II

The Policy underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate*

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2.1 Introduction

Crimes against humanity are an elusive and uncertain category of international crimes. Even though international criminal courts have clarified the meaning and scope of crimes against humanity in case law, fundamental questions remain. One of the issues of continuous debate concerns the proper characterisation of the policy requirement, i.e. the requirement that crimes against humanity need to be committed pursuant to or in furtherance of a (state) policy. Whereas one group of scholars qualifies the existence of a policy as a necessary element of crimes against humanity that needs to be established before an act can be qualified as a crime against humanity, others question the added value and legal basis of the policy requirement. Rather, they consider the existence of a policy underlying the commission of crimes as a relevant factual circumstance that can be used to establish the *chapeau* elements of crimes against humanity, in particular the widespread or systematic attack-requirement.

These opposing views are similarly reflected in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). On the one hand, the ICTY holds that the existence of a policy is not a requirement of crimes against humanity, but may be evidentially relevant for determining the systematic character of the attack against a civilian population. On the other hand, the Rome Statute of the ICC in Article 7(2) explicitly depicts the state or organisational policy as an autonomous element of crime. An analysis of ICTY and ICC case law, however, makes clear that these theoretical characterisations of the policy requirement do not completely control the requirement's application in practice. Despite the courts' different theoretical understanding of the policy requirement, the ICTY and the ICC substantiate the existence of a policy in a comparable way. Furthermore, the finding 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 evidentially relevant circumstance in the ICTY's jurisprudence. The ICTY and the ICC thus use and apply the policy in a similar way.

The analogous construction of the policy requirement by the ICTY and the ICC detracts from the value of the current scholarly debate. In light of recent practice, the distinction between the policy as a legal element or as a 'mere' relevant factual circumstance, becomes an academic one. This chapter therefore argues that discussions about the added value of the policy requirement should not be limited to theoretical distinctions concerning the abstract characterisation of the law, but must always take account of how the law is used in practice. The chapter accordingly aims to induce a more practical discourse in which the meaning of the policy requirement is assessed in light of the requirement's application in individual cases.

The first part of the chapter (section 2) describes the current state of the scholarly debate on the policy requirement. The term 'policy requirement' has become a term of

art in 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 is, in fact, still the object of debate. I therefore generally reserve the terms 'policy requirement' and 'policy element' for situations in which the existence of a policy is considered a necessary and autonomous element of crime. By contrast, when the policy is seen as a 'mere' relevant fact, it is described by the terms 'relevant circumstance' or 'factor'. Having said that, in the first part of the chapter the terminology that is used in the scholarly debate is adopted. In the second part of the chapter (sections 3 and 4), the case law of the ICTY and the ICC is discussed. Emphasis is thereby placed on the factual circumstances that are used to apply the policy factor/requirement in individual cases. Furthermore, a comparison is made between the way in which the ICTY and the ICC apply the policy factor/requirement in practice. In section 5, the practical application of the policy is contrasted with its theoretical characterisation. 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 chapter (section 6), the divergence between the theoretical characterisation and practical application of the policy is explained in light of the factor-based character of legal reasoning in (international criminal) law.

2.2 A Fundamental Disagreement

International scholars generally agree that isolated and randomly committed acts of violence should be excluded from the scope of crimes against humanity.[1] A wave of spontaneous and unrelated crimes that is the product of mere individual action cannot qualify as crimes against humanity. Instead, crimes against humanity are criminal acts that are part of a larger context of organised violence. This limitation is essential for distinguishing crimes against humanity from 'ordinary' domestic criminality.[2]

1 M. McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes against Humanity', 22 *Human Rights Quarterly* (2000) 335, 375-376; G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda', 43 *Harvard International Law Journal* (2002) 237, 314-315; K. Ambos and S. Wirth, 'The Current Law of Crimes against Humanity', 13 *Criminal Law Forum* (2002) 1, 30; 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* (München: C.H. Beck oHG, 2008) 168, 169; W.A. Schabas, 'State Policy as an Element of International Crimes', 98 *Journal of Criminal Law & Criminology* (2008) 953, 954; G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2009) 288.

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

Under the Nuremberg Charter, these thoughts were reflected in and ascertained by the requirement of a 'war nexus'.[3] The nexus requirement restricted the jurisdiction of the International Military Tribunal (IMT) to crimes against humanity that were 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 increasingly questioned. In 1984, one of the delegates to the International Law Commission (ILC) argued 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 accordingly agreed that the concept of crimes against humanity had become autonomous and was no longer linked to war crimes or crimes against peace.[6]

With the removal of the war nexus and the recognition of crimes against humanity as an autonomous international crime, there was need for a new way to exclude isolated, random and individually committed crimes from the crimes against humanity concept. The initiatives that were formulated in this respect primarily focused on the character of the attack in which crimes were committed.[7] International scholars argued that crimes can only be qualified as crimes against humanity when they were part 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 recognised as an essential element of crimes against humanity.[9] The legal status of the policy

3 Van Schaack (n. 2 above) 850; Ambos and 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 *Second Report on the Draft Code of Offences against the Peace and Security of Mankind*, 2 Yearbook of International Law Commission, UN Doc. A/CN.4/SerA/1984, 90.

