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THE POLICY UNDERLYING CRIMES AGAINST HUMANITY: PRACTICAL REFLECTIONS ON A THEORETICAL DEBATE

ABSTRACT. This article argues that the debate concerning the theoretical characterization of the policy requirement as either an element of crime or an evidentiary relevant circumstance for crimes against humanity is deficient. Comparative case law analysis illustrates that this characterization does not fundamentally affect the position, meaning and scope of the policy underlying crimes against humanity in judicial practice. This can be explained by the "open texture" of legal rules and the factor-based character of judicial decision-making. This article aims to initiate a practical debate that evaluates the added value of a policy element on the basis of its application in individual cases.

I INTRODUCTION

Crimes against humanity are an elusive and uncertain category of international crimes. Despite the significant clarification of the meaning and scope of this international crime in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), fundamental questions remain. One of the issues of continuous debate, in both academia and judicial practice, is the necessity of the incorporation of a policy requirement in the *chapeau* of crimes against humanity and the desired form and scope of such a requirement. The debate demonstrates a particular disagreement amongst scholars on the characterization of the policy requirement in the crimes against humanity concept. Whereas one group of scholars qualifies the policy requirement as a necessary element of crimes against humanity that

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ought to be established before an act may be qualified as a crime against humanity, other question both the necessity of and the legal basis for the incorporation of a policy requirement in the *chapeau* of crimes against humanity. Rather, they consider the existence of a policy underlying the crimes as a relevant factual circumstance that may be used as evidence for establishing the *chapeau* elements of crimes against humanity, in particular the widespread of systematic attack-requirement.

These opposing views on the character of the policy requirement in the crimes against humanity concept are similarly reflected in the jurisprudence of the ICTY and the International Criminal Court (ICC). On the one hand, the ICTY has held that the existence of a policy underlying the crimes committed is not an autonomous element of crimes against humanity, but may be evidentially relevant in evaluating the systematic character of the attack against the civilian population. On the other hand, the Rome Statute of the ICC in Article 7(2) explicitly incorporates a state or organizational policy as an autonomous element of the crime.

Analysis of the case law of both these institutions, however, shows that the theoretical characterization of the policy requirement does not exclusively determine its practical application. Despite the contrary theoretical understanding of the character of the policy requirement by the ICTY and the ICC, their factual substantiation of the existence of a policy is comparable. Furthermore, the finding of the existence of a policy appears to have no greater relevance when it is observed as an element of crime in the context of the ICC than as an evidential circumstance in the ICTY's jurisprudence. The ICTY and ICC use and apply the policy in a similar manner.

The similar construction of the policy requirement by the ICTY and ICC detracts from the practical value of the current academic debate. In light of recent practice, the distinction between the recognition of the policy as a legal element or as a ''mere'' relevant factual circumstance, becomes an academic one. This article argues that discussions about the added value of the policy element may not be limited to academic distinctions concerning the abstract characterization of the law, but must always take account of how the law is applied in individual cases. The article accordingly aims to induce a more practical debate where the added value of the policy element to the crimes against humanity concept is observed on the basis of its application in individual cases.

The first part of the article (section II) describes the current state of the academic debate concerning the policy requirement. The term 'policy requirement' has become a term of art in academic literature on crimes

against humanity. The use of the term 'requirement' in this context is, however, misleading. It implies that the existence of a policy is a necessary condition for crimes against humanity whereas this, in fact, is still the object of debate. The author hereinafter therefore generally reserves the terms 'policy requirement' and 'policy element' for the situations in which the existence of a policy is considered as a necessary and autonomous element of crime. In the situations in which the policy is observed as a "mere" relevant factual circumstance it is described by the terms 'relevant circumstance' or 'factor'. Having said that, in this first part of the article the terminology used in the academic debate is adopted. In the second part of the article (sections III and IV), the case law of the ICTY and the ICC is discussed. Emphasis is thereby placed on the factual circumstances that are used when applying the policy factor/requirement in individual cases. Furthermore, a comparison is made between the practical application of the policy factor/requirement by the ICTY and ICC. In section V, the practical application of the policy is contrasted with its theoretical characterization. This section illustrates that the inclusion of the policy as an element of crime does not necessarily generate a different crimes against humanity concept than the recognition of the policy as a relevant factual circumstance. In the final part of the article (section VI), the divergence between the theoretical characterization and the practical application of the policy will be explained on the basis of the factor-based character of legal reasoning in (international criminal) law.

II A FUNDAMENTAL DISAGREEMENT

International scholars generally agree that isolated, individual and randomly committed acts of violence should be excluded from the scope of crimes against humanity.[1] A wave of spontaneous, unrelated

[1] M. McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes Against Humanity' (2000) 22 *Human Rights Quarterly* 335, 375–376; G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard International Law Journal* 237, 314–315; K. Ambos & S. Wirth, 'The Current Law of Crimes against Humanity' (2002) 13 *Criminal Law Forum* 1, 30; R. Dixon (revised by C. Hall), 'Article 7 Crimes Against Humanity', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Baden–Baden: C.H.Beck/Hart/Nomos, 2nd ed., 2008) 168, 169; W. A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law & Criminology* 953, 954; G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2nd ed., 2009) 288.

and randomly committed crimes that are the product of mere individual action cannot qualify as crimes against humanity. Rather, crimes against humanity are criminal acts that are part of a larger context of organized violence. This limitation of the crimes against humanity concept is essential in distinguishing international crimes from ''ordinary'' domestic criminality.[2]

Under the Nuremberg Charter, these thoughts were reflected in and ascertained by the 'war nexus'.[3] This requirement restricted the jurisdiction of the Nuremberg Tribunal to crimes against humanity committed 'before or during the war' and 'in execution or in connection with any crime within the jurisdiction of the Tribunal', i.e. crimes against peace or war crimes.[4]

In the years following World War II, the validity of the war nexus was, however, increasingly questioned. In 1984, one of the delegates to the International Law Commission (ILC) in this respect held that while belligerency and criminality were closely linked in the World War II period, 'in the modern age the concept of an international crime has acquired a greater degree of autonomy and covers all offences which seriously disturb the international public order'.[5] The delegates agreed that the concept of crimes against humanity had become effectively autonomous and was no longer linked with war crimes or crimes against peace.[6]

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[2] P. Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal* 457, 489; B. Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 *Columbia Journal of Transnational Law* 787, 787.

[3] Van Schaack (n. 2 above) 850; Ambos & Wirth (n. 1 above) 5.

[4] In this respect Robert Jackson considered that '[i]t has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business…The reason that this program of extermination of the Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern'. Minutes of Conference Session of July 23, 1945. Quoted in Van Schaack (n. 2 above) 799.

[5] D. Thiam, Special Rapporteur, Second Report on the Draft Code of Offences Against the Peace and Security of Mankind [1984], 2 Y. B. Int'l Comm'n, UN Doc A/CN.4/SerA/1984, 90.

[6] Summary Records of the 1960s Meeting, [1986] 1 Y. B. Int'l L Comm'n 104, UN Doc A/CN.4/SerA/1986.

With the removal of the war nexus and the recognition of crimes against humanity as an autonomous international crime, the legal elements excluding isolated, random and individually committed crimes from the crimes against humanity concept had to be sought elsewhere. The initiatives that were formulated in this respect primarily focused on the character of the attack in the context of which the crimes were committed.[7] International scholars argued that crimes may only qualify as crimes against humanity when they are committed in the context of a widespread or systematic attack that was instigated or tolerated by a policy or plan of the acting authority.[8] Today, the widespread or systematic attack-requirement is generally recognized as an essential element of crimes against humanity.[9] The legal status of the policy, conversely, continues to be surrounded by uncertainty and disagreement.

Two different views on the legal status of the policy may be discerned. Both of these views recognize the relevance of the policy for distinguishing crimes against humanity from ''ordinary'' crimes falling within domestic criminal jurisdiction. The disagreement between them concerns the proper position or characterization of the policy within the crimes against humanity concept.

The first view, expressed by amongst others, William Schabas and Cherif Bassiouni, considers the recognition of a policy requirement necessary, if not vital, for distinguishing crimes against humanity from common domestic crimes.[10] Two fundamental arguments are

[7] Additionally, there were some proposals to find the distinguishing character of crimes against humanity in the *mens rea* of the accused by including the requirement of a discriminatory motive or the exclusion of personal motives. These proposals did, however, not have a long life. They were promptly rejected by the ICTY in the Tadić Appeals Judgment.

[8] M. Lippmann, 'Crimes Against Humanity' (1997) 17 *Boston College Third World Law Journal* 171, 264; Y. Dinstein, 'Crimes Against Humanity After Tadić' (2000) 13 *LJIL* 373, 379. Also see Hwang (n. 2 above) 489–491; Van Schaack (n. 2 above) 787.

[9] W. A. Schabas, *UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) 191–192; G. Boas, J. L. Bischoff & N. L. Reid, *International Criminal Law Practitioner Library, Volume 2* (Cambridge: Cambridge University Press, 2008) 35. Also see Hwang (n. 2 above) 490; Van Schaack (n. 2 above) 850; McAuliffe de Guzman (n. 1 above) 375; Mettraux (n. 1 above) 259; Dixon (n. 1 above) 177.

