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STATE POLICY AS AN ELEMENT OF INTERNATIONAL CRIMES

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Recent case law of the international criminal tribunals has tended to focus on the individual mental element of offenders, and dismissed any relevance for State policy as a component of the analysis. It is posited that an individual deviant, acting alone, can commit genocide or crimes against humanity, to the extent that he or she aspires to destroy an ethnic group or to persecute civilians in a widespread or systematic manner. This has led to a distortion in the law, partially explained by a focus on low-level perpetrators in early trials of the International Criminal Tribunal for the former Yugoslavia, but also by mistaken analysis of previous authority. This Article argues for revival of state policy as an element of such crimes.

I. INTRODUCTION

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced," reads the judgment of the International Military Tribunal.[1] This oft-cited phrase expresses a vital idea, but it may also have contributed to some misconception about the nature of international crimes. The Nuremberg court made the statement in answer to the charge that the Nazi leaders were not responsible for war crimes because they were acting in the interests of the German State. Where the famous pronouncement about abstract entities may mislead is in suggesting that the State's role is irrelevant or even secondary to the discussion about crimes against international law.

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[1] France et. al. v. Goering et. al., 22 IMT 411, 466 (Int'l Mil. Trib. 1946).

Article VI of the Charter of the International Military Tribunal defined the subject-matter jurisdiction of the court.[2] In three distinct paragraphs, it listed the core offenses, namely crimes against peace, war crimes, and crimes against humanity.[3] Here, too, an important element is often overlooked. Article VI begins with a preambular paragraph stating that the offenders must have been "acting in the interests of the European Axis countries."[4] This implies a gloss on the statement that "crimes against international law are committed by men," to the extent that the "men" must be acting in the interest of a State. Even summary perusal of the judgment issued in 1946 makes it clear just how central to the prosecution was the policy of the Nazi state.

In recent years, case law has tended to play down the role of State policy in international crimes. In the first genocide prosecution to come to judgment before the International Criminal Tribunal for the former Yugoslavia (ICTY), the Trial Chamber held that a State plan or policy was not an element of the crime of genocide, and that the offense could be committed by an individual acting alone, without any State involvement.[5] A few years later, the Appeals Chamber of the ICTY reached essentially the same conclusion with respect to crimes against humanity.[6] Underpinning this development in the law may be a concern that the requirement of a State policy as an element of such crimes will make prosecution of so-called non-State actors more difficult.

In practice, however, there have been few if any cases before the international tribunals involving entrepreneurial villains who have exploited a situation of conflict in order to advance their own perverse personal agendas. Essentially all prosecutions have involved offenders acting on behalf of a State and in accordance with a State policy, or those acting on behalf of an organization that was State-like in its attempts to exercise control over territory and seize political power, such as the Republika Srpska. Indeed, in 2005, an expert commission of inquiry mandated by the U.N. Security Council to investigate whether genocide was being committed in Darfur answered the question "whether or not acts of genocide have occurred"[7] not by examining the acts of individual offenders,

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[2] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, annex art. 6 (Aug. 8, 1945), 82 U.N.T.S. 279.

[3] *Id.*

[4] *Id.*

[5] Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement, ¶ 100 (Dec. 14, 1999), *aff'd*, Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgement, ¶ 48 (July 5, 2001).

[6] Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgement, ¶ 98 (June 12, 2002).

[7] S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

but by concluding "that the Government of Sudan has not pursued a policy of genocide."[8]

Other factors within the evolving discipline of international criminal law also argue for revival of the role of State policy as an element of international crimes. The Rome Statute of the International Criminal Court[9] and the Elements of Crimes[10] that complements its interpretation suggest a role for State policy that is somewhat enhanced by comparison with the case law of the ad hoc Tribunals. In addition, with the growing focus on "gravity" as a test to distinguish cases that are deserving of the attention of international tribunals, a State policy requirement may prove useful in the determination of whether genocide has occurred. When the important doctrine of "joint criminal enterprise" is applied to so-called big cases, the State policy element becomes decisive. Joint criminal enterprise is the expression used in international criminal law to describe what is better known to national criminal justice systems as common purpose complicity. Perhaps of greatest interest, a requirement of a State policy for certain international crimes, notably genocide and crimes against humanity, facilitates reconciling perspectives on individual criminal responsibility with those of State responsibility.

II. THE DEBATE AND THE AUTHORITIES

The Office of the Prosecutor of the ICTY was very cautious in charging the crime of genocide with respect to atrocities committed during the 1992-1995 war in Bosnia and Herzegovina. Indeed, it appears that there was considerable difference of opinion on the matter within the Office itself as to whether genocide was the appropriate legal term to characterize what was widely described as "ethnic cleansing."[11] However, a few indictments included genocide charges, and one of these came to trial in 1999. It involved a severely disturbed Serb racist, Goran Jelisic, who, over a two-week period, was the principal executioner in the Luka camp, in northwest Bosnia. He was shown to have systematically killed Muslim inmates as well as some Croats. The victims comprised essentially all of the Muslim community leaders. Jelisic was charged with genocide as both an

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[8] Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur*, ¶ 518, U.N. DOC. S/2005/60 (Jan. 25, 2005) [hereinafter *Darfur Report*].

[9] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[10] Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., Addendum, *Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (July 6, 2000) [hereinafter Elements of Crimes].

[11] FLORENCE HARTMANN, PAIX ET CHATIMENT 124-32 (2007).

accomplice and as a principal perpetrator, as well as with crimes against humanity. He agreed to plead guilty to crimes against humanity, but the Prosecutor was not satisfied and insisted that trial proceed on the genocide count.

Examining the evidence at the close of the prosecution's case, the Trial Chamber, with Judge Claude Jorda presiding, concluded that the prosecution had not proven the existence of any organized plan or policy of a State or similar entity to destroy in whole or in part the Bosnian Moslems. Therefore, the Trial Chamber opined that Jelisic could in no way be an accomplice to genocide, because genocide was never committed by others. That is, there was insufficient evidence of the perpetration of genocide in Bosnia in the sense of some planned or organized attack on the Muslim population.[12] After dismissing the charge of aiding and abetting in genocide, the Trial Chamber turned to whether or not Jelisic might have committed genocide acting alone, as the principal perpetrator rather than as an accomplice. The Trial Chamber said this was "theoretically possible," namely that an individual, acting alone, could commit the crime—a kind of Lee Harvey Oswald of genocide. In the end, Jelisic was also acquitted as a principal perpetrator. The Trial Chamber's approach, developed as *obiter dictum* in a manner more appropriate for psychiatry than criminal law, now stands as authority for the entirely speculative and hypothetical proposition that genocide may be committed without any requirement of an organized plan or policy of a State or similar entity.[13] The position of the Trial Chamber was confirmed on appeal:

> The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor *in most cases*. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[14]

These views, however, have not proven to be of any significance in any subsequent prosecutions for genocide at the ICTY. For instance, although two cases at the ICTY have led to findings that genocide took place, no convictions for the crime followed. Of particular concern here is that neither case involved any debate about whether isolated individuals can commit genocide. In the first case, General Krstic, after initially being

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[12] *Jelisic*, Case No. IT-95-10-T, ¶ 98.

[13] *Id.* ¶ 100.