6 *Summary Records of the 1960's Meeting*, 1 Yearbook of International Law Commission 104, UN Doc. A/CN.4/SerA/1986.

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. Lippman, 'Crimes against Humanity', 17 *Boston College Third World Law Journal* (1997) 171, 264; Y. Dinstein, 'Crimes against Humanity after *Tadić*', 13 *Leiden Journal of International Law* (2000) 373, 379. See also 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 et al., *International Criminal Law*

requirement, conversely, continues to be surrounded by uncertainty and disagreement. Two different views on the legal status of the policy can be discerned. Both of these views recognise the relevance of the policy for distinguishing crimes against humanity from 'ordinary' crimes that fall within the domestic criminal jurisdiction. The disagreement between them only concerns the function and character of the policy requirement.

The first view – expressed by amongst others, Schabas and Bassiouni – considers the policy requirement necessary, if not vital, for distinguishing crimes against humanity from common domestic crimes.[10] Two arguments are presented for this position. First, 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 and its replacement with the widespread or systematic attack-requirement, the crimes against humanity concept allegedly became applicable to widespread, yet unrelated, crimes. The concept would thus encompass the criminal acts of serial killers, mafias and motorcycle gangs.[12] The policy requirement is considered essential for excluding such acts from the scope of crimes against humanity. It ascertains a certain degree of organisation in cases of mere widespread attacks. Secondly, the policy requirement is found to warrant the involvement of a higher authority in the commission of crimes against humanity.[13] By establishing 'some kind of link with a State or a *de facto* power in a certain territory by means of the policy of this entity', it is confirmed 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 arguments that some scholars consider the inclusion of an autonomous policy requirement in the *chapeau* of crimes against humanity essential for upholding the international nature of this crime.

Practitioner Library, Volume II: Elements of Crimes under International Law (New York: Cambridge University Press, 2009) 35. See also Hwang (n. 2 above) 490; Van Schaack (n. 2 above) 850; McAuliffe deGuzman (n. 1 above) 375; Mettraux (n. 1 above) 259; Hall (n. 1 above) 177.

10 M.C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999) 244-246; W.A. Schabas, 'Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes', 23 *Leiden Journal of International Law* (2010) 847, 853; Schabas (n. 1 above) 982.

11 D. Robinson, 'Defining Crimes against Humanity at the Rome Conference', 93 *American Journal of International Law* (1999) 43, 47; Bassiouni (n. 10 above) 244-246; Schabas (n. 1 above) 960.

12 Schabas (n. 1 above) 960.

13 Hwang (n. 2 above) 49; Bassiouni (n. 10 above) 249-252; Ambos and Wirth (n. 1 above) 34.

14 Ambos and 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).'

This view is strongly opposed by the second group of scholars. They find that the insertion of a policy requirement in the *chapeau* of crimes against humanity is unsubstantiated. Mettraux in this respect argues that 'there is nothing in customary international law which mandates the imposition of an additional requirement that the acts be connected to a policy or plan'.[15] The policy requirement thus lacks a legal basis. In addition, it is asserted that the policy requirement is redundant, because it ensures a level of organisation that is equally upheld by the civilian population- and the widespread or systematic attack-requirement.[16] 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] The second group of scholars therefore finds that the existence of a policy is not an autonomous element of crime, but an evidentially relevant circumstance that courts may take into account when they assess whether the crimes have been committed in the context of a widespread or systematic attack against a civilian population.

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 substantiate their respective points of view and are unwilling to leave their positions. Consensus about the proper characterisation of the policy requirement appears to be beyond reach. This impasse may be broken by supplementing the debate on the theoretical characterisation of the policy with a practical discourse in which the function, meaning and scope of the policy requirement are analysed and evaluated on the basis of its application in individual cases. This practical evaluation provides new insights into the value of including a policy requirement in the *chapeau* of crimes against humanity.

2.3 The ICTY and the Policy Factor

2.3.1 General Considerations

Article 5 of the ICTY Statute, criminalising crimes against humanity, does not explicitly incorporate a policy requirement. Nevertheless, the *Tadić* Trial Chamber considered that the wish to exclude isolated and random acts of individuals from the scope of crimes

15 Mettraux (n. 1 above) 281-282.

16 See Ambos and Wirth (n. 1 above) 21; Hall (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 victimised; the expression simply denoted that crimes against humanity must be crimes of collective nature and thus exclude single or isolated acts'. *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-T, Trial Chamber II, 7 May 1997 (*Tadić* Trial Chamber judgment), para. 644.

against humanity implies that 'there must be some form of a governmental or organisational policy to commit these acts'.[18] In subsequent jurisprudence, the Trial Chamber's recognition of an implicit policy requirement was increasingly questioned and critically observed.[19] This ultimately resulted in the explicit rejection of the policy requirement by the *Kunarac* Appeals Chamber. The Appeals Chamber held that

> neither 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 existence of a plan or policy may be evidentially relevant, but it is not a legal element of the crime.[20]

Later ICTY judgments confirm that the policy constitutes a 'mere' evidentially relevant circumstance or relevant factor.[21] Case law also clarifies that the policy should

18 *Tadić* Trial Chamber judgment, 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*, Judgment, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998 (*Akayesu* Trial Chamber judgment), para. 580. See also *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, Trial Chamber II, 21 May 1999 (*Kayishema and Ruzindana* Trial Chamber judgment), paras. 123-124.