[10] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999) 244–246; Schabas, 'State Policy as an Element of International Crimes' (n. 1 above) 982; W. A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 *LJIL* 847, 853.

presented for this position. Firstly, it is argued that the policy requirement addresses concerns about the unqualified disjunctive test of the widespread or systematic attack-requirement.[11] With the dissolution of the war nexus from the *chapeau* of crimes against humanity and its replacement with the disjunctive widespread or systematic attack-test, the crimes against humanity concept arguably became applicable to widespread, yet unrelated, crimes. The crimes against humanity concept would thus encompass the criminal acts of serial killers, mafias and motorcycle gangs.[12] The policy requirement is considered essential for the exclusion of such criminal acts from the scope of crimes against humanity. It ascertains a certain degree of organization in cases of mere widespread attacks. Secondly, the policy requirement warrants the involvement of a higher authority in the commission of crimes against humanity.[13] The establishment of 'some kind of link with a State or a de facto power in a certain territory by means of the policy of this entity' is necessary to ascertain that 'a town with an extraordinarily high level of criminality- resulting in a great number of victims' could not qualify as a crime-site for crimes against humanity.[14] It follows from these two arguments that these scholars consider the inclusion of an autonomous policy requirement in the *chapeau* of crimes against humanity essential for upholding the international nature of the concept.

This view is strongly opposed by the second group of scholars. They hold that the inclusion of the policy requirement in the *chapeau* of crimes against humanity is unsubstantiated. Guénaël Mettraux in this respect has argued that 'there is nothing in customary international law which mandates the imposition of an additional require-

[11] D. Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (1999) 93 *AJIL* 43, 47; Bassiouni (n. 10 above) 244–246; Schabas, 'State Policy as an Element of International Crimes' (n. 1 above) 960.

[12] Schabas, 'State Policy as an Element of International Crimes' (n. 1 above) 960.

[13] Hwang (n. 2 above) 49; Bassiouni (n. 10 above) 249–252; Ambos & Wirth (n. 1 above) 34.

[14] Ambos & Wirth (n. 1 above) 34. The authors hold that the 'intensity' of this link differs according to the character of the attack. 'The policy in the case of a systematic attack would be to provide at least certain guidance regarding the prospective victims in order to coordinate the activities of single perpetrators. A systematic attack thus requires active conduct from the side of the entity behind the policy. (…) A widespread attack which is not at the same time systematic must be one that lacks any guidance or organization. The policy behind such an attack may be one of mere deliberate inaction (*toleration*).'

ment that the acts be connected to a policy or plan'.[15] The policy requirement thus lacks a legal basis. Furthermore, reference is made to the redundancy of the incorporation of a policy requirement in the *chapeau* of crimes against humanity.[16] It is argued that the level of organization ascertained by the policy requirement is equally upheld by the civilian population- and widespread or systematic attack-requirements. The alleged purpose of the policy requirement, the exclusion of random and isolated acts from the scope of crimes against humanity, is thus already served by other *chapeau* elements.[17] On the basis of these two arguments, the second group of scholars argues that the policy underlying the crimes committed is not an autonomous element of crime, but an evidentiary factor the court may take into account in the context of its assessment of the other *chapeau* elements.

After years of discussion, the debate between the two groups of scholars appears to have arrived at an impasse. Both groups have ensconced themselves behind a host of legal sources that apparently substantiate their respective points of view and are unwilling to leave their positions. Consensus about the theoretical characterization of the policy appears to be beyond reach.

This impasse may be broken by supplementing the debate on the theoretical characterization of the policy with a practical discourse in which the position, meaning and scope of the policy in the crimes against humanity concept are analyzed and evaluated on the basis of the application of this concept by international courts and tribunals in individual cases. This practical evaluation of the crimes against humanity concept provides new insights into the value of the inclusion of a policy requirement in the *chapeau* of crimes against humanity.

[15] Mettraux (n. 1 above) 281–282.

[16] See Ambos & Wirth (n. 1 above) 21; Dixon (n. 1 above) 179–180; Werle (n. 1 above) 300.

[17] The *Tadić* Trial Chamber accordingly considered that 'the term population does not mean that the entire population of a given state or territory must be victimized; the expression simply denoted that crimes against humanity must be crimes of collective nature and thus exclude single or isolated acts'. *Prosecutor* v. *Tadić* (Trial Judgment) Case No. IT-94-1-T (7 May 1997) [hereinafter *Tadić* Trial Judgment] para. 644.

III THE ICTY AND THE POLICY FACTOR

3.1 *General Considerations*

Article 5 of the ICTY Statute, criminalizing crimes against humanity, does not explicitly incorporate a policy requirement. In the *Tadić* Trial Chamber judgment, the ICTY however considered that the wish to exclude isolated and random acts of individuals from the crimes against humanity concept restricts the concept to crimes committed in the context of a widespread or systematic attack directed against a civilian population and implies that 'there must be some form of a governmental or organizational policy to commit these acts'.[18] In subsequent jurisprudence, the recognition of the policy as a necessarily implicit requirement of crimes against humanity was, however, increasingly questioned and critically observed.[19] This ultimately resulted in the explicit rejection of the policy requirement in the *Kunarac* Appeals Chamber judgment. The Chamber held that

> [N]either the attack nor the acts of the accused needs to be supported by any form of ''policy'' or ''plan''. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. (…) [P]roof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus the exis-

[18] *Tadić* Trial Judgment (n. 17 above) paras. 644 and 653. The ICTR similarly considered that the policy requirement is inherent in the 'systematic attack requirement' when it held that '[t]he concept of ''systematic'' may be defined as thoroughly organized 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 is formally adopted as the policy of a state. There must however be some kind of preconceived plan or policy'. *Prosecutor* v. *Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 580. Also see *Prosecutor* v. *Kayishema & Ruzindana* (Trial Judgment) Case No. ICTR-95-1-T (21 May 1999) paras. 123–124.

[19] See *Prosecutor v. Kupreškić* et al. (Trial Judgment) Case No. IT-95-16-T (14 January 2000) [hereinafter *Kupreškić* et al. Trial Judgment] paras. 551–555; *Prosecutor v. Kordić & Čerkez* (Trial Judgment) Case No. IT-95-14/2-T (26 February 2001) [hereinafter *Kordić & Čerkez* Trial Judgment] para. 182; *Prosecutor v. Jelisić* (Appeal Judgment) Case No. IT-95-10-A (5 July 2001) para. 48.

tence of a plan or policy may be evidentially relevant, but it is not a legal element of the crime.[20]

The characterization of the policy underlying the crimes committed as a ''mere'' evidentiary relevant circumstance, or relevant factor, was continuously affirmed in later judgments.[21]

In elaborating on the character of the policy factor, the ICTY held that the policy underlying the crimes should entail the commission of a multiplicity of criminal acts against a civilian population.[22] This does not imply that the policy needs to be formally adopted or declared either expressly or precisely.[23] The policy may be inferred from the totality of the factual circumstances. The *Blaškić* Trial Chamber in this respect considered that the existence of a plan may be deduced from *inter alia*: the general historical circumstances and the overall political background; the establishment and implementation of autonomous political structures; the general content of the political programme; media propaganda; the establishment and implementation of autonomous military structures; the mobilization of armed forces; the execution of temporally and geographically repeated and co-ordinated military offensives; the existence of links between the military hierarchy and the political structure and its programme; the

[20] *Prosecutor v. Kunurac* (Appeal Judgment) Case No. IT-96-23 & IT-96-23/1-A (12 June 2002) [hereinafter *Kunurac* Appeal Judgment] para. 98.

[21] See *Prosecutor v. Krstić* (Appeal Judgment) Case No. IT-98-33-A (19 April 2004) [hereinafter *Krstić* Appeal Judgment] para. 225; *Prosecutor v. Blaškić* (Appeal Judgment) Case No. IT-95-14-A (29 July 2004) [hereinafter *Blaškić* Appeal Judgment] para. 100; *Prosecutor v. Limaj* et al. (Trial Judgment) Case No. IT-03-66-T (30 November 2005) [hereinafter *Limaj* Trial Judgment] para. 184; *Prosecutor v. Martić* (Trial Judgment) Case No. IT-95-11-T (12 June 2007) [hereinafter *Martić* Trial Judgment] para. 49. This jurisprudential development may similarly be observed at the ICTR. Whereas the first judgments held that the policy requirement is inherent in the 'systematic attack' requirement, in the later jurisprudence, the ICTR adopted a more expansive interpretation of the term 'systematic'. See *Prosecutor v. Semanza* (Appeal Judgment) Case No. ICTR-97-20-A (20 May 2005) para. 269; *Prosecutor v. Gacumbitsi* (Appeal Judgment) Case No. ICTR-2001-64-A (7 July 2006) para. 84; *Prosecutor v. Nahimana* et al. (Appeal Judgment) Case No. ICTR-99-55-A (28 November 2007) para. 922; *Prosecutor v. Seromba* (Appeal Judgment) Case No. ICTR-2001-66-A (12 March 2008) para. 149.