[14] Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgement, ¶ 48 (July 5, 2001) (emphasis added). The Appeals Chamber's dictum was followed in *Prosecutor* v. *Sikirica*. Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, ¶ 62 (Sept. 3, 2001).

convicted of genocide by the Trial Chamber,[15] was acquitted of the charge by the Appeals Chamber. However, he was found guilty of aiding and abetting the genocide perpetrated at Srebenica in 1995 under the direction of General Ratko Mladic.[16] Colonel Blagojevic, another Mladic subordinate, was also convicted of complicity in genocide by the Trial Chamber,[17] but the ruling was overturned on appeal.[18]

In *Krstic*, the factual developments are discussed under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica." The Srebrenica enclave, in eastern Bosnia, was of immense strategic importance to the Bosnian Serbs. Elimination of Muslim population in the area would have allowed the geographic connection of two large areas that each had a Serbian majority. Over the course of a few days in mid-July 1995, Serbian military units summarily executed 7,000 Muslim men and adolescent boys. The Trial Chamber concluded that, "following the take over of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave."[19] The central issue, in terms of the guilt of General Krstic, was whether or not he had knowledge of the plan. As the Trial Chamber found:

> The plan to execute the Bosnian Muslim men may not have been of his own making, but it was carried out within the zone of responsibility of the Drina Corps. Furthermore Drina Corps resources were utilised to assist with the executions from 14 July 1995 onwards. By virtue of his position as Drina Corps Commander, [General Krstic] must have known about this.[20]

Although noting the finding of the Appeals Chamber in *Jelisic* that a plan was not a required element of the crime of genocide, the Trial Chamber did not consider this significant given its finding that the killings were indeed planned.[21] In the second Srebrenica case to come to judgment, *Blagojevic*, the Appeals Chamber quashed a conviction for complicity to commit genocide essentially because the accused did not know of the mass executions and therefore could not have known of the plan.[22]

Thus, the Srebrenica prosecutions to date have not involved any debate about whether isolated individuals can commit genocide. The Trial Chambers and the Appeals Chamber have concluded that the mass killings of Bosnian men were part of an "execution plan" formulated by a State or

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[15] Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 687 (Aug. 2, 2001).
[16] Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement, ¶ 40 (Apr. 19, 2004).
[17] Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgement, ¶ 797 (Jan. 17, 2005).
[18] Prosecutor v. Blagojevic, Case No. IT-02-60-A, Judgement, ¶ 135 (May 9, 2007).
[19] *Krstic*, Case No. IT-98-33-T, ¶ 87; *see also id.* ¶ 427.
[20] *Id.* ¶ 421; *see also Krstic*, Case No. IT-98-33-A, ¶ 238.
[21] *Krstic*, Case No. IT-98-33-T, ¶ 572.
[22] *Blagojevic*, Case No. IT-02-60-A, ¶¶ 122-24.

state-like entity.[23] All of the other genocide prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY) have led to acquittals or abandonment of the charge of genocide. At the International Criminal Tribunal for Rwanda (ICTR), the issue has never even arisen. All knowledgeable observers understand that the Rwandan genocide involved a plan or policy emanating from the State or, at the very least, from a powerful clique within it.

Nevertheless, the evidence in the Srebrenica cases also shows that the execution plan was a last-minute, improvised business, devised by General Mladic and his close collaborators on or about July 11-12, 1995. As such, the Prosecutor apparently did not seriously attempt to establish the existence of a plan prior to that date, one that was part of an overall genocidal strategy of the Bosnian Serb leadership.[24] Thus, the evidence in the Srebrenica trials has not tended to suggest a genocidal plan going beyond the vision of the local military leadership. Nothing produced in the *Milosevic* trial or in proceedings before the International Court of Justice in the *Application by Bosnia and Herzegovina against Serbia and Montenegro* supports the suggestion that the Srebrenica massacre was organized, planned, and coordinated, in its so-called genocidal dimension, at a higher level, or that it responded to the imperatives of a strategic plan. Rather, it has been presented as a perverse local variant on the Serbian ethnic cleansing campaign. As the International Court of Justice has confirmed, the ethnic cleansing program in general is not recognized as being genocidal.[25] Therefore, establishing that the Srebrenica massacre was organized at the local level and that it was not simply a random act does not necessarily respond to a requirement that genocide be committed pursuant to a State policy. Imposing such a criterion would therefore compel a reassessment of the allegedly genocidal nature of the crimes committed at Srebrenica in July 1995.

Unfortunately, the ICTY Appeals Chamber extended its approach on the State policy issue—the existence of a plan or policy is not a legal ingredient of the crime—from genocide to encompass crimes against humanity.[26] Indeed, it referred to its ruling on this point in *Jelisic* in support.[27] In *Jelisic*, the ICTY had relied on a literal reading of the definition of the crime. The text of the definition contains no explicit requirement of a plan or policy. Similarly, with respect to crimes against

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[23] *Krstic*, Case No. IT-98-33-T, ¶ 361, 468; *Krstic*, Case No. IT-98-33-A, ¶ 61, 100.

[24] *Krstic*, Case No. IT-98-33-T, ¶ 360.

[25] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 70 (Feb. 26).

[26] Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶ 98, n.114 (June 12, 2002).

[27] *Id.*

humanity, the text of the Statute contains no explicit requirement of a plan or policy. On the other hand, the Appeals Chamber noted that there had been a significant debate on the matter in the case law and the academic literature. Astonishingly, however, the discussion of this important point was confined to a footnote in the judgment of the Appeals Chamber![28] When the authorities cited in the reference are scrutinized, it is not at all apparent how many of them assist in the conclusion that a State plan or policy is not an element of crimes against humanity.

Generally speaking, the ICTY's very summary discussion of the issue of a State plan or policy with respect to both crimes against humanity and genocide has an air of the superficial. The result reached—that a State plan or policy is not a required element—appears to be a results-oriented political decision rather than a profound analysis of the history of the two

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[28] The footnote in question reads:

> There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (Streicher) and 318-319 (von Schirach); Article II(1)(c) of Control Council Law No 10; In re Ahlbrecht, I.L.R. 16/1949, 396; Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor, (1991) 172 CLR 501; Case FC 91/026; Attorney-General v Adolph Eichmann, District Court of Jerusalem, Criminal Case No. 40/61; Mugesera et al. v Minister of Citizenship and Immigration, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; In re Trajkovic, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; Moreno v Canada (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, 1994 1 F.C. 298, 14 September 1993; Sivakumar v. Canada (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, 1994 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May– 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May– 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No. A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (Jelisic) Appeal Judgement, para 48. Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., Public Prosecutor v Menten, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 I.L.R. 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the factual circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see In re Altstötter, I.L.R. 14/1947, 278 and 284 and comment thereupon in Ivan Timofeyevich Polyukhovich v. The Commonwealth of Australia and Anor, (1991) 172 CLR 501, pp 586-87).

Id.

crimes or of their theoretical underpinnings. The ICTY also appears to have ignored the drafting histories of the crimes as well as subsequent developments such as the work of the International Law Commission.