19 See *Prosecutor v. Kupreškić* et al., Judgment, Case No. IT-95-16-T, Trial Chamber II, 14 January 2000 (*Kupreškić* et al. Trial Chamber judgment), paras. 551-555; *Prosecutor v. Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-T, Trial Chamber III, 26 February 2001 (*Kordić and Čerkez* Trial Chamber judgment), para. 182; *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001 (*Jelisić* Appeals Chamber judgment), para. 48.

20 *Prosecutor v. Kunarac* et al., Judgment, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber, 12 June 2002 (*Kunarac* et al. Appeals Chamber judgment), para. 98.

21 See *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004 (*Krstić* Appeals Chamber judgment), para. 225; *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004 (*Blaškić* Appeals Chamber judgment), para. 100; *Prosecutor v. Limaj* et al., Judgment, Case No. IT-03-66-T, Trial Chamber II, 30 November 2005 (*Limaj* et al. Trial Chamber judgment), para. 184; *Prosecutor v. Martić*, Judgment, Case No. IT-95-11-T, Trial Chamber I, 12 June 2007 (*Martić* Trial

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] Instead, the policy may be inferred from the totality of factual circumstances. The *Blaškić* Trial Chamber in this respect considered that the existence of a policy 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 program; media propaganda; the establishment and implementation of autonomous military structures; the mobilisation of armed forces; the execution of temporally and geographically repeated and coordinated military offensives; the existence of links between the military hierarchy and the political structure and its program; the 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 has consistently held that the established policy does not have to be drafted by a *de jure* state.[25] Forces which – although not part of the legitimate government – exercise *de facto* control over, or are able to move freely within the defined territory may also be capable of implementing a policy that leads to the commission of crimes against humanity. They can therefore be held criminally responsible for such crimes too. Whether the policy is implemented by a *de jure* state or a *de facto* power, it

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Chamber 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*, Judgment, Case No. ICTR-97-20-A, Appeals Chamber, 20 May 2005 (*Semanza* Appeals Chamber judgment), para. 269; *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, Appeals Chamber, 7 July 2006 (*Gacumbitsi* Appeals Chamber judgment), para. 84; *Prosecutor v. Nahimana* et al., Judgment, Case No. ICTR-99-52-A, Appeals Chamber, 28 November 2007 (*Nahimana* et al. Appeals Chamber judgment), para. 922; *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-A, Appeals Chamber, 12 March 2008 (*Seromba* Appeals Chamber judgment), para. 149.

22 *Tadić* Trial Chamber judgment, para. 653.

23 *Tadić* Trial Chamber judgment, para. 653; *Kupreškić* et al. Trial Chamber 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, Trial Chamber, 20 October 1995 (*Nikolić* Rule 61 decision), para. 26; *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-T, Trial Chamber I, 3 March 2000 (*Blaškić* Trial Chamber judgment), para. 204.

24 *Blaškić* Trial Chamber 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 (paras. 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 to be accepted as evidence of a plan or policy underlying the crimes committed.

25 *Tadić* Trial Chamber judgment, para. 654; *Kupreškić* et al. Trial Chamber judgment, para. 552.

does not have to be conceived at the highest hierarchical level.[26] The policy may be developed at any level of the state or organisation that exercises *de facto* power over the territory.

2.3.2 *Factual Application of the Systematic Attack-Requirement*

Since the ICTY does not qualify the policy as an autonomous element of crimes against humanity, policy-related issues are not individually evaluated. Instead, the policy factor is analysed in the context of the systematic attack-requirement. The ICTY uses three categories of factual circumstances to assess the systematic character of an attack: circumstances concerning the preparation for attack; circumstances concerning the characteristics of the attack; and contextual circumstances.[27]

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 was discussed;[28] pre-emptive warnings of an imminent attack given by officials to citizens from their ethnic group, which allow these citizens 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;[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 organised character of the attack;[36] the coordination amongst and between the different troops involved in the

26 *Nikolić* Rule 61 decision, para. 26; *Blaškić* Trial Chamber 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 categorisation as the factual circumstances get a different color in each of the three categories.

28 *Blaškić* Trial Chamber judgment, para. 389; *Kordić and Čerkez* Trial Chamber judgment, paras. 610-613, 630; *Martić* Trial Chamber judgment, para. 303.

29 See *Blaškić* Trial Chamber judgment, paras. 389, 573, 624; *Kordić and Čerkez* Trial Chamber judgment, para. 645; *Prosecutor v. Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004 (*Kordić and Čerkez* Appeals Chamber judgment), para. 511.

30 See *Martić* Trial Chamber judgment, paras. 144-148.

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

32 See *Blaškić* Trial Chamber judgment, paras. 390, 504.

33 See *Blaškić* Trial Chamber judgment, para. 504.

34 See *Blaškić* Trial Chamber judgment, paras. 350, 361, 624; *Mrkšić* et al. Trial Chamber judgment, para. 470.

35 See *Blaškić* Trial Chamber judgment, paras. 359, 388, 411-412, 512; *Martić* Trial Chamber judgment, paras. 227, 349, 351.

