Non-State Entities and Crimes Against Humanity: Purpose and Power

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Thesis submitted for assessment with a view to obtaining the degree of
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Abstract

In order to find that a crime against humanity has been committed, there is a threshold requirement that the acts must have been carried out '*pursuant to or in furtherance of a State or organizational policy*' under Article 7(2)(a) of the Rome Statute of the International Criminal Court. The use of the word '*organizational*' in this Article raises questions about what type of groups may be considered perpetrators of such crimes. A classic viewpoint alleges that only States or State-like actors commit such crimes. Increasingly, there are moves to broaden this stance, with non-State groups such as terrorist organisations, independent armed groups, rebels and organised crime syndicates being coined the culprits of crimes against humanity. This piece aims to identify what types of group entities may be considered an organisation orchestrating a policy to commit such attacks, thus falling under the remit of the Article. In order to do so, there will be a move to isolate the most pertinent characteristics of an organisation that indicate it is shaping a policy to commit crimes of an international nature, thus demarcating its actions from the concern of domestic criminal law.

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1. Introduction

> *Where is this plan? Show it to me. Where is the protocol or the fact that only those here accused met and said a single word about what the indictment refers to so monstrously? Not a thing of it is true.*
>
> Robert Ley.[1]

The above was spoken by Robert Ley, Nazi politician and head of the German Labour Front from 1933 to 1945, in response to the indictment served on himself and others on 19 October 1945, stating that *'*[a]*ll defendants formulated and executed a common plan…to commit Crimes against Humanity…*'.[2] The notion of a '*common plan*' or policy to commit crimes against humanity will be the theme of this paper, the above quote demonstrating that such a concept dates as far back as Nuremberg, and that proving the existence of such a policy is fraught with difficulties.

The *chapeau* of Article 7 of the Rome Statute of the International Criminal Court (Rome Statute) affirms the spirit of such crimes, providing a jurisdictional threshold for which subparagraph 2(a) provides further definition.[3] The need for a '*common plan*' to commit crimes against humanity has evolved considerably in international criminal law (ICL), and is now expressed in Article 7(2)(a) of the Rome Statute, which provides a contextual requirement to the finding of crimes against humanity, that they must be committed '*pursuant to or in furtherance of a State or organisational policy*'.[4] This policy requirement safeguards against random or isolated attacks being included in the remit of

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[1] National Archives II, College Park, Maryland, Jackson main files, RG 238, Box 3, letter from Robert Ley to Dr Pflücker, 24 October 1945, p.9, *quoted in* Richard Overy, 'The Nuremberg Trials: International Law in the Making' *in* Philippe Sands (ed.) *From Nuremberg to The Hague: The Future of International Criminal Justice* (CUP 2003) 1.

[2] ibid.

[3] Rodney Dixon, 'Crimes Against Humanity: Chapeau' *in* Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed., Nomos 2008) 168; William A. Schabas, *An Introduction to the International Criminal Court* (4th ed., CUP 2011) 110; Herman von Hebel & Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (2nd ed., Kluwer Law International 2002) 79, 91.

[4] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter 'Rome Statute'].

crimes against humanity.[5] The need for a State policy under the Rome Statute is now relatively uncontested,[6] however the use of the phrase '*organisational*' continues to cause '*profound disagreement*', in the case law of the International Criminal Court (ICC) and academic commentary alike. [7]

Chapter II of this thesis will conduct a careful analysis of a 2010 decision of the ICC, the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (*Kenya Investigation Authorisation* case), which aptly elucidates upon the competing claims over how to define an '*organisation*' that can be found to have committed crimes against humanity under the remit of the ICC.

Chapter III will consider these opposing visions through the prism of the academic debate in the field, in an effort to isolate drawbacks in the literature, and in order to ascertain repetitive leitmotifs that arise. These recurrent themes will serve as indicators as to which features of an '*organisation*' will serve as a cursor that such an entity is capable of creating a policy to attack a portion of the civilian population.

Chapter IV will provide a systematic reading of the historical development of the policy requirement, including the relevant *Travaux Préparatoires* of the Rome Statute, and pertinent case law. It is hoped that the recurrent themes that arise amongst commentators will again be disclosed, aiding this author to narrow down factors that are deemed most important in defining an '*organisation*' under Article 7(2)(a).

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[5] *Prosecutor v. Tadić*, Case No. IT-95-1-T, Trial Judgement (ICTY, May 7, 1997) ¶ 653 [hereinafter, '*Tadić* Judgement'].

[6] See for example, William A. Schabas, 'State Policy as an Element of International Crimes' (2007-2008) 98(3) *Journal of Criminal Law and Criminology* 953. The author of this paper recognises that there still remains a degree of contestation in this area: See Matt Halling, 'Pushing the Envelope- Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' (2010) 23 *Leiden Journal of International Law* 827; doi:10.1017/S0922156510000397, who argues for the total removal of the policy requirement, on the basis that it allows for a narrow loophole of impunity. See also, William A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 *Leiden Journal of International Law* 847: doi: 10.1017/S0922156510000403, for a strong refute of this proposition. Nonetheless, the debate of whether there is a need for a policy requirement in general remains outside the scope of this article.

[7] Gerhard Werle & Boris Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organisation?' (2012) 10 (5) *Journal of International Criminal Justice* 1151, 1152: doi: 10.1093/jicj/mqs069.

Chapter V will present an exploration of various theories of crimes against humanity, in an attempt to theoretically underpin tentative conclusions made about the need for an '*organisation*' under Article 7(2)(a) to have a *political purpose*, combined with *power*.

2. Kenya at the International Criminal Court

2.1. Introduction

A 2010 decision of the Pre-Trial Chamber II of the ICC provides a very apt demonstration of the competing claims over how to define '*organisational*' under Article 7(2)(a). The Decision Pursuant to Article 15 concerned the authorisation of an investigation into the 2008 Post-election violence in Kenya.[8] The results of the presidential elections on 30 December 2007 - disputed between incumbent president Mwai Kibaki of the Party of National Unity (PNU) and opposition candidate Rail Odinga, - triggered wide scale violent demonstrations and attacks in several sites in Kenya.[9] The scale of this violence resulted in a reported 1,220 civilian deaths, and the recounted internal displacement of around 350,000 persons.[10] The Prosecutor alleges that '*the multiple crimes had been organised and planned within the context of a widespread and systematic attack against selected segments of the Kenyan civilian population*',[11] allegedly orchestrated by political leaders, local businessmen and others.[12] Throughout the Prosecutor's request for authorisation of an investigation, there are repeated references to the organised, organisational and strategic element of many of these attacks, with a clear pattern, involving looting and burning of houses, threats, sexual violence and killings.[13] Following its consideration of the Prosecutor's request for authorisation to investigate, the Pre-Trial Chamber II found that '*the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory*'. [14] Concerned with determining whether all the contextual requirements of crimes against humanity had been met, the Pre-Trial Chamber was tasked with judging whether the crimes had taken place '*pursuant to or in furtherance of a State or*

[8] *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, Pre Trial Chamber II, 31 March 2010 [hereinafter '*Kenya Investigation Authorisation* case']. See Charles C. Jalloh, 'Case Report: Situation in the Republic of Kenya' (2011) 105 *American Journal of International Law* 540, for a developed case note on Kenya's journey to the ICC.

[9] *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, Office of the Prosecutor, 26 November 2009, ¶ 4.

[10] ibid ¶ 56.

[11] ibid ¶ 57.

[12] ibid ¶ 63.

[13] ibid ¶ 68, 75-87.

[14] *Kenya Investigation Authorisation* case (n 8) ¶ 73.

organisational policy'.[15] As previously stated, the alleged actors in question were multiple, including politicians, businessmen and criminal gang leaders, and thus it follows that these crimes were not part of a State policy. This left the Pre-Trial Chamber charged with determining whether the actors in question could constitute an organisation for the purposes of Article 7(2)(a). In addressing this question, the Chamber proceeded to consider how to define '*organisation*'. Reflecting much of the academic literature on this position, there was a fundamental split in the Chamber's opinion: the majority, consisting of Judges Trendafilova and Tarfusser, asserted, amongst other things, that the existence of an organisation under this Article turns upon '*whether a group has the capability to perform acts which infringe on basic human values*'.[16] Conversely, Judge Kaul in dissent argued for a more stringent standard to define an organisation under the Article, reasoning that said organisation must be '*State-like*'.[17]

At this stage it is pertinent to assert, as Judge Kaul did in his Dissenting Opinion, that while the English text of the Rome Statute refers to an '*organisational policy*', thus creating confusion over whether such a policy need only be organised,[18] the French text refers to '*la politique d'un État ou d'une organisation*', and the Spanish text: "*con la política de un Estado o de una organización*".[19] These texts '*clearly refer to the requirement that a policy be adopted by an "organisation"'.* [20] Thus, Article 7(2)(a) allows for the acts of organisations to constitute crimes against humanity.

The sensitivity over how to define '*organisation*' under the Article arises from the understanding that this directly affects what type of criminal actors can be guilty of '*unimaginable atrocities that deeply shock the conscience of humanity*'.[21] This issue goes to the heart of the debate of determining the demarcation line between international crimes and domestic crimes. The purpose of the policy requirement is to ensure that random and unconnected crime waves do not fall within the remit of the ICC, thus resulting in a

[15] Article 7(2)(a), Rome Statute (n 4).
[16] *Kenya Investigation Authorisation* case (n 8) ¶ 89.
[17] Dissenting Opinion of Judge Hans-Peter Kaul, *Kenya Investigation Authorisation* case (n 8) ¶ 66.
[18] ibid ¶ 37.
[19] ibid ¶ 38.
[20] ibid.
[21] Preamble, Rome Statute (n 4).

'*banalisation*' or '*trivialisation*' of international criminal law.[22] This chapter will conduct an intense evaluation of both the majority decision of the Pre-Trial Chamber, and the Dissenting Opinion. This will include a survey of the case law and academic literature that the two passages rely on. Further, other relevant case law from both the *ad hoc* tribunals and Nuremberg will be explored, alongside a study of how the decision has been treated by later Pre-Trial Chamber judgments. This study will be conducted with the objective of clarifying the competing claims over how to define an organisation capable of committing crimes against humanity.

2.2. The Majority Decision

The Pre-Trial Chamber, on considering how to define the term '*organisational*':

> *…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 a group has the capability to perform acts which infringe on basic human values*.[23]

This general statement has attracted much criticism on the basis that it allows for many types of groups to be considered as organisations which fall under the jurisdiction of Article 7.[24] In reaching this conclusion, the majority considered the jurisprudence of two preceding Pre-Trial Chamber decisions: the Decision on the confirmation of charges in the Case against Katanga and Ngudjolo Chui; and the Decision Pursuant to Article 61(7) (a) and (b) on the Charges against Jean-Pierre Bemba Gombo.[25] The majority decision quotes a passage from each judgment, which both include identical phrasing:

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[22] Dissenting Opinion of Judge Hans-Peter Kaul, *Kenya Investigation Authorisation* case (n 8) ¶ 55.

[23] *Kenya Investigation Authorisation* case (n 8) ¶ 90.

[24] See Claus Kress 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855, 857; and Dissenting Opinion of Judge Hans-Peter Kaul, *Kenya Investigation Authorisation* case (n 8) ¶ 117 for discussion of the problems with this statement.

[25] *Kenya Investigation Authorisation* case (n 8) ¶ 84; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008 [hereinafter '*The Prosecutor v. Katanga and Chui*, confirmation of charges']; *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute,

> *Such a policy may be made either by groups of persons who govern a specific territory or by an organisation with the capability to commit a widespread or systematic attack against a civilian population.*[26]

It is clear that the Pre-Trial Chamber II in the *Kenya Investigation Authorisation* case is partially influenced by the notion of '*capability*' in this passage, despite the fact that it makes no reference to an organisation's capability to '*infringe on basic human values*'. Further, it is interesting to note that the Chamber seem to have chosen to ignore an earlier part of the same paragraph in *the Prosecutor v. Katanga and Chui*, confirmation of charges, which asserts that the policy requirement *'…ensures that the attack…must still be thoroughly organised and follow a regular pattern*'.[27] More fully, Article 7(2)(a) reads that an '"[a]*ttack directed against any civilian population" means a course of conduct…pursuant to or in furtherance of a State or organisational policy to commit such attack*'.[28] The policy requirement is therefore, in plain reading, part of how one identifies an '*attack directed against any civilian population*'. Thus, one might expect that the Chamber might focus upon the need attack being '*thoroughly organised*' and following a '*regular pattern*', in order to demonstrate the existence of an organisational policy.

The Pre-Trial Chamber finds its support for the defining criteria of '*capability to perform acts which infringe on basic human values*' in a handful of academic articles, principally an article by Di Fillipo, which the judgment directly quotes and lifts the phrase from.[29] Di Fillipo, in asserting that terrorism and terrorist organisations could fall under the remit of Article 7, subscribes to the argument that private criminal organisations can satisfy the organisational requirement '*given the latter's acquired capacity to infringe basic human values*'.[30] The difficulty with the Majority opinion's reliance on this particular Article is that it insufficiently supports this assertion. Di Fillipo considers this classification of organisation under the Article as '*the natural evolution of the category of crimes against*

Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009 [hereinafter '*Prosecutor v. Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b)'].

[26] *Kenya Investigation Authorisation* case (n 8) ¶ 84; *The Prosecutor v. Katanga and Chui*, confirmation of charges (n 25) ¶ 396; *Prosecutor v. Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) (n 25) ¶ 81.

[27] *The Prosecutor v. Katanga and Chui*, confirmation of charges (n 25) ¶ 396.

[28] Article 7(2)(a), Rome Statute (n 4).

[29] See Marcello Di Fillipo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' (2008) 19 *European Journal of International Law* 533, 567; Kenya Investigation Authorisation case (n 8) ¶ 90.

[30] Di Fillipo, (n 29) 567.

humanity', a statement for which he provides no explanation.[31] Further, he makes a cursory footnote reference to the work of Robinson in support of the '*capacity to infringe basic human values*' method, the same piece that the majority decision indeed footnotes in support of the '*capability to perform acts which infringe on basic human values*' criteria.[32] In his paper, Robinson does indeed endorse a '*much more flexible*' approach to the policy requirement.[33] However, at no stage does he do this based on the reasoning of capability. Therefore, it seems strange and weak that the majority judgment chooses to reference this Article in support of their '*capability to perform acts which infringe on basic human values*' definition. Robinson chooses to base his subscription to a more flexible definition of the policy requirement relying on his interpretation of the contextual requirement that an attack also be '*widespread or systematic*', under Article 7(1)(a).[34] For Robinson, while the '*systematic*' criterion means '*thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources*', the policy requirement is much more flexible, meaning that, for him, radio broadcasts endorsing attacks under Article 7 can satisfy the meaning of organisational policy.[35] It is difficult to see, as it will be explicated later in this paper, how to separate the contextual requirement that an attack be '*systematic*' and the need for an organisational policy. Indeed, Robinson indirectly demonstrates this, by providing a definition of '*systematic*' that even includes a reference to and relevance of the existence of a policy. For Robinson, given that identifying a '*systematic*' attack involves some consideration of policy, this allows for a more flexible approach to the policy requirement itself. But what about cases where the Prosecutor bases his case not on the systematic nature of the attack, but the widespread context of it? Should the policy requirement remain so flexible? This point will be returned to. At this stage, it is simply necessary to highlight that this piece does very little to support the majority decision and Di Fillipo's finding of a '*capability to perform acts which infringe on basic human values*' definition of organisation under Article 7(2)(a), given that he makes no attempt to help define the term himself.

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[31] ibid.

[32] ibid*; Kenya Investigation Authorisation* case (n 8) ¶ 90.

[33] Darryl Robinson, 'Defining "crimes against humanity" at the Rome Conference', (1999) 93 *American Journal of International Law* 43, 50.

[34] Article 7(1)(a), Rome Statute (n 4).

[35] Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 50-51.

The Chamber's reference to the work of the International Law Commission (ILC) in its Draft Code of Crimes Against the Peace and Security of Mankind (1991) is also flawed. At Article 21, the ILC assert that they '*do not rule out the possibility that private individuals with de facto power or organised in criminal gangs or groups*' might fall under the scope of the Code.[36] However, Article 21 has jurisdiction over '[s]*ystematic or mass violations of human rights'*, not crimes against humanity. It is easy to extend this to crimes against humanity, but the fact nonetheless remains that the ILC were considering actors of a broader category for mass violations of human rights, not the actors of crimes against humanity, and thus might have been more malleable in their approach.

The work of Burns, which again the Chamber references in its reasoning, provides an interesting perspective on the matter of identifying groups which would fall under the definition of organisations.[37] He holds that it '*probably turns upon the mental element of the crime*'.[38] Thus, organised crime groups like the Hells Angels would never fall under the Article, because, while their acts may result in collateral damage to civilians, they never intentionally direct their violence towards the civilian population. On the other hand, those who direct attacks towards the civilian population purposefully, in order to further a particular cause, for example narco-terrorists or rebels, would fall under the actors to be included in Article 7(2)(a). This assertion seems to parallel the reasoning of the Prosecutor, in *The Prosecutor v. Bemba Gombo*, the Decision on the Prosecutor's Application for a Warrant of Arrest. Here, the Prosecutor emphasises the presence of a '*deliberate tactic*' to attack, humiliate and punish those who support the rebel troops of François Bozizé.[39] This mirrors Burns' claim for the finding of a mental element to deliberately target the civilian population. Further, at Nuremberg, when the criminalisation of entire organisations was considered, it was found that such associations must have an '*existence as a group entity,*

[36] Article 21, Draft Code of Crimes Against the Peace and Security of Mankind in *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session* (29 April-19 July 1991), 46 U.N. GAOR Supp. (No. 10), U.N. Doc. A/46/10 (1991); *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n 94, 103, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (part 2) [hereinafter 'Draft Code of Crimes Against the Peace and Security of Mankind 1991'].