The ICTY's determination that no State plan or policy is required for crimes against humanity has proven to be more significant than in the case of genocide. For example, the *Kunarac* case involved the detention of women civilians in appalling conditions and their regular mistreatment, including rape. These were crimes committed by members of an organized paramilitary group, but they were not necessarily attributable to a State plan or policy. Kunarac was convicted of crimes against humanity. Expanding the concept of crimes against humanity by eliminating any requirement of a State plan or policy was therefore of considerable legal significance.[29]

To be certain, the Appeals Chamber has not denied the relevance of a plan or policy in the commission of genocide and crimes against humanity. For example, in *Krstic* the Chamber wrote:

> While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence. Similarly, the Appeals Chamber has rejected the argument that the legal elements of crimes against humanity (which include extermination) require a proof of the existence of a plan or policy to commit these crimes. The presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic, but it is not a legal element of a crime against humanity.[30]

Eliminating the State plan or policy element from crimes against humanity has the potential to make the concept applicable to a wide range of criminal acts that go beyond those that are merely random or isolated. Instead of insisting upon a State plan or policy, the contextual element for crimes against humanity comes to depend solely on their "widespread or systematic" nature, but this has the potential to make crimes against humanity applicable to serial killers, mafias, motorcycle gangs, and small terrorist bands. This was certainly not what was intended by the U.N. War Crimes Commission, the London Conference, and the International Military Tribunal when the category of crimes against humanity first received legal definition at the conclusion of the Second World War.

The first codification of crimes against humanity, in Article VI(c) of the Charter of the International Military Tribunal, does not explicitly establish a State plan or policy as an element of crimes against humanity. Presumably it is for this reason that the Appeals Chamber of the ICTY cited Article VI(c) as its first authority for the proposition that there is no State

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[29] *Kunarac*, Case No. IT-96-23/1-A, ¶ 27-43.

[30] Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement, ¶ 225 (Apr. 19, 2004) (internal citations omitted).

plan or policy element in customary international law.[31] However, as mentioned above, the introductory paragraph or *chapeau* of Article VI of the Charter of the International Military Tribunal specifies that accused persons must have been "acting in the interests of the European Axis countries, whether as individuals or as members of organizations." Moreover, the so-called nexus that requires that crimes against humanity be committed "in connection with any crime within the jurisdiction of the Tribunal" had the effect of linking them to crimes which are themselves associated with a State plan or policy, namely war crimes and crimes against peace. Probably the possibility that crimes against humanity might apply to what are today called non-State actors crossed the minds of those who drafted the Charter of the International Military Tribunal.

It is of course true that Nazi propagandist Julius Streicher was convicted of crimes against humanity by the International Military Tribunal despite the conclusion that "the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment."[32] Streicher was a *gauleiter*, or regional party leader, a position of some importance in the Nazi regime. Moreover, his crimes consisted essentially of being a propagandist for Nazi policy. It seems to be reading a lot into the judgment to assert, as did the ICTY Appeals Chamber in *Kunarac*, that his conviction is authority for the view that there is no State plan or policy element with respect to crimes against humanity.

Another example given by the *Kunarac* Appeals Chamber is that of Baldur von Schirach. Since the 1920s, von Schirach had been leader of the Hitler Youth.[33] During the war, he was *Gauleiter*, Reichs Governor, and Reichs Defense Commissioner for Vienna.[34] The Nuremberg Tribunal convicted von Schirach of crimes against humanity for atrocities committed during the Nazi occupation of Austria.[35] The convictions of these Nazi figures at Nuremberg may support the position that a perpetrator of crimes against humanity need not be an "insider" in the plan. However, it cannot buttress the argument that crimes against humanity do not require the existence of a plan, something of which there was no shortage in Nazi Germany.

The International Military Tribunal never directly addressed the issue of whether a plan or policy was an element of the international crimes being

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[31] *Kunarac*, Case No. IT-96-23/1-A, ¶ 98, n.114.

[32] France et. al. v. Goering et. al., 22 IMT 411, 466 (Int'l Mil. Trib. 1946).

[33] *Id.* at 563-64.

[34] *Id.* at 564.

[35] *Id.* at 564-66.

prosecuted. The reason is obvious: the Nazi plan and policy to wage aggressive war and to exterminate the Jews of Europe underpinned the entire case. Why would the Tribunal ever have even spoken to the issue, under the circumstances? For the same reasons, the *Israel v. Eichmann* case[36]—another source upon which the *Kunarac* Appeals Chamber relied—seems flimsy authority indeed for the suggestion that there is no plan or policy element to crimes against humanity. The *Eichmann* court's entire judgment is based upon evidence of the Nazi plan or policy. The Israeli judges concluded that Eichmann had known of the "secret of the plan for extermination" since mid-1941.[37] He was acquitted of genocide for acts committed prior to that date.[38]

Much of the reasoning of the *Kunarac* Appeals Chamber relies upon the literal text of the definitions of crimes against humanity and genocide set out in the ICTY Statute, where there is no explicit reference to a State plan or policy. Yet the same can be said of the "widespread or systematic" language that the *Kunarac* Appeals Chamber has contended is the defining contextual element of crimes against humanity. The Nuremberg Judgment used the words "widespread" and "systematic" on many occasions, but in a general sense, applicable to all of the Nazi atrocities and not as in any way a definitional element of crimes against humanity.[39] In *Eichmann*, the word "widespread" appeared only once ("The Accused also headed a widespread establishment of officials")[40] and "systematic" was not used at all. If the failure of the *Kunarac* Appeals Chamber to find the plan or policy element in *Nuremberg* and *Eichmann* is an argument for dismissing its relevance at customary international law, can't the same thing be said about "widespread or systematic"?

An important and rather glaring oversight in the Appeals Chamber's analysis in the famous footnote in *Kunarac* on this important issue is Article 7(2)(a) of the Rome Statute, which states that crimes against humanity must be committed in the course of an "attack directed against any civilian population" that is "pursuant to or in furtherance of a State or organizational policy to commit such attack."[41] The Appeals Chamber has not hesitated to invoke the Rome Statute as authority for customary international law when the Statute's text corresponds to the Chamber's own views on a particular point. In *Tadic*, for example, when it was first

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[36] A.G. Israel v. Eichmann, 36 I.L.R. 5 (JerDC 1968).

[37] *Id.* ¶ 235.

[38] *Id.*

[39] France et. al. v. Goering et. al., 22 IMT 411, 467, 472, 474, 475, 477, 482, 484, 485, 491, 494, 502, 504, 510, 514, 516, 537, 542, 543, 547, 567, 575 (Int'l Mil. Trib. 1946).

[40] *Eichmann*, 36 I.L.R. 5, ¶ 231.

[41] Rome Statute, *supra* note 9.

enunciating the theory of joint criminal enterprise, the ICTY Appeals Chamber pointed to Article 25(3)(d) of the Rome Statute as important evidence of the *opinio juris* of States and, therefore, of customary law.[42] Of course, Article 7(2)(a) of the Rome Statute leaves room for interpretation, but there can be no doubt that it imposes some kind of contextual element involving a policy. At the very least, the suggestion in the Rome Statute that crimes against humanity have this policy requirement should have been addressed in any reasonably thorough analysis of the question.