36 See *Blaškić* Trial Chamber judgment, paras. 503, 506; *Mrkšić* et al. Trial Chamber judgment, paras. 43, 472.

attack;[37] and the type and amount of armaments that were used.[38] Secondly, reference is made to the consequences of the attack.[39] In particular evidence that shows the devastating and discriminatory consequences of the attack is considered relevant for establishing the organised and thus systematic character of the attack.

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 relates to the political background against which the attack took place. In this respect, reference can 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 group;[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 that can lead 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 crimes committed. This scale is defined in terms of the total number of crimes and the consequences of the attack.[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 determines the scope of this context. By assessing the relations between the individual crimes and/or attacks, it seeks to establish a pattern of similar criminal conduct, which defines the larger context of violence in which the individual crimes were committed. The relations between crimes and/or attacks can be

37 See *Blaškić* Trial Chamber judgment, paras. 401, 624; *Kordić and Čerkez* Trial Chamber judgment, para. 637; *Martić* Trial Chamber judgment, para. 351.

38 See *Kordić and Čerkez* Trial Chamber judgment, para. 635; *Mrkšić* et al. Trial Chamber judgment, para. 470.

39 See *Blaškić* Trial Chamber judgment, paras. 411-412, 512; *Kordić and Čerkez* Trial Chamber judgment, paras. 635, 643; *Martić* Trial Chamber judgment, paras. 227, 349, 351; *Mrkšić* et al. Trial Chamber judgment, paras. 55-59, 465-469, 472.

40 See *Blaškić* Trial Chamber judgment, paras. 129, 136, 344; *Kordić and Čerkez* Trial Chamber judgment, para. 472; *Martić* Trial Chamber judgment, para. 473; *Mrkšić* et al. Trial Chamber judgment, paras. 20, 32.

41 See *Blaškić* Trial Chamber judgment, paras. 344, 359, 361, 364; *Kordić and Čerkez* Trial Chamber judgment, paras. 481-491, 496; *Martić* Trial Chamber judgment, paras. 131, 135, 137, 139, 149-158.

42 See *Blaškić* Trial Chamber judgment, paras. 389, 573, 624.

43 See *Blaškić* Trial Chamber judgment, paras. 353-355, 359, 361, 545; *Kordić and Čerkez* Trial Chamber judgment, paras. 499, 603, 649; *Martić* Trial Chamber judgment, paras. 164, 166.

44 See *Blaškić* Trial Chamber judgment, paras. 341, 387, 496, 538; *Martić* Trial Chamber judgment, para. 166; *Mrkšić* et al. Trial Chamber judgment, paras. 24-25.

45 See *Blaškić* Trial Chamber judgment, paras. 361, 365-366.

46 See *Kordić and Čerkez* Trial Chamber judgment, paras. 635, 750.

assessed in terms of their temporal and geographical scope; the means and methods of attack; the troops that were involved; and the type and consequences of the crimes committed.[47]

2.3.3 *Factual Application of the Policy Factor*

How is the policy factor reflected in the ICTY's evaluation of the systematic attack-requirement? This question can be answered by observing the judicial application of the systematic attack-requirement in light of the factual circumstances that the *Blaškić* Trial Chamber considered indicative of a policy to commit crimes. It seems that the *'Blaškić* policy circumstances' are analogous to the contextual circumstances that the ICTY uses to establish the systematic attack-requirement. The policy factor thus appears to manifest itself in the ICTY's use of contextual circumstances for assessing the systematic character of an attack.

The case law illustrates that the contextual circumstances constitute an important element of the ICTY's evaluation of the systematic attack-requirement. In particular, the contextual circumstances that establish a relation between the different crimes and/or attacks committed, are relevant. Following the assertion 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 regularly assesses the systematic character of the attack on the basis of a pattern of crimes.[49] In *Mrkšić* 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] The fact that the troops followed similar lines of attack in each of the attacked villages and the finding that the attacks were executed in an indiscriminate

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

48 See *Kunarac* Appeals Chamber judgment, para 94; *Blaškić* Appeals Chamber judgment, para. 101; *Kordić and Čerkez* Appeals Chamber judgment, para. 94; *Martić* Trial Chamber judgment, para. 49.

49 See *Blaškić* Trial Chamber judgment, paras. 573, 624, 750; *Kordić and Čerkez* Appeals Chamber judgment, paras. 667-668; *Martić* Trial Chamber judgment, para. 349; *Mrkšić* et al. Trial Chamber judgment, paras. 19-37, 43, 472. Less explicit, but certainly not less relevant in this 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 Chamber judgment, para. 472.

manner, were considered particularly relevant in this respect.[51] By reasoning in this way, the *Mrkšić* et al. Trial Chamber established a factual relationship between the crimes and/or attacks committed. In *Kordić and Čerkez*, the Appeals Chamber adopted a different, more abstract approach. It qualified the attack as systematic because the crimes committed could be qualified in similar legal terms (e.g. murder and inhumane acts).[52]

