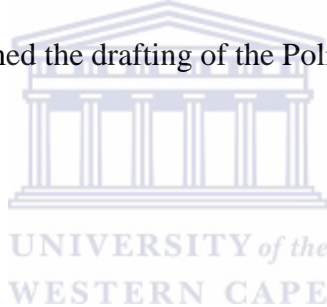
¹⁴¹ Werle, G., and Burghardt, B., (2012:1163)

¹⁴² Werle, G., and Burghardt, B., (2012:1165)

Lastly, holding the argument that the ILC Draft Codes reflect the prevailing position within the international criminal law discourse, the Policy Element provided for in the commentary on Article 18 of the 1996 ILC Draft Code stated thus:

‘...[t]he instigation or direction of a Government or any organisation or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a state’.¹⁴³

The formulation above, merely two years before the advent of the ICC Statute, clearly envisages organisations that go beyond those having state-like characteristics. This would most likely have been the prevailing idea at the time the ICC Statute was negotiated and thus informed the drafting of the Policy Element in Article 7(2) (a).



4.4 CONCLUSION

The major contention in *The Decision on the Authorization of an Investigation into the Situation in Republic of Kenya* is the interpretation of the term ‘organisational policy’ in Article 7(2) (a) of the ICC Statute envisaged only state-like organisations or organisations in general.

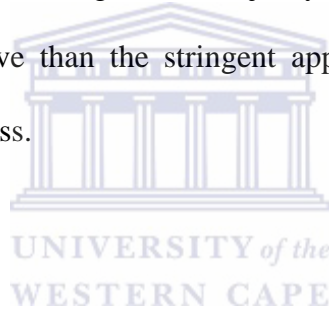
The Majority Decision interpreted the ‘organisational policy’ under Article 7(2) (a) to cover all organisations while the Dissenting Opinion narrowed the meaning to only state-like organisations. The interpretation of the Majority Decision is supported Werle and Burghardt. Claus Kress supports the Dissenting Opinion.

¹⁴³ Schabas, W., (2008: 965); Bassiouni, C., (2011:10).

The Majority Decision entails that widespread or systematic crime against a civilian population committed by private organisations such as Boko Haram, Al-Qaeda, Al-Shabab and others with discernible policies are covered within the term ‘organisational policy’ under Article 7(2)(a) of the ICC Statute.

The Majority Decision also entails a more stringent evidential burden for the Prosecution than in the *Kunarac* Decision with respect to both state and organisational policy. It further affects the evidential burden to be discharged with respect to state policy as the adoption of policies at regional or local level is attributable to the state. This mitigates the evidential burden to be discharged by the Prosecution.

This Research finds the reasoning of the Majority Decision supported by Werle and Burghardt more persuasive than the stringent approach adopted in the Dissenting Opinion supported by Kress.



CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The Research Paper set out to provide a comprehensive understanding of the two interconnected debates concerning the Policy Element in international criminal law. The first debate involves the question whether the Policy Element is a requirement for crimes against humanity at customary international law. The second one relates to the question whether the term ‘organisational policy’ under the ICC Statute envisages any organisation or only an organisation that is state-like. The preceding chapters have adequately dealt with the debates in terms content, reasoning and the legal ramifications of the divergent positions taken.

This Chapter will draw conclusions from the preceding discussion. The Chapter will further attempt recommendations as to whether the Policy Element should be a legal requirement for crimes against humanity.

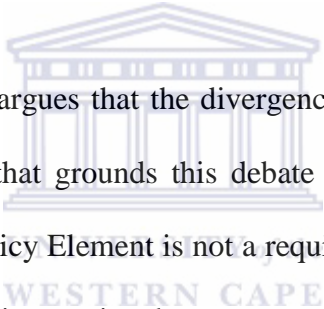
5.2 THE POLICY ELEMENT REQUIREMENT UNDER INTERNATIONAL CRIMINAL LAW FOR CRIMES AGAINST HUMANITY

5.2.1 The Policy Element under Customary International law

The Research has found that protagonists of the non-existence of Policy Element find support in the *Kunarac* Decision of the ICTY. However, the *Kunarac* Decision is criticised for being unelaborate. Legal scholars such as Guenael

Mettraux and Goran Sluiter also render their support to the finding in the *Kunarac* Decision.

In the main, the argument proffered is that a survey of international instruments and jurisprudence since the first codification of crimes against humanity in the IMT Charter until the ICTY and ICTR Statutes indicates that the Policy Element was not expressly provided for. The Research finds this argument very plausible. Logically, the Policy Element, a factor that transcends ordinary crimes onto crimes against humanity, should be expressly provided for in the various instruments. Its exclusion from the notable instruments vitiates the argument that it is an element for crimes against humanity at customary law.



Further, the Research argues that the divergence of opinion regarding the Policy Element requirement that grounds this debate does also provide support to the conclusion that the Policy Element is not a requirement at customary international law. As noted above, international custom must be verified by general practice accepted as law. The divergence in opinion indicates difference in practice and *opinio juris*.