[22] *Tadić* Trial Judgment, para. 653.

[23] *Tadić* Trial Judgment, para. 653; *Kupreškić* et al. Trial Judgment, para. 552; *Prosecutor v. Nikolić* (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) Case No. IT-94-2-R61 (20 October 1995) [hereinafter *Nikolić* Rule 61 Decision] para. 26; *Prosecutor v. Blaškić* (Trial Judgment) Case No. IT-95-14-T (3 March 2000) [hereinafter *Blaškić* Trial Judgment] para. 204.

occurrence of alterations in the ethnic composition of populations; the imposition of discriminatory measures; and the scale of the violence perpetrated.[24]

Furthermore, the ICTY consistently held that the established policy does not need to be that of a *de jure* state.[25] Forces which, although not part of the legitimate government, have *de facto* control over, or are able to move freely within the defined territory may be just as capable as states of implementing a policy that leads to the commission of crimes against humanity. They can therefore be held equally criminally responsible for such crimes. Whether the policy is implemented by a *de jure* state or a *de facto* power, the policy does not need to be conceived at the highest hierarchical level.[26] It may be developed at any level of the state or organization that exercises *de facto* power over the territory.

3.2 *Factual Application of the Systematic Attack-Requirement*

Since the ICTY does not consider the policy as an autonomous element of crimes against humanity, it is not individually evaluated. Instead, the policy factor is analyzed and evaluated in the context of the systematic attack-requirement. The factual circumstances the ICTY uses, either explicitly or implicitly, to assess the systematic character of the attack, vary. They can be divided into three distinct categories: circumstances concerning the preparation of the attack; circumstances concerning the characteristics of the attack; and contextual circumstances.[27]

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[24] *Blaškić* Trial Judgment, para. 204. The reasoning of the *Blaškić* Trial Judgment concerning the policy underlying the crimes committed was addressed on appeal. The Appeals Chamber held that is was unclear whether the Trial Chamber deemed the existence of a plan to be a legal element of crime and affirmed previous jurisprudence that qualifies the policy as evidentially relevant in proving that the crime was committed against a civilian population and was widespread or systematic in character (para. 100, 120). However, the Appeals Chamber did not reject the Trial Chamber's reference to the enumerated factual circumstances. These circumstances will therefore be considered accepted as evidence of a plan or policy underlying the crimes committed.

[25] *Tadić* Trial Judgment, para. 654; *Kupreškić* et al. Trial Judgment, para. 552.

[26] *Nikolić* Rule 61 Decision, para. 26; *Blaškić* Trial Judgment, para. 205.

[27] Some of the circumstances may be classified under multiple (sub)categories. The categories thus to some extent overlap. However, this does not fundamentally devalue the categorization as the factual circumstances get a different colour in each of the three categories.

In the context of the first category reference is made to, *inter alia*: preparatory meetings held between officials and citizens during which the possibility of an attack is discussed[28]; pre-emptive warnings of an imminent attack given by the officials to citizens from their ethnic group to give them the opportunity to leave the area before the attack[29]; the training of military personnel[30]; the increased presence or control of military troops[31]; unusual troop movements[32]; the purchase and distribution of arms[33]; the installation of roadblocks and barricades leading to the villages[34]; and the imposition of a curfew and discriminatory measures.[35]

The second category of factual circumstances is concerned with the characteristics of the attack itself. These characteristics firstly relate to the means and methods of attack. In this respect attention may be paid to the complexity and organized character of the attack[36]; the co-ordination amongst and between the different troops involved in the attack[37]; and the type and amount of armaments used.[38] Secondly, reference is made to the consequences of the attack. In particular, evidence indicating the devastating and discriminatory

[28] *Blaškić* Trial Judgment, para. 389; *Kordić & Čerkez* Trial Judgment, paras. 610–613, 630; *Martić* Trial Judgment, para. 303.

[29] See *Blaškić* Trial Judgment, paras. 389, 573, 624; *Kordić & Čerkez* Trial Judgment, para. 645; *Prosecutor v. Kordić & Čerkez* (Appeal Judgment) Case No. IT-95-14/2-A (17 December 2004) [hereinafter *Kordić & Čerkez* Appeal Judgment] para. 511.

[30] See *Martić* Trial Judgment, paras. 144–148.

[31] See *Blaškić* Trial Judgment, paras. 359, 390, 504; *Prosecutor v. Mrkšić* et al. (Trial Judgment) Case No. IT-95-13/1-T (27 September 2007) [hereinafter *Mrkšić* et al. Trial Judgment] para. 465.

[32] See *Blaškić* Trial Judgment, paras. 390, 504.

[33] See *Blaškić* Trial Judgment, para. 504.

[34] See *Blaškić* Trial Judgment, paras. 350, 361, 624; *Mrkšić* et al. Trial Judgment, para. 470.

[35] See *Blaškić* Trial Judgment, paras. 359, 388, 411–412, 512; *Martić* Trial Judgment, paras. 227, 349, 351.

[36] See *Blaškić* Trial Judgment, paras. 503, 506; *Mrkšić* et al. Trial Judgment, paras. 43, 472.

[37] See *Blaškić* Trial Judgment, paras. 401, 624; *Kordić & Čerkez* Trial Judgment, para. 637; *Martić* Trial Judgment, para. 351.

[38] See *Kordić & Čerkez* Trial Judgment, para. 635; *Mrkšić* et al. Trial Judgment, para. 470.

consequences of the attack is considered relevant for establishing the organized and thus systematic character of the attack.[39]

The factual circumstances in the third category differ from the previously mentioned circumstances in the sense that they are not limited to one specific attack. Instead, they describe the overall context of violence. This context firstly entails the political background against which the attack took place. In this respect, reference may be made to the issuance of a declaration of independence by one of the parties to the conflict[40]; the concentration of political and military power within specific institutions and their increased control over daily life[41]; the issuance of warnings from one ethnic group against another to leave the area[42]; the issuance and expiration of ultimata that force certain ethnic groups to disarm and/or to be subject to the power of another[43]; the expression of nationalistic statements or calls for violence by politicians in the media or during meetings[44]; and, finally, the imposition of discriminatory measures possibly leading to changes in the ethnic composition of the area.[45] The second element that determines the context of the attack is the overall scale of the crimes committed. This scale is defined in terms of both the total number of crimes committed and the consequences of the attacks.[46] The third contextual element concerns the relations between the various crimes and/or attacks committed. This element does not so much describe the character of the context in which the attack took place, but rather determines the scope of the context. On the basis of the relations between the individual crimes and/or

[39] See *Blaškić* Trial Judgment, paras. 411–412, 512; *Kordić & Čerkez* Trial Judgment, paras. 635, 643; *Martić* Trial Judgment, paras. 227, 349, 351; *Mrkšić* et al. Trial Judgment, paras. 55–59, 465–469, 472.

[40] See *Blaškić* Trial Judgment, paras. 129, 136, 344; *Kordić & Čerkez* Trial Judgment, para. 472; *Martić* Trial Judgment, para. 473; *Mrkšić* et al. Trial Judgment, paras. 20, 32.

[41] See *Blaškić* Trial Judgment, paras. 344, 359, 361, 364; *Kordić & Čerkez* Trial Judgment, paras. 481–491, 496; *Martić* Trial Judgment, paras. 131, 135, 137, 139, 149–158.

[42] See *Blaškić* Trial Judgment, paras. 389, 573, 624.

[43] See *Blaškić* Trial Judgment, paras. 353–355, 359, 361, 545; *Kordić & Čerkez* Trial Judgment, paras. 499, 603, 649; *Martić* Trial Judgment, paras. 164, 166.

[44] See *Blaškić* Trial Judgment, paras. 341, 387, 496, 538; *Martić* Trial Judgment, para. 166; *Mrkšić* et al. Trial Judgment, paras. 24–25.

[45] See *Blaškić* Trial Judgment, paras. 361, 365–366.

[46] See *Kordić & Čerkez* Trial Judgment, paras. 635, 750.

attacks, the Tribunal may be able to establish a pattern of crimes consisting of similar criminal conduct that defines the larger context of violence within which the individual crimes were committed. The relations between the crimes and/or attacks committed, may be assessed in terms of their temporal and geographical scope; the means and methods of attack; the troops that were involved; the type of crimes committed and the consequences thereof.[47]

3.3 *Factual Application of the Policy Factor*

In what way is the policy factor reflected in the ICTY's evaluation of the systematic attack-requirement on the basis of the three categories of factual circumstances discussed above? This question may be answered by observing the application of the systematic attack-requirement in light of the factual circumstances the *Blaškić* Trial Chamber considered indicative of a policy underlying the crimes committed. It is possible to identify that the ''*Blaškić* policy circumstances'' are analogous to the contextual circumstances referred to with respect to the systematic attack-requirement. The policy factor thus appears to manifest itself in the ICTY's use of contextual circumstances in its assessment of the systematic character of the attack.