Another noteworthy oversight in the *Kunarac* Appeals Chamber's discussion of the question is the Chamber's failure to mention some of the significant national decisions dealing with crimes against humanity. It cited three Canadian cases from lower courts, but did not mention what was at the time the leading case on crimes against humanity of the Supreme Court of Canada, *Regina v. Finta*. The ICTY Appeals Chamber had earlier referred to the *Finta* ruling in *Tadic*, a case where its own views coincided with those expressed by the Canadian Supreme Court.[43] On the State policy issue, however, *Finta* was not helpful to the Appeals Chamber, and it was simply ignored. In *Finta*, the majority of the Supreme Court of Canada said that "'state action or policy' was a prerequisite legal element of crimes against humanity."[44] Similarly, in applying the French *Code pénal*,[45] French cases have taken this as requiring a State plan or policy which requires evidence that crimes against humanity were "organised in the pursuit of a concerted plan against a group of a civil population."[46]

Among the authorities listed by the *Kunarac* Appeals Chamber to support its position that there is no policy element is the Report of the Secretary-General to the Security Council on the draft ICTY Statute. The footnote in *Kunarac* cites paragraphs 47 and 48 of that Report as proof of the "overwhelming support" of the contention that there is no State plan or policy requirement under customary international law. The text of the cited paragraphs reads:

> 47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

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[42] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 222-23 (July 15, 1999).

[43] *Id.* ¶¶ 266-67.

[44] [1994] 1 S.C.R. 701, 823 (Can.).

[45] C. PEN. art. 212-1 (Fr.).

[46] *Barbie*, Cass. crim., Dec. 20, 1985, 1985 Bull. Crim., No. 407; *Touvier*, Cass. crim., Nov. 27, 1992, 1992 Bull. Crim., No. 394.

> 48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[47]

Do these two relatively laconic paragraphs really provide "overwhelming support" for the *Kunarac* Appeals Chamber's position?

The footnote in *Kunarac* also refers to the 1954 draft Code of Offences Against the Peace and Security of Mankind developed by the International Law Commission as an authority supporting its view that there is no State plan or policy element. The contrary would actually appear to be the case. The 1954 draft of the Commission's definition of crimes against humanity reads as follows: "Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*."[48] Members of the Commission had been attempting to reformulate the Nuremberg definition of crimes against humanity so as to eliminate the requirement of a connection with armed conflict. They voted to eliminate this nexus, but initially put nothing in its place.[49] At the next day's meeting, after a night of reflection, the members of the Commission realized that without the contextual element of armed conflict they had made it difficult to distinguish between crimes against humanity and ordinary crimes. They decided to reconsider their earlier decision,[50] and subsequently voted to add the words "[i]nhuman acts by the authorities of a State or by private individuals acting under the instigation or toleration of the authorities against any civilian population."[51] The Report of the International Law Commission concluded:

> [I]n order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State.[52]

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[47] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 47-48, *delivered to the Security Council*, U.N. DOC. S/25704 (May 3, 1993) (internal citations omitted).

[48] *Draft Code of Offences Against the Peace and Security of Mankind* art. 2, 2 Y.B. Int'l L. Comm'n 150, U.N. DOC. A/2693 (emphasis added).

[49] U.N. DOC. A/CN.4/SR.267, ¶ 59.

[50] U.N. DOC. A/CN.4/SR.268, ¶ 11.

[51] U.N. DOC. A/CN.4/SR.270, ¶ 36.

[52] Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 48, ¶ 50.

The International Law Commission did not revisit the draft code for nearly thirty years. In the 1980s, it went through a decade of often extravagant attempts at progressive codification before, at one point, deciding to abandon the classification of crimes against humanity altogether.[53] Basically, the Commission reformulated crimes against humanity as an umbrella concept addressing gross or systematic violations of human rights. The issue of State policy was rarely discussed during this period, although to the extent that the Commission had focused on human rights violations, it can be said that State involvement may have been viewed as a *sine qua non.*

When it produced the final version of the Code of Crimes Against the Peace and Security of Mankind in 1996, the International Law Commission dramatically revised its earlier drafts, and declared that the purpose of the threshold in crimes against humanity is to exclude "a random act" or "an isolated inhumane act."[54] Although the Commentary did not explicitly mention non-State actors or provide any examples to assist in understanding its views, it said that "[t]he instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State."[55] The Commission supported this proposition by citing the Nuremberg judgment, specifically the convictions of Streicher and von Schirach. The rationale of the Tribunal seems to have been that they were acquitted of crimes against peace because they were not Nazi insiders. However, even if Streicher and von Schirach were non-State actors in that they were not part of Hitler's inner circle, their acts were not random or isolated precisely because they were part of the Nazi plan or policy to persecute minorities, as has already been noted earlier in this Article.

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[53] Int'l Law Comm'n, *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session*, ¶ 176, U.N. Doc. A/46/10 (July 19, 1991).

[54] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement, ¶ 648 (May 7, 1997). The "random act" language has also been used in several judgments without acknowledgement to the International Law Commission. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 579 (Sept. 2, 1998); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgement, ¶ 202, n.376 (July 29, 2004); Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 22 (Oct. 7, 1997).

[55] Int'l Law Comm'n, *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session*, art. 18, ¶ 5, U.N. Doc. A/51/10 (1996) [hereinafter *Forty-Eighth Session Report*].

III. GENOCIDE: SPECIFIC INTENT OR POLICY?

With respect to genocide, it is self-evident that nothing in the text of the definition of genocide explicitly identifies the existence of a State plan or policy as an element of the crime of genocide. Genocide was originally defined in Article II of the 1948 Genocide Convention, but an essentially identical provision appears in such modern instruments as the ICTY Statute,[56] the ICTR Statute,[57] and the Rome Statute.[58] During the drafting of the Genocide Convention in 1948, proposals to include an explicit requirement that genocide be planned by a government were rejected.[59] Nevertheless, while theoretical exceptions cannot be ruled out, it is nearly impossible to imagine genocide that is not planned and organized either by the State itself or a State-like entity, or by some clique associated with it. Raphael Lemkin, the scholar who first proposed the concept of genocide in his book *Axis Rule in Occupied Europe*, spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide.[60] In the case of *Prosecutor v. Kayishema*, the ICTR Trial Chamber wrote: "[A]lthough a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization."[61] Furthermore, the Chamber said that "the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide."[62]

The 1996 Commentary of the International Law Commission on its draft Code of Crimes Against the Peace and Security of Mankind seemed to recognize that a State plan or policy was central to the crime of genocide:

> The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a

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[56] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, art. 4, U.N. Doc. S/RES/827 (May 25, 1993).

[57] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 Jan. 1994 and 31 Dec. 1994, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[58] Rome Statute, *supra* note 9, art. 6.

[59] U.N. ECOSOCOR, Report of the Ad Hoc Committee on Genocide, 4th mtg. at 3-6, U.N. Doc. E/AC.25/SR.4 (Apr. 15, 1948); *see also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

[60] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (1944).

[61] Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgement, ¶ 94 (May 21, 1999).

[62] *Id.* ¶ 276.

> subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide.[63]

The Elements of Crimes, adopted by the Assembly of States Parties of the International Criminal Court in September 2002, includes the following element of the crime of genocide: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[64] The Elements eschews the words *plan* or *policy* in favor of requiring a "manifest pattern of similar conduct," but any difference between the two expressions would appear to be largely semantic. Surprisingly, the ICTY Appeals Chamber did not even consider, in either *Jelisic* or *Kunarac*, this rather compelling evidence of *opinio juris* for the presence of a State policy component with respect to genocide and, by analogy, crimes against humanity.[65]

IV. BLURRING STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL LIABILITY

Good evidence as to why a State policy is so important to any determination of the crime of genocide appears in the Report of the Commission of Inquiry on Darfur, set up in late 2004 at the behest of the U.N. Security Council and chaired by the distinguished international legal scholar Antonio Cassese. Answering the Security Council's question of "whether or not acts of genocide have occurred,"[66] the Darfur Commission said "that the Government of Sudan has not pursued a policy of genocide."[67] Explaining its position, the Commission said:

> However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who

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[63] *Forty-Eighth Session Report*, *supra* note 55, at 45.

[64] Preparatory Comm'n for the Int'l Crim. Ct., *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (July 6, 2000).

[65] In a subsequent judgment, the Appeals Chamber observed that the definition of genocide adopted in the Elements of Crimes "did not reflect customary law as it existed at the time Krstic committed his crimes." Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement, ¶ 224 (Apr. 19, 2004).

[66] S.C. Res. 1564, *supra* note 7, ¶ 4.

[67] *Darfur Report*, *supra* note 8, ¶ 518, U.N. Doc. S/2005/60 (Jan. 25, 2005).

> planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[68]

The Darfur Commission did not challenge the case law of the ICTY Appeals Chamber, and did not exclude the possibility that an individual acting alone might have committed genocidal acts.[69] In practice, it attempted to answer the U.N. Security Council's question, whether acts of genocide were committed in Darfur, by looking for evidence of a policy devised by the Sudanese State. A similar phenomenon appears in the February 2007 judgment of the International Court of Justice (ICJ) on the claim filed by Bosnia and Herzegovina against Serbia and Montenegro pursuant to Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, in which the ICJ discussed whether or not the policy of Serbia and its Bosnian allies was one of ethnic cleansing or of genocide.[70]

Both the Darfur Commission and the ICJ looked at genocide through a lens that included State responsibility within its scope. If either actually accepted the theory that genocide does not require a State plan or policy and that it can be committed by a lone perpetrator, they would have looked for evidence that a single individual whose acts were attributable to Sudan or to Serbia had killed a member of a targeted group with the intent to destroy it in whole or in part. The Darfur Commission interpreted the request of the U.N. Security Council that it "determine also whether or not acts of genocide have occurred" to mean whether or not Sudan had a plan or policy to commit such acts. The International Court of Justice reasoned along the same lines.

Both institutions attempted to apply the definition of genocide found in Article II of the 1948 Genocide Convention, which describes genocide as one of five punishable acts, including killing "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." These words distinguish genocide from garden-variety killing. Judgments of the international criminal tribunals are replete with declarations that the defining element of genocide is this "specific intent" or "special intent" or, for continental jurists, its *dolus specialis*.[71] The Darfur Commission described the requirement as follows:

> [A]n aggravated criminal intention or *dolus specialis*: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in

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[68] *Id.*

[69] *Id.* ¶ 520.

[70] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 70, ¶ 190 (Feb. 26).

[71] *See e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 121, 497, 498, 516, 539 (Sept. 2, 1998).

> whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.[72]

The Darfur Commission actually associated the notion of policy with that of specific intent: "Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."[73]

For the International Court of Justice, the acts must be committed "with the necessary specific intent *(dolus specialis)*, that is to say, with a view to the destruction of the group, as distinct from its removal from the region."[74] The ICJ concluded "that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such."[75] Note that the Court referred to "the perpetrators" in a collective sense. The judgment includes a particularly interesting discussion of specific intent in the context of the Srebrenica massacre:

> The issue of intent has been illuminated by the [*Krstic]* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica," the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave" . . . .[76]

As can be seen, in effect the ICJ analyzes specific intent in terms of the existence of a plan, but in criminal law, this is not such a straightforward matter. Several individuals may participate in a common plan, but this does not necessarily mean that they all share the same specific intent.

In the *Bosnia* case, the Applicant was responsible for some of the blurring of the distinction between specific intent and a State plan or policy. The Court noted:

> [T]his argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of

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[72] *Darfur Report*, *supra* note 8, ¶ 491.

[73] *Id*. ¶ 4.

[74] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 70, ¶ 190 (Feb. 26).

[75] *Id*. ¶ 277.

[76] *Id*. ¶ 292.

> practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework."[77]

In effect, Bosnia was arguing that the specific intent to commit genocide could be shown by a pattern of acts perpetrated "within an organized institutional framework." The ICJ considered evidence of official statements by Bosnian Serb officials, but observed:

> The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership[,] to create a larger Serb State, by a war of conquest if necessary[,] did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion.[78]

Here the Court added yet another ingredient to the discussion: the question of motive. Again, *policy* is the better term to describe what was being considered. Conflating specific intent and plan or policy, the Court concluded: "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist."[79] Moreover, "[T]he Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent."[80]

Neither the Darfur Commission nor the ICJ was looking for the specific intent of individual offenders. Rather, they were looking for the specific intent of a State, like Sudan, or a State-like entity, like the Bosnian Serbs. States, however, do not have specific intent. Individuals have specific intent. States have policy. The term specific intent is used to describe the inquiry, but its real subject is State policy. It seems plausible, indeed, likely, that in a campaign of ethnic cleansing carried out at the instigation of a State on a large scale, there will be individual perpetrators who are so driven by racist hatred that they will seek the physical extermination of the victimized group. In other words, acts whose purpose is not genocidal may be perpetrated by groups of individuals, some of whom have genocidal intent. Obviously, when asked whether "acts of genocide been committed," bodies like the Darfur Commission and the ICJ do not pursue their search for these marginal individuals. Rather, they look to the policy.

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[77] *Id.* ¶ 371.
[78] *Id.* ¶ 372.
[79] *Id.* ¶ 373.
[80] *Id.* ¶ 376.

An important legal difficulty here concerns the relationship between State responsibility and individual criminal liability. The Darfur Commission and the International Court of Justice appear to address this through the fiction that a State can have a specific intent. It might be more productive to reverse this logic. Instead of a mechanistic and unsatisfying attempt to impose concepts that belong to individual liability on the behavior of a State, it would be better to take the State policy as the starting point and attempt to relate this to individual guilt. Following this approach, the first issue to be resolved in a determination as to whether genocide is being committed is whether there exists a State policy. If the answer is affirmative, then the inquiry shifts to the individual, with the central question being not the individual's intent, but rather the individual's knowledge of the policy. Individual intent arises, in any event, because the specific acts of genocide, such as killing, have their own mental element, but as far as the plan or policy is concerned, knowledge is the key to criminality.

One important difficulty that this approach helps to resolve is the potential for different results in terms of State responsibility and individual criminal liability, but it also assists in addressing another problem that has perplexed judges at the international tribunals, that of complicity in genocide. They have addressed complicity by convicting those who assist in perpetrating the crime to the extent that the accused knows the intent of the perpetrator.[81] Again, it is not really very realistic to expect an individual to know the intent of another, especially when it is specific intent that is being considered. Even courts will only deduce the intent from the behavior of the perpetrator. The inquiry seems much more logical and efficient when the question to be posed is whether the accomplice had knowledge of the policy. General Krstic was convicted of complicity because the Appeals Chamber believed that he knew of the policy being pursued by General Mladic, not because it believed he had read Mladic's mind and knew of his "specific intent."