[37] *Kenya Investigation Authorisation* case (n 8) ¶ 90.

[38] Peter Burns, 'Aspect of Crimes Against Humanity and the International Criminal Court- A paper prepared for the Symposium on the International Criminal Court, February 3-4, 2007: Beijing, China' <http://www.icclr.law.ubc.ca/site%20map/icc/aspectofcrimesagainsthumanity.pdf> accessed 10 September 2013.

[39] *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, Pre-Trial Chamber III, 10 June 2008 ¶ 30 [hereinafter '*The Prosecutor v. Bemba Gombo*, the Decision on the Prosecutor's Application for a Warrant of Arrest'].

such that its members would have understood that they were participating in a collective purpose'.[40] These points demonstrate the relevance not only of capability, but also of the aim and purpose of the organisation.

The above illustrates that the Chamber has erred in its finding that an organisation must have the '*capability to perform acts which infringe on basic human values*'. If the Chamber intends this to be taken as the principle definition of an '*organisation*', then it is worrying. However, it is critical to note that the Chamber at no point specifies that it considers the statement '*capability to perform acts which infringe on basic human values'* as its guiding definition on '*organisation*'. The Chamber does in fact go further. It holds that the following elements might be pertinent on a case-by-case basis, in order to determine whether a group may qualify as an organisation under the purposes of Article 7(2)(a):

> *(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 a civilian population as a primary purpose;*
> *(v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (in line with primary purpose) and*
> (vi) *whether the group is part of a larger group, which fulfills some or all of the above mentioned criteria.*[41]

This case-by-case approach recognises that policies to attack a civilian population can develop and occur in such varied ways that it is difficult to envisage a catch-all definition of an organisation.[42] It also incorporates a number of the other relevant factors that the case

[40] See Allison Danner & Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 113, 166.
[41] *Kenya Investigation Authorisation* case (n 8) ¶ 92.
[42] Thomas O. Hansen, 'The Policy Requirement in Crimes against Humanity: Lessons from and for the Case of Kenya*'* (2011) 43 *George Washington International Law Review* 1, 3.

law and academic commentary in this area highlight as relevant to consider, including purpose, intention and capability. The difficulty with this criterion however, rears at point (ii). Given the interdependence between the requirement of a '*systematic*' attack and an '*organisational policy*' to commit such an attack, it seems that including the consideration of '*whether a group possesses…the means to carry out a widespread or systematic attack against a civilian population*' creates a circular position. In order to identify the existence of a '*widespread or systematic*' attack it is often necessary to consider the existence of some kind of policy to commit such an attack, and in determining the existence of an '*organisational policy*' it may be necessary to identify whether an attack was systematic enough to have involved such a policy.[43]

The above passage has demonstrated that the Chamber's statement that the existence of an organisation for the purpose of Article 7(2)(a) turns on whether a group has '*the capability to perform acts which infringe on basic human values*' is flawed, through its reliance on references that do not help further this position. It is therefore difficult to sustain support for such a broad an under-justified conception of organisation. Nonetheless, the criteria that the Chamber deems relevant to consider in determining the identification of an organisation under Article 7(2)(a) is appropriate, in that it parallels a degree of factors previously mentioned in both case law and academic commentary. It is however, challenging to isolate exactly which approach it is, the case-by-case method or the capability requirement, that the Chamber intends to present as its central guidance for ascertaining the type of organisation that is capable of committing crimes against humanity.

2.3. Dissenting Opinion of Judge Hans-Peter Kaul

In his separate Dissenting Opinion, Judge Kaul takes issue, as the author of this paper has done, with the majority's contention that a non-State organisation can qualify as an actor of crimes against humanity if it '*has the capability to perform acts which infringe on basic human values*'. Judge Kaul argues that the phrase cannot act as a guide '*without further*

[43] This has also been noted by Dixon in relation to the general structure of article 7(2)(a), who identifies that '*the same considerations applicable to proving the widespread or systematic character of the attack… will have to be taken into account when establishing the multiplicity and organisational components of the attack'*. See Dixon, 'Crimes Against Humanity: Chapeau'*, in* Triffterer (ed), *Commentary on the Rome Statute* (n 3) 159, N. 94.

specification', and in doing so seems to ignore that the majority do indeed provide further specification, through the given list of possible factors to consider, as discussed above.[44] Viewing the phrase as stand-alone, it is understandable that Judge Kaul would consider such a criterion as risking the *'"banalisation" or "trivialization" of the crimes contained in the Statute*', for Article 7(2)(a) plays a crucial role in distinguishing crimes against humanity from domestic crimes.[45] It is this concern that triggers Judge Kaul to reason based on the grammatical presentation of the Article. He argues that the juxtaposition of the terms '*State*' and '*organisational*' in the Article indicates that the organisations in question '*should partake of some characteristics of a State*'.[46] This argument is '*not compelling*'[47] and has even been directly challenged, on the basis that the use of the conjunction 'or' in the phrasing of '*State or organisational policy*' impliedly provides equality between the two definitions.[48] Nonetheless Judge Kaul uses this flawed reasoning as a platform to set out criteria that he considers relevant in determining whether an organisation has '*quasi-State abilities*'.[49] For Kaul, an organisation is '*State-like*', if it involves:

> *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*.[50]

The difficulty with Judge Kaul's approach is his unwillingness to define '*State-like*' beyond organisations that '*partake of some characteristics of a State*'.[51] Further, in spite of his insistence that an organisation be '*State-like'* for the purposes of Article 7(2)(a), the list of relevant indicators Judge Kaul provides are remarkably similar to the chosen list of

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[44] Dissenting Opinion of Judge Hans-Peter Kaul, *Kenya Investigation Authorisation* case (n 8) ¶ 53.
[45] ibid ¶ 55.
[46] ibid ¶ 51.
[47] Kress, 'On the Outer Limits of Crimes against Humanity' (n 24) 863.
[48] Werle & Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organisation?' (n 7) 1156.
[49] Dissenting Opinion of Judge Hans-Peter Kaul, *Kenya Investigation Authorisation* case (n 8) ¶ 51.
[50] ibid.
[51] ibid. See also Werle & Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organisation?' (n 7) 1162.

factors of the majority judgment, despite justifying their stances on the matter very differently. For example, the judgment's first consideration that an organisation '*is under responsible command, or has an established hierarchy*', undoubtedly corresponds with the dissent's position at (d): that an organisation '*is under responsible command or adopted a certain degree of hierarchical structure*'. These provisions even mirror the same phrasing concerning '*responsible command'*. The decision's second indicator of a '*means to carry out*' an attack, reflects the dissenting opinion's contention of the need for an organisation to have the '*capacity and means to attack any civilian population*' at (f). Although Judge Kaul chooses not to refer to the contextual requirement of a '*widespread or systematic*' attack, his reference to an attack '*on a large scale*' infers a similar consideration. Finally, point (iv) in the judgment identifies the relevance of the group having '*criminal activities as a primary purpose*', which, viewed in partnership with Judge Kaul's contention that an organisation should be '*established and acts for a common purpose*' at (b) demonstrates how both passages consider the aim or purpose of the group to be an entirely pertinent contemplation. These similarities reveal that, despite grounding their arguments with very different sentiments about what sort of actors can be guilty of crimes against humanity, the considerations they make in regulating the types of actors to be within the remit of the act are remarkably similar.[52] Beyond this, it can even be argued that Judge Kaul's approach in fact inadvertently results in a broader reading of '*organisation*', given that his list of relevant factors does not include any notion of control over territory, in the same way the majority approach does, but simply control over members. Thus, Judge Kaul's vehement criticism of the majority's decision loses a degree of its gravitas.

The Dissenting Opinion of Judge Kaul also saw him reject the relevance of the jurisprudence of other international courts, particularly of the *ad hoc* tribunals.[53] He bases this on the contention that Article 7(2)(a) of the Rome Statute is a fully separate contextual requirement to the necessity under Article 7(1), that an act must be committed '*as part of a widespread or systematic attack*'. Thus, because the statutes of the *ad hoc* tribunals did not provide for a policy requirement, and because Article 7(1) should be read separately to 7(2)(a), it is not pertinent to consider the jurisprudence of the tribunals on '*systematic*' as relevant to help interpret 7(2)(a). The author of this paper disagrees with the Dissenting

[52] Charles C. Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (2012-2013) 28 *American University International Law Rev*iew 381, 432.
[53] Dissenting Opinion of Judge Hans- Peter Kaul, *Kenya Investigation Authorization* case (n 8) ¶ 28-32.

Opinion on this matter: Article 7(2)(a) reads in full:

> *"Attack directed against a civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.*[54]

Here the policy requirement specifically links itself to Article 7(1) by referring to and quoting '*attack directed against a civilian population*' for the Article. Thus, the construction of the Article itself implies that the policy requirement is to be used in order to help interpret Article 7(1). It follows that the jurisprudence of the *ad hoc* tribunals is entirely relevant. An interesting counter-argument to this is impliedly provided by Smith, who, in arguing that the '*organisational policy*' requirement broadens crimes against humanity so as to include the acts of organised crime syndicates, references the other threshold elements of crimes against humanity, that are, according to her '*more dependent on the nature of the crime than the nature of the actor'*.[55] This statement implies that for Smith, organisational policy relates to the nature of the *actor* and not the nature of the crimes, enabling a *separation* between the policy requirement and the other contextual requirements.

Nonetheless, it is clear that '*organisational policy*' remains a criterion that informs the requirement of '*widespread or systematic'.* [56] This is aptly demonstrated by the jurisprudence of the *ad hoc* tribunals.[57] In *Kunarac*, it was held that systematic refers to '*the organised nature of the acts of violence and the improbability of their random*

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[54] Article 7(2)(a), Rome Statute (n 4).

[55] Jennifer M. Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (2009) 97 *The Georgetown Law Journal* 1111, 1114.

[56] Schabas concedes that '*[i]t seems…that the term "attack" has both widespread and systematic aspects*', Schabas, *An Introduction to the International Criminal Court* , 4th ed., (n 3) 111.

[57] See, for example: *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeals Judgement (ICTY, 5 July 2001) [hereinafter '*Jelisić* Appeals Judgement'] ¶ 48: '*the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime*'; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgement (2 September 1998) [hereinafter '*Akayesu* Trial Judgement'] ¶ 580: '*The concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State*'.

occurrence'.[58] Further, the International Criminal Tribunal for the Former Yugoslavia[59] (ICTY) held that a plan or policy '*may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic*'.[60] Although the ICTY finally did not recognise the legal necessity for a policy requirement of any kind, it did note that the '*crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding de facto authority over a territory'*.[61] Thus the ICTY did indeed envisage the role of an organisational policy in determining widespread or systematic.[62] Similarly, the ICTR has recognised interdependence between policy and sytematicity.[63]

It is also important to note the particular incoherence in the Pre-Trial Chamber II decision, one that Hansen rightly outlines.[64] The judges in the majority also observe the key elements of crimes against humanity under the Rome Statute, including '*a State or organisational policy*' as an entirely separate contextual requirement to the obligation that the attack be '*widespread or systematic*'.[65] However, the judgment then goes on to consider it relevant that an organisation has the '*means to carry out a widespread or systematic attack against a civilian population*' in determining whether that organisation falls under Article 7(2)(a).[66] Conversely then, the judgment inextricably links the two

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[58] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23/1-A, Appeals Judgement (ICTY, 12 June 2002) [hereinafter '*Kunarac* Appeals Judgement'] ¶ 94.

[59] Created by the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S. C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *amended by* S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [hereinafter 'ICTY Statute'].

[60] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Judgement (ICTY, 29 July 2004) [hereinafter '*Blaškić* Appeal'] ¶ 120; *Kunarac* Appeals Judgement (n 58) ¶ 98.

[61] *Prosecutor v. Kupreškic et al*, Case No. IT-95-16-T, Judgement (ICTY, 14 January 2000) [hereinafter '*Kupreškic* Judgment'] ¶ 522.

[62] It has been noted that this particular body of ICTY jurisprudence, seemingly finite in its rejection of the need for a policy, in fact further confuses matters, given that it ignores certain authorities, such as the Rome Statute definition explicitly including a policy requirement. For a discussion of these issues, see Schabas, 'State Policy as an Element of International Crimes' (n 6) 959-64; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed., Kluwer Law International 1999) 24-26, and Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 381- 402.

[63] *Akayesu* Trial Judgement (n 57) ¶ 580: here Trial Chamber I defines '*systematic*' as '*thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources*', in doing so citing the ILC; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement (21 May 1999) [hereinafter '*Kayishema* Trial Judgement'] ¶ 123: asserts that a systematic attack is one '*carried out pursuant to a preconceived policy or plan*'.

[64] Hansen, 'The Policy Requirement in Crimes against Humanity: Lessons from and for the Case of Kenya*'* (n 42) 3.

[65] *Kenya Investigation Authorisation* case (n 8) ¶ 79.

[66] ibid ¶ 92.

requirements.

Support for viewing the contextual requirements collectively can also be found elsewhere. For example, in the preparation stages of the Rome Statute, when discussing the widespread or systematic criteria, it was found that there was support for the following elements to be considered: '*planning, policy, conspiracy or organisation…and acts committed as part of a policy, plan conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes…*' [67] Further, even earlier jurisprudence of the Pre-Trial Chamber at the ICC has evidenced the struggle to separate the contextual requirements. Take, for example *The Prosecutor v. Bemba Gombo*, the *Decision on the Prosecutor's Application for a Warrant of Arrest*. Here the Pre-Trial Chamber III held that '*the existence of a State or organisational policy is an element from which the systematic nature of an attack may be inferred*'.[68]

Having established that the two contextual requirements of a systematic attack and an organisational policy cannot be read separately, how do we read them together? Here it is necessary to return to the argument of Robinson that was considered earlier in this paper: that the threshold for finding an attack to be '*systematic*' should be higher than the level of organisational policy needed.[69] The author of this paper rejects this assertion, on the basis that both the policy requirement and the necessity for a '*widespread or systematic*' attack perform the same function: informing the identification of an attack directed against a civilian population. Thus the same threshold should apply to both. However, this thesis is concerned with how to define the types of actors that can formulate an organisational policy to commit an attack directed against a civilian population, and the question of threshold that Robinson attempts to address is directed towards the standard of the policy, not the standard of the actors. Therefore, while it is important to consider sources that opine on how to define '*systematic*' as a way to inform our understanding of how to define '*organisational*', we should not confuse this with definitions identifying a policy.

[67] *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* Vol. I, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22, (1996) ¶ 85.
[68] *The Prosecutor v. Bemba Gombo*, the Decision on the Prosecutor's Application for a Warrant of Arrest (n 39) ¶ 33.
[69] Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 50.

2.4. How to Understand the Judgment

Having highlighted the inconsistencies and weaknesses in both the majority decision and the Dissenting Opinion, it is now pertinent to consider how we are to interpret the judgment going forward. Kress highlights the central discrepancy in the majority approach: in one breath the judgment reads that capability is the definition to be applied in order to determine the type of organisation capable of crimes against humanity, and in the next heartbeat a case-by-case approach is promulgated.[70] The author of this paper contends that the '*capability*' principle was intended to be understood, not as a definition, but as a general statement about the approach the majority believes should be taken in tackling such a question. It is the case-by-case tactic that the Chamber truly intends to present as a guiding methodology.

This reasoning has been supported by a later Pre-Trial Chamber judgment on the authorisation of an investigation into the Situation in the Republic of Côte d'Ivoire. Here the Pre-Trial Chamber III agrees with the Pre-Trial Chamber II, that whether a group qualifies as an '*organisation*' for the purposes of Article 7 must be approached on a case-by-case basis.[71] The Chamber only refers in passing to the capability requirement of the Pre-Trial Chamber II that seems to have caused so much controversy, enforcing that, as the Pre-Trial Chamber III understands it, the Pre-Trial Chamber II intended weight to be attached to its case-by-case approach, not its sweeping statement of capability.[72]

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[70] Kress, 'On the Outer Limits of Crimes against Humanity' (n 24) 857.

[71] *Situation in the Republic of Côte D'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11-14, Pre-Trial Chamber III, 3 October 2011 ¶ 46.

[72] ibid. ¶ 43. See also *Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09- 02/11, Pre-Trial Chamber II, 8 March 2011 ¶ 22: here the Pre-Trial Chamber II systematically applies its list of relevant factors from the earlier Kenya Investigation Authorisation case, to find that the Mungiki criminal gang can indeed be classified as an '*organisation*' for the purposes of article 7(2)(a).

2.5. Conclusion

In its dissection of the *Kenya Investigation Authorisation* case, this chapter has clarified that, while imperfect in its reliance on the criterion '*capability to perform acts which infringe on basic human values*', the decision by the Pre-Trial Chamber II ultimately achieves a degree of clarification over how to determine whether a group constitutes an organisation that can commit crimes against humanity. The status of the debate in case law, academic commentary and other materials validates just how trying it is attempting to settle on a definition of '*organisation*' which is commonly accepted, particularly given that this notion can depend entirely upon how one justifies the concept of crimes against humanity more generally. Defining '*organisation*' under Article 7(2)(a) is further convoluted by intersection between the other contextual elements of a crime against humanity under Article 7(1), particularly the requirement of a '*systematic*' attack. Ultimately it is clear that the purpose of Article 7(2)(a) is to ensure that random, isolated, and unconnected attacks do not fall under the jurisdiction of the Court. It is the ability to adopt a policy that can set in motion the machinery to commit a widespread and systematic attack against a civilian population that elevates an organisation to fall under the jurisdiction of the International Criminal Court.