The ICTY's assessment of the relations between attacks and/or crimes is essential in light of the objective to exclude random acts of violence from the scope of crimes against humanity. Evidence of the preparation for attack and the organised and coordinated execution of an attack may well indicate that this attack was pre-meditated or purposely executed, but it does not exclude isolated incidents from the crimes against humanity concept. Instead, the exclusion of such incidents can only be warranted by establishing a relationship between the different crimes and/or attacks committed. In this way, the individual crimes and/or attacks are taken out of their isolation and linked to the larger context of violence. The contextual circumstances are essential for ascertaining this link. The 'factual method' that was employed by the *Mrkšić* et al. Trial Chamber should in this respect be preferred over the 'abstract method' of the *Kordić and Čerkez* Appeals Chamber. After all, the mere equivalence of legal qualifications does not establish an empirical relation between the various incidents. Consequently, it does not guarantee that random, individual crimes that are unrelated to the larger context of violence fall outside the scope of the crimes against humanity concept.

Summarising, it can be concluded that the contextual circumstances play an essential role 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 a systematic attack. The critical attitude of the ICTY towards 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.

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 Chamber judgment, para. 43.

52 *Kordić and Čerkez* Appeals Chamber judgment, paras. 667-668.

2.4 The ICC and the Policy Element

2.4.1 General Considerations

In contrast to the ICTY Statute, Article 7 of the Rome Statute of the ICC explicitly incorporates a policy element in the *chapeau* of crimes against humanity. The relevant part of 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 organisational policy to commit such attack.[53]

During the drafting negotiations, the delegates agreed that crimes against humanity have to be committed within a larger context of organised violence. They, however, disagreed on the way in which this objective could be achieved. On the one hand, a number of delegations argued that the disjunctive widespread *or* systematic attack-test may lead to the qualification of a spontaneous wave of unrelated crimes as crimes against humanity.[54] Since this is contrary to the objective of excluding randomly committed criminal conduct from the scope of crimes against humanity, these delegates found it necessary to establish a cumulative relation between the qualifiers of the attack (widespread *and* systematic attack). On the other hand, a second group of delegates argued that the widespread or systematic attack- and the civilian population-requirement sufficiently warrant that random and isolated acts fall outside the scope of crimes against humanity.[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', the drafters made clear that this attack is characterised by a quantitative element ('course of conduct involving the multiple commission of acts') and a qualitative element (the policy element). Both these elements have to be established in the case of either a widespread or

53 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (ICC Statute), Article 7.
54 Robinson (n. 11 above) 47; McAuliffe deGuzman (n. 1 above) 372.
55 Robinson (n. 11 above) 47.

a systematic attack. In this way, the policy element ascertains a certain level of organisation in the case of a mere widespread attack and makes sure 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. The resulting uncertainties have generated considerable debate among legal scholars. Whereas some scholars maintain that a policy 'is something akin to systematicity',[57] others hold that the policy element 'is more flexible' and does not require the high degree of organisation and orchestration that are characteristic of the systematic attack-requirement.[58] The emerging jurisprudence of the ICC provides some further clarity on this point. In its decision on the confirmation of charges against Katanga and Ngudjolo Chui, Pre-Trial Chamber I held that the policy element

> [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 seems to introduce a particularly high threshold. It has even been argued that Pre-Trial Chamber I interpreted the policy element as being synonymous to the systematic attack-requirement and thus effectively replaced the alternative widespread *or* systematic attack-requirement with a cumulative widespread *and* systematic attack-requirement.[60] This argument is apparently confirmed by the Pre-Trial Chamber's interpretation of the term 'systematic':

> [t]he 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

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

57 Boas et al. (n. 9 above) 106-107.

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

59 *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, Case No. ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008 (*Katanga and Chui* confirmation of charges decision), para. 396.

60 M. Halling, 'Push the Envelop – Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity', 23 *Leiden Journal of International Law* (2010) 827, 836-837.

> crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis'.[61]

Article 7(3) of the Elements of Crimes further expands upon the required form of the policy. It particularly stipulates that 'the policy to commit such attack requires that the state or organization actively promote or encourage such an attack against a civilian population'. According to Pre-Trial Chamber I, this means that the attack should be planned, directed or organised,[62] but it is not required that the policy is explicitly defined or formalised.[63] The existence and content of the policy can be deduced from 'the occurrence of a series of events'.[64] In this respect, reference can be made to the factual circumstances that are listed in the *Blaškić* Trial Chamber judgment.[65]

Article 7(2) of the Rome Statute explicitly recognises both states and organisations as possible entities behind a policy to commit crimes against humanity. The meaning and scope of the term 'organisation' is uncertain and has been extensively debated.[66] Pre-Trial Chamber II on this point decided that:

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61 *Katanga and Chui* confirmation of charges decision, para 397. The (evidential) relationship between the systematic attack-requirement and the policy element may also be observed in *Prosecutor v. Harun and Kushayb*, Decision on the Prosecution's application under Article 58(7) of the Statute, Case No. ICC-02/05-01/07, Pre-Trial Chamber I, 27 April 2007 (*Harun and 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'.

62 *Katanga and Chui* confirmation of charges decision, para. 396.