The case law illustrates that the contextual circumstances hold an important position in the ICTY's evaluation of the systematic attack-requirement. In particular, the use of contextual circumstances that establish the relations between the crimes and/or attacks committed, is central in the assessment of the systematic character of the attack. In light of its understanding that 'the improbability of the accidental occurrence of a pattern of similar criminal conduct, is a common expression of the systematic occurrence of acts of violence',[48] the ICTY has regularly substantiated the systematic character of the attack on the basis of the pattern of the crimes committed.[49] In *Mrkšić*

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[47] See *Blaškić* Trial Judgment, paras. 573, 624; *Kordić & Čerkez* Trial Judgment, paras. 520, 576, 642–643, 665, 667, 723, 750, 802; *Martić* Trial Judgment, paras. 351, 427; *Mrkšić* et al. Trial Judgment, para. 472; *Kordić & Čerkez* Appeal Judgment, paras. 449, 667–668; *Prosecutor v. Martić* (Appeal Judgment) Case No. IT-95-11-A (8 October 2008) [hereinafter *Martić* Appeal Judgment] para. 318.

[48] See *Kunurac* Appeals Judgment, para 94; *Blaškić* Appeals Judgment, para. 101; *Kordić & Čerkez* Appeal Judgment, para. 94; *Martić* Trial Judgment, para. 49.

[49] See *Blaškić* Trial Judgment, paras. 573, 624, 750; *Kordić & Čerkez* Appeal Judgment, paras. 667–668; *Martić* Trial Judgment, para. 349; *Mrkšić* et al. Trial Judgment, paras. 19–37, 43, 472. Less explicit, but certainly not less relevant in this

et al. the Trial Chamber, for example, held that the systematic character of the attack was evidenced by 'the JNA's approach to the taking of each village or town and the damage done therein'.[50] In particular, the fact that the troops followed similar lines of attack in each of the attacked villages and the indiscriminate manner in which the attack was executed, were considered relevant in this respect.[51] In this manner, the *Mrkšić* Trial Chamber established a factual relationship between the various crimes and/or attacks committed. In Kordić and Čerkez, the Appeals Chamber conversely adopted a more abstract approach in its evaluation of the relations between the various crimes and/or attacks. It qualified the attack as systematic on the basis of the mere similarity of the legal qualifications of the crimes that were committed (e.g. murder and inhumane acts) within certain temporal and geographical limits.[52]

The ICTY's assessment of the systematic attack-requirement on the basis of the relations between the various attacks and/or crimes committed, appears to be essential in light of the objective of excluding random acts of violence from the scope of crimes against humanity. Evidence of preparation for attacks and the organized and co-ordinated manner in which these attacks were executed may well indicate that the attack was pre-meditated or purposely executed in this manner. However, it does not exclude isolated incidents from the crimes against humanity concept. The exclusion of such incidents is only ascertained by the establishment of a relationship between the various crimes and/or attacks committed. In this way, the individual

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Footnote 49 continued
respect, is the ICTY's evaluation of the crimes committed per region and its frequent description of the political and military context in which the crimes were committed.

[50] *Mrkšić* et al. Trial Judgment, para. 472.

[51] 'The system of attack employed by the JNA typically evolved along the following lines; (a) tension, confusion and fear is built up by a military presence around a village and provocative behavior; (b) there is then artillery or mortar shelling for several days, mostly aimed at the Croatian parts of the village; in this stage churches are often hit and destroyed; (c) in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and delivery to the JNA of all weapons; village delegations are formed but their consultations with JNA military authorities do not lead, with the exception of Ilok, to peaceful arrangements; with or without waiting for the results of the ultimata a military attack is carried out; and (d) at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varies from murder, killing, burning and looting to discrimination.' *Mrkšić* et al. Trial Judgment, para. 43.

[52] *Kordić & Čerkez* Appeal Judgment, paras. 667–668.

crimes and/or attacks are taken out of their isolation and linked to the larger context of violence. The contextual circumstances are essential for establishing this link.

The ''factual method'' that was employed by the *Mrkšić* et al. Trial Chamber must in this respect be preferred over the ''abstract method'' adopted by the *Kordić and Čerkez* Appeals Chamber. The mere equivalence of legal qualifications does not adequately establish an empirical relation between the various incidents. It consequently does not sufficiently assure the exclusion of random, individual crimes that are unrelated to the larger context of violence.

Summarizing, it can be concluded that the contextual circumstances hold an essential and central position in the ICTY's evaluation of the systematic attack-requirement. As these contextual circumstances are analogous to the ''*Blaškić* policy circumstances'', the factual establishment of a policy has arguably become the principal indicator of the systematic character of the attack. The critical attitude of the ICTY versus the policy as an element of crime has thus not prevented the Tribunal from placing the policy factor at the core of its evaluation of the systematic attack-requirement.

IV THE ICC AND THE POLICY REQUIREMENT

4.1 *General Considerations*

In contrast to the ICTY Statute, the Rome Statute of the ICC in Article 7 explicitly incorporates a policy element in the *chapeau* of crimes against humanity. The article reads as follows

> (1) For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (…)
> (2) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[53]

During the drafting negotiations, the delegates agreed that crimes against humanity should be restricted to crimes committed within a larger context of organized violence. They however disagreed on the

[53] UN Doc A/CONF. 183/9 (emphasis added).

manner in which this objective should be accomplished. On the one hand, a number of delegations argued that the disjunctive widespread or systematic attack-test may lead to the inclusion of a spontaneous wave of unrelated crimes in the crimes against humanity concept.[54] Since this is contrary to the objective of excluding randomly committed criminal conduct from the scope of crimes against humanity, these delegates considered it necessary to establish a cumulative relation between the qualifiers of the attack. On the other hand, a second group of delegates argued that the widespread or systematic attack- and civilian population-requirements sufficiently assure the exclusion of random and isolated acts from the crimes against humanity concept.[55]

A compromise between the two opposing groups was reached by supplementing the widespread or systematic attack-requirement with a policy element. By incorporating this element in the definition of the 'attack directed against any civilian population', this definition does not only comprise of a quantitative element ('course of conduct involving the multiple commission of acts'), but also of a qualitative element (the policy element). Both these elements ought to be fulfilled in the case of either a widespread or a systematic attack. The policy element thus ascertains a certain level of organization in the case of a mere widespread attack and assures that random acts committed pursuant to an individual plan cannot qualify as crimes against humanity.[56]

The exact meaning of the policy element remained largely undecided at the Rome Conference. Whereas some scholars argued that a policy 'is something akin to systematicity',[57] others held that the policy element 'is more flexible' and does not require the high degree of organization and orchestration characteristic of the systematic attack-requirement.[58] Further clarity on the character of the policy element can be gleaned from the emerging jurisprudence of the ICC. In its decision on the confirmation of charges against Katanga and Ngudjolo Chui, Pre-Trial Chamber I held that the policy element,

[54] Robinson (n. 11 above) 47; McAuliffe deGuzman (n. 1 above) 372.

[55] Robinson (n. 11 above) 47.

[56] M. Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (2004) 5 *San Diego International Law Journal* 112, 116; Werle (n. 2 above) 300.

[57] Boas, Bischoff & Reid (n. 9 above) 106–107.

[58] Robinson (n. 11 above) 48, 50–51; McAuliffe deGuzman (n. 1 above) 374; Badar (n. 56 above) 115.

[E]nsures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organized and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public and private resources. (…) An attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.'[59]

This interpretation of the policy element has been understood as introducing a particularly high threshold. It was even argued that Pre-Trial Chamber I has, in this way, interpreted the policy element as being synonymous with the systematic attack-requirement,[60] thereby effectively replacing the alternative 'widespread or systematic attack' requirement with a cumulative 'widespread and systematic attack' requirement.

A confirmation of the synonymous meaning of the policy element and the systematic attack-requirement may be found in the Pre-Trial Chamber's interpretation of the term 'systematic':

The term 'systematic' has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis.[61]

The required form of the policy is further expanded upon in Article 7(3) of the Elements of Crime. Article 7(3) holds that 'the policy to commit such attack requires that the state or organization actively promote or encourage such an attack against a civilian population'. Pre-Trial Chamber I considered that this means that the attack

[59] *Prosecutor v. Katanga & Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) [hereinafter *Katanga* Confirmation of Charges] para. 396.

[60] M. Halling, 'Push the Envelop – Watch it Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' (2010) 23 *LJIL* 827, 836–837.

[61] *Katanga* Confirmation of Charges, para 397. The (evidential) relationship between the systematic attack requirement and the policy element may also be observed in *Prosecutor* v. *Harun & Kushayb* (Decision on the Prosecution's Application under Article 58 (7) of the Statute) ICC-02/05-01/07 (27 April 2007) [hereinafter *Harun & Kushayb* Decision on the Application of Article 58(7)] para 62. The Pre-Trial Chamber considered that 'systematic refers to the organized nature of the acts of violence and the improbability of their random occurrence. The Chamber is also of the view that the existence of a state or organizational policy is an element from which the systematic nature of an attack may be inferred'.

should be planned, directed or organized.[62] This does not imply that the policy needs to be explicitly defined or formalized.[63] The existence and content of the policy may, instead, be deduced from 'the occurrence of a series of events'.[64] In this respect, reference may be made to the factual circumstances listed in the *Blaškić* Trial Chamber judgment.[65]

Article 7(2) of the Rome Statute explicitly recognizes both states and organizations as possible entities behind a policy pursuant to, or in furtherance of, which crimes against humanity were committed. The meaning and scope of the term 'organization' is controversial and has been extensively debated.[66] Pre-Trial Chamber II on this point held that:

[62] *Katanga* Confirmation of Charges, para. 396.