3. 'Chaos was the law of nature; Order was the dream of man'[73]: State of Nature in the Academic Debate

3.1. Introduction

This chapter intends to reflect in greater detail on the two camps of academic debate that are perfectly elucidated by the *Kenya Investigation Authorisation* case, that is, a broader '*capability to commit*' crimes against humanity approach, and a much more strict '*State-like*' interpretation of organisations under Article 7(2)(a).[74] In focusing on the fundamental split in academic opinion in this area, this chapter will evaluate the competing reasoning at play. There will also be an effort to isolate recurring themes that may arise in the literature, helping to identify trends in establishing what curious characteristic of an organisation might make it one that is guilty of crimes against humanity.

3.2. Capability

Although the preceding chapter demonstrates that the majority decision did not necessarily succeed in presenting a definition of '*organisation*' that is broader than Judge Kaul's dissenting opinion, it is still pertinent to explore the work of those who support an interpretation of '*organisation*' that is based on whether said organisation is capable of committing crimes against humanity, thereby reflecting the language of the majority opinion.[75]

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[73] Henry Adams, *The Education of Henry Adams* (Blackmask Online 2002) 189.

[74] Other arguments in this arena, such as for the removal of the policy requirement in totality, or simply for a State policy, remain outside the scope of this paper, although they will be touched upon at points. See Darryl Robinson, 'Essence of Crimes against Humanity Raised by Challenges at ICC' (EJIL: Talk, 27 September 2011) <http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/> accessed 11 September 2013, for a succinct overview of such literature. See also: George P. Fletcher, *Romantics at War: Glory and Guilty in the Age of Terrorism* (Princeton University Press 2002) 63, for the view that the '*organisational policy*' requirement explicates a component that is implicit in all international crimes. There are even those who entertain the idea that international organisations may be guilty of international crimes: see André Nollkaemper, 'Introduction' *in* André Nollkaemper & Harmen Van Der Vilt (eds), *System Criminality in International Law* (CUP 2009) 17-18, who contemplate that inaction by these organisations may imply a policy that condones systematic crimes. See also the comments of Kofi Annan on the Rwandan Genocide in 1994: '*The international community is guilty of sins of omission*', in 'UN chief's Rwanda genocide regret' (BBC, 26 March 2004) <http://news.bbc.co.uk/1/hi/world/africa/3573229.stm> accessed 18 July 2013. See Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd ed., CUP 2010) 237-241 for analysis of competing authorities on the merits of the inclusion or removal of any kind of policy requirement.

[75] *Kenya Investigation Authorisation* case (n 8) ¶ 90.

Robinson has painted the importance of including non-State actors in Article 7, thus widening the dimensions of '*organisation*' to beyond merely '*State-like*', because '*we must recognise the massive harms that non-State actors can commit*'.[76] This is quite clearly a capability-based justification for broadening the scope of organisations that may fall under the remit of Article 7. He opines that customary international law has developed in a manner that indicates that only a State conception of the policy requirement is too constricting, as evidenced by certain jurisprudence of the ICTY.[77] Thus, the word '*organisation*' was included at the Rome Conference, because it was agreed it aptly reflected the state of customary international law at the time.[78] Robinson asserts that the term '*systematic*' requires a '*very high degree of organisation or orchestration*', whereas '*policy*' is '*much more flexible*'.[79] Robinson argues that Article 7 creates a compromise, helping to limit the unqualified disjunctive test.[80]

Smith argues for the prosecution of organised crime syndicates under international criminal law on the basis that ICL developed outside the context of conflicts. She asserts that it is the introduction of the '*organisational policy*' element that validates how international criminal law has expanded to include organised crime syndicates as potential perpetrators of crimes against humanity.[81] She is principally concerned with the prosecution of transnational criminal organisations: those that threaten international peace

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[76] Robinson, 'Essence of Crimes against Humanity Raised by Challenges at ICC' (n. 73).

[77] Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 50. See *Prosecutor v. Dragan Nikolić*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, (20 October 1995) ¶ 26: crimes against humanity '*need not be related to a policy established at a State level, in the conventional sense of the term*' but '*they cannot be the work of isolated individuals alone*'; and *Tadić* Judgement (n 5) ¶ 652, which included entities with *de facto* control over territory, and left open the question of whether organisations can be considered in this way.

[78] Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 50.

[79] ibid 50-51. This is directly contradicted by Hwang's interpretation of the *chapeau:* Phyllis Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal* 457, 502. Hwang concludes that '*systematic*' according to *Tadić* is looser, only needing to find some evidence of a plan that is not formalised. By applying the policy requirement, the construction of '*widespread and systematic*' is reintroduced anyway, thereby negating the function of applying the disjunctive test for '*widespread or systematic*'. Schabas has described the apparent broadening of the threshold for crimes against humanity, through the use of the disjunctive approach, as a '*deception*', due to the policy requirement: Schabas, *An Introduction to the International Criminal Court* , 4th ed., (n 3) 110. See also Timothy LH McCormack, 'Crimes Against Humanity' *in* Dominic McGoldrick, Peter Rowe & Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 179, 187-188.

[80] Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 51.

[81] Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1114.

and security due to their economic and political power, and organised structure.[82] It is these characteristics that ensure such organisations have the *capability* to commit international crimes, for '[t]*he world is getting smaller and the organised crime syndicates are taking advantage of new technology to transcend the antiquated concept of regional activity*'.[83] Interestingly, Smith notes that much of the violence, murders and other acts committed by transnational organised crime syndicates are done so in order to further the purposes of said organisation.[84] This throws out questions about the importance of the purpose of an organisation in the context of Article 7.

Jalloh, rather than seeking to add to the debate on how to identify what types of actors can be guilty of crimes against humanity, instead intends to outline the parameters of the debate by '*exposing the curious lack of consensus theory*' in the literature, underlining the difficulties that such competing visions can create.[85] He demonstrates this through the prism of the '*organisational policy*' debate. In doing so, Jalloh makes it explicit that he comports with a broad human rights oriented interpretation of the term.[86] Jalloh falls into the trap that many academics have also stumbled into in their reading of the *Kenya Investigation Authorisation* case, believing that the majority decision succeeds in presenting a broad conception of organisational policy, while Judge Kaul in dissent achieves a vision that is altogether narrower.[87] As the previous chapter of this paper demonstrated, there is in reality not much between the two positions. Jalloh uses his exploration of the competing scopes of organisational policy to buttress his call for an amendment to Article 7. He highlights that the *ICC Elements of Crimes* notes a policy can be found through deliberate State failure.[88] This means that, should a State fail to

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[82] ibid 1112.

[83] ibid 1113; Joseph E. Ritch, 'They'll Make You an Offer You Can't Refuse: A Comparative Analysis of International Organized Crime' (2002) 9 *Tulsa Journal of Comparative & International Law* 569, 569-70.

[84] ibid: '*Organised crime syndicates also commit violence and murders often called "hits", to further their organisational objectives*'.

[85] Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 386.

[86] ibid 416-417.

[87] ibid 390, 411. See also Hansen, 'The Policy Requirement in Crimes against Humanity: Lessons from and for the Case of Kenya*'* (n 42) 2, who states that the majority establish a '*new threshold*' in their reference to a group with the *'capability to perform acts which infringe on basic human values*'; and Kress, 'On the Outer Limits of Crimes against Humanity' (n 24) 857, 861.

[88] The Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B, Article 7, Introduction, n.6, states that '[s]*uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence*

intervene, this can help identify the existence of such a policy.[89] This position is reminiscent of a capability-based argument: the existence of a policy is self-evident if such an organisation, coupled with deliberate State failure to prevent, was in fact capable of committing an attack directed against the civilian population. This paper will go one step further: State failure to prevent or prosecute can be evidence of two things: that there is State involvement; or that the State has been co-opted by a politically powerful organisation. The former would equate to evidence of a State or State-like policy, the latter relates to the policy of an organisation with a particular factor: political power. This is a theme that will be returned to.

Werle has also argued for a broader interpretation of the policy requirement. He asserts that '*any group of people can be categorised as an organisation if it has at its disposal, in material and personnel, the potential to commit a widespread or systematic attack in a civilian population*'.[90] This statement, which certainly resonates with the capability approach, is based upon Article 21 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (1991), where the ILC assert that they '*do not rule out the possibility that private individuals with de facto power or organised in criminal gangs or groups*' might fall under the scope of the Code.[91] However, as stated in the previous chapter, Article 21 has jurisdiction over '[s]*ystematic or mass violations of human rights*', not crimes against humanity.

Finally, Hwang believes that Article 7(2)(a) '*appropriately recognises the relevant entity orchestrating the policy can be either a State or an organisation*'.[92] He believes this is an accurate reflection of customary international law at the time, though it is important to note that this piece was written just after *Tadić*, and before the ICTY rejection of the policy requirement altogether, in *Kunarac*.

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of governmental or organisational action' <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> accessed 08 July 2013.

[89] Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 426.

[90] Gerhard Werle, *Principles of International Criminal Law* (2nd ed., T.M.C. Asser 2009) M.N. 814.

[91] Article 21, Draft Code of Crimes Against the Peace and Security of Mankind 1991 (n 36).

[92] Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (n 78) 504.

3.3. State-like

Schabas posits a policy requirement that includes only States or State-like entities, like the Republika Srpska (Bosnian Serb Republic) or the Revolutionary Armed Forces of Columbia (FARC).[93] For Schabas, crimes against humanity almost always involve State policy, involvement or tolerance.[94] One of his key arguments is that organisations should not be prosecuted for crimes against humanity internationally, because it is the role of the State to prosecute. For this, he uses the case study of the 9/11 terrorist attacks. Critically, he at no point considers attacks within the context of a failed State, and also does not distinguish between local terrorism and global terrorist organisations in his evaluation. In doing so, he overlooks potential analogies with transnational organised crime. Schabas' position on the matter is that the 9/11 attacks were evidently widespread and systematic, '*but then, this can be said of the conduct of practically any serial killer*'.[95] Additionally, terrorism was purposefully excluded from the jurisdiction of the ICC. However, Schabas considers that it may have been excluded as a specific category of crime due to the lack of consensus over a definition in the international community, as opposed to any contention that terrorism may not be considered an international crime. This does not necessarily provide an absolute barrier to prosecuting certain attacks as crimes against humanity, as Schabas even admits himself '*there is undoubtedly an overlap*' between terrorism and crimes against humanity. Nonetheless, he expresses concerns about floodgates being opened if terrorist attacks begin to be prosecuted as international crimes.[96]

Schabas also raises some pertinent concerns about the customary recognition and development of the inclusion on non-State actors in international criminal law. Particularly, he contends that the use of *Tadić* as a precedent is shaky:

> [t]*he prosecutor…argues that under international law, crimes against humanity can be committed on behalf of entities exercising de facto control over a*

[93] William A. Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002-2003) 26(4) *Fordham International Law Journal* 907, 929-930. See also Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press, CUP, 2005) 6.
[94] ibid 912.
[95] ibid 924.
[96] Ibid 925. Categorising 9/11 as a crime against humanity '*leaves the concept with indeterminate parameters and virtually impossible to distinguish from other "terrorist" acts of lesser magnitude*'.

> *particular territory but without international recognition or formal status of a "de jure" State, or by a terrorist group or organisation. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity*.[97]

The fact that a statement goes unchallenged by the Defence, as Schabas rightly highlights, '*is hardly a firm precedent*'.[98] He looks to the history of crimes against humanity, identifying that the original conception of the crime at Nuremberg concerned itself with attacks that would have gone unpunished, given that it was the State itself committing the crimes.[99] He thus considers that lack of prosecution may be a problem in cases where the actors are the State or '*State-like*' entities that control portions of territory - like the FARC in Columbia - but he believes this is not a legitimate concern with regard to terrorist organisations, where States are often willing and able to prosecute.[100] For this latter statement, Schabas provides no evidence. Indeed, he seems not to consider the fact that while States may be willing to prosecute terrorist organisations and attacks, they are not necessarily able, particularly given the transnational quality that a number of terrorist organisations have acquired. Here it is easy to draw parallels with the crux of Smith's argument for the prosecution of transnational organised crime syndicates at the international level. Much of her justifications could easily be extended to apply to transnational terrorist organisations. Schabas concludes that in the context of 9/11 '*never has a justice system been more willing and more able to act*'.[101] Thus, Schabas supports a narrow, '*State-like*' conception of Article 7, reflecting Article 22(2) of the Rome Statute that calls for strict construal of the definitions of crimes[102], for he subscribes to the traditional reasoning of Nuremberg, that '*crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced*'.[103]

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[97] *Tadić* Judgement (n 5) ¶ 654.
[98] Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (n 92) 927.
[99] ibid 929.
[100] ibid 929-930.
[101] ibid 931.
[102] Article 22(2), Rome Statute (n 4). Article 22(2) reads in full: '[t]*he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted*'.
[103] Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (n 92) 933. See also, 'Judicial Decisions: International Tribunal (Nuremberg), Judgment and Sentences', Oct. 1, 1946, (1947) 41 *American Journal of International Law* 172.

Kress also sits squarely in the '*State-like*' camp of literature in this debate.[104] He validly provides a thorough critique of the majority approach, highlighting, as this author has done, the weakness in the use of such a general statement as '*capability to perform acts which infringe on basic human values*', and the lack of clarity over whether this should be the guiding principle in determining whether an organisation falls under the scope of Article 7, or whether the latter case-by-case analysis should be followed.[105] Further, he also questions to what extent this list of criteria need to be met, and whether some characteristics should have stronger weighting than others. However, while these are valid criticisms, Kress does not strengthen his position that a State-like approach is more appropriate by simply pinpointing weaknesses in the position of the majority. Kress largely directs his critique on the majority opinion towards the use of the '*capability to infringe on basic human values*' criterion, which, as stated before, in this author's opinion is misguided. He rightly isolates that the judgment is missing any reference to cross-border repercussions, as gross human rights violations tend to have transnational affects, therefore presenting a threat to international peace and security.[106] Kress frames his support for Kaul's approach in these terms, without highlighting exactly how a reference to cross-border affects lines up with the need for a State-like approach. Further, he does not consider that the inclusion of the notion '*threat to international peace and security*' may even harm his position, for it is arguable that non-State actors that are not '*State-like*' are capable of creating such regional instability. More than that, Werle and Burghardt convincingly deflect this position, by underscoring that the question of what kind of entity commits a widespread or systematic attack should not bear a normative influence on whether an attack is classified as being a threat to international peace and security.[107]

[104] Kress, 'On the Outer Limits of Crimes against Humanity' (n 24) 855.
[105] ibid 857.
[106] ibid 864.
[107] Werle & Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organisation?' (n 7) 16.

3.4. A Constructive Approach

A number of commentators frame their understanding of the definition based on an exploration of the ordinary meaning of '*organisation*'. Werle and Burghardt base their call for a broad conception of organisation upon a constructive exploration of the term. Looking to the Oxford English Dictionary an organisation can mean three things:

> *1) an organised group of people with a particular purpose, such as a business or government department…*
> *2) the action of organising something…*
> *3) the way in which the elements of a whole are arranged…*[108]

In doing so, they reach the conclusion, which this author endorses, that the most relevant definition for understanding Article 7(2)(a) would be the first.[109] There is evidence that the Oxford Dictionary's definition of '*organisation*' bears some resemblance to the list of factors that are relevant, as provided by both the majority decision and the Dissenting Opinion. The need for '*primary purpose'* in the majority approach, and a '*common purpose*' in the Dissenting Opinion, is in line with the Oxford Dictionary's need for '*a particular purpose*'. However, Schabas believes that the dictionary reference to an '*organised group of people*' is very vague, and could constitute anything from a club to a business.[110] It is clear then, that the Oxford Dictionary's definition of '*organisation*' can cause as much confusion as the use of the term in the Statute. Therefore, it is also necessary to explore other constructions of the word. For example, the Oxford Dictionary's definition of the verb '*organise*' reads as follows:

> *arrange systematically; order:*
>
> - *coordinate the activities of (a person or group) efficiently*
> - *form (a number of people) into a trade union or other political*

[108] 'organization', Oxford Dictionaries Pro, April 2010 (Oxford Dictionaries Pro, April 2010, Oxford University Press) <http://english.oxforddictionaries.com.ezproxy.eui.eu/definition/organization> accessed 15 September 2013.
[109] Werle & Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organisation?' (n 7) 5.
[110] Schabas, 'State Policy as an Element of International Crimes' (n 6) 972.

group.[111]

Again this definition aligns well with both the majority and the Dissenting approaches to the term organisation. Particularly, the notion of forming a group bears a degree of resemblance to the finding of an '*established hierarchy*' or a '*degree of hierarchical structure*'.