63 *Katanga and Chui* confirmation of charges decision, para. 396; *Prosecutor v. Bemba Gombo*, Decision on the Prosecutor's application for a warrant of arrest against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Pre-Trial Chamber I, 10 June 2008 (*Bemba* warrant of arrest decision), para. 81.

64 *Katanga and Chui* confirmation of charges decision, 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, Case No. ICC-01/09, Pre-Trial Chamber II, 31 March 2010 (*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 2.3.1 of this chapter. This use of the ICTY's jurisprudence to interpret the Rome Statute is criticised 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 organisational policy".' *Situation in the Republic of Kenya*, Dissenting opinion Judge Hans Peter Kaul, Case No. ICC-01/09, Pre-Trial Chamber II, 31 March 2010 (Dissenting opinion Judge Kaul), paras. 28 and 31, footnotes omitted.

66 See Schabas (n. 1 above) 953-982; Werle (n. 1 above) 301. See also W.A. Schabas, 'Crimes against Humanity: The State Plan or Policy Element' in L.N. Sadat and M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (The Hague: Martinus Nijhoff

> the 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. 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.[67]

This interpretation remains, however, highly controversial.[68] It is hoped that future ICC judgments will offer some clarity on this point.

2.4.2 Reservations

Before engaging in an analysis of ICC case law, two reservations should be made at the outset. First, any analysis of ICC case law is somewhat limited by virtue of the fact that – as a relatively young court – the ICC has rendered only a small number of relevant decisions, which in and of themselves are not entirely consistent. It is therefore as yet impossible to speak of *the* ICC's position or to identify a definitive line of reasoning. With regard to the policy element, we can, for example, discern two different understandings and two related ways of applying the law in Pre-Trial Chamber decisions.

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. It, for example, held 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] By reasoning in this way, the Pre-Trial Chamber appears to consider the existence of a policy as an evidentially relevant circumstance for determining the

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Publishers, 2008) 347; C. Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 *Kenya* Decision', 23 *Leiden Journal of International Law* (2010) 855.

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 'organisational' that is limited to 'state-like' organisations. '[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 Kress (n. 66 above) 855-873.

69 *Katanga and Chui* confirmation of charges decision, para. 413. See also *Bemba* warrant of arrest decision, para. 33; *Harun and Kushayb* decision on the application of Article 58(7), paras. 62-67.

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 assessed the policy element separately from the widespread or systematic-requirement.[70] It thus characterised 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 function of the policy element.

The second reservation that needs to be made, concerns the fact that scholarly analyses of ICC case law are affected by the inherently limited evaluation of facts in pre-trial decisions. As pre-trial decisions are rendered before the examination of 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 provides the best preliminary insights into the application of crimes against humanity in individual cases, is Pre-Trial Chamber II's *Kenya* decision. This decision will therefore form the basis for a further assessment of the ICC's use of the policy element. 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.

2.4.3 Factual Application of the Policy Element

In the *Kenya* decision, Pre-Trial Chamber II refers to a variety of factual circumstances to substantiate its finding that the crimes were committed pursuant to an organisational policy. These circumstances can be divided into the same three categories as were discerned in relation to the ICTY's systematic attack-analysis, namely circumstances concerning: (i) the preparation for attack; (ii) the characteristics of the attack; and (iii) the political, military and social context in which the attack took place.

In relation to the 'preparation category', the ICC refers to, *inter alia*: meetings between local leaders, businessmen and politicians during which the violence was coordinated and weapons and money were distributed;[71] the training of recruits 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 concerning the characteristics of the attack relates to: the

70 *Kenya* authorization decision, paras. 115-128.
71 *Kenya* authorization decision, paras. 118-119.
72 *Kenya* authorization decision, para. 119.
73 *Kenya* authorization decision, para. 127.
74 *Kenya* authorization decision, para. 120.

coordinated and organised 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 that were used in the course of the attack. The factual circumstances that fall within the third contextual category concern the execution of simultaneous attacks on different villages and the issuance of public statements by politicians that articulate the violent aim of the attack.

The ICC's use of the policy element in the *Kenya* decision gives rise to two observations. First, it appears that the ICC 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 evaluates the policy element on the basis of the entire range of factual circumstances that the ICTY deems relevant for establishing the systematic character of an attack. Thus, the policy element and the systematic attack-requirement may in practice become analogous concepts.

This finding on the analogous meaning of the policy element and the systematic attack-requirement is confirmed by the ICC's practice to substantiate these elements interchangeably. 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 a factual evaluation, the other is ascertained without further substantiation. In the decision on the confirmation of charges against Katanga and Ngudjolo Chui, Pre-Trial Chamber I, for example, characterised the attack on Bogoro village as systematic by looking at the pattern of attacks. It particularly took account of the common characteristics of the attacks committed; the large scale of the attack; the large number of persons targeted; and the organised common plan underlying the acts of violence.[76] The existence of a policy was subsequently accepted without explanation. By contrast, Pre-Trial Chamber II in the *Kenya* decision established the policy element on the basis of relatively extensive reasoning and factual evidence, while later simply stating that the crimes were committed in the context of a systematic attack.