[63] *Katanga* Confirmation of Charges, para. 396; *Prosecutor v. Bemba Gombo* (Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (10 June 2008) [hereinafter *Bemba* Application for a Warrant of Arrest] para. 81.

[64] *Katanga* Confirmation of Charges, para. 396; *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) [hereinafter *Kenya* Authorization Decision] para. 84.

[65] *Kenya* Authorization Decision, para. 87. The factual circumstances considered relevant by the *Blaškić* Trial Chamber are listed in section 3.1 of this article. This use of the ICTY's jurisprudence to interpret the Rome Statute is criticized by Judge Kaul in his dissenting opinion to this decision. Judge Kaul holds that '[j]urisprudential references to the ad hoc tribunals and that of other hybrid tribunals, such as the Special Court for Sierra Leone ("SCSL"), are, in my opinion, to be treated with utmost caution (…) A cautious approach is even more warranted in the event that the basic texts of other courts and tribunals do not contain the same legal *requirements* in a provision as contained in the Court's Statute. In this respect, it is worth noting that the pertinent provisions in the statutes of the ICTY and the ICTR do not contain *expressis verbis* a legal requirement equivalent to that of Article 7(2)(a) of the Rome Statute, namely the legal requirement of a 'State or organizational policy'. (paras. 28 and 31, footnotes omitted).

[66] See Schabas, 'State Policy as an Element of International Crimes' (n. 1 above) 953–982; Werle (n. 1 above) 301. Also see W. A. Schabas, 'Crimes Against Humanity: The State Plan or Policy Element', in L. N. Sadat & M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law, Essays in Honour of M. Cherif Bassiouni* (The Hague: Martinus Nijhoff Publishers, 2008) 347; Claus Kreβ, 'On the Outer Limits of Crimes Against Humanity: The Concept or Organization Within the Policy Requirement: Some Reflections on the March 2010 Kenya Decision' (2010) 23 *LJIL* 855.

[T]he formal nature of a group and the level of its organization 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.[67]

The majority of the Pre-Trial Chamber thus included purely private organizations that are capable of setting up and carrying out a policy to commit an attack in the crimes against humanity concept. This interpretation of 'organizational' remains, however, highly controversial.[68] It is hoped that future ICC judgments will offer some clarity on this point.

4.2 *Reservations*

Before engaging in an analysis of the ICC's case law, two reservations should be made at the outset. Firstly, any analysis of the ICC's case law is limited somewhat by virtue of the fact that as a relatively young court, it has rendered only a small number of relevant decisions, which in and of themselves are not entirely consistent. As such, it is as yet impossible to speak of the ICC's position or to identify a definitive line of reasoning. With regard to the policy element, for example, it is possible to observe two diverse understandings and two related means of application of the law in the decisions of the Pre-Trial Chambers. On the one hand, Pre-Trial Chamber I has brought the policy element under the heading and within the context of the systematic attack-requirement. This Pre-Trial Chamber, for example, considered that the attack against the civilian population of Bogoro village was part of a systematic attack because the violent acts 'were not random acts of violence against the civilian population, but were committed pursuant to a common policy and an organised common plan'.[69] In adopting this reasoning, the Pre-Trial Chamber appears to

[67] *Kenya* Authorization Decision, para. 90.

[68] In an extensive dissenting opinion Judge Kaul concluded that both textual and teleological arguments lead to a more restricted interpretation of the term 'organizational' that is limited to 'state-like' organizations. '[T]he juxtaposition of the notions ''State'' and ''organization'' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those ''organizations'' should partake of some characteristics of a State. Those characteristics eventually turn the private ''organization'' into an entity which may act like a State or has quasi-State abilities' (Dissenting opinion Judge Kaul para. 51). For an academic comment on the decision see Kreβ (n. 66 above) 855–873.

[69] *Katanga* Confirmation of Charges, para. 413. See also *Bemba* Application for a Warrant of Arrest, para. 33; *Harun & Kushayb* Decision on the Application of Article 58(7), paras. 62–67.

consider the existence of a policy as an evidentiary relevant circumstance for the establishment of the systematic character of an attack. On the other hand, in the Decision on the Authorization of an Investigation into the Situation of the Republic of Kenya (*Kenya* decision) Pre-Trial Chamber II viewed the policy element separately from the widespread or systematic-requirement.[70] It thus characterized the policy element as an autonomous element of crime. In future decisions, the ICC will have to provide further certainty on the proper application and evaluation of the policy element. Until that time, it remains difficult to make conclusive statements about the ICC's understanding of the character and position of the policy element.

Secondly, academic research into the practical application of the law by the ICC is affected by the inherently limited factual evaluation that takes place in pre-trial decisions. As pre-trial decisions are rendered before the examination of the facts underlying the charges against the accused, they cannot and do not include an extensive factual substantiation of the decision. The Pre-Trial Chamber decision that best provides preliminary insights into the way in which the court applies the crimes against humanity concept to the facts of a specific case, is Pre-Trial Chamber II's *Kenya* decision. This decision will therefore form the basis for the further assessment of the practical application of the policy element by the ICC. It should, however, be kept in mind that this assessment is merely preliminary and that its findings may need adjustment in response to future developments.

4.3 *Factual Application of the Policy Element*

In the *Kenya* decision, Pre-Trial Chamber II refers to a variety of factual circumstances to substantiate its decision that an organizational policy underlies the crimes committed. The circumstances the Pre-Trial Chamber refers to can be divided into the same three categories as discerned in the context of the ICTY's systematic attack-analysis, namely: circumstances relating to the preparation for attack, circumstances concerning the characteristics of the attack and those defining the political, military and social context in which the attack took place.

In the context of the preparation category the ICC refers *inter alia* to: meetings of local leaders, businessmen and politicians during which the violence was coordinated and weapons and money were

[70] *Kenya* Authorization Decision, paras. 115–128.

distributed[71]; the training in camps[72]; the enlistment of gangs to unleash violence on perceived rival communities[73]; and the warnings that were given to people in anticipation of the violence.[74] The second category of circumstances relating to the characteristics of the attack concern: the coordinated and organized manner of attack; the large size of the groups that carried out attacks from different directions; and the fact that the troops fought in shifts.[75] Additionally, the Pre-Trial Chamber takes account of the materials and types of armament used in the course of the attack. The factual circumstances that fall within the third contextual category concern the evidence of public statements by politicians in the media or on leaflets in which the violent aim of the attack is articulated and the execution of simultaneous attacks on different villages.

This application and substantiation of the policy element in the *Kenya* decision gives rise to two observations. Firstly, it appears that Pre-Trial Chamber II adopts a broader understanding of the policy requirement than the ICTY. Whereas in the ICTY's jurisprudence the policy factor is reflected in the contextual circumstances, the ICC's Pre-Trial Chamber II evaluates the policy element by observing the entire range of factual circumstances relevant for establishing the systematic character of the attack. By doing so, the policy element and the systematic attack-requirement may in practice become analogous concepts.

This analogous understanding of the policy element and the systematic attack-requirement is also illustrated by the ICC's practice of substantiating these two elements in an interchangeable manner. The policy element and the systematic attack-requirement appear to operate as ''communicating vessels''. When either of these elements is established on the basis of an evaluation of the factual circumstances, the other is ascertained without further substantiation. In the decision on the confirmation of charges against Katanga and Chui Pre-Trial Chamber I, for example, concluded that the attack on Bogora village was systematic in character on the basis of the pattern of attacks. This finding was based on the common characteristics of the attacks committed; the large scale of the attack; the large number of persons

[71] Ibid., paras. 118–119.

[72] Ibid., para. 119.

[73] Ibid., para. 127.

[74] Ibid., para. 120.

[75] Ibid., para. 121.

targeted; and the organized common plan underlying the acts of violence.[76] The existence of the policy underlying the crimes committed was subsequently accepted without further substantiation. This contrasts with the approach of Pre-Trial Chamber II in the *Kenya* decision where it established the policy element on the basis of relatively extensive reasoning and factual evidence, while later accepting the systematic attack-requirement without further substantiation.

A second observation concerning the factual substantiation of the policy element in the *Kenya* decision, is that the contextual circumstances appeared to play a limited role in the Pre-Trial Chamber's reasoning. The Pre-Trial Chamber's conclusion that a policy is underlying the crimes committed is primarily based on the preparatory measures that were taken and the characteristics of the attack.

These two observations illustrate that the inclusion of a policy element in the *chapeau* of crimes against humanity has so far not led to a more central focus on the policy by means of an extensive evaluation of the contextual circumstances.