Smith, like Werle and Burghardt, sets out to explore the ordinary meaning of the Statute wording, in order to demonstrate that organised crime syndicates can indeed satisfy the organisational part of the policy requirement.[112] She takes her ordinary definition of the term 'organisation' from Black's, as opposed to Werle and Burghardt, who use the Oxford Dictionary's, and is as follows: '*body of personas…formed for a common purpose*.'[113] As previously stated, Smith fits into the camp of academics that envisage a broader interpretation of '*organisation*', concluding that the ordinary meaning of the term clearly denotes a wider conception beyond organisations that are State-like actors.[114] Nonetheless, it should be noted that this broader reading might be motivated by Smith's determination to argue for the international prosecution of organised crime, given that for her, this is the only way to '*effectively address'* the problem.[115] Her motivation to find a way to prosecute transnational organised crime syndicates shines through in her appraisal of the customary international law concerning the State or organisational policy requirement. She concludes that under current customary international law there is no policy requirement. Nonetheless, looking to earlier ICTY or ICTR jurisprudence, we can see the development of the '*de facto control*' criteria for non-State actors. Smith thus argues that transnational organised crime groups can be powerful and influential enough to exercise such a level of control, and can therefore be regarded as actors capable of being tried for crimes against humanity under this criterion.[116] In this way, Smith simultaneously argues for a broadening of the

[111] 'organize', Oxford Dictionaries Pro, April 2010 (Oxford Dictionaries Pro, April 2010, Oxford University Press) <http://english.oxforddictionaries.com.ezproxy.eui.eu/definition/organize> accessed 15 September 2013.
[112] Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1123. See also Robinson, 'Essence of Crimes against Humanity Raised by Challenges at ICC' (n 73), for a similar argument, concerning the '*plain meaning*' of '*organisation*', and the difficulty with reconciling this meaning with a State-like interpretation.
[113] *Black's Law Dictionary* (8th ed., West Group 2004) 1133.
[114] Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1123.
[115] ibid 1121.
[116] ibid 1128.

conception of organisations under Article 7 in order for transnational criminal organisations to be captured in its net, and for the fact that such groups have enough '*de facto*' territorial control to be considered State-like in any case.

Interestingly, all of the aforementioned definitions of organisation make some reference to the importance of '*purpose*' or '*common purpose*'. Jalloh makes similar observations, looking to different dictionary definitions.[117]

3.5. Somewhere in Between

There is a portion of academics that position their conception of '*organisation*' somewhere between a strict '*State-like*' interpretation, and the altogether looser '*capability to commit*' construal, be it purposefully, or due to confusion.

Hansen seems to sit amid the '*State-like*' and '*capability*' conceptions of organisations that can commit crimes against humanity. While he recognises that a '*State-like*' vision of organisation may bar prosecution of certain '*highly organised instances of mass violence*' at the ICC, he also acknowledges the legitimacy of the arguments for limiting the scope of the Rome Statute, so as to guard against an increase in selectivity of cases and in order to avoid a blurring of the line between domestic and international crimes.[118] Hansen therefore champions Kaul's attempt to limit the scope of the policy requirement, while also questioning whether it is the correct method of constraint.[119] He believes that the Kenyan Post-Election Violence serves as a perfect demonstration of how it is not only State or State-like entities that are capable of planning, organising and orchestrating mass atrocities against a particular civilian population. In direct contradiction to Schabas' contention that where there is no State or State-like actor it is likely that domestic prosecution will

[117] Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 428: '*Standard dictionary definitions of the term "organisation" usually refer to…a group of people sharing a particular purpose, "as in a business, a government department, a charity etc.," or a group of people who work together in a structured way for a shared purpose'.*

[118] Hansen, 'The Policy Requirement in Crimes against Humanity: Lessons from and for the Case of Kenya*'* (n 42) 2, 31-35.

[119] ibid 35.

materialise, Hansen looks to recent examples to demonstrate how this is not the case.[120] He concludes that he favours a nuanced approach; one with the flexibility to appreciate that highly organised mass atrocities may happen in such varied circumstances that any attempts to limit the policy requirement very specifically would lead to impunity.[121] This seems to be a nod of approval to the Kenya Investigation Authorisation case Majority decision, in the way that it favours a case-by-case approach to organisations. Nonetheless, Hansen's recognition of the dangers of definitional vagueness imply that he would still see it limited a little further than was done so by Pre-Trial Chamber II.

Those who criticise the inclusion of non-State entities in international criminal law tend to rely on the work of Bassiouni.[122] This is understandable, given that he chaired the drafting committee of the Rome Conference, and has voiced his disapproval of understanding Article 7 as including non-State entities.[123] However, Bassiouni himself even seems confused on the matter. In 1999, he affirmed the importance of the policy requirement, providing that '*mass victimisation can occur without "State action or policy" but "crimes against humanity" cannot*'.[124] Thus, the inclusion of non-State actors assumes that those actors exercise a level of territorial control, and can adopt a policy of a similar level to a '*State policy*'.[125] It follows that Bassiouni considers that an '*organisation*' under Article 7(2)(a) would need to be '*State-like*', with reasoning analogous to Judge Kaul's. However, in the same piece of work, he later states that the policy requirement '*should be extended by analogy to non-State actors when their conduct manifests an expression or implied*

[120] ibid 37. This is also underlined by Werle & Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organisation?' (n 7) 17, who note that such cases at the ICC as the DRC, Uganda, CAR and Darfur can hardly be described as concerning crimes committed by purely State or State-like entities. See, for example, *The Prosecutor v. Katanga and Chui*, confirmation of charges (n 25) ¶ 17-22, 27 for a summary of the prosecution argument that the Non-State sponsored armed groups *Fronte des Nationalistes et Intégrationnistes* (FNI) and *Force de Résistance Patriotique en Ituri* (FRPI) committed crimes against humanity, and had a policy of targeting the Hema civilian population in the Ituri district of the Democratic Republic of the Congo, particularly the Bogoro village, from January 2001 to January 2004; *Situation in Uganda*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, Case No. ICC-02/04-01/05-53, Pre-Trial Chamber II, 27 September 2005 ¶ 5, for a summary of the Prosecutor's allegations against the Lord's Resistance Army (LRA), a non-State armed group which repeatedly targets civilian populations; *Prosecutor v. Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) (n 25) ¶ 93, for details of the Prosecutor's allegations that the Movement for the Liberation of Congo (MLC), a non-State armed group, raped, killed and looted in an attack against a civilian population of the Central African Republic.

[121] Hansen, 'The Policy Requirement in Crimes against Humanity: Lessons from and for the Case of Kenya' (n 42) 38-41.

[122] See, for example: Schabas, *An Introduction to the International Criminal Court*, 4th ed., (n 3) 111-112.

[123] W. A. Schabas, *An Introduction to the International Criminal Court* (3rd ed., CUP 2007) 102-3.

[124] Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 62) 45.

[125] ibid.

"policy"', and so he seemingly believes in the need for a policy to be found in order to establish international jurisdiction.[126] Thus, where there is no State policy, by extension non-State actors who demonstrate a policy can be found guilty of crimes against humanity. It is not unreasonable to conclude that, although Bassiouni envisages actors as being '*State-like*', it could be sufficient for them to have the capability to conduct policy decisions. Conversely, in a later piece, Bassiouni retreats from this position, imposing that '*the words "organisational policy" do not refer to the policy of an organisation, but the policy of a State. It does not refer to non-State actors*'.[127] His position has regressed from accepting the inclusion of Non-State actors that are "*State-like*" to rejecting the inclusion of non-state entities in any capacity. This is in spite of the fact that, two pages before, Bassiouni quotes in full the *chapeau* of the *Elements of Crimes*, which states clearly that '"*organisational policy" refers to the policy of an organisation, not the organisational policy of a State*'.[128] This path of confusion continues, when in another works he acknowledges that the policy requirement entails the active encouragement or promotion of an attack by a State *or* an organisation.[129] Given Bassiouni's conflicted position on the matter, it is difficult for his words to be taken as authority for any particular position, in spite of his role on the drafting committee.

3.6. '*Something more sinister*'

The difficulty with the all of the literature that has been discussed thus far in this chapter, is that although commentators on either side find plausible practical argumentation for either a limitation or an expansion of the understanding of an organisation under Article 7(2)(a), there is no real attempt to isolate exactly which characteristic(s) of an organisation, aside from its capability, turn it from an entity committing domestic crimes, into a creature committing crimes that are altogether '*more sinister*'. The following observers do just that.

[126] ibid 246.
[127] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (vol. I, Transnational Publishers 2005) 151-2.
[128] ibid 150.
[129] M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 41-42.

Both Luban and Haque contend that there must be some kind of political dimension to the actor in question for it to be sufficiently organisational.[130] Haque argues for the prosecution of organisations for crimes against humanity where the group in question is '*either identical with the State, among the agents of the State, or are uniquely capable of co-opting the State to either assist or ignore group violence*'.[131] He envisages that the organisations, if not '*State-like*', must be influential or involved in the political process in some manner, in other words, be politically organised groups. Again we see here a reference to the importance of the aim or purpose of the organisation in question, and whether it should have a political element to it. While this is not necessarily a pure '*State-like*' conception of the term, it certainly stands as an attempt to limit the scope of the policy requirement somewhat.

Smith uses similar reasoning, based on the theoretical justifications for prosecuting international crimes, to contend that organised crime groups can be considered guilty of such crimes.[132] Due to the economic and political power such organisations can hold, this can often prevent States from effectively prosecuting them. She then goes on to assert that large criminal organisations are capable of posing a similar level of threat as a State, paramilitary or political organisation.[133] Smith's references to the role of political power and influence resonates with Haque's conception that if an organisation is not '*State-like*', it should be powerful enough, and have the relevant political affiliation, to be able to co-opt the power of the State.

For Luban:

> *Crimes against humanity are [1] international crimes [2] committed by politically organised groups acting under the colour of policy, [3] consisting of the most severe and abominable acts of violence and persecution, and inflicted*

[130] Adil Ahmad Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (2005) 9 *Buffalo Criminal Law Review* 273, 302-303; David Luban, 'A Theory of Crimes Against Humanity' (2004) *Yale Journal of International Law* 85, 99.
[131] Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 302.
[132] Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1133.
[133] ibid 1134.

on victims [[4]] who are fellow nationals] [5] because of their membership in a population or group rather than their individual characteristics.[134]

Again there is a reference to the importance of the purpose of a group at [2], with particular attention paid to the need for a political dimension to its organisation. Luban considers that crimes against humanity are those that '*offend our character as political animals*'. Given that human beings form themselves into social groups, which are then politically organised, crimes against humanity are '*politics gone cancerous*'. [135] Therefore, it follows that Luban envisages crimes against humanity as an offence committed by a State or State-like organisation, given that it is in this type of entity that we put our faith in as political animals. Thus, it is political organs that commit crimes against humanity. This, however, does not necessarily defeat the majority's broader approach to non-State actors. Luban links the actor to needing some political purpose in order for its crime to be '*something more sinister*', and so it is entirely plausible that such organisations may be applicable under Article 7(2)(a) so long as they have a political agenda.

The authors discussed here all make attempts to tackle the true demarcation line between a domestic crime and a crime against humanity, and in doing so shed light on what particular characteristics turn an entity into a committer of such crimes. The final chapter of this piece will analyse their positions, along with others, in greater detail. For now it is sufficient to isolate relevant key themes concerning group actors that have arisen in the academic debate on perpetrators of crimes against humanity.

3.7. Conclusion

This chapter has set out to sequester certain regular themes in the literature debate over how to define '*organisation*' for the purposes of Article 7(2)(a), and in doing so to highlight particular shortcomings. The key deficiency in much of the literature is the lack of an attempt to isolate characteristics that transform an ordinary criminal group perpetrator into an offender of international crimes. For example, Jalloh's approach is the following: he opines that he shares Sadat and Robinson's understanding of a '*moderate*'

[134] Luban, 'A Theory of Crimes Against Humanity' (n 129) 108.
[135] ibid 90-91.

interpretation of '*organisation*', thus affording the ICC greater flexibility in its approach.[136] However, in doing so, he does not make any attempt to reconcile a broader conception of '*organisation*' with the concerns that Judge Kaul and the likes of Kress and Schabas raise. This work intends to offset concerns of a '*banalisation*' of international criminal law by attempting to identify what further criteria an organisation must demonstrate in order to be considered under Article 7.

A recurring trend in the literature is an emphasis on the purpose of the organisation in question as a means of identifying actors as international criminals. Tentative steps have been made to endorse an interpretation of '*organisation*' that focuses quite heavily on the purpose of the entity. At this stage it is hypothesised that a *political* dimension to the purpose of the organisation is a red-flag trait[137], and in order for international prosecution to be justified, the group attacker in question must have sufficient *political power* in order to be able to co-opt the State, or for the State to be complicit. This author will attempt to provide a theoretical underpinning to this assertion in the final chapter of this piece.

[136] Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 431-432.

[137] Indeed, it is important to note that under the ICC Elements of Crimes, the crime against humanity of enforced disappearance of persons is to be committed '*by, or with the authorisation, support or acquiescence of, a State or a political organisation*', highlighting the importance of a political dimension to the actors in question. See The Elements of Crimes (n 87) 12.

4. The Long and Winding Road to Rome: The Historic Development of Crimes Against Humanity

4.1. Introduction

This Chapter intends to conduct an overview of the development of the corpus of legal documents on crimes against humanity. This will include early progress, the work of the International Law Commission, relevant national case law, the jurisprudence of the *Ad Hoc* tribunals, the efforts of the *Ad Hoc* Committee and the Preparatory Committee towards establishing a permanent international criminal court, and, of course, the materials available on developments at the Rome Conference. At every stage the author will identify the most pertinent advances with regard to the policy requirement, and more specifically the type of actors envisaged by these works as being able to orchestrate a policy to commit crimes against humanity.

4.2. Early Development

The first notable conception of something similar to crimes against humanity found its genesis in humanitarian law.[138] The 1907 Hague Convention's groundbreaking Martens Clause affirmed that, regardless of situations falling outside the scope of the convention, '*the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience*'.[139] This was, in a few short years, followed by the first recorded use of the phrase '*crimes against humanity*' in a politico-legal context: a joint declaration by Great Britain, Russia, and France made on 28 May 1915 denounced the Turkish atrocities against its population of Armenians to be '*crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the*

[138] Margaret M. deGuzman, 'Crimes against humanity' *in* William A. Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 121.

[139] Preamble, Convention Respecting the Laws and Customs of War on Land (18 October 1907), 36 Stat. 2277, 1 Bevans 631. See also Mohamed Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (2004) 5 *San Diego International Law Journal* 73, 144 for a general overview of the historical development of Crimes Against Humanity.

massacres'.[140] The first modern attempt to find liability for crimes against humanity then occurred after the First World War: in a report to 1919 Preliminary Peace Conference, the majority of the Allied commission found that the Central powers had committed atrocities '*in violation of the established laws and customs of war and the elementary laws of humanity*'.[141] The Turkish massacre of Armenians remained the prominent issue at hand, with a heavy disregard for such a concept putting an abrupt stop to any finding of violations of crimes against humanity. The American representatives at the Conference were concerned with the uncertainty and immeasurability of the term '*laws of humanity*', and believed the new turn of phrase violated the principle of *nullem crimen sine lege.*[142] Thus, following the tragedy of the First World War, there was no establishment of crimes against humanity.

The Charter of the International Military Tribunal (IMT) is the first time we see the notion of crimes against humanity enshrined in an international legal tool. Article 6(c) of the Charter reads as follows:

> *Article 6…The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility…*
> *(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*[143]

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[140] Egon Schwelb, 'Crimes Against Humanity' (1946) 23 *British Yearbook of International Law* 178, 181 (quoting the Armenian Memorandum Presented by the Greek Delegation to the Commission of the Fifteen on 14 March 1919).

[141] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919, reprinted in* 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 *American Journal of Interational Law* 95, 115.

[142] See ibid 144-146 for notable dissents from two American members of the commission; Shwelb, 'Crimes Against Humanity' (n 139) 181-82; Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd ed., OUP 2001) 46-47. See also, Margaret M. deGuzman, 'Crimes against humanity' (n 137) 122.

[143] Article 6(c), Charter of the International Military Tribunal, United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")* 8 August 1945, <http://www.refworld.org/docid/3ae6b39614.html> accessed 17 September 2013 [hereinafter 'Charter

Article 6(c) provides for the criminalisation of acts that are not merely war crimes, perpetrated in the context of war against the citizens or soldiers of another State, but also allows for finding responsibility for atrocities committed against a State's own citizens, although crucially there is a need for the act in question to be '*in connection with*' other crimes under the Charter.[144] The Charter of the International Military Tribunal for the Far East mirrors this definition.[145] After the Nuremberg Charter creation, which was then incorporated into the Tokyo Charter, the Law No. 10 of the Control Council for Germany was also formed, which allowed the Allied powers to prosecute Nazi leaders in other locations that they occupied, including for crimes against humanity.[146] Beyond the consolidation of the IMT definition of crimes against humanity into these other two legal tools, there was no real effort to elaborate upon the definition provided at Nuremberg, although Control Council Law No. 10 did indeed drop the nexus to other crimes that is a necessity for the crime under the IMT.[147]

The IMT Charter gave the Allied powers the authority to find liable those individuals '*acting in the interests of the European Axis countries, whether as individuals or as members of organisations*'.[148] A policy requirement is not included in the IMT and resulting legal documents, however, State action or involvement was implicit in the entire Nazi enterprise[149], and although the Control Council Law No. 10 is silent on the matter, all of those tried under it were considered as acting pursuant to a State policy.[150]

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of the International Military Tribunal']. This article has been coined the '*locus classicus*' for the definition of crimes against humanity: see Yoram Dinstein, 'Crimes Against Humanity' *in* Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 891-908, 891.

144 See *Complete History of the United Nations War Crimes Commission and the Development of the Laws of War*, Compiled by the United Nations War Crimes Commission (UNWCC), Published for the UNWCC by His Majesty's Stationery Office (London 1948) 193-95, for a discussion of the compromise reached to include a connection to the other crimes in the IMT definition of crimes against humanity, <http://www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517> accessed 16 September 2013. See also Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law* (n 141) 47, and Margaret M. deGuzman, 'Crimes against humanity' (n 137) 122-123.

145 Article 5(c), Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, (*as amended* Apr. 26, 1946) <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> accessed 7 August 2013 [hereinafter 'Charter of the International Military Tribunal for the Far East'].

146 *Complete History of the United Nations War Crimes Commission* (n 143) 464-66.

147 *Complete History of the United Nations War Crimes Commission* (n 143) 464-66. See also Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law* (n 141) 48.