Secondly, it is also noteworthy that the contextual circumstances appear to play a limited role in the ICC's factual substantiation of the policy element. In the *Kenya* decision, the Pre-Trial Chamber's conclusion that crimes were committed pursuant to a policy was primarily based on the preparatory measures that were taken and the characteristics of the attack. So far, the inclusion of a policy element in the *chapeau* of

75 *Kenya* authorization decision, para. 121.

76 *Katanga and Chui* confirmation of charges decision, paras. 412-416.

crimes against humanity has thus not led to a more central focus on the policy and a more extensive evaluation of contextual circumstances by the ICC.

2.4.4 Evaluation

The case law analysis shows that the inclusion of a 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 characterisation of the policy, the ICTY and the ICC evaluate it in a comparable way. With this in mind, it can be argued that the theoretical difference between the policy as an element of crime or as an evidentially relevant circumstance is, in essence, merely academic. Some commentators may reject this argument and assert that the ICC's current practice illustrates a deficiency in the application of the law, not in 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 included in the Rome Statute as an element of crimes against humanity, which means that the ICC has the obligation to give effect to the element as such.

Indeed, it must be acknowledged that the designation of the policy 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. The Court's interchangeable substantiation of the policy element and the systematic attack-requirement should therefore be criticised. Even though this practice is understandable in view of the factual analogy between the policy element and the systematic attack-requirement (why would the Court engage in the same factual substantiation twice?), by observing these two elements of crime in an alternative way, the ICC denies them their character and position as autonomous and necessary conditions of crime that should be established and substantiated in each case.[77]

At the same time, it must be recognised that the meaning, scope and restrictive value of the policy cannot be determined by the mere inclusion of a statutory policy element. As elements of crime are put in relatively abstract and general terms, they can be customised 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 – i.e. the exclusion of

77 In this light see also, Dissenting opinion Judge Kaul, 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.

random, large-scale crimes and the exclusion of crimes committed pursuant to individual plans or in furtherance of the policy of private organisations that do not exercise *de facto* authority – without recognising the policy as an autonomous requirement of crimes against humanity. Four characteristics of the ICTY's jurisprudence are particularly noteworthy in this respect.

First, the ICTY has applied the systematic attack-requirement in a way that takes account of the larger context of organised violence in which the crimes were committed. By placing emphasis on contextual circumstances, the Tribunal warrants that isolated incidents are excluded from the crimes against humanity concept. Second, the ICTY's characterisation of an attack as systematic generally coincides with its qualification of this attack as widespread.[79] There are thus hardly any cases of mere large scale violence in which the finding of a policy underlying the commission of crimes has real restrictive value. Third, in those cases in which the ICTY did merely qualify an attack as widespread, reference was still made to contextual circumstances that linked the crimes committed to each other. In this way, the ICTY still construed a situation of organised violence.[80] Fourth, the link between the various individual crimes committed, can also be ascertained by the requirements that the attack was committed in the context of an armed conflict and was directed against a civilian population. Both these elements establish a connection between individual crimes and the larger context of violence, which ensures the organised character of crimes against humanity. Despite its rejection of the policy as a necessary element of crimes against humanity, the ICTY has thus shaped and applied the crimes against humanity concept in such a way that widespread, yet unrelated, crimes are excluded from the crimes against humanity concept. In addition, ICTY case law also ascertains the involvement of a high-level authority in the commission of crimes. The contextual circumstances to which the Tribunal refers mostly relate to the implication of a higher authority.[81] In particular, they establish a link between the specific crimes and the political, military or institutional context in which these crimes were committed. Violence committed pursuant to individual plans thus falls outside 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

79 Schabas (n. 9 above) 192; Boas et al. (n. 9 above) 107.

80 See *Martić* Trial Chamber 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 program; media propaganda; the establishment and implementation of autonomous military structures; the mobilisation of armed forces; the execution of temporally and geographically repeated and coordinated military offensives; and the existence of links between the military hierarchy and the political structure and its program (para. 204). See also Schabas (n. 9 above) 193.

course, no guarantee that future courts will operate in a similar way and achieve a similar result. The specific, relatively unproblematic, application of the crimes against humanity concept by the ICTY is at least partly related to the character of the cases that are brought before this Tribunal. They concern crimes that were committed during an (inter)national armed conflict between multiple ethnic groups. Furthermore, the crimes were mostly executed in an organised way pursuant to a (state) policy. Because of this factual context, the Tribunal does not have to consider situations of widespread, yet unrelated, armed violence. It is therefore only logical that ICTY substantiates the systematic attack-requirement on the basis of contextual circumstances.

The ICC may be presented with more varied and controversial situations than the ICTY, since the Rome Statute opens the jurisdiction of the Court to situations of large scale violence outside the context of an armed conflict. In the Kenya situation, the contextual circumstances were already far less evident. The Pre-Trial Chamber consequently focused on other factual circumstances evidencing the organised character of crimes. Could the recognition of the policy as an element of crime have an added value in these and similar cases of unorganised/loosely organised large-scale violence? The answer to this question depends on the ICC's interpretation and application of the policy element and on its interpretation and application of other *chapeau* elements. These are still largely undetermined. With respect to the ICC's interpretation of the policy element, it can, however, already be noted that the Court appears to have limited the added value of the policy element by adopting a relatively broad understanding of the organisational policy concept. The majority in the *Kenya* decision considered that this concept includes private organisations. In this way, the Pre-Trial Chamber diminished the restrictive effect of the policy element. The other *chapeau* elements already require some type of organisation, since it is difficult, if not impossible, for individuals or unorganised groups to execute a widespread or systematic attack against a civilian population. These *chapeau* elements do, however, not necessarily limit the crimes against humanity concept to crimes that involve a state or 'state like' organisation. If the majority of the ICC had interpreted the organisational policy concept in a more restricted manner, the policy element could have had a restraining effect on this point.