4.4 *Evaluation*

The case law analysis indicates that the inclusion of the policy element in the Rome Statute has not resulted in a more prominent role for the policy in the crimes against humanity concept. Despite their different theoretical understanding and characterization of the policy, the ICTY and ICC evaluate it in a comparable manner. With this analysis in mind, it is argued that the theoretical differentiation between the policy as either an element of crime or as an evidentiary relevant circumstance is, in essence, merely academic. This conclusion may lead some commentators to argue that this is more a deficiency in the application of the law than of the law itself. The fact that the policy element has little added value to the systematic attack-requirement is not a consequence of inaccurate rule-making, but of improper rule-application. The policy element is explicitly recognized in the Rome Statute as an element of crimes against humanity. The ICC thus has the obligation to give effect to the element as such. Indeed, it must be acknowledged that the inclusion of a policy element as an autonomous requirement of crimes against humanity can have restrictive value. The fact that the policy element is explicitly included in the Rome Statute obliges the ICC to evaluate this element in every case that comes before it. With this in mind, the ICC's

[76] *Katanga* Confirmation of Charges, paras. 412–416.

interchangeable substantiation of the policy element and the systematic attack-requirement must be criticized. Even though this practice is understandable in view of the factual analogy between the policy element and the systematic attack-requirement (why would the Chamber engage in the same factual substantiation twice?), by observing the two elements of crime in this alternative manner, the Pre-Trial Chambers deny the policy element and systematic attack-requirement their character and position as autonomous and necessary conditions of crime that should be individually established and substantiated in every case.[77]

At the same time, it must be observed that the meaning, scope, position and restrictive value of the policy cannot be determined by the mere inclusion of a policy element in a Statute. As the elements of crime are formulated in relatively abstract and general terms, they can be customized to the factual situation to which they are applied. This is clearly illustrated by the ICTY's evaluation of the crimes against humanity concept.[78] Through its specific interpretation and application of the *chapeau* elements of crimes against humanity, the ICTY has ascertained both objectives of the policy element, namely the exclusion of random large-scale crimes and the exclusion of crimes committed pursuant to individual plans or in furtherance of the policy of private organizations not exercising *de facto* authority without recognizing the policy as an element of crimes against humanity. With respect to the first of these objectives, four characteristics of the ICTY's jurisprudence should be discerned.

First, the ICTY has applied the systematic attack-requirement in a manner that emphasizes the larger context of organized violence in which the crimes are committed. By emphasizing the contextual circumstances the Tribunal ensures that isolated incidents are excluded from the crimes against humanity concept. Second, the ICTY's characterization of the attack as systematic generally coincides with its qualification as widespread.[79] There are thus hardly any cases of mere large scale violence in which the establishment of a policy underlying the crimes committed has a restrictive influence. Third, in those cases in which the ICTY did qualify the attack as merely widespread, reference

[77] In this light also see Dissenting Opinion Judge Kaul with the *Kenya* Authorization Decision, paras. 31–32.

[78] For the ICTY, the elements of crime are not laid down in the Statute, but have been explicated in case law.

[79] Schabas, *UN International Criminal Tribunals* (n. 9 above) 192; Boas, Bischoff & Reid (n. 9 above) 107.

was still made to the contextual circumstances that linked the widespread crimes to each other. In this manner, the ICTY still construed a situation of organized violence.[80] Fourth, the link between the various individual crimes committed may be ascertained by the requirements that the attack is committed in the context of an armed conflict and directed against a civilian population. Both these elements establish a connection between the individual crimes and the larger context of violence. This approach has ensured that the ICTY recognizes the organized character of crimes against humanity. Despite its rejection of the policy as a necessary element of crimes against humanity, the Tribunal has thus formed and applied the crimes against humanity concept in such manner as to ascertain the exclusion of widespread, yet unrelated, crimes from the crimes against humanity concept.

The second objective of the policy element, the ascertainment of the involvement of a high-level authority in the crimes, is upheld because the contextual circumstances listed and referred to by the ICTY in the context of the systematic attack-requirement mostly refer to the implication of a higher authority.[81] They establish a link between the individual crime and the political, military or institutional context in which the crime was committed. Crimes committed pursuant to an individual plan are thus excluded from the scope of crimes against humanity.

The fact that the ICTY has ascertained the objectives of the policy element despite its rejection of the policy as an autonomous element of crimes against humanity is, of course, no guarantee that future courts will operate in a similar manner and achieve a similar result. The specific, relatively unproblematic, application of the crimes against humanity concept by the ICTY is connected to and depends on the character of the cases brought before this tribunal. The cases concern crimes that were committed during an (inter)national armed conflict between multiple ethnic groups. Furthermore, the crimes were mostly executed in an organized manner pursuant to a policy. The factual context in which the crimes were committed, was thus of such character

[80] See *Martić* Trial Judgment, para. 469.

[81] The *Blaškić* Trial Chamber in this respect referred to amongst others the overall political background; the establishment and implementation of autonomous political structures; the general content of the political programme; media propaganda; the establishment and implementation of autonomous military structures; the mobilization of armed forces; the execution of temporally and geographically repeated and co-ordinated military offensives; and the existence of links between the military hierarchy and the political structure and its programme (para. 204). Also see Schabas, *UN International Criminal Tribunals* (n. 9 above) 193.

that the Tribunal did not have to consider situations of widespread, yet unrelated, armed violence. In this light, the ICTY could logically and understandably award the contextual circumstances a central position in its substantiation of the systematic character of the attack.

The ICC may, however, be presented with more varied and controversial situations since the Rome Statute opens the jurisdiction of the ICC to situations of large scale violence outside the context of an armed conflict. In the situation in Kenya, for example, the contextual circumstances were far less evident. The Pre-Trial Chamber consequently focused on other factual circumstances evidencing the organized character of the attack against the civilian population.

Could the recognition of the policy as an element of crime have an added value in these and similar cases of unorganized/loosely organized large-scale violence? The answer to this question depends on the interpretation and application of the policy element by the ICC and its interpretation and application of the other *chapeau* elements. These are still largely undetermined. With respect to the interpretation of the policy element by the ICC, it can, however, already be observed that the ICC appears to have seriously limited the added value of the policy element by adopting a relatively broad understanding of the organizational policy concept. The majority in the *Kenya* decision considered that this concept includes private organizations. By doing so, the Pre-Trial Chamber diminished the exclusive restrictive effect of the policy element, that is the requirement of the involvement of a state or a ''state like'' organization in the crimes committed. The other *chapeau* elements, in particular the widespread or systematic attack- and the civilian population-requirements, appear to require some form of organization. It is, after all, practically difficult, if not impossible, for individuals or unorganized persons to execute an attack with these characteristics. These requirements do, however, not necessarily limit the crimes against humanity concept to crimes that involve a State or ''State like'' organization. Had the majority of the ICC interpreted the organizational policy concept in a more restricted manner, the policy element could on this point have had a restraining effect on the crimes against humanity concept. This observation illustrates that the elements of crimes against humanity are interconnected.[82] The abstract interpretation and practical application of one element does not merely determine its own

[82] In this light also see L. J. van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity', in S. Darcy & J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 80, 102.

meaning, scope and position, but additionally influences the value and need for other elements of crime. The value of and need for an autonomous policy element are concordantly related to the interpretation and application of the widespread or systematic attack-requirement and the civilian population-requirement.

Furthermore, it must be observed that the position and meaning of the policy are not exclusively determined by its abstract characterization, but are additionally shaped by its application to the specific factual situation of individual cases. Despite their different theoretical characterization of the policy, the ICTY and the ICC apply the policy underlying crimes against humanity in an essentially similar manner. This practical similarity of a theoretically different concept may be explained by the ''open-texture'' of legal rules and the factor-based character of legal reasoning.

V JUDICIAL REASONING

5.1 *The Open-Texture of Legal Rules*

Judicial institutions operate on the basis of argumentative legitimacy,[83] or put simply, they must justify their decisions on the basis of rational arguments. In law, there are explicit presumptions regarding the form and substance of these arguments. The primary and most fundamental presumption with respect to judicial argumentation in (international criminal) law is that it is rule-based.[84] For the most part, the rules of international criminal law are laid down in statutes and judicial decisions. These sources jointly explicate the elements of international crimes- the individually necessary and jointly sufficient conditions that give rise to criminal responsibility for international crimes. Article 7 of the Rome Statute, for example, determines that

[83] H. L. Packer, *The Limits of Criminal Sanction* (Stanford: Stanford University Press, 1968) 88; B. Bengoetxea, *The Legal Reasoning of the European Court of Justice, Towards a European Jurisprudence* (Oxford: Oxford University Press, 1993) 116–117; L. Moral Soriano, 'The Use of Precedents as Arguments of Authority, Arguments *ab exemplo*, and Arguments of Reason in Civil Law Systems' (1998) 11 *Ratio Juris* 90, 91–92; A. Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 *JICJ* 585, 589; W. Twining & D. Miers, *How to do Things with Rules* (Cambridge: Cambridge University Press, 2010) 268–270.