148 Article 6, Charter of the International Military Tribunal (n 142).

149 Indeed, at Nuremberg there are many references to policy, impliedly that of a State: '*The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be*

4.3. The Intervening Years

In the intervening years between the IMT and the most groundbreaking work of the International Law Commission, national courts affirmed the recognition of a policy element in crimes against humanity.[151]

French case law cemented the need for governmental action. The cases of *Barbie* and *Trouvier* require that '*the criminal act be affiliated with the name of a State practicing a policy of ideological hegemony*'.[152] The *Menten* case of the Netherlands held that '*the concept of crimes against humanity also requires… that the crimes in question form part of a system based on terror or constitute a link in consciously pursued policy directed against particular groups of peoples*'.[153] While there is no reference to policy in Canadian law, the Supreme Court of Canada impliedly found it, holding that '*what distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.*'[154]

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hostile to the Government, was most ruthlessly carried out': See Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1, October 1946 (1947) 254, *quoted in* Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2002) 43 *Harvard International Law Journal* 237, 272-3.

[150] Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law* (n 141) 67.

[151] Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (n 138) 112. *NB.* Israel's national Statute marks no need for a policy of any kind: See Nazis and Nazi Collaborators (Punishment) Law 5710/1950 (1st August 1950) <http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20-punishment-%20law-%20571.aspx> accessed 16 September 2013.

[152] *Barbie*, French Court of Cassation (Criminal Chamber), June 3, 1988, *reprinted in* 100 *International Law Reports* 331, 336 (1995); *Trouvier* French Court of Appeal of Paris (First Chamber of Accusation), April 13, 1992, *reprinted in* 100 *International Law Reports* 338, 350-51 (1995); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 *International Law Reports* 388, 351 (1995). See also Leila Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Trouvier to Barbie and Back Again' (1994) 32 *Columbia Journal of Transnational Law* 289, 310.

[153] *Public Prosecutor v. Menten*, The Netherlands, District Court of Amsterdam, Extraordinary Penal Chambers, *reprinted in* 75 *International Law Reports* 361-63 (1981).

[154] R v. Finta, [1994] 1 S.C.R. 701, 814 (Can.) <http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Canada/RcFinta_SupremeCourt_24-3-1994-EN.pdf> 131 accessed 9 September 2013. Expert witness to this case, M. Cherif Bassiouni, asserts that the policy in question must be that of a State (141).

4.4. The Work of the International Law Commission

The first United Nations (UN) endorsement of the notion of crimes against humanity came when the UN General Assembly recognised the principles of international law provided in the IMT Charter.[155] This was followed by a request to the International Law Commission (ILC) to formulate a draft code on international crimes.[156] The General Assembly, in 1948, asked the ILC to '*study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ…*'.[157] At its third session in 1951, the ILC produced the first draft Code of Offences against the Peace and Security of Mankind. According to the ILC, '*offences against the peace and security of mankind*' are limited to those crimes that have a *political* component.[158] This draft was then elaborated upon in 1954. During compilation of the Draft Code of 1954, Hsu of China proposed deleting the need for a crime against humanity to be committed in connection with the other offences in the Code, and replacing the nexus with '[i]*nhuman acts by the authorities of a State, or by private individuals acting under the instigation or toleration of the authorities, against any civilian population…*'.[159] This undoubtedly influenced the resulting Draft Code, which asserted that offences against the peace and security of mankind included '[i]*nhuman acts… by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*'.[160] The ILC commented that it chose to broaden the

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[155] *Affirmation of the Principles of International Law Recognised by the Charter of the Nurnberg Tribunal*, GA Res. 95(I), UN GAOR, 1st Sess., U.N. Doc. A/RES/1/95 (1946), 188.

[156] *Formulation of the Principles Recognised in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, GA Res. 177(II), UN GAOR, 2nd sess., U.N. Doc. A/RES/2/177 (1947) 111-112.

[157] *Prevention and Punisment of the Crime of Genocide*, GA Res. 260(III), UN GAOR, 3rd Sess., U.N. Doc. A/RES/3/260 (1948) 174-178, 177.

[158] Draft Code of Offences Against the Peace and Security of Mankind, in *Report of the International Law Commission to the General Assembly on the Work of Its Third Session* (16 May-27 July 1951) 6 U.N. GAOR Supp. (No. 9) U.N. Doc. A/1858 ¶52 *reprinted in* [1951] 2 *Yearbook of the International Law Commission* 123, 134 U.N. Doc. A/CN.4/44. See also Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullem Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) ¶296.

[159] Draft Code of Offences Against the Peace and Security of Mankind (Part I), *Summary Records of the Sixth Session of the International Law Commission*, 268th meeting (13 July 1944); [1954] 1 *Yearbook of the International Law Commission* 134, 136, U.N. Doc. A/CN.4/SR/268. See also Boot, *Genocide, Crimes Against Humanity, War Crimes* (n 157) ¶ 439 on this point.

[160] Article 2(11) Draft Code of Offences Against the Peace and Security of Mankind, in *Report of the International Law Commission on the Work of Its Sixth Session* (3 June- 28 July 1954), 9 U.N. GAOR Supp. (No. 9), U.N. Doc A/2693 (1954) 149, 151-152; [1954] 2 *Yearbook of the International Law Commission* 112, U.N. Doc. A/CN.4/87.

scope of the Article in order to remove the required nexus with other acts in the Code, but ensured that the definition was not overly expansive by including a need for an individual to act either at the instigation or toleration of State authorities.[161] Here we see recognition from the ILC that it is possible for actors other than State officials to commit inhuman acts. It is important to recognise that crimes against humanity were not strictly included in the 1954 Draft Code, but the list of potential '*inhuman acts*' in Article 2(11) is remarkably similar to a list of acts that would later constitute crimes against humanity.

Following the work of the ILC in 1954, progress was halted due to a standoff between States over the crime of aggression in light of the political sensitivities of the Cold War.[162] There were also other serious political and legal concerns over the establishment of a permanent international criminal court.[163] The task was revisited in the late 1980s, with Special Rapporteur to the Draft Code, Doudou Thiam commenting that that the mass nature of crimes against humanity implies group perpetration, group victimisation and a plurality of methods.[164] For Thiam, the character of the perpetrator is less important than its capability to commit such offences.[165] This garners support for the Majority's capability formula, also expressed in *Bemba-Gombo* and *Natanga and Chui*, as discussed in Chapter II. This paper asserts that whether an organisation is capable of committing attacks is inherently linked to its character, and the notion of group perpetration and victimisation will be visited in Chapter V. Importantly, Thiam also noted that the '*plurality of victims*' involved in crimes against humanity usually indicated perpetration through use of '*a State apparatus*', and there is no recognition of non-State actors as perpetrators of crimes against humanity by the Special Rapporteur.[166] By 1991 however, the ILC takes a different position on this point, commenting that:

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[161] ibid 150.

[162] David Scheffer, 'The International Criminal Court' *in* Schabas & Bernaz (eds), *Routledge Handbook of International Criminal Law* (n 137) 67; Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (n 138) 144.

[163] Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 5-6.

[164] Draft Code of Crimes Against the Peace and Security of Mankind (Part II)- including the Draft Statute for an International Criminal Court, *Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur,* U.N. Doc. A/CN.4/419 and Add. 1 (1989) ¶¶ 60-62; [1989] II: 1 *Yearbook of the International Law Commission*, 81, U.N. Doc. A/CN.4/SER.A/1991/Add.1(Part 1).

[165] ibid.

[166] ibid ¶ 61.

> (*5) It is important to point our that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with de facto power or organised in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article*.[167]

This was followed soon after by the 1994 Draft Code, which finally replaced '*systematic or mass violations of human rights*' with '*crimes against humanity*', although there was no elaboration on the type of actors that may commit the crimes in question.[168] This was extended by the 1996 Draft Code, which held that crimes against humanity could be '*instigated or directed by a Government or by any organisation or group*'.[169]

4.5. The *Ad Hoc* Tribunals

The creation of the *Ad Hoc* Tribunals '*paved the way for the development of a body of international jurisprudence on crimes against humanity, which helped guide the delegations assembled at the Rome Conference*'.[170] Neither the Statute of the International Criminal Tribunal for Rwanda, nor the Statute of the International Criminal Tribunal for

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[167] Article 21, Draft Code of Crimes Against the Peace and Security of Mankind 1991 (n 36).

[168] Article 20, Draft Code of Crimes Against the Peace and Security of Mankind in *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session* (2 May- 22 July 1994), 49 U.N. GAOR Supp. (No. 10), U.N. Doc. A/49/10 (1994); *reprinted in* [1994] 2 *Yearbook of the International Law Commission*, 94, 103, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (part 1).

[169] Article 18, Draft Code of Crimes against the Peace and Security of Mankind, in *Report of the International Law Commission to the General Assembly on the work of its Forty-Eighth Session* (6 May- 26 July 1996), 51 U.N. GAOR Supp. (No. 10), U.N. Doc. A/51/10 (1996); *reprinted in* [1996] 2 *Yearbook of the International Law Commission*, 15, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 1). See also Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1130: In her discussion of the 1996 ILC Draft Code, Smith argues that its explicit reference to organisations and groups proves that transnational organised crime groups' actions can commit crimes against humanity. Smith asserts, supporting the statement with a mere one footnote, that *'[t]he organisational aspect was added to include groups such as terrorist, insurrectionist, and separatist organisations*'. In reality, it seems the inclusion of the term was much more complicated than this, and the result of political compromise, as this chapter will soon serve to demonstrate. Smith, in her efforts to convince us that transnational organised criminal groups should be prosecuted at the international level, makes no real effort to explore the view points of delegates skeptical of the inclusion of the term 'organisational' in the policy requirement. This reduces the legitimacy of her argument.

[170] Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 45.

the Former Yugoslavia include a policy requirement in any capacity[171], with Ratner and Abrams labeling this a '*deliberate decision*' by the UN Security Council caused by a recognition that an increasing amount of events of mass atrocities are conducted by non-State entities.[172] Nonetheless, the jurisprudence of these courts remains thoroughly pertinent to any study of the policy requirement, as many groundbreaking developments occurred at the two tribunals.

The ICTY has held that the systematic character of an attack is indicated by the existence of a plan or policy of some kind:

> [t]*he systematic character refers to…the existence of a* ***political objective****, a plan pursuant to which the attack is perpetrated…the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan*.[173]

The *Blaškić* Trial judgment also relied on the International Law Commission's Draft Code of 1996 to assert that organisations and groups can commit crimes against humanity.[174] The Trial Chamber's reference to a political objective or plan is interesting, and is in line with a recurring theme in this thesis: that the purpose of an organisation is integral to our understanding of it as a perpetrator of crimes against humanity.

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[171] ICTY Statute (n 59). Article 5 reads: '*[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population*'; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res 955, U.N. SCOR, 3453rd mtg., UN Doc. S/RES/955 (1994) [hereinafter 'ICTR Statute']. Article 3 reads: '*[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*'.

[172] Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law* (n 141) 67.

[173] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement (ICTY 3 March 2000) ¶ 203 [emphasis added] [hereinafter '*Blaškić* Trial Judgement']. See also *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement (ICTY, 14 December 1999) ¶ 53; *Kupreškic* Judgement (n 61) ¶ 551; *Prosecutor v. Dario Kordić*. Case No. IT-95-14/2-T, Judgement (ICTY, 26 Febuary 2001) ¶¶ 181-2; At the ICTR, the Trial Chamber stated that the concept of systematicity '*may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources*': *Akayesu* Trial Judgement (n 57) ¶ 580. See Simon Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes Against Humanity in the Rome Statute' (2000) 10 *Duke Journal od Comparative & International Law* 307; and William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* (CUP 2006) 192, for an overview of the ICTY/R case law on the '*widespread or systematic*' contextual requirement.

[174] *Blaškić* Trial Judgement (n 172) ¶ 205.

The ICTY, in *Kunarac*, eventually rejects that the policy requirement is a separate contextual requirement to the finding of crimes against humanity.[175] While this was then relied upon by subsequent judgments of both the ICTY and ICTR, the jurisprudence of both tribunals nonetheless consider at length the relevance of the finding of a policy, in a body of illuminating passages that help decipher what type of entities may be considered as behind a policy to commit such crimes. For example, in a judgment that precedes *Kunarac*, the ICTY Trial Chamber raises doubt that finding a policy may be a strict requirement of the crime, but nevertheless goes on to deliberate upon the implications of such a requirement.[176] While conceding that such crimes are ordinarily instigated at the State or governmental level, it recognises that circumstances may occur in which individuals may act without the authorisation of a State or other such entity, although it is likely that the implicit approval from the State or State-like entity is required. The judgment studies the *Weller* case as evidence of such an eventuality. The issue at hand was the ill treatment of Jews by two people under the command of Weller, who was neither in uniform nor acting in an official capacity and was exploiting the political atmosphere at his own discretion. This was sufficient to constitute a crime against humanity in the German courts, as his acts were still committed in connection with the national-socialist system of power and hegemony.[177] This demonstrates the ability for those acting in a private capacity to still be considered criminals against humanity, if their actions were in line with, or exploiting, an overarching policy, and were impliedly encouraged or accepted by the policy-maker.

Preceding this, the ICTR Trial Chamber confirmed that, for the accused to be found guilty, they must be satisfied that the accused's actions were '*instigated or directed by a Government or by any organisation or group*'.[178] Here, the ICTR relied on *Tadić,* and in spite of *Kunarac*'s ultimate rejection of *Tadić*'s position on the requirement of policy, it still stands that the Trial Chamber noted that the definition of crimes against humanity puts '*the emphasis ... not on the individual victim but rather on the collective*', implying in particular that there '*be some form of a governmental, organisational or group policy to*

[175] *Kunarac* Appeals Judgement (n 58) ¶ 98. This was then relied upon in subsequent case law of both the ICTY and the ICTR. See: *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement (ICTY, 12 June 2007) ¶43; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Appeals Judgement (20 May 2005) ¶ 269; *Prosecutor v. Radoslav Bradanin*, Case No. IT-99-36-T, Judgement (ICTY, 1 September 2004) ¶ 137; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment (17 June 2004) ¶ 299;

[176] *Kupreškic* Judgement (n 61) ¶¶ 551-555.

[177] ibid ¶ 555.

[178] *Kayishema* Trial Judgement (n 63) ¶ 126.

commit these acts'.[179]

It remains very clear from the jurisprudence of these two tribunals that the existence of a policy is evidentially relevant to the finding of crimes against humanity. It also becomes apparent that, in their consideration of policy, they hold the view that the orchestrator of such a policy may be a body other than a State or government. The tribunals even provide minor insights into the nature of such a body, finding the objective or purpose of a body as relevant to our understanding of it as an entity capable of orchestrating such crimes, and elucidating upon the collective nature of the actors in question.

4.6. The *Ad Hoc* Committee & the Preparatory Committee

The United Nations General Assembly chose to re-trigger research towards establishing a permanent international criminal court, strongly influenced by the ILC's 1991 and 1996 Draft Codes[180], by convening an *Ad Hoc* Committee, which met twice in 1995.[181] The General Assembly gave the *Ad Hoc* Committee the power to review the Draft Codes of the ILC, and ensured it would be open to input from all Member States, and civil society. This would be done so with a view to preparing for an international conference for debating what would ultimately become the Rome Statute. Schabas notes that one of the *Ad Hoc* Committee's key points of departure from the Draft Code is a decision to provide a more detailed definition of crimes, rather than merely listing crimes that fall under its jurisdiction.[182] There is no mention of a policy requirement in the report of the *Ad Hoc* Committee, nor is there any attempt to categorise actors capable of being charges with crimes against humanity.[183]

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[179] *Tadić* Judgement (n 5) ¶ 644.

[180] deGuzman, 'Crimes against humanity' (n 137) 124.

[181] The Ad Hoc Committee was created by the UN General Assembly: *Establishment of an International Criminal Court*, G.A Res 49/53, UN GAOR, 49th Sess., U.N. Doc. A/RES/49/53 (1995); *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995) [hereinafter 1995 Ad Hoc Committee Report] ¶¶ 77-80 on Crimes Against Humanity; see also Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 3-4.

[182] Schabas, *An Introduction to the International Criminal Court* 4th ed., (n 3) 16-17.

[183] 1995 Ad Hoc Committee Report (n 180) ¶ 77-80.

The *Ad Hoc* Committee work was swiftly followed by the General Assembly arranging for a Preparatory Committee (PrepCom) in December 1995, where Member States and various international organisations and non-governmental organisations could participate.[184] This Committee met six times between 1996 and 1998, preparing a consolidated text, building on the work of the ILC, combined with proposals from other parties.[185] The text, like the work of the *Ad Hoc* Committee, makes no attempt to include a policy requirement, or to elucidate upon the relevant actors for crimes against humanity. During the PrepCom stages, a body of highly experienced delegates from a range of regions were charged with tackling key issues concerning the ICC, including the definition of crimes in question. The idea was that these selected delegates would steer working groups and other forms of informal negotiations at the Rome Conference. These groups had no official records, enabling participants to lay their cards out, aiding the conclusion of compromises over the definitions.[186]

4.7. Rome

Two General Assembly resolutions in 1996 and 1997 paved the way for the creation of the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, convened on 15 June 1998 in Rome.[187]

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[184] *Establishment of an International Criminal Court*, GA Res. 50/46, UN GAOR, 50th Sess., U.N. Doc. A/RES/50/46 (1995): '[d]*ecides to establish a preparatory committee open to all States Members of the United Nations or members of specialised agencies… to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for a international criminal court as a next step towards consideration by a conference of plenipotentiaries, and also decides that the work of the Preparatory Committee should be based on the draft statue prepared by the International Law Commission and should take into account the report of the Ad Hoc Committee and the written comments by States…*'.