On the other side of the debate, the main argument is that the Policy Element requirement is implied in all the definitions of crimes against humanity as they are modelled on Article 6 (c) of the IMT Charter which presupposes that the Policy Element is an integral part of crimes against humanity. The Research finds that this argument is also vitiates by the non-inclusion of the Policy Element in the notable instruments.

With the arguments above, generally, the Research finds the arguments proffered by the protagonists of the existence of the Policy Element at customary international law less persuasive than the antagonist arguments.

With that conclusion, the Research postulates that the non-existence of the Policy Element requirement for crimes against humanity would entail that at customary law widespread and systematic crimes committed by private entities having no plan or policy to commit the said crimes would qualify as crimes against humanity. Thus, as Schabas had alluded to earlier on, crimes committed by serial killers, the Mafia, motorcycle gangs and terrorist bands could qualify as crimes against humanity so long as they are committed in a widespread and systematic manner even where there is no discernible policy or plan.

The Research finds the postulation above in tandem with the spirit and intendment of contemporary international criminal law: the curbing of impunity for serious crimes of global concern. The non-existence of the Policy Element is helpful in closing loopholes created in international criminal law by the proliferation of asymmetric armed conflicts and groups with the capacity to orchestrate and carry out attacks on the civilian population.

5.2.2 The Policy Element under the ICC Statute

Recently, the *Situation in the Republic of Kenya* has confronted the ICC with a contention about the concept of organisation within the Policy Element requirement in Article 7(2) (a). The contention has birthed a debate as to the term

‘organisational policy’ in Article 7(2) (a) envisages only state-like organisations or organisations in general.

The Majority Decision followed recent jurisprudence of the ICTY and interpreted the ‘organisational policy’ under Article 7(2) (a) to cover all organisations. Judge Kaul dissented and narrowed the meaning to only state-like organisations. The interpretation of the Majority Decision is supported Werle and Burghardt. Claus Kress supports the Dissenting Opinion.

This Research finds the reasoning underlying the Majority Decision and the commentaries in support more persuasive than that of the Dissenting Opinion. The major thrust of the argument for the Research is that there is nothing in Article 7(2) (a) to support qualification of ‘organisational policy’ to be limited to only state-like organisations.

Legally, The Majority Decision entails that private organisations with discernible policies to commit widespread or systematic crimes are covered under Article 7(2) (a) of the ICC Statute. This resonates with the *Kunarac* Decision to a large extent: The Policy Element under the ICC Statute covers states and organisations in general. The only difference is that in the ICTY crimes committed by states and organisations without any Policy Element would be crimes against humanity as long as they are widespread and systematic.

5.3 SHOULD THE POLICY ELEMENT BE A REQUIREMENT FOR CRIMES AGAINST HUMANITY?

The Research has found that the historic context of discarding the Policy Element requirement by the ICTY lay in the need to accommodate widespread and

systematic crimes committed by non-state actors in asymmetric armed conflicts that occurred in the former Yugoslavia and Rwanda within the law of crimes against humanity and genocide. It has been seen that similar reasoning informed the formulation of Article 7(2) (a) of the ICC Statute.

Further, the Research has found that there seem to be two contextual elements for crimes against humanity: The ‘Policy Element’ and the ‘widespread and systematic’ attack requirements. The Research, therefore, postulates that there is uncertainty as to what Policy Element requirement contributes to crimes against humanity that is not already covered by the ‘widespread or systematic’ attack requirement. The non-existence of the Policy Element requirement, as argued earlier on, does not negatively affect the ambit or prosecution of crimes against humanity.

Additionally, Matt Halling argues for the amending of the ICC Statute to remove the state or organisational policy requirement for similar reasoning. He argues that having the Policy Element within the ICC Statute creates a loophole that would serve to grant impunity to some widespread or systematic crimes that would have been covered as crimes against humanity under the ICC Statute but for the lack of the Policy Element.¹⁴⁴

With the premises above, the Research postulates that the Policy Element should not be a requirement for crimes against humanity at all.

¹⁴⁴ Halling, M., (2010: 836).

5.4 RECOMMENDATIONS

5.4.1 A Convention of Crimes against Humanity

The Research notes that there is already an inclination within the international criminal law discourse to have a convention on crimes against humanity.¹⁴⁵ Other crimes under international law already have specialised conventions, save for the crime of aggression.¹⁴⁶

With this background, the Research recommends adoption of a specialised convention for crimes against humanity and most particularly the inclusion of a definition of crimes against humanity that does not include the Policy Element requirement. The recommended definition should mirror that articulated in Article 7 of the ICC Statute minus the portion in Article 7(2) (a) that reads '*pursuant to or in furtherance of a State or organizational policy to commit such attack*'. This would effectively remove the Policy Element from the definition.

5.4.2 Amendment to Article 7 (2) (a) of the ICC Statute

Based on the reasoning above, the Research recommends that Article 7 should be amended in accordance with ICC procedure under Article 121 to remove the Policy Element requirement. The definition of crimes against humanity under Article 7 would mirror the proposed definition in the Convention on Crimes against Humanity above without any Policy Element requirement.

¹⁴⁵ See Sadat, L. (2011: i).

¹⁴⁶ For example the Four Geneva Conventions and the Additional Protocols and the Genocide Convention for war crimes and the genocide respectively.

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