Admittedly, this amounts to a radical rethinking of the definition of genocide. It involves reading in to the definition adopted in the 1948 Genocide Convention an element that is, at best, only there by implication. There is nothing inadmissible about this, from the standpoint of treaty interpretation. It may not be justified with reference to the *travaux preparatoires*, but as Judge Shahabuddeen of the ICTY Appeals Chamber noted in his dissenting opinion in *Krstic*, excessive reliance should not be

[81] Prosecutor v. Blagojevic, Case No. IT-02-60-A, Judgement, ¶¶ 119-24 (May 9, 2007).

placed on drafting history.[82] Confirming the importance of a State plan or policy as an element of the crime of genocide has many advantages in terms of coherence and judicial policy.

The same is, of course, true of crimes against humanity. In a recent judgment dealing with crimes against humanity, the Supreme Court of Canada, which a decade earlier had affirmed that State policy was an element of crimes against humanity,[83] took note of recent developments in international case law: "It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement."[84]

V. STATE OR "ORGANIZATIONAL" POLICY

An important objection to such an interpretation of genocide, and crimes against humanity, is the exclusion of non-State actors. This problem can be adequately addressed by a broad construction of the concept of State policy so as to apply to State-like actors as well as States in the formal sense. Bodies like the Republika Srpska, the FARC, the Palestinian Authority, and perhaps the government of Taiwan would be addressed in this manner, but not organizations like the Hell's Angels or the mafia.

Even outside the context of customary international law, this issue will arise in the interpretation of Article 7(2)(a) of the Rome Statute, with its reference to a "State or organizational policy" as a contextual requirement for crimes against humanity. Dictionary definitions consider an organization to comprise any organized group of people, such as a club, society, trade union, or business. Surely the drafters of the Rome Statute did not intend for Article 7 to have such a broad scope, given that all previous case law concerning crimes against humanity, and all evidence of national prosecutions for crimes against humanity, had concerned State-supported atrocities. If they really meant to include any type of organization, such as a highly theoretical "organization" of two people, why did they put these words in at all? The biggest problem for the proponents of the broad view is their inability to explain how the term organization is to be qualified.

In his recent three-volume work, *The Legislative History of the International Criminal Court*, one of the leading experts on crimes against humanity, Professor M. Cherif Bassiouni, argues:

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[82] Prosecutor v. Krstic, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 52 (Apr. 19, 2004).

[83] R. v. Finta, [1994] 1 S.C.R. 701, 823 (Can.).

[84] Mugesera v. Canada, [2005] 2 S.C.R. 100, 2005 SCC 40, ¶ 158 (Can.).

> Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one state, falls within this category. In this author's opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, and for that matter, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses . . . . The text [of article 7(2)] clearly refers to state policy, and the words "organisational policy" do not refer to the policy of an organisation, but the policy of a state. It does not refer to non-state actors . . . .[85]

Professor Bassiouni may be pitching this a little too high because his approach excludes the State-like actors. As I understand his view, the term *organization* is meant to encompass bodies within a State such as the Gestapo and the SS.

At a time when the ICTY Prosecutor appeared to consider that State policy was an essential element of crimes against humanity, she took the view that it need not be confined to State policy, but that it could also be that of a State-like body. Here is how the argument was explained in 1997, in *Tadic*:

> An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy "because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nurnberg Charter]". While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a "de jure" state, or by a terrorist group or

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[85] M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT VOL. I 151-152 (2005); *see also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 243-81 (2d. rev. ed., 1999).

> organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.[86]

Returning to the origins of the concept at Nuremberg, it seems clear that the rationale for recognition of crimes against humanity was to punish crimes that were either authorized by Nazi law or tolerated by the authorities. Isn't that why Article VI(c) of the Charter of the International Military Tribunal concludes with the words "whether or not in violation of the domestic law of the court where perpetrated . . . . "?[87] Over the decades, a principal rationale for prosecuting crimes against humanity as such has been the fact that such atrocities generally escape prosecution in the State that normally exercises jurisdiction, under the territorial or active personality principles, because of the State's own involvement or acquiescence. International atrocity crimes,[88] and crimes against humanity in particular, were created so that such acts could be punished *elsewhere*, and therefore so that impunity could be addressed effectively.

We do not, by and large, have the same problem of impunity with respect to non-State actors. Most States are both willing and able to prosecute the terrorist groups, rebels, mafias, motorcycle gangs, and serial killers who operate within their own borders. At best, international law is mainly of assistance here in the area of mutual legal assistance. For example, there is little real utility in defining terrorism as an international crime because, as a general rule, the States where the crimes are actually committed are willing and able to prosecute. Usually, they have difficulty apprehending the offenders. However, this problem is addressed through international cooperation rather than by defining the acts as international crimes so that they may be subject to universal jurisdiction or by establishing international tribunals for their prosecution.

VI. JOINT CRIMINAL ENTERPRISE, "LARGE-SCALE CRIMES," AND STATE PLAN OR POLICY

Although not identified as such in the statutes of the ad hoc Tribunals, judges have developed a potent theoretical model of accomplice liability known as joint criminal enterprise. Describing the concept, the ICTY Appeals Chamber explained that "international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a

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[86] Prosecutor v. Tadic, Case No. IT-94-1-T, Judgement, ¶ 654 (May 7, 1997) (footnote omitted).

[87] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, annex art. 6 (Aug. 8, 1945), 82 U.N.T.S. 279.

[88] David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law,"* 2 GENOCIDE STUD. & PREVENTION 91 (2007).

common criminal design."[89] The idea is similar to well-known concepts of common purpose complicity in domestic legal systems. According to the recent authorities, the approach is rooted in customary international law, as evidenced with reference to post-Second World War prosecutions,[90] to Article 25(3)(d) of the Rome Statute, and to the provision on which it is based, Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings.[91]

In the *Tadic* Judgment, the ICTY Appeals Chamber noted that often "collective criminality" will involve situations where all co-defendants, acting pursuant to a common design, possess the same criminal intention. There are, however, instances:

> [W]here one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.[92]

The Appeals Chamber has described this concept as the "extended" form of joint criminal enterprise liability.[93]

Tadic found authority for three categories of joint criminal enterprise liability. The first category involves cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention.[94] The second category is similar to the first category, with the common purpose being applied "to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps."[95] In both the first and second categories, the participant must have the criminal intent to commit the

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[89] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 193 (July 15, 1999).

[90] *Id.* ¶¶ 195-220.

[91] *Id.* ¶¶ 221-22. *See also* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, ¶ 29 (Sept. 17, 2003); Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Draguljob Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶¶ 19-20 (May 21, 2003).

[92] *Tadic*, Case No. IT-94-1-A, ¶ 204.

[93] Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A, Case No. ICTR-96-17-A, Judgement, ¶ 465 (Dec. 13, 2004).

[94] *Tadic*, Case No. IT-94-1-A, ¶ 196.