[185] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, Vol. II, U.N. GAOR, 51st Sess. Supps. No. 22 and 22A, U.N. Doc. A/51/22 (1996); Draft Statute for the International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/2/Add. 1 (1998) [1996 PrepCom Report]; See also Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 4.

[186] Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 21-22.

[187] *Establishment of an International Criminal Court*, G.A Res 51/207, UN GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (1997); *Establishment of an International Criminal Court*, G.A. Res 52/160, UN GAOR, 52nd Sess., U.N. Doc. A/RES/52/160 (1998).

There was no contestation at the Preparatory Committee stage that crimes against humanity should be included in the Statute.[188] Likewise, at the Rome Conference, it was undisputed that crimes against humanity would fall under the jurisdiction of the court.[189] At the Rome Conference, the negotiations over a definition of crimes against humanity were coordinated by Sadi of Jordan in an Informal Working Group on Crimes Against Humanity.[190] There was a general feeling among many States that the definition should be as detailed and precise as possible. The most controversial aspect of the crime's definition manifested itself in the debate over the best *chapeau*, or '*threshold test'*. With many '*likeminded*' States favouring a disjunctive test[191], reflecting the position seeming to crystallise in the most recent *Ad Hoc* Tribunal jurisprudence, and a significant amount of other States contending that an unqualified disjunctive test would be unduly broad, there was a standoff in negotiations.[192] It was argued by some members of the Security Council and many Asian and Arab representatives that a disjunctive test would be too inclusive, allowing '*widespread*' on its own as a sufficient threshold test, which had the potential to permit random, unconnected and spontaneous crime waves to constitute crimes against humanity.[193] Thus, the solution was to address the concerns over the disjunctive test

[188] 1996 PrepCom Report, Vol. I (n 184) ¶ 82.

[189] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June- 17 July 1998, *Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 328, U.N. Doc. A/CONF.183/13 (Vol. II), June 15-17 July, 1998, 147 [3rd meeting of the Committee of the Whole, U.N. Doc.A/CONF.183/C.1/SR.3, ¶16]; Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 79, 90; Young Sok Kim, *The International Criminal Court: A Commentary of the Rome Statute* (Wisdom House Publication 2003) 76; McCormack, 'Crimes Against Humanity' (n 78) 179. For an overview of the Rome Conference, see Philippe Kirsch & John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 3, 30.

[190] Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 79-81; McCormack, 'Crimes Against Humanity' (n 78) 186-189.

[191] See The 3rd and 4th Meeting of the Committee of the Whole on 17 June 1998: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June- 17 July 1998, *Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 328, U.N. Doc. A/CONF.183/13 (Vol. II), June 15-17 July, 1998, 147 [3rd meeting of the Committee of the Whole, U.N. Doc.A/CONF.183/C.1/SR.3, 17th June 1998] [4th meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.417th June 1998]

[192] ibid. See also Kirsch & Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (n 188) 3, 31 for a summary of the conjunctive/disjunctive debate at the Rome Conference; and Leila Nadya Sadat & S. Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381, 429-32.

[193] Elsewhere, Robinson has conjured an interesting example to demonstrate exactly how a disjunctive test allows for non-international crimes to potentially fall under the remit of the court. He uses the example of Post-Apartheid South Africa, a period of rampant crime and lawlessness that were all unconnected and unendorsed by a policy. Without a policy requirement, 15-25,000 murders per year certainly meet the criteria of widespread. See Robinson, 'Essence of Crimes against Humanity Raised by Challenges at ICC' (n 73).

through the definition of '*attack*', which now safeguards against widespread but spontaneous crime waves. The resulting compromise sees that the disjunctive test is to be read in conjunction with paragraph 2(a), the definition of '*attack directed against any civilian population*'.[194] It should be noted that during the PrepCom stages of the development of the Statute, there was no proposal to include the agreed upon definition of '*attack*' that can now be found in Article 7(2)(a). The definition arose at the behest of the delegates to the Rome Conference, inferring a desire to define the scope of application of the Article as accurately as possible.[195]

The original informal proposal for Article 7(2)(a), provided by Canada and spearheaded by Robinson, defined '*attack directed against any civilian population*' as follows:

> *a course of conduct involving the commission of multiple acts referred to in paragraph 1 against any civilian population, pursuant to or knowingly in furtherance of a governmental or organisational policy to commit such acts*.[196]

This was directly influenced by the *Tadić* trial judgment, and the 1996 ILC report resulting definition was also built on this.[197] The original proposal stresses that:

> *the "population" element is intended to imply crimes of a collective nature and thus excluding single or isolated acts…This has been interpreted to mean…that*

See also Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 *Columbia Journal of Transnational Law*, 787, 844.

[194] Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 94-95. See also Boot, *Genocide, Crimes Against Humanity, War Crimes* (n 157) ¶ 455; 'The International Criminal Court MONITOR: The Newspaper of the NGO Coalition for an International Criminal Court' (Issue 10, November 1998) 13 <http://www.iccnow.org/documents/monitor10.199811.pdf> accessed 5 September 2013. See Robinson, 'Defining "crimes against humanity" at the Rome Conference' (n 33) 43, for an examination of the diplomatic process at the Rome Conference that resulted in the current definition of Article 7.

[195] Dixon, 'Crimes Against Humanity: Chapeau', *in* Triffterer (ed), *Commentary on the Rome Statute* (n 3) 158, N. 88.

[196] Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 95. See also Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (n 192) 844-45, on the Canada Proposal.

[197] See Boot, *Genocide, Crimes Against Humanity, War Crimes* (n 157) ¶ 447; and Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 95-96.

there must be some form of a governmental organisational or group policy to commit these acts.[198]

Robinson has asserted that the policy requirement was intended as a flexible test, with a lower threshold than '*widespread or systematic*', as previously mentioned in Chapters II and III. The '*delegations supporting the compromise explained that the policy element was intended as a flexible test*'.[199] The original proposal, like Doudou Thiam's work with the ILC, underlines the collective nature of crimes against humanity, providing a broad understanding of '*organisation*' for the purposes of Article 7.

Despite all this, at the Rome Conference itself there was not much discussion of the decision to include '*organisational*' in Article 7(2)(a). That said, some did voice disapproval, for example the representative of Congo, Okoulatsongo, expressed great concern that the wording of the Article '*constituted an unacceptable threshold that in no way reflected contemporary realities in international law*'.[200] However, beyond this statement, the representative made no effort to clarify the specifics behind his contention over the Article. Jalloh speculates that his reference to '*contemporary realities*' relates to the increasing role of the non-State actor, in the form of rebel groups, in Africa today.[201] Conversely, the Sri Lankan representative provided positive support, asserting that it '*should…be made quite clear that the final words of paragraph 2(a)…were also intended to cover the policy of non-governmental entities*'.[202] Jamaica's delegation at the Rome Conference also notes that, in their opinion, the policy requirement unduly confines the Article.[203] Beyond this, the trail runs cold as to what the delegates of the Rome Conference considered to be the parameters of the word "organisational" in Article 7(2)(a). Given that these are the only three statements that can be found in the treaty negotiation documents,

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[198] *Quoted in* Kim, *The International Criminal Court: A Commentary of the Rome Statute* (n 188) 101. This again mirrors the position in *Tadić* Judgement (n 5) ¶ 644.

[199] Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', *in* Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (n 3) 96-97.

[200] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (n 188) Committee of the Whole, Summary Record of the 36th Meeting, UN Doc. A/CONF.183/C.1/SR.36 (13th July 1998), ¶13.

[201] Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 415.

[202] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (n 188) Committee of the Whole, Summary Record of the 27th Meeting, U.N. Doc. A/CONF.183/C.1/SR.27 (1998), ¶ 74.

[203] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Committee of the Whole, Summary Record of the 34th meeting, U.N. Doc. A/CONF.183/C.1/SR.34 (1998) ¶ 15.

Jalloh concludes that this is a sign that the other delegates did not object to a broader interpretation of organisational policy, though this in no way can be conclusively proven.[204]

Bassiouni contends that the lack of clarity on the matter of actors to be covered by Article 7(2)(a) is worded in an uncertain way intentionally, as this helped to appease pressure from non-governmental organisations and civil society, whose agenda was to ensure that crimes against humanity encompassed all large scale infringements of human rights.[205] The author of this paper disputes this; in light of the heavy discussion at the Conference over the conjunctive/disjunctive debate, and the resulting Canadian proposal, it is quite clear that the wording is envisaged as a compromise to appease those who thought an unqualified and disjunctive need for '*widespread or systematic attack*' would leave the category of crimes against humanity as too broad in scope. Ultimately, while clarifying the rationale behind the policy requirement, the Rome Conference documents provide little guidance in aiding us to understand what type of groups can be considered actors of crime against humanity.

4.8. Conclusion

This chapter has marked the development of the policy requirement from Nuremberg to Rome, with a view to building upon earlier findings about the relevance of an entity's purpose in isolating its ability to coordinate a strategy to commit these crimes.

As noted in this chapter, as early as 1951, the ILC isolated that there is a '*political component*' to these types of crimes. This gives credence to this author's previous endorsement of an organisation with a political affiliation and/or purpose as being a strong indicator as to its ability to orchestrate a plan. A steady move towards recognition that the actors in question can be non-State actors that are not necessarily State-like is evident in

[204] Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (n 52) 415.

[205] M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell International Law Journal* 443, 462; see also Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (n 126) 152.

the ILC literature. This is twinned with the Special Rapporteur Thiam's illuminating comments on the nature of such actors as group-based perpetrators. This is then bolstered by the *Ad Hoc* tribunals' acknowledgement of the power of non-State groups and organisations to act in an international criminal capacity, along with their reliance on the existence of a plan or objective that is political. Finally, while the work of the Ad Hoc Committee and PrepCom does little to elucidate upon what types of actors can be considered as being in the remit of crimes against humanity, the developments at the Rome Conference, most pertinently the Canadian delegation's compromise proposal, demonstrate that the drafters of said proposal certainly intended for Article 7(2)(a) to be interpreted flexibly. This is despite a lack of clarity over whether this was given much thought by other delegates upon adoption of the compromise.

This chapter illustrates further evidence that, in the quest to establish the parameters of an '*organisation*' under Article 7(2)(a), the purpose and political will of an actor is increasingly pertinent.

5. How Do We Harm Humanity?

5.1. Introduction

In his speech at the close of the Rome Conference, Bassiouni eloquently and succinctly captures the driving force and logic behind international prosecution in general, and the creation of the International Criminal Court more specifically, quoting John Donne: '[n]*o man is an island, entire of itself; each man is a piece of the continent, a part of the main…Any man's death diminishes me because I am involved in mankind*'.[206] This Chapter sets out to fortify existing claims about the importance of political purpose and political power in marking the boundaries of the types of organisations that can create and implement the policies of criminals against humanity. The question of the types of actors that are involved in these crimes raises integral questions about the demarcation point between domestic and international criminal law. It has been noted that the IMT Charter, in its treatment of crimes against humanity, did everything it could to put forward a version of this type of crime that rendered it organically produced within existing international law, in an attempt to conceal its novelty. In spite of this, it is hard to escape the simple fact that the use of the term '*humanity*' '*expressed a sense of moral outrage before it became an international offence*'.[207] And yet we find the acts in question are expressed in legal terminology, they are a *crime.* How do we reconcile this juxtaposition of the moral and the legal? This section will endeavour to elucidate upon and evaluate key competing philosophies over exactly how humanity, or mankind, can be harmed.

5.2. Policy

The International Law Commission's Draft Code, as quoted in *Tadić*, reads that:

> *[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*

[206] M. Cherif Bassiouni, Speech at Rome Conference (July 18, 1998) <http://mcherifbassiouni.com/intl-normative-developments/icc/> accessed 19 September 2013.
[207] Richard Vernon, 'What is a Crime against Humanity?' (2002) 10(3) *Journal of Political Philosophy* 231, 232.

or agents of a State.[208]

From this we can gather that the existence of a policy, whether one of a State or an organisation, promotes crimes to the platform of international crimes. As already stated the policy requirement is motivated by a need to avoid including isolated or random acts of violence. The inclusion of '*organisational*' policy, and the above description, argues for a rationale that does not focus on the actors, but on the way in which they act: in a premeditated, organised and pre-planned manner. This infers that it is the presence of machinery for committing crimes against the civilian population that advances an attack to the level of a crime against humanity. Thus, if an organisation has the aim, skills, organisation, hierarchy, control and common intention to commit such an act, it constitutes an organisation for inclusion under Article 7(2)(a). This picture certainly fits with all the criteria that have proven useful to consider by both the majority judgment and Dissenting Opinion. The difficulty with taking at face value that the presence of a policy *per se* elevates a crime to one of international concern, is that it opens the category of international crime to grey areas. Those with murderous intentions may meticulously plan their actions, and may even have a team to help them. However, does this make every murderous organisation guilty of crimes against humanity? The policy thesis does not direct sufficient attention to character of the organisations employing such a policy, which is a key drawback when attempting to define the characteristics of these actors.

5.3. Crimes that Shock the Conscience of Mankind

In 1946, Schwelb provided a select summary of developments in the use of the term '*crime against humanity*' in the years building up to, over the course of, and in the aftermath of the Second World War. He noted the novelty of Article 6 of the Charter of the International Military Tribunal, particularly part (c), which gave the Allies power to prosecute '[c]*rimes against humanity…committed against any civilian population, before or during the war…whether or not in violation of the domestic law of the country where perpetrated*'.[209] For him, the inclusion of this provision provides '*a radical inroad …into*

[208] *Tadić* Judgment (n 5) ¶ 655.
[209] Article 6(c), Charter of the International Military Tribunal (n 142).

the sphere of the domestic jurisdiction of sovereign States'.[210] He provides an account of the development of the term '*crimes against humanity*' and presents an interesting dialogue on how to understand the meaning of the word '*humanity*' in such a context.[211] Faced with two interpretations of the word: its appeal to the whole of mankind, or it representing the character of what it is to be human: humane; Schwelb asserts that its meaning in the context of the category of crimes against humanity is the latter. It follows that for him an attack does not have to affect the entire human race for it to be considered such a crime, but the attack in question must become the concern of the international community because of the way it offends certain principles. He does not elucidate upon what these principles are, and how they might be offended. He simply stipulates that these crimes offend humaneness. Similarly, for Justice Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, the crime in question must achieve '*in magnitude or savagery any limits of what is tolerable by modern civilisations*'.[212] This vague and emotive phrasing is again not elaborated upon. Indeed, there are multiple references in this corpus of literature to the horrific nature of these crimes as being the characteristic that raises them to being '*against humanity*', or to their nature as acts that '*shock the conscience of humanity*', measured by their magnitude and savagery.[213] They have been labelled as '*particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings…*'.[214] The difficulty with these justifications is their use of emotive language, full of intangible and immeasurable notions.

Geras, like Schwelb notes that the '*humanity*' that we harm can be considered in two ways: harming humankind, or humanity as a whole, or harming/offending that which makes us human, or our '*human sentiment*', as he coins it.[215] He cross-examines other possible explanations that fall under these two categories, concluding that viewing crimes against

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[210] Schwelb, 'Crimes Against Humanity' (n 139) 179.

[211] ibid 178-188, 195-197.

[212] Robert H. Jackson, Opening Speech for the Prosecution at Nuremberg (Nov. 21, 1945), in 2 Trial of the Major War Criminals before the International Military Tribunal, Nurember: 14 November 1945- 1 October 1946, at 98, 101 (1947) q*uoted in* Schwelb, 'Crimes Against Humanity' (n 139) 195.

[213] Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1131; Dixon, 'Crimes Against Humanity: Chapeau'*, in* Triffterer (ed), *Commentary on the Rome Statute* (n 3) 123.

[214] Report of the International Commission of Inquiry on Darfur to the Secretary General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60 (2005) ¶ 178.