[84] F. R. Coudert, *Certainty and Justice, Studies of the Conflict Between Precedent and Progress in the Development of Law* (New York: D. Appleton and Company, 1914) 1. See also G. Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1, 5–6; Twining & Miers (n. 83 above) 32.

the listed individual criminal acts may be qualified as crimes against humanity only when the accused knew that these acts were committed as part of a widespread or systematic attack directed against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

The elements of crime are general in character. That means that they are context-independent and may be applied to a variety of unknown future situations. The elements of crime are therefore necessarily and inevitably formulated in relatively abstract terms. They are consequently characterized by, what H.L.A. Hart calls, an 'open texture'.[85] In the context of concrete cases, when the particular case has to be observed in the light of general rules of law, questions may arise concerning the meaning and scope of the abstract elements of crime. Does the term 'systematic' in the elements of crimes against humanity, for example, imply a preconceived plan?

Rather than settle the discussion on the meaning and scope of the law, the elements of crime have thus stimulated an interpretative process.[86] In response to questions raised in individual cases, judges have interpreted and explicated the elements of crime by rephrasing the abstract terms of these elements in more concrete definitions or criteria. By doing so, they have provided further guidance for the assessment of the elements of crime in a specific situation. With respect to the widespread or systematic attack-requirement of the crimes against humanity concept, the ICTY has, for example, held that the systematic character of the attack refers to 'the organized nature of the violence and the improbability of their random occurrence'.[87] These judicial interpretations are authoritative for the Tribunal. They are consistently referred to when setting out the meaning and scope of the law and have acquired a central position in the Tribunal's reasoning.

[85] J. M. Brennan, *The Open Texture of Moral Concepts* (Michigan: Macmillan, 1977); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) 12. The open texture of rules of international criminal law has been previously signaled and illustrated by various scholars. See J. Klabbers, 'The Meaning of Rules' (2006) 20 *International Relations* 295, 298; H. van der Wilt, 'Equal Standards? On the Dialectics Between National Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229, 263–264; E. van Sliedregt, 'System Criminality at the ICTY-Individual Responsibility & Collective Criminality', in A. Nollkeamper & Harmen van der Wilt (eds.), *System Criminality* (Cambridge: Cambridge University Press, 2009) 183, 199–200.

[86] Klabbers (n. 85 above) 300.

[87] See *Kunurac* Appeal Judgment, para 94; *Blaškić* Appeal Judgment, para. 101; *Kordić & Čerkez* Appeal Judgment, para. 94; *Martić* Trial Judgment, para. 49.

Like the elements of crime, the judicial interpretations can, however, not be applied in a simple, deductive manner. Because the definitions and criteria are still formulated in general terms, their meaning and scope are not carved in stone, but allow leeway for diverse applications. Depending on the way in which definitions and criteria are applied to the facts of a case, they may acquire either a broad or a restrictive meaning. It thus follows that even the combined analysis of the elements of crime and their judicial interpretation will not exclude doubts regarding their applicability in individual cases.

The ICTY and ICC are clearly aware of this problem and have responded to the need for further practical guidance. This is most evident in the situations in which they explicitly listed a non-exhaustive number of factual circumstances they consider relevant in light of the elements of crime and their judicial criteria. The *Blaškić* Trial Chamber in this respect, for example, held that the existence of a plan underlying the indicted crimes may be surmised from *inter alia* the general historical circumstances; media propaganda; the mobilization of armed forces; and the imposition of discriminatory measures.[88] In other cases, the judges' acknowledgment of the influence of the factual circumstances on the meaning and scope of the law is somewhat less specific. With respect to several legal concepts, the ICTY has, for example, declared that the applicability of a legal requirement or element of crime may be inferred from the facts of the case.[89] The relevant factual circumstances and their relative weight must subsequently be derived from the Tribunal's evaluation of and decision regarding the legal requirement or element in the individual case before the court.

5.2 *The Character and Position of Factual Circumstances*

The factual circumstances of a case, whether explicitly listed or implicit in a court's reasoning, play an essential role in the evaluation of the accused's responsibility for international crimes. As was previously illustrated, the meaning and scope of legal concepts, can only be properly understood in the light of their application to a specific factual context.[90] In contrast to the elements of crime and the judicial

[88] *Blaškić* Trial Judgment, para. 204.

[89] The ICTY has, for example, held that the purpose of a Joint Criminal Enterprise does not need to be explicitly formulated, but may be inferred from the facts of the case. See *Prosecutor v. Vasiljević* (Appeal Judgment) Case No. IT-98-42-A (25 February 2004), para. 100.

[90] Similar observations have been made by Van der Wilt and Van Sliedregt. See Van der Wilt (n. 85 above) 265–268; Van Sliedregt (n. 85 above) 199–200.

interpretations thereof, the relevant factual circumstances are not laid down as necessary and sufficient conditions of the crime. Instead, they are listed as open-ended illustrations of relevant facts. It thus appears that the factual circumstances function as factors that favour a certain outcome.[91] In factor-based reasoning, the mere existence of a factor does not determine the decision. That means, on the one hand, that not all relevant factors have to be established in every case and, on the other hand, that when they are established, factors do not automatically determine a specific outcome, but merely move the decision-maker in a certain direction. The establishment of an element of crime and the determination of individual criminal responsibility are in this view ultimately based on the balancing and evaluation of all relevant factors and the relations between them.

When applying this theory to the establishment of a policy underlying the crimes committed, it becomes evident that legally relevant circumstances such as the mobilization of armed forces and the imposition of discriminatory measures in an individual case should not be observed as necessary conditions for the establishment of a policy, but as factors favouring the establishment of a policy. The un-coordinated character and the small scale of the crimes, on the other hand, do not exclude the existence of a policy, but do not favour the acceptance of this policy. The ultimate decision depends on the balancing of the first set of arguments, pleading for, and the second set of arguments, pleading against the existence of a policy.

Preliminary research into the process of factor-based reasoning illustrates that its flexible character does not necessarily make this form of reasoning unbounded. Factor-based reasoning is not conducted in a vacuum; it is a means to justify the leap from the general legal rule to the decision in the case at hand.[92] It entails a particular process to determine whether the factual circumstances of the case at hand meet the legal standards laid down in the elements of crime and the judicial interpretations thereof. In the process of factor-based reasoning, the formulation of factors is primarily limited by the goals pursued by the legal provision, whereas the subsequent weighing and balancing of the applicable factors is structured and restricted by the analogous application of factual standards laid down in precedents.

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[91] G. Sartor, *Legal Reasoning: A Cognitive Approach* (Dordrecht: Springer, 2005) 177.

[92] A similar argument appears to be made by Moral Soriano. M. Soriano (n. 83 above) 97.

Not every factual circumstance may be qualified as a factor. Factor-based reasoning rather derives from the thought that factual circumstances only become factors in light of the object of the legal provision.[93] Factors originate from the desire to achieve a certain object and the belief that acting and deciding in a specific manner promotes that object. Sartor in this respect adopts the following reasoning scheme:

> Having goal G; and believing that doing A, under pre-condition C, promotes G is a reason for having the propensity to do action A under pre-condition C (viewing precondition C as a factor favouring action A)[94]

On this basis, factor-based reasoning can be observed as a process or technique that simplifies and operationalizes the process of teleological reasoning,[95] a prominent form of reasoning in international criminal law.[96]

The subsequent weighing and balancing of the established factors is an essential part of the process of factor-based reasoning. For the outcome of the process is not determined by the mere existence of a factor, but by the evaluation of the relative strength of the factors favouring and those disfavouring a certain outcome.[97] The essential question in this respect is when a certain set of factors is sufficient for the qualification of a crime as an international crime or for the establishment of the criminal responsibility of the accused. Different judges may answer this question in different ways. The risk of arbitrary and inconsistent application of the law can, however, be limited by means of analogous reasoning on the basis of precedents.

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[93] Sartor *Legal Reasoning* (n. 92 above) 178; G. Sartor, 'Reasoning with Factors' (2005) 19 *Argumentation* 417, 417–418. Also see Van der Wilt (n. 85 above) 272.

[94] Sartor *Legal Reasoning* (n. 92 above) 179.

[95] Sartor *Legal Reasoning* (n. 92 above) 180.

[96] A. Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia', in T. A. J. A. Vandamme & J. H. Reestman (eds.), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems* (The Hague: Europa law Publishing, 2001) 13, 18; Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Ph.D. Thesis, Leiden University, 2006) 65; J. Powderly, 'Judicial Interpretation at the *ad hoc* Tribunals: Method from Chaos?', in S. Darcy & J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 17, 40–41; D. Robinson, 'The Two Liberalisms of International Criminal Law', in C. Stahn & L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 115, 136–142.

[97] Sartor *Legal Reasoning* (n. 92 above) 221.