[95] *Id*. ¶ 202.

actual crime. Only in the third extended category is it required that the act be merely a foreseeable consequence of affecting the common purpose, which is an essentially objective standard of knowledge. In other words, the third category allows the conviction of an individual who did not actually intend for the crime to be committed or have actual knowledge that his or her accomplices would commit it.

The doctrine of joint criminal enterprise was first enunciated in a case involving a low-level offender who had joined associates in a raid on a village as part of a campaign of ethnic cleansing. Dusko Tadic was acquitted by the Trial Chamber of five murders committed by his associates in Jaskici because it had not been proven that he had personally intended them,[96] but the verdict was overturned and a conviction entered by the Appeals Chamber on the basis of the joint criminal enterprise theory.[97] The context of this prosecution, which was in many ways characteristic of many early prosecutions involving offenders whose place in the criminal hierarchy was insignificant, colored the legal descriptions of the joint criminal enterprise concept. The paradigm for joint criminal enterprise was a gang of bank robbers, not the Nazi party.

The joint criminal enterprise theory was obviously of great potential in leadership cases. It had not been alleged in the first indictment of Slobodan Milosevic,[98] issued several weeks before the *Tadic* Judgment, but the Prosecutor later amended the allegations to charge:

> [P]articipation in a joint criminal enterprise as a co-perpetrator. The purpose of this joint criminal enterprise was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. To fulfil[l] this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.[99]

Nevertheless, the application of joint criminal enterprise to leadership cases remained untested until the verdict in the case of one of the most prominent of the Bosnian Serbs, Radoslav Brdanin, in September 2004.[100] Amongst other responsibilities, he had served as president of the Crisis Group of the Autonomous Region of Krajina. Relying upon earlier

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[96] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement, ¶ 373 (May 7, 1997).

[97] *Tadic*, Case No. IT-94-1-A, ¶¶ 233-34.

[98] Prosecutor v. Milosevic, Case No. IT-99-37-I, Decision on Review of Indictment and Application for Consequential Orders (May 24, 1999).

[99] Prosecutor v. Milosevic, Case No. IT-99-37-PT, Second Amended Indictment, ¶ 16 (Oct. 16, 2001).

[100] Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgement, ¶¶ 355-56 (Sept. 1, 2004).

formulations by the Appeals Chamber, the Trial Chamber concluded that the joint criminal enterprise theory was inapplicable, and held that the primary perpetrator of the criminal act must be a member of the joint criminal enterprise.[101] The consequence was to confine the doctrine to small groups and to exclude its relevance to large scale criminal plans in which the primary perpetrator may even be ignorant of the overall intentions of the leaders and organizers.

The Appeals Chamber reversed the legal findings of the Trial Chamber, thereby holding that joint criminal enterprise was applicable not only to small cases but to large-scale criminal enterprises involving primary perpetrators or offenders who are personally outside of the common plan. Referring to two post-Second World War cases, the Appeals Chamber said it found strong support for the imposition of criminal liability upon an accused for participation in a common criminal purpose "where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose." There is no requirement of proof "that there was an understanding or an agreement to commit that particular crime between the accused and the principal perpetrator of the crime."[102]

One of the authorities relied upon by the *Brdanin* Appeals Chamber, a U.S. Military Tribunal decision known as the *Justice Case*, involved prosecution of leading judges, magistrates, and prosecutors for their role in implementing the racist and genocidal Nazi policy.[103] The Appeals Chamber cited one of the conclusions in the *Justice Case*: "The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law."[104] The Appeals Chamber relied heavily on the analysis of Judge Iain Bonomy, who in his separate opinion in a preliminary ruling in *Prosecutor v. Milutinovic* the previous year had also analyzed the *Justice Case*:

> The Military Tribunal appears to have imposed criminal responsibility on both accused for their participation in the common criminal plan although they did not perpetrate the *actus reus* of the crimes of which they were convicted; the *actus reus* was instead perpetrated by executioners simply carrying out the orders of the court. Nowhere did the Tribunal discuss the mental state of the executioners who carried out the death sentences imposed as a result of the actions of Lautz, Rothaug, and their fellow participants in the common plan, or whether such persons even had knowledge

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[101] *Id*.

[102] Prosecutor v. Brdanin, Case No. IT-99-36-A, Judgement, ¶ 394 (Apr. 3, 2007).

[103] United States of America v. Alstötter, 14 I.L.R. 278 (U.S. Military Trib. 1948).

[104] *Brdanin*, Case No. IT-99-36-A, ¶ 397 (*citing id.* at 1063).

> that the death sentences formed part of a plan to pervert the law for the purpose of exterminating Jews and other "undesirables."[105]

The other post-Second World War case referred to by the *Brdanin* Appeals Chamber, and discussed by Judge Bonomy in his separate opinion, involved the SS Race and Resettlement Main Office, and is known as the *RuSHA case*. The RuSHA leaders were charged with participating in a "systematic program of genocide."[106] As Judge Bonomy noted:

> The Military Tribunal found that the Prosecution had established that there existed among Hitler, Himmler—the leader of the SS—and other Nazi officials a "two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations." It found additionally that the leadership of RuSHA—and particularly the accused Hofmann and Hildebrandt—adhered to and enthusiastically participated in the execution of this "Germanisation" plan . . . .[107]

The Appeals Chamber concluded:

> The Appeals Chamber notes that it is clear from the Military Tribunal's discussion of the various aspects of the Germanization plan that Hofmann and Hildebrandt, as the leaders of RuSHA, worked closely and interactively with Himmler, Kaltenbrunner, and other high SS officials in planning the details of how the plan was to be executed, especially with respect to the abortions and abduction programmes. On the basis of their active participation in this plan and their knowledge of the activities carried out pursuant to it, both accused were held responsible for the conduct of the RuSHA agents who carried out the crimes, without any discussion of whether the principal perpetrators had knowledge that their actions formed part of the Germanization plan, or of whether an agreement existed between the accused and these agents.[108]

The Chamber also referred to two exceptions, both of them involving senior leaders, and noted that much of the early case law of the Tribunal dealt with small scale joint criminal enterprises and was not therefore good authority when broader schemes were concerned.[109]

This important development in the case law of the ICTY does not directly concern the issue of State plan or policy as an element of genocide or crimes against humanity. Nevertheless, the discussion by the Appeals Chamber, the separate opinion of Judge Bonomy, and the post-Second World War authorities all underscore the significance of State plan or policy in the prosecutions of leaders.

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[105] Case No. IT-05-87-PT, Separate Opinion of Judge Iain Bonomy, ¶ 20 (Mar. 22, 2006).

[106] United States of America v. Greifelt, 4 TWC 1, 609 (U.S. Military Trib. 1948).

[107] *Milutinovic*, Case No. IT-05-87-PT, ¶ 22.

[108] *Brdanin*, Case No. IT-99-36-A, Judgement, ¶ 403 (Apr. 3, 2007).

[109] *Id.* ¶ 408 (citing Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement (Apr. 19, 2004) and Prosecutor v. Stakic, Case No. IT-97-24-A, Judgement (Mar. 22, 2006)).