[215] Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press 2011) 38.

humanity as '*inhumane*' acts (falling under the '*human sentiment*' category) does not set a high enough jurisdictional threshold, for what is considered '*inhumane*' is incredibly relative, and there is a concern that its meaning will be diluted, washing away the demarcation line between domestic crimes and crimes against humanity.[216] Likewise, viewing crimes against humanity as those crimes which '*diminish the human race*' (harming humanity as a whole), is an equally vague and imprecise conception, and subject to differing sentiments.[217] In considering the categorisation of crimes against humanity as those crimes that breach the sovereign authority of humankind, Geras gives a nod of approval, while also perceiving that this is more a point of observation: it does not help us identify exactly what peculiar characteristics makes a crime one against humanity, but at a secondary level isolates the authority of which the crime falls foul.[218] Equally, stating that crimes against humanity are those that '*shock the conscience of humankind*' does not define the parameters of what it takes to in fact shock, offend or outrage humankind.[219] On this point, deGuzman also gives her opinion, noting that an atrocity's ability to shock is inextricably linked to the gravity of such an attack. This rationale for the category of crimes in question, removes any notion of the organisational aspects of the perpetrators, and focuses solely on scale of the atrocity itself.[220] Going beyond crimes that are '*inhumane*', by adding a further qualification that they are so grave, heinous or abhorrent to be considered '*inhuman*' helps to set the appropriate parameters of gravity for crimes against humanity. Nonetheless, it is difficult to manoeuver around the definitional difficulties of setting a threshold for what is to be considered '*inhuman*'.[221]

Vernon also explores how a crime can be against '*humanity*'. As a crime against '*humaneness*' or a crime that '*diminishes every member of the human race*' he admires the use of these phrases as a moral cursor, but sees that the terms lacks limitation or definitional certainty, in the same way as Geras.[222] Further, distinguishing crimes against humanity purely on scale, i.e. through an attempt to quantify the harm caused, is both

[216] ibid 38-41.
[217] ibid 41-42.
[218] ibid 44- 47.
[219] ibid 47-49.
[220] deGuzman, 'Crimes against humanity' (n 137) 128-9.
[221] Geras, *Crimes Against Humanity: Birth of a Concept* (n 214) 49-51.
[222] Vernon, 'What is a Crime against Humanity?' (n 206) 236-7.

implausible and incredibly subjective, even if it were conceivable.[223] Viewing crimes against humanity as a '*crime against the human status*' holds the recurring drawbacks of vagueness, in that it does not explicate the demarcation line between this international crime and a lesser human rights violation.[224]

A more literal approach to conceiving how we can harm humanity leads some to categorise international crimes as those that threaten international peace and security. Vernon studies what it might mean to view '*humanity*' as some kind of separate entity that can be consequentially affected by threats to peace and security. While this is something to be borne in mind, it ultimately leads to a definition of crimes against humanity that must only really have cross-border affects, or affect the interests of foreign powers in some capacity, allowing for certain instances to fall through the net of international justice.[225] It therefore unduly limits the doctrine, for it will not cover those crimes that concern '*no one beyond the targeted group*'.[226]

5.4. State Failure

May does not endeavour to tackle the conundrum of the role of non-State actors in international criminal law, or even narrower, to present his definition of '*organisation*', in his '*tremendously important*' work.[227] He in fact burdens himself with a much broader question: how to justify intervention by international bodies into the domestic criminal affairs of a sovereign State.[228] In other words, he attempts to defend international criminal tribunals from a philosophical perspective, turning to the work of Thomas Hobbes to

[223] ibid 237-8.
[224] *Quoted in* Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 1977) 257.
[225] Vernon, 'What is a Crime against Humanity?' (n 206) 239.
[226] Geras, *Crimes Against Humanity: Birth of a Concept* (n 214) 42-44. deGuzman has also raised concerns over finding international jurisdiction where there is a threat to international peace and security. While the inclusion of the war nexus in the Nuremberg Charter enshrined the importance of the role of peace in moving forward, the elimination of said requirement undermined the pursuit of international peace and security as the paradigm justification for this international crime. For her, notions of '*peace and security*' are inextricably linked with the yardstick of gravity of the offences in question. See deGuzman, 'Crimes against humanity' (137) 128.
[227] David Luban, 'Beyond Moral Minimalism (Response to Crimes Against Humanity)' (2006) 20(3) *Ethics and International Affairs* 353.
[228] May, *Crimes Against Humanity: A Normative Account* (n 92) 3-4.

broadly justify international criminal legal intervention.[229] May uses the work of Hobbes and Buchanan to reach a position of justifying international criminal prosecution that has strong parallels with Luban's defences for finding crimes against humanity, in his theory on the subject. They choose different avenues to reach the same conclusion. May takes a measured approach, beginning with a presentation of the arguments of, and reasons for, respect for sovereignty, including a need for deference to the value of tolerance.[230] He fleshes out the basis for tolerance and sovereignty: that a State is willing and able to protect it subjects proportionately and in an appropriate manner.[231] Thus, if a State fails to provide for, or actively participates in the relinquishment of the security of its subjects, international prosecutorial intervention is justified. [232] Luban employs a similar justification, although his language and reasoning is far more emotive. He employs the rhetoric of '*our character as political animals*' justifying the way human beings form political associations.[233] What is certain about the position of both May and Luban is that, although their task is not to directly tackle the question of what type of actors can be guilty of crimes against humanity, their theories both presuppose some level of State or State-like involvement, with little room for non-State organisations that do not take on the characteristics of the State.

May's formula for finding a justification for international legal prosecution is two-fold: a violation of the security principle, plus a violation of the harm principle, equates to the need for international prosecution.[234] The security principle is as follows:

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[229] Ibid 5,14. For Hobbes, Man should vest all of their natural rights in the power of one Sovereign 'Leviathan', in order to alleviate the anarchical state of nature. The power of the sovereign would be unlimited to the extent that '*the love of order [be] confused with a taste for oppression*', Martin Loughlin, *Sword & Scales: An Examination of the Relationship Between Law and Politics* (OUP 2000) 28. Therefore, as May highlights, it is difficult to imagine Hobbes, in his theory of the social contract, accounting for the possibility of intervention into the realm of such a sovereign: May, *Crimes Against Humanity: A Normative Account* (n 92) 4,15. However, May rationalises that, given that under Hobbes' treatise the sole motivation for investing all of Man's rights in the sovereign power is so that said sovereign provides peace and security for Man, it follows that should the sovereign then fail to protect, or even actively threaten this, the State sovereign should lose its claim to exclusive control over its subjects.

[230] May, *Crimes Against Humanity: A Normative Account* (n 92) 8-16.

[231] ibid 12.

[232] ibid 12, 21. Physical security being, for May, the threshold infringement that is severe enough to trigger international intervention, owing to his morally minimalist approach.

[233] Luban, 'A Theory of Crimes Against Humanity' (n 129) 90.

[234] May, *Crimes Against Humanity: A Normative Account* (n 92) 64.

If a State deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence,

a) then that State has no right to prevent international bodies from "crossing its borders" in order to protect those subjects or remedy their harms;
b) and then international bodies may be justified in "crossing the borders" of a sovereign State when genuinely acting to protect those subjects.[235]

The security principle does not answer the question of what types of actors can be guilty of crimes against humanity. It does, however, trigger the process for international prosecution by allowing for the rebuttal of the presumptive respect for Sovereignty, thereby allowing international criminal tribunals to intervene in the internal affairs of a State.[236] Once this door has been opened, the conditions of the international harm principle must also be met.

Haque explores international criminal law through a different paradigm to May: the theory of relational retributivism.[237] He justifies international prosecution through focus on the relational structure of States and social groups.[238] At the domestic level, he revisits the role of retribution in justice as providing relational cursors in communities of the rights and duties of members.[239] He draws contrasts with consequential justifications for punishment, which emphasise the impersonal utility in prosecuting as a means of deterrence and improvement of general social welfare. Conversely, relational views on retribution accentuate the personal: the State can legitimately punish as a result of the moral relations that exist between victim, punisher and perpetrator.[240] Haque sets out to use the features of a relational structure of retributive justice to justify international criminal law. In order to do so, he looks to the origins of retributive theory, highlighting that wrongs inflicted were settled in a community setting, for such as within a tribe or family.[241] This can become problematic when the victim and the perpetrator are from different communities, and

[235] ibid 68.
[236] ibid 70.
[237] Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 273.
[238] ibid 274.
[239] ibid 278, 284.
[240] ibid 284-287.
[241] ibid 291-294.

retribution can be mistaken for '*the unthinking cry of vengeance*'.[242] The State's role therefore, is to provide a neutral authority displacing issues of vengeance between rival social groups. As we well know, the State does not always remain neutral in the dispensing of justice. It may become indifferent to, or complicit in crimes, particularly if the State has been co-opted by one particular social group.[243] In order to circumvent such a state of affairs, we must supplant the role of the State with the international community, and this is to be justified by re-aligning the boundaries of the relations that justify punishment. Thus, victim and perpetrator are presented as members of moral community coined '*common humanity*'. Haque realistically recognises that moral universalism is far from achieving global recognition, and the success of international institutions enforcing it remain tied to State co-operation. He nonetheless believes that international tribunals represent a fundamental stepping-stone in attempts to strive towards a global moral community.[244] It is notable that, in similar rhetoric to Haque, Arendt famously cautioned against misinterpreting justice for vengeance. Criminal proceedings are put in place as a neutral forum to guard against vengeance and to right the wrong that has been committed, not just against the victim, but also against the community: '*the body politic itself…stands in need of being "repaired,"…It is…the law, not the plaintiff, that must prevail*'.[245]

Vernon attempts to reconcile the use of the word '*crime*' to describe a moral concept with legal terminology, by aiming to identify exactly what type of evil encapsulates a crime against humanity rather than merely a human rights violation.[246] He reviews several kinds of claims about what a crime against humanity is in his essay. He ultimately settles on a State-centric approach to categorising these crimes, paralleling Luban. While Luban relates to crimes against humanity, committed by States as '*politics gone cancerous*', Vernon in unison, labels them as a '*moral inversion…of the State*', or '*an abuse of State power involving a systematic inversion of the jurisdictional resources of the State*'.[247] Thus, in his thesis States are the primary actors and perpetrators of crimes against humanity. This is

[242] Robert H. Jackson, Opening Speech for the Prosecution at Nuremberg (Nov. 21, 1945), in 2 Trial of the Major War Criminals before the International Military Tribunal, Nurember: 14 November 1945- 1 October 1946, at 98, 101 (1947), *quoted in* Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 292.

[243] Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 294-296.

[244] ibid 297.

[245] Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (n 223) 260-261.

[246] Vernon, 'What is a Crime against Humanity?' (n 206) 232.

[247] ibid 233, 242.

because only States have the administrative capacity, authority and territoriality to set in motion '*industrial slaughter…[and] to convince their citizens that some of their number are subhuman and deserve to die*'.[248] Vernon studies the notion that crimes against humanity were created as a category of international crime to fill a jurisdictional vacuum, not unlike piracy. In the same way that pirates are '*enemies of the human race*', not because of the evil of their crime, but because they fall outside the jurisdiction of any State and can thus go unpunished, crimes against humanity are immune from prosecution precisely because they are committed by the very entity that is supposed to guard against them: the State.[249] For Vernon, this analogy does not hold water: piracy is a crime of universal concern because pirates strike indiscriminately, so there is a mutual universal interest in guarding against it; whereas victims of crimes against humanity are handpicked, in a precisely discriminate way. This reading has been openly critiqued by Geras, who considers this a one-dimensional position, based on the simple assertion that crimes against humanity are in fact rather difficult to predict.[250] This paper is more in line with Geras on this point. Vernon too easily abandons the jurisdictional vacuum conundrum. It is in fact extendable to cover atrocities committed by non-State actors, for the exact reason we have international criminal justice is to cover those crimes that States are either 'unwilling or unable' to prosecute themselves. It is the State failure to protect and/or prosecute that creates the jurisdictional vacuum that international criminal law has been put in place to recover.

The unwillingness and/or inability for a State to prosecute crimes at the domestic level is a key component of the crimes against humanity thesis. While both Luban and Vernon present State-centric approaches to this justification for international prosecution of these crimes, their theories are nonetheless relevant for those who envisage non-State actors as falling under the remit of crimes against humanity. Their focus on the inversion of *political* power as a key element of the crime guides us once again to view the actors in question as having some kind of political motive. Haque's thesis proves even more pertinent: he not

[248] Gérard Prunier, 'A well-planned genocide' Times Literary Supplement, Oct. 22, 1999, 30, *quoted in* Vernon, 'What is a Crime against Humanity?' (n 206) 243.
[249] ibid 234. See also Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (n 223) 261-2, who, in her critique of the reliance of the Eichmann trial upon universal jurisdication, aptly explicates that pirates are *hostis humanis generis* not because of the severity of their crimes, but because of their exception to the territorial principle. He has '*put himself outside all organised communities*', and thus, because he can be judged by no one, in the interests of combatting impunity he can be judged by everyone.
[250] Geras, *Crimes Against Humanity: Birth of a Concept* (n 214) 36-37.

only recognises the need for the international community to supplant the role of the State in situations of '*politics gone cancerous*', but also accounts for non-State actors within his framework: there is a need for international prosecution where the State power in question has been *co-opted* by a particular group, a group which may well commit crimes against humanity without fear from the relevant State or governmental entity.[251]

5.5. Group-based Crimes

For Fletcher, the principle of individual criminal responsibility creates a myth, because international crimes '*are deeds that by their very nature are committed by groups and typically against individuals as members of groups…the crimes of concern to the international community are collective crimes*'.[252]

As noted in the previous chapter, Special Rapporteur Doudou Thiam recognised that the mass nature of crimes against humanity implies group perpetration, group victimisation and a plurality of methods, having asserted that the '*mass nature of the crime obviously implies a plurality of victims, which is often made possible only by the plurality of authors and the mass nature of the means employed*'.[253] Similarly Arendt theorises the demarcation line between domestic and international crimes is one that is based on *community*.[254] For Arendt, crimes against humanity were, using the words of the French prosecutor François

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[251] See also Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1131-1132. Concerning the unwillingness or inability of States to prosecute such crimes at the domestic level, Smith also considers the work of May, Luban and Haque. Using Luban's theory of crimes against humanity to further her argument, Smith argues that all humankind is interested in international prosecution of such crimes in order to prevent '*politics gone cancerous'*. However, Smith's use of this theory presupposes that such an organisation as she envisages as being prosecuted for crimes against humanity must have usurped or be involved in the political process in some manner. This implies that Smith's conception of actors capable of being tried for crimes against humanity must have some kind of political role or purpose. This is similarly reflected in her reliance on the work of Haque, whose conception of international crimes involves prosecution where the crimes are committed by either the State, State agents, or organisations that are powerful enough to co-opt the State and are therefore involved in the political process in some manner.

[252] Fletcher, *Romantics at War: Glory and Guilty in the Age of Terrorism* (n 73) 45.

[253] Draft Code of Crimes Against the Peace and Security of Mankind (Part II)- including the Draft Statute for an International Criminal Court, *Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur* (n 163) ¶¶ 60-62.

[254] Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (n 223) 272: '*[n]othing is more pernicious to an understanding of these new crimes, or stands in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same. The point of the latter is that an altogether different order is broken and an altogether different community is violated*'.

de Menthon, '*a crime against the human status*'.[255] She extrapolates the idea, reasoning that the notion of a human status is interwoven with a racially diverse human race. Thus, crimes against humanity aim to '*eliminate forever certain "races" from the face of the earth*', rendering them '*an attack on human diversity*'.[256] This viewpoint certainly appeals to other writings on the element of group victimisation in crimes against humanity, however it unduly links human status to one's difference from others, which does not necessarily capture the wrongness in question.[257] Geras contemplates those who espouse the view that individuals must be attacked because of their status as a certain member of a group: ethnic, political, national or religious.[258] For Geras, this elevates crimes against humanity to the same threshold as genocide, and is therefore misconceived.[259] This paper asserts that the group nature of the victim is certainly a common aspect of many crimes against humanity, but for genocide to be achieved, there must be an intent to '*destroy, in whole or in part*' the relevant group.[260] In the context of crimes against humanity, there may be political motivations to attack and terrorise a certain group to achieve certain political purposes, though not necessarily with the aim of destroying said group.

May structures his justification of international criminal tribunals through the paradigm of the '*group*'. Using the arguments of Buchanan, he proposes the theory that humans choose to form associations, in the form of States, for the purpose of protection.[261] Given that groups have chosen to associate in this way self-determinately, this forms a presumption in favour of respect for sovereignty, which can then only be rebutted when the sovereign State in question does not fulfill its duty, or fails to reach a threshold level, as discussed through use of the security principle earlier in this chapter.[262] May's international harm principle asserts a rationale for prosecution at the international level based on the very nature of the harm itself. While the security principle gives the green light to violate State

[255] ibid 257.
[256] ibid 268-9.
[257] Vernon, 'What is a Crime against Humanity?' (n 206) 241.
[258] See for example Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (n 223) 256-7, describing crimes against humanity as the '*blotting out of whole peoples*'; 268-9 for a conception of the crime against Jews as a '*crime against the human status*'; and 275-6 categorising the extermination of ethnic groups as not just a crime against the groups in question, but against '*mankind in its entirety*'.
[259] Geras, *Crimes Against Humanity: Birth of a Concept* (n 214) 55.
[260] Article 6, Rome Statute (n 4).
[261] See Allen Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford: OUP, 2004), and May, *Crimes Against Humanity: A Normative Account* (n 92) 11.
[262] May, *Crimes Against Humanity: A Normative Account* (n 92) 11.

sovereignty, the harm principle validates such a level of infringement into the individual right to liberty of the defendant. May is the proponent of a theory of international harm that demonstrates how harms against humanity are characterised by their non-internationalised element.[263] Like Haque, he draws analogies with justifications for prosecution at the domestic level, focusing on the community motivator, that is, we prosecute in domestic criminal systems when the actions of a particular criminal harm not just the victim, but the community at large.[264] By extension, a crime becomes a crime against humanity when it harms the international community. But how can we measure this? May presents his version of harming humanity as follows:

> *To determine if harm to humanity has occurred, there will have to be one of two (and ideally both) of the following conditions met: either the individual is harmed because of the person's group membership or other non-individualised characteristic, or the harm occurs due to the involvement of a group such as a State.*[265]

And so the international harm principle itself is:

> *Only when there is serious harm to the international community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualised characteristics of the individual, such as the individual's group membership, or is perpetrated by, or involves, a State or other collective entity.*[266]

It is from here that we can see May's position on the role of organisations in crimes against humanity, and observe that May posits a notion of crimes against humanity that involves perpetration by non-State entities too. May seems confused in this regard, having latterly asserted, on the subject of his international harm principle, that perpetrators are group-

[263] ibid 80-81.
[264] ibid 82.
[265] ibid 83.
[266] ibid.

based as such because they are '*associated with the State*'.[267] The first part of the international harm principle - that victims are chosen based on group characteristics - relates to the widespread nature of the crime in question. Choosing a body of victims based on non-individualised traits is a '*callous disregard for the individuality of the person, and hence an assault on what is common to all humans and hence to humanity*'.[268] In support of this claim, May refers to the *Tadić* judgment's affirmation that the transposition of a crime from the domestic to the international, in particular relation to the crime of persecution, is triggered when '*the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership in a targeted civilian population*'.[269] The difficulty with this approach is, however, is that it brings the parameters of crimes against humanity close to the definition of genocide, minus the requirement of an intent to destroy the group in whole or part. There might also be issues with its applicability to, for example, a meeting of international diplomats, an example provided by deGuzman.[270]