5.3 *Precedents in Factor-Based Reasoning*

The use of precedents in legal reasoning is particularly studied in relation to the common law and its doctrine of *stare decisis*.[98] However, it is not unique to comman law. In every legal system judges make use of precedents when deciding cases.[99] The manner in which precedents are used and the weight that is attached to precedents, however, differs. In international criminal law, precedents are not recognized as sources of law nor is the doctrine of *stare decisis* strictly adhered to.[100] This does not mean, though, that precedents are irrelevant in judicial decision-making.[101] They are most explicitly referred to in the reiteration and confirmation of previously defined interpretative criteria and

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[98] D. N. MacCormick & R. S. Summers, 'Introduction', in D. N. MacCormick & R. S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (London: Ashgate/Darthmouth, 1997) 1, 11–12.

[99] MacCormick & Summers (n. 99 above); M. Schahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996); M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004).

[100] *Kupreškić* et al. Trial Judgment, para. 540; *Prosecutor v. Aleksovski* (Appeal Judgment) Case No. IT-95-14/1-A (24 March 2000), paras. 107–114. In the latter case, the Appeals Chamber explicates that 'a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been ''wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'' It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts' (paras. 107–109) (footnotes omitted). The Appeals Chamber furthermore considered that 'a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers (…).The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive' (paras. 113–114).

[101] C. Harris, 'Precedent in the Practice of the ICTY', in R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) 341, 344–356; A. M. Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 *Vanderbilt Law Review* 1, 49.

definitions. Precedents are then used as sources for the applicability of those criteria and definitions without observing the factual analogy between the precedent and the present case.[102] When judicial reasoning is observed as a process of weighing and balancing factors, precedents, however, acquire an additional argumentative role. In this respect, precedents are observed as past situations in which a set of factual circumstances was weighed and decided upon.[103] Assuming that new cases should be decided in a similar manner, one can argue that the fact that a precedent (X) had outcome (Y) in the presence of factors (Z), justifies the thought that this combination of factors (Z) produces this outcome (Y) in future cases as well.[104] A previous decision made on the basis of a combination of factors may in this view be applied analogically in future similar cases. Where differences between cases occur, the judge must ask himself whether these differences justify a defeat of the precedent in light of the underlying purpose of the legal rule.

When observing precedents in this manner, it becomes essential that judges explicate what factors underlie their decision on the accused's responsibility for international crimes. They have to characterize the factual circumstances of the case in light of the relevant factors, judicial definitions and criteria and, ultimately, the elements of crime. For only on the basis of this explication, can judges in future cases evaluate the factual analogies between the precedent and the present case.[105]

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[102] This use of precedents in the context of international criminal law appears to resemble the use of precedents in civil law systems. MacCormick and Summers in this respect observe that 'precedents are commonly conceived as loci of relatively abstract rules or (perhaps even more) principles, and it is generally to the stated rule or principle of law espoused by the court as an interpretation of code or statute that normative force attaches for the subsequent court, even where code or statute does not closely govern. There is usually not, as in common law systems, a restriction of the binding element to a ruling on an issue of law considered in the special light of the material facts of the case. Thus what we call the model of particular analogy plays far less part here. (…) [P]recedents can be treated as applicable, and applied, without any explicit consideration of their aptness for application in the instant case in the light of its material facts (…).' D. N. MacCormick & R. S. Summers, 'Further General Reflections and Conclusions', in D. N. MacCormick & R. S. Summers (n. 99 above) 531, 536–537 and 539.

[103] Sartor *Legal Reasoning* (n. 92 above) 738; Lamond (n. 84 above) 15.

[104] Moral Soriano (n. 83 above) 99; Sartor *Legal Reasoning* (n. 92 above) 738; Lamond (n. 84 above) 15.

[105] M. J. Borgers, 'De Communicatieve Rechter', in *Controverses Rondom Legaliteit en Legitimatie*, Handelingen Nederlandse Juristen-Vereniging 2011-1 (The Hague: Kluwer, 2011) 103, 130–135.

It follows that the fact-based evaluation of the law in factor-based reasoning does not necessarily make the meaning and scope of legal concepts unclear, uncertain or unbounded. Factor-based reasoning rather strikes a balance between the need for flexibility and substantive justice and the need for legal certainty and the rule of law. On the one hand, by observing the totality of relevant precedents in relation to each other, the judge will be able to determine an ordering of factors (which factors and combinations of factors carry sufficient weight to qualify an attack as widespread or systematic?) and will have to decide a new case on the basis of this established ordering. One the other hand, because factors operate in a non-decisive manner, factor-based reasoning is susceptible to the possibility that future cases present new factual circumstances that shed such a different light on the circumstances the Tribunal previously considered sufficient for the establishment of an element of crime, that it may not come to the same conclusion in this future case.[106] The law in this light remains open for continuous development and improvement.

5.4 *Implications for the Policy Requirement and Debate*

When observing the judicial decision-making process as a process of factor-based reasoning, it becomes understandable how and why the inclusion of the policy as an element of crime in the Rome Statute has not resulted in a different understanding of the crimes against humanity concept by the ICC in comparison to the ICTY. The abstract formulation of the policy element in the Rome Statute allows leeway for the recognition of a variety of relevant factors that may be balanced in various ways, resulting in either a more restrictive or a more liberal understanding of the element. By exploiting this leeway when applying the policy element to a factual situation, the ICC is able to apply the element in a manner that is very similar to the ICTY's application of the policy factor in the context of the systematic attack-requirement.

Furthermore, the theory of factor-based reasoning holds that the factors are formulated in light of the object underlying the legal rule or concept. Rules and concepts that pursue a similar object will thus be evaluated on the basis of similar factors. Both the ICTY and the ICC have acknowledged that the object underlying the policy element

[106] K. van Willigenburg, 'Casuïstiek en de Individualiseerbaarheid van Rechterlijke Beslissingen in het Materiële Strafrecht' (2011) 41 *Delikt en Delinkwent* 365. Van Willigenburg derives from J. Darcy, *Ethics Without Principles* (Oxford: Oxford University Press, 2004).

and systematic attack-requirement is the exclusion of isolated crimes committed according to an individual plan from the crimes against humanity concept. In view of the theory of factor-based reasoning, these requirements will thus have to be evaluated on the basis of similar factual circumstances. Consequently, the policy can acquire a similar meaning and scope, irrespective of its qualification as either an evidentiary relevant circumstance or an element of crime.

This is not to say that the inclusion of a policy element in the Rome Statute is unnecessary or useless and will never have an effect on legal doctrine. Nor should it automatically lead to the conclusion that the ICC has misapplied its Statute. It merely states that the meaning, scope and position of the policy do not solely depend on its theoretical characterization, but are additionally shaped by the application of the requirement/factor to specific factual situations. In light of this application, theoretically different conceptions of the policy may acquire an analogous meaning.

These observations do undermine the value of the theoretical distinction between the policy as an element of crime or as an evidentiary circumstance. They show that it is essential that discussions about the value of the inclusion of a policy element in the crimes against humanity concept are not limited to the abstract characterization of the law, but take additional account of its practical application. To date, this has been insufficiently recognized in the academic debate on the policy underlying crimes against humanity. This debate has been primarily concerned with the theoretical characterization of the policy as either an element of crime or a relevant factual circumstance, while little or no attention has been paid to the way in which this factor/requirement is applied in individual cases. By focusing on the theoretical characterization of the policy, legal scholars fail to take account of the way in which the law is shaped in the context of its practical application. They may consequently engage in a debate that is, in essence, merely theoretical. It is therefore advisable that the current debate is supplemented with a more practical discourse in which the jurisprudence of the ICTY and ICC is analyzed and evaluated on the basis of their application of the policy factor/requirement in individual cases. This discourse may demonstrate that the inclusion of the policy as a necessary condition of crimes against humanity does not necessarily guarantee the exclusion of isolated, random and individually committed crimes from the scope of crimes against humanity any more than its recognition as a relevant circumstance. Whether this is so will largely

depend on the application of the policy element to the factual situation of individual cases.

VI CONCLUSIONS

The analysis of the ICTY's and ICC's case law shows that these two institutions apply the policy underlying crimes against humanity in a very similar manner. Their different characterization of the policy as either an element of crimes against humanity or an evidentiary circumstance does not appear to fundamentally affect its position, meaning or scope. This may be explained by the "open-textured" character of legal rules. The abstract terms in which the elements of international crimes are formulated in Statutes and case law, provide leeway for various applications. By using the leeway of the legal elements in the course of their application, theoretically different concepts may acquire an analogous position, meaning and scope. The meaning and scope of legal concepts are thus not merely determined by their theoretical characterization, but also by their practical application.

In this view, the focus of the current academic debate on the theoretical characterization of the policy is deficient. A comprehensive study of the crimes against humanity concept requires an additional analysis of the practical application of the policy requirement. This analysis may show that further restriction of the law is unnecessary or that theoretical legal reforms did not have the expected effect in legal practice.

This article is a first step in the direction of a more practical evaluation of the ICTY's and ICC's understanding and application of legal rules and concepts. Further research into the way in which abstract elements and requirements are applied to specific factual situations is, however, desirable. This research should particularly address the character of factor-based and analogous reasoning and the influence of such reasoning on judicial decision-making in international criminal law.