VII. GRAVITY

Article 17(1)(d) of the Rome Statute states that a case may be declared inadmissible where it "is not of sufficient gravity to justify further action by the Court." The gravity criterion is part of the International Criminal Court's broader admissibility test, its principal companion being the issue of complementarity. Many early commentators on admissibility treated the matter as essentially synonymous with complementarity, and largely neglected the issue of gravity.[110] An early decision of a Pre-Trial Chamber of the International Criminal Court (ICC) suggests that gravity is far more important than many had initially believed. Pre-Trial Chamber I noted that the gravity threshold was "in addition to the drafters' careful selection of the crimes included in articles 6 through 8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to the most serious crimes of international concern."[111] As a result, "the relevant conduct must present particular features which render it especially grave."[112]

Pre-Trial Chamber I said that the gravity threshold was intended to ensure that the ICC pursued cases only against "the most senior leaders" in any given situation under investigation.[113] It said that this factor was comprised of three elements. The first is the position played by the accused person. The second factor is the role played by that person "when the State entities, organizations or armed groups to which they belong commit systematic or large-scale crimes." The third factor is the role played by such State entities, organizations, or armed groups in the overall commission of crimes. According to the Chamber, because of the position such individuals play, they are also "the ones who can most effectively prevent or stop the commission of those crimes."[114] The Chamber explained that the gravity threshold was "a key tool provided by the drafters to maximize the Court's deterrent effect. As a result, the Chamber must

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[110] ANTONIO CASSESE ET AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY 667-731, 1153-54, 1946 (Oxford Univ. Press 2002); Morten Bergsmo & Pieter Kruger, *'Article 53'*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 708-09 (Baden Baden: Nomos, Otto Triffterer, ed., 1999); Éric David, *La cour pénale internationale*, 313 RECEUIL DES COURS 248-51; Sharon A. Williams, *'Article 17'*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra*, 383, 393.

[111] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 41 (Feb. 10, 2006).

[112] *Id.* ¶ 45.

[113] *Id.* ¶ 50.

[114] *Id.* ¶¶ 51-53.

conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention."[115] The decision declared:

> The Chamber holds that the following two features must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-drive selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.[116]

The Pre-Trial Chamber further justified its emphasis on senior leaders with reference to current practice at the ad hoc U.N. international criminal tribunals. It noted Security Council Resolution 1534, which mandates the completion strategy of the ad hoc Tribunals.[117] Resolution 1534 calls for the Chamber to "concentrate on the most senior leaders suspected of being responsible."[118] Reference was also made to Rule 28(A) of the Rules of Procedure and Evidence of the ICTY, which authorizes the Bureau to block the approval of indictments that do not meet the senior leaders' standard, and to Rule 11 *bis* of the Rules of Procedure and Evidence, which establishes "the gravity of the crimes charged and the level of responsibility of the accused" as the standard to be imposed in transferring cases from the international to the national courts.[119] The Pre-Trial Chamber compared the ad hoc Tribunals, with their limited jurisdiction over one crisis situation, to the ICC, with its broad personal, temporal, and territorial jurisdiction. "In the Chamber's view, it is in this context that one realizes the key role of the additional gravity threshold set out in article 17(1)(d) of the Statute in ensuring the effectiveness of the Court in carrying out its deterrent function and maximizing the deterrent effect of its activities," the Pre-Trial Chamber concluded.[120]

The authorities on the gravity threshold do not specifically consider policy as a relevant factor. However, their emphasis upon leadership confirms the orientation that international criminal law is now taking. In assessing gravity, for the purpose of selection of cases, the State plan or policy element may prove to be increasingly useful. The existence of a State plan or policy may prove to be decisive in distinguishing the less

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[115] *Id.* ¶ 48.
[116] *Id.* ¶ 46.
[117] *Id.*
[118] UN Doc. S/RES/1534 (2004).
[119] *Lubanga*, Case No. ICC-01/04-01/06-8, ¶¶ 55-58 (Feb. 10, 2006).
[120] *Id.* ¶ 60.

significant cases from those that deserve to be addressed by international criminal tribunals.

VIII. CONCLUSION

Rulings of the ICTY Appeals Chamber declare that as a matter of customary international law a State policy is not an element of either genocide or crimes against humanity. Unfortunately, with respect to both genocide and crimes against humanity, the Appeals Chamber's analysis is not particularly profound. In each case, the discussion is exceedingly brief and relies largely upon a literal reading of texts, coupled with a debatable interpretation of a relatively small number of authorities. The rulings suggest that they were driven more by results-oriented judicial policy, given the specifics of prosecutions in the former Yugoslavia, than by in-depth analysis of the legal authorities, the origins of the concepts, and the object and purpose of genocide and crimes against humanity.

The Appeals Chamber of the Tribunal has been extremely influential, and it has clarified many important issues in international criminal law. It does not, however, bind its successors, including the International Criminal Court.[121] Not only do the decisions concerning State plan or policy merit reconsideration, they cannot apply automatically to the Rome Statute and the Elements of Crimes adopted for its application because the provisions vary between each governing Statute. Both the Rome Statute and the Elements of Crimes suggest a role for State plan or policy in the context of prosecutions for genocide and crimes against humanity.

Two recent features of evolving practice in the area of international criminal law also argue for an enhanced role of the State policy. It is now established that the joint criminal enterprise theory applies to large-scale atrocity crimes. The early authorities from the Second World War cases are clear that these crimes will involve leaders who apply policies, even if those who actually carry them out are unwitting participants. There will be two components to establishing mens rea in these cases: Was there a policy? Did the perpetrator know of the policy and act with the intent to further it? The so-called gravity threshold is also of some relevance. As international criminal tribunals focus their attention on a limited number of offenders, they are being directed to leaders. In practice, prosecution of genocide cases will involve identifying a plan or policy and then prosecuting those most responsible for its implementation.

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[121] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶¶ 44-45 (Nov. 30, 2007).

Probably the best argument for strengthening the policy requirement is its capacity to better articulate the relationship between State responsibility and individual criminal liability. The Nuremberg judgment was correct to insist that crimes are committed by individuals and not by abstract entities, but individual crimes committed in isolation from abstract entities are of little or no interest at the international level. Indeed, the existence of a State policy may be the best criterion in distinguishing between individual crimes that belong to national justice systems, and international crimes with their special rules and principles concerning jurisdiction, immunities, statutory limitations, and defenses.

Analysis of the State policy requirement also sheds light on the mens rea debate, especially with respect to genocide. For several years, there has been a preoccupation with identifying the so-called specific intent or *dolus specialis* of genocide. This is a concept transplanted from national justice systems where it is applied to ordinary crimes. The migration from one system to the other is not without difficulty, however, notably because genocide requires a system for its implementation. Prosecution of perpetrators of genocide would be much more straightforward if we abandoned the inquiry about specific intent in favor of a search for the policy. The individual who knows of the policy and intends to further it should be convicted of genocide. Anyone else can be tried for homicide by ordinary courts.

Concerns that requiring a State policy will leave a so-called impunity gap are misplaced. Most so-called non-State actors find themselves more than adequately challenged by various national justice systems. The needs in prosecution are not a broadening of the definitions of international crimes, but rather a strengthening of international judicial cooperation mechanisms so as to facilitate bringing offenders to book for "ordinary" crimes. Mainly, it is when perpetrators commit heinous acts precisely because they are acting on behalf of a State, and in pursuit of its policies that we require international justice to step in. Insisting that the policy be an element of the crime clarifies the reality of this special form of criminality and facilitates its distinction.