I now turn to May's discussion of the second prong of the international harm principle, that is, group perpetration. This element of the international harm principle is most relevant, in that it informs our understanding of May's position on the type of groups that can be found guilty of international crimes, allowing us to speculate how May might classify organisations capable of creating a policy to commit crimes against humanity. While Smith asserts that May's conception of group-based perpetrators is wider than State-like, this paper interprets his position as being ambiguous. While he mentions the vague '*other collective entity*' in his definition of the international harm principle, he then goes on to flesh out the second strand of this principle. In doing so, he declares that an attack will be systematic when it is perpetrated through State avenues '*or similar group involvement*'.[271] A similar group to a State arguably amounts to one that is '*State-like*', according with the position he presents on this matter in his opening chapter. May presents his thesis in a way that aligns with a view of actors as groups similar to the State, and thus he seems to lean towards a State-like vision of offenders, although that does not negate the pertinence of his theory to this work. May also uses his group perpetration theory to assert that low-level

[267] Larry May, 'Crimes Against Humanity' (2006) 20(3) *Ethics and International Affairs* 349, 350.
[268] May, *Crimes Against Humanity: A Normative Account* (n 92) 84-85.
[269] *Tadić* Judgment (n 5) ¶ 644.
[270] deGuzman, 'Crimes against humanity' (n 137) 129.
[271] May, *Crimes Against Humanity: A Normative Account* (n 92) 88.

perpetrators can only be convicted of crimes against humanity if discriminatory intent is found, which has rightly been criticised.[272] Article 7 is not drafted in this manner, as the civilian population in question does not have to be attacked based on national, racial, ethnic, religious or other identity grounds. To use an example provided by Luban and Mayerfield, the Revolutionary United Front (RUF) attacked the civilian population in Sierra Leone indiscriminately in a power play to take over the diamond mines from the government, and these acts still fall under the remit of crimes against humanity.[273] If the victims of *Tadić*, as a '*low-level*' perpetrator, had been chosen based on military strategy rather than ethnicity, then '*May's reasoning gets ordinary soldiers off the hook if they do not act with discriminatory intent*'.[274]

Altman has criticised May's use of the group-based nature of crimes against humanity as a way to understand how these types of crimes '*harm humanity*'.[275] For Altman, humanity is not harmed when a particular group is persecuted by virtue of its group membership, only the victims in question, and possibly other strands of said group scattered across the globe, are harmed. In other words, '*genocides in Cambodia and Rwanda…did not affect the vital interests of very many people outside of those States…the interests of…most humans- are barely affected*'.[276] Here, by focusing on humanity being harmed by virtue of the effect that crimes against humanity have on the rest of the world. Altman, in this paper's view, misinterprets the group-based theory. He does not see that the very reason Australians are harmed by genocide many miles away goes as follows: human beings, by their very nature chose to form political associations for survival interests. Thus the harm emitted upon humanity by '*politics gone cancerous*' elsewhere is the very fact that these crimes *could* happen anywhere in the world. Australia is harmed by cancerous politics abroad because political associations turned sour have the potential to happen in Australia too. The prevailing interest for Australia is then guarding against impunity anywhere in the world, in the hope that, should such a pernicious state of affairs occur in Australia, the rest of the

[272] May, *Crimes Against Humanity: A Normative Account* (n 92) 85. See Luban, 'Beyond Moral Minimalism (Response to Crimes Against Humanity)' (n 226) 358; and Jamie Mayerfeld, 'Ending Impunity (Responses to Crimes Against Humanity)' (2006) 20(3) *Ethics and International Affairs* 361, 362-363.
[273] Luban, 'Beyond Moral Minimalism (Response to Crimes Against Humanity)' (n 226) 358.
[274] Mayerfeld, 'Ending Impunity (Responses to Crimes Against Humanity)' (n 271) 363.
[275] Andrew Altman, 'The Persistent Fiction of Harm to Humanity (Response to Crimes Against Humanity)' (2006) 20(3) *Ethics and International Affairs* 367, 368-370.
[276] ibid 370.

world would bring the perpetrators to justice.[277] This is exactly how May has defended his own position on the matter: to Altman's objection that only Muslims are harmed when they are attacked by virtue of their religion, May responds: '*if one can attack Muslims with impunity merely because they are Muslims, then one can similarly attack Catholics because they are Catholics*'.[278] This author extended the politics gone cancerous analogy to demonstrate how group-based crimes harm humanity, while May uses Altman's religious example as a springboard in the same way.

It is important to note that ideally both strands of the international harm principle should be met, but it is sufficient for one of them, plus the security principle, to be present. This is therefore similar to the workings of the widespread or systematic criteria in Article 7, and May even categorises it in this way, identifying that group-based victims relate to the widespread dimension of a crime, and group-based perpetrators accord with a systematic account of a crime.[279] This is in concurrence with other observations made so far in this thesis: that '*organisational policy*' indicators mirror characteristics marking a systematic attack.

Haque also frames his attempt to transpose retributivist theory from the domestic to the international in terms of individual victimisation and perpetration at the domestic level, and group victimisation and perpetration at the international level.[280] Applying this to crimes against humanity, Haque lifts from Luban's theory of such crimes, exploring the notion that crimes against humanity are committed '*by politically organised groups under color of policy*'.[281] These politically organised groups are the relevant actors in crimes against humanity, because they are either '*identical with the State, among the agents of the State, or are uniquely capable of co-opting the State to either assist or ignore group*

[277] This point is also made, in not so many words, by Arendt: Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (n 223) 269-270: quoting Karl Jaspers: '*mankind would certainly be destroyed if States were permitted to perpetrate such crimes*'.
[278] Larry May, 'Humanity, international crime, and the rights of defendants (reply to critics)' (2006) 20(3) *Ethics and International Affairs* 373, 374.
[279] May, *Crimes Against Humanity: A Normative Account* (n 92) 84-90.
[280] Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 297-299.
[281] Luban, 'A Theory of Crimes Against Humanity' (n 129) 108.

violence'.[282] It is the collapse of the moral authority of the State that paves the way for the international community to provide justice.

Luban, in a rhetoric not dissimilar to May's international harm principle, asserts that crimes against humanity formulate an attack on our human individuality: by targeting based on group membership, the human nature of needing to form a community is threatened, thereby attacking our very nature as political beings.[283] Thus, it is our nature as political animals that triggers universal human interest in such crimes, whereas for Haque the retributivist theory focuses on the State's loss of authority over retribution. Haque notes that Luban denies the existence of a universal moral community, on account of the fact that universal jurisdiction is not invoked for retribution purposes, but because of self-interest: we could all become victims of group-based crimes, so there is a common interest in punishing and safeguarding against it.[284] This is where the two accounts differ: Luban rests upon universal self-interest in punishing crimes against humanity, whereas Haque's relational account of retribution is based entirely on moral authority. As previously noted, for Luban, crimes against humanity are those atrocities that '*offend our character as political animals*'. Given that human beings form themselves into social groups, which are then politically organised, crimes against humanity are '*politics gone cancerous*'.[285] It is the State that we put our faith in as political animals, and thus, for Luban, it is political organs that commit crimes against humanity. It follows that this interpretation of crimes against humanity leads us to view that it is the policy of a State that helps characterise crimes against humanity, and such a policy '*alter[s] the nature and character of such crimes*'.[286] It is however notable that latterly on this point, in his comments on the work of May, Luban recognises that cancerous politics has led to suffering '*at the hands of governments, rebels, warlords, militias, bureaucracies, and demagogues*', thus providing us with evidence that Luban recognises the role of non-State actors in his vision of cancerous politics.[287]

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[282] Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 302.
[283] Luban, 'A Theory of Crimes Against Humanity' (n 129) 116-17.
[284] See Luban, 'A Theory of Crimes Against Humanity' (n 129) 125-7; and Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (n 129) 321.
[285] Luban, 'A Theory of Crimes Against Humanity' (n 129) 90-91.
[286] Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 62) 252.
[287] Luban, 'Beyond Moral Minimalism (Response to Crimes Against Humanity)' (n 226) 353, 355.

The context of international crimes, particularly their systemic nature, has been explored by Nollkaemper and Van Der Vilt, who focus upon the lacuna in international criminal justice created by the limitation of the law of individual responsibility.[288] Their work identifies that international crimes are usually caused by collective entities, coined '*system criminality*', with international criminal culpability manifesting itself in one, or a few, individual actor(s).[289] The piece advocates for a level of accountability that relates to the '*system*' under which the crimes were committed, as well as liability being found at the individual level. Under the current position in international criminal law '[c]*rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced*'.[290] The definition of '*system criminality*' advocated by the study is as follows: '*a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes*'.[291] This book characterises international crimes, including crimes against humanity, as '*crimes of obedience*'. This is what demarcates this category from ordinary crimes, that the acts are committed at the issuance of orders from some authority.[292] It should be noted that '*the fact that a criminal action serves various personal motives or is carried out with a high degree of initiative and personal involvement does not necessarily remove it from the category of crimes of obedience*', so long as the act(s) in question still align with, and are performed in the context of the policy of a collective entity to which the actor is obedient and/or a member.[293]

This study asserts that Vernon seems to be painting a very strict interpretation of crimes against humanity, that is more akin to describing its worst type: genocide. Nonetheless, he validly elucidates upon a characteristic of crimes against humanity that is proving very

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[288] Nollkaemper, 'Introduction' *in* Nollkaemper & Van Der Vilt (eds), *System Criminality in International Law* (n 73) 1-2.
[289] ibid 1.
[290] *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, Part 22, 447 *quoted in* Nollkaemper, 'Introduction' *in* Nollkaemper & Van Der Vilt (eds), *System Criminality in International Law* (n 73) 3.
[291] Nollkaemper, 'Introduction' *in* Nollkaemper & Van Der Vilt (eds), *System Criminality in International Law* (n 73) 16.
[292] Herbert C. Kelman, 'The policy context of international crimes' *in* Nollkaemper and Van Der Vilt (eds), *System Criminality in International Law* (n 73) 26-27.
[293] H. C. Kelman and V. L. Hamilton, *Crimes of Obedience: Towards a Social Pyschology of Authority and Responsibility* (Yale University Press, New Haven and London 1989) 46, *quoted in* Kelman, 'The policy context of international crimes' *in* Nollkaemper and Van Der Vilt (eds), *System Criminality in International Law* (n 73) 27.

pertinent to this piece: that victims of these crimes, unlike sufferers of human rights violations, are not individuated, but are chosen by virtue of their status as part of a particular group. At no point does he consider that the actors in question may be anything other than the State, and much of his essay seems to focus on victims as handpicked by virtue of their race or religion. Importantly though, he indeed concedes that the thesis must extend to cover those that are persecuted for an '*innocent choice*' they make, for example the choice to pursue education or to affiliate oneself with a particular political inclination.[294]

5.6. Conclusion

There are many competing ideas about exactly what factor of a crime elevates it to one of international concern. Many discuss the nature of crimes against humanity in evocative terms, contending that the reason that such crimes are the concern of the international community as a whole is because these crimes surpass '*in magnitude or savagery any limits of what is tolerable by modern civilisations*'.[295] This emotive language includes references to notions that are entirely subjective and difficult to define. All individuals have a varied understanding of what is '*tolerable*' in levels of '*savagery or magnitude*'. There are those who are more scientific in their approach to crimes against humanity, appreciating that it is not the inhumane or horrific nature of the crimes that commands the attention of the international community. Rather, it is their large-scale nature, or exceptional gravity, coupled with a desire to exclude random or isolated acts of extreme violence from the remit of international criminal law.[296] It is this desire that triggers the necessity for the contextual requirements, because, as Kaul argues in his Dissenting Opinion, '*it is not the cruelty or mass victimisation that turns a crime into a delictum iuris gentium but the constitutive contextual elements in which the act is embedded*'.[297] Of

[294] Vernon, 'What is a Crime against Humanity?' (n 206) 247.

[295] Schwelb, 'Crimes Against Humanity' (n 139) 195.

[296] See, for example, Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press, 2012) 37; *Tadić* Judgment (n 5) ¶ 648: '*It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian "population"'.*

[297] Dissenting Opinion of Judge Hans-Peter Kaul, (n. 6) ¶ 52. See also, Schabas, *An Introduction to the International Criminal Court,* 3rd ed., (n 122) 101: '*The contextual elements are 'an important threshold that elevates the 'acts'…to crimes against humanity'*'.

course, differing interpretations of the meaning of a crime against humanity ensures that varying positions on the role of organisations in crimes against humanity are reached.

Crimes against humanity '*instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a State or, more loosely, in accordance with the* ***political objectives*** *of a State or other entity*'.[298] In order to help identify the parameters of the '*other entity*' in question, political objective or purpose is an integral factor. By their very nature, crimes are of concern to the international community because they are a moral inversion of politics. Ordinarily, this implies the imposition of crimes by State or governmental actors but increasingly non-State actors are becoming capable of implementing such horrors, due to State failure. This State failure can be categorised an unwillingness, which implies State involvement in the policy in any case, or by inability. For a State to be unable to punish such crimes, the actors in question must be politically powerful enough to co-opt the functioning State or government. Thus, they key features of political power and political purpose provide strong cursors as to what type of organisations can orchestrate a policy to commit crimes against humanity under Article 7(2)(a) of the Rome Statute.

[298] Immi Tallgren, 'The Sense and Sensibility of International Criminal Law' (2002) 13 *European Journal of International Law* 575 [emphasis added].

6. Concluding Remarks: Politics, Purpose & Power

Philippe Kirsch, Chairman of the Committee of the Whole of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, expressed that, '*crimes against humanity may be committed not only by or under the direction of State officials, but also by "organisations." The latter word is intended to include such groups as terrorist organisations and organisations of insurrectional or separatist movements*'.[299] This thesis has conducted an intense focus upon the case law, literature, historical development and theoretical foundations of the policy requirement in crimes against humanity, in order to tease out the most pertinent cursors to be used to identify what types of organisations can be considered to be orchestrating a strategy, plan or policy to commit crimes against humanity. In doing so, this piece has isolated two keys factors, the *political purpose*, and *political power*, of the relevant organisation or group. The author does not wish to replace the list of indicators provided in the *Kenya Investigation Authorisation* case by both the majority judgement, and the Dissenting Opinion of Judge Kaul, but hopes to enrich them, and underline the more important elements.

In cases where the actor in question is not a State or governmental actor, it stands that, in some capacity, the State is complicit, or that it has been co-opted by the perpetrating group. It follows that, in order to be able to do so, the actor in question must have sufficient power to achieve this. This power is coupled by a political will to do so. It is asserted that these characteristics do not unduly narrow the boundaries of the definition of '*organisation*' to one that is State-like. It is in fact broader, but still sufficiently guards against the inclusion of random acts of violence, or those acts that may be dealt with under domestic criminal law. Smith, in her mission to include transnational organised crime groups under the remit of Article 7, succinctly summarises common characteristics amongst such groups as including such characteristics as a hierarchical structure, economic power, and political influence.[300] Transnational organised crime groups certainly cannot be considered State-like. Nonetheless, they may have sufficient power to escape domestic prosecution. It should be noted, however, that where a State is unable to prosecute, but not necessarily unwilling, the need for the organisation in question to be politically powerful falls away.

[299] Kirsch & Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (n 188) 31.
[300] Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (n 55) 1115.

For example, the Movement for the Liberation of Congo had a policy of attacking François Bozizé's supporters, in a manner that was clearly politically motivated, in an environment where there was certainly domestic inability to prosecute, as indicated by the Central African Republic's self-referral to the ICC.[301] Additionally, where a State is unwilling but able to prosecute, the need to prove a political purpose is less urgent, as State cooperation ensures it is self-evident. The post election violence in Kenya in 2008 was clearly politically motivated. The Mungiki criminal gang was allegedly employed to aid pro-Party of National Unity (PNU) youth to commit attacks against civilians targeted as supporters of the Orange Democratic Party (ODM).[302] Paralleling this, there was a policy to target supporters of the PNU, in order to attack them and extricate them from the Rift Valley region of Kenya, '*in the ultimate goal of gaining power and creating a uniform voting block*'.[303] In this instance, the group actors had sufficient political power and political motive to generate cancerous politics.

Where a State is unwilling to prosecute perpetrators of widespread or systematic attacks against a portion of the civilian population, it is evident that there is some level of State involvement, encouragement or acceptance of the atrocity. Therefore the actor in question may well be part of the State apparatus, and thus is likely to be acting pursuant to an implicit or explicit State policy. It is also possible that a State may be unable to prosecute at the domestic level, perhaps because the orchestrating group is powerful enough to circumvent prosecution. Thus, the power of an organisation is very pertinent to assessing whether a group is capable of falling under the remit of Article 7. Further, the importance purpose of an organisation has been substantiated at every stage of this study. Organisations that have as their primary purpose the attacking of a portion of the civilian population set themselves apart from groups that may cause harm to innocent civilians in pursuit of some other gain. The latter generally do not go unpunished by the State, unless they are sufficiently powerful to co-opt the State. The former are stamped not just by their principles aims, but also by the way they select their victims. They may target a slice of the

[301] 'ICC-Prosecutor receives referral concerning Central African Republic' (ICC Press Release, 2005) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx> accessed 15 September 2013.

[302] *Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09 -01/11-01, Pre-Trial Chamber II, 8 March 2011 ¶ 15.

[303] Ibid. ¶26.

population based upon their religion, their ethnicity or on other persecutory reasons, with a view to prevent such a group from participating in public life, an inherently political endeavour; but they may also cherry-pick their prey based on a wholly '*innocent choice*' that the victim embarks upon. Group-based attacks aimed at stifling any civilian population's fundamental rights in this manner are innately political: an attempt to change the political landscape.

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