The previous observations illustrate that the elements of crimes against humanity are interconnected.[82] The abstract interpretation and practical application of a legal element does not merely determine the meaning, scope and function of this specific element, but additionally influence the value of and need for other elements of crime. The role of an autonomous policy element is accordingly related to the interpretation and application of

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

the widespread or systematic attack-requirement and the civilian population-requirement. Furthermore, we should be mindful that the value of the policy is not exclusively determined by its abstract characterisation, but is additionally shaped by its application to the facts of individual cases. Despite their different theoretical characterisation of the policy, the ICTY and the ICC apply this factor/requirement in an essentially similar manner. This practical similarity of theoretically different concepts may be explained by the 'open texture' of legal rules and the factor-based character of legal reasoning.

2.5 Judicial Reasoning

2.5.1 The Open Texture of Legal Rules

Judicial institutions operate on the basis of argumentative legitimacy,[83] which means that they must justify their decisions on the basis of rational arguments. In law, there are explicit presumptions about the form and substance of these arguments. The 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, i.e. 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 the listed individual criminal acts can be qualified as crimes against humanity 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 organisational policy to commit such attack.

The elements of crime are general in character. This means that they are context-independent and can be applied to a variety of unknown future situations. The elements of crime are therefore necessarily and inevitably put in relatively abstract terms. As a

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.M. Soriano, 'The Use of Precedents as Arguments of Authority, Arguments *ab Exemplo*, and Arguments of Reason in Civil Law Systems', 11 *Ratio Juris* (1998) 90, 91-92; A. Cassese, 'The ICTY: A Living and Vital Reality', 2 *Journal of International Criminal Justice* (2004) 585, 589; W. Twining and 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?', 11 *Legal Theory* (2005) 1, 5-6; Twining and Miers (n. 83 above) 32.

result, they are characterised by, what Hart calls, an 'open texture'.[85] In the context of concrete cases – when the facts of a case have to be observed in light of the general rules of law – questions may rise about 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 settling the discussion on the meaning and scope of the law, the elements of crime thus stimulate an interpretative process.[86]

Judges interpret and explicate the elements of crime in response to the questions raised in individual cases. In particular, they rephrase the abstract terms of legal elements in more concrete definitions or criteria. In this way, they provide further guidance on the meaning of these elements. With respect to the widespread or systematic attack-requirement of crimes against humanity, the ICTY has, for example, clarified that the systematic character of the attack refers to 'the organized nature of the violence and the improbability of their random occurrence'.[87] This judicial criterion is authoritative for the Tribunal and has acquired a central position in the Tribunal's reasoning about the meaning and scope of the law. Like the elements of crime, judicial criteria can, however, not be applied in a simple, deductive manner. Because the 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 the 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 judicial criteria will not exclude doubts about the law's applicability in individual cases.

The ICTY and the 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 have explicitly listed a non-exhaustive number of factual circumstances that they consider relevant in light of the elements of crime and judicial criteria. The *Blaškić* Trial Chamber has, 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 mobilisation of armed forces; and the imposition of discriminatory

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', 20 *International Relations* (2006) 295, 298; H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *International Criminal Law Review* (2008) 229, 263-264; E. van Sliedregt, 'System Criminality at the ICTY' in A. Nollkeamper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 183, 199-200.

86 Klabbers (n. 85 above) 300.

87 See *Kunarac* Appeals Chamber judgment, para 94; *Blaškić* Appeals Chamber judgment, para. 101; *Kordić and Čerkez* Appeals Chamber judgment, para. 94; *Martić* Trial Chamber judgment, para. 49.

measures.[88] In other cases, the influence of factual circumstances on the meaning and scope of the law is less explicit. 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 should then be derived from the Tribunal's evaluation of individual cases.

2.5.2 The Character and Position of Factual Circumstances

The factual circumstances of a case – whether explicitly listed or implicit in the court's reasoning – play an essential role in the judicial evaluation of an accused's responsibility for international crimes. As was previously illustrated, the meaning and scope of legal concepts can only be properly understood in light of their application to a specific factual context.[90] In contrast to the elements of crime and the judicial interpretations thereof, the relevant factual circumstances are not laid down as necessary and sufficient conditions of crime. Instead, they are listed as open-ended illustrations of relevant facts. It thus appears that the factual circumstances function as factors.[91]

Research on reasoning with factors shows that the mere existence of a factor does not determine the decision. This means, on the one hand, that not all relevant factors have to be established in every case. On the other hand, 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 ultimately based on the balancing and evaluation of all relevant factors and the relations between them. When applying this thought to the judicial assessment of the policy to commit crimes against humanity, it becomes clear that legally relevant circumstances – such as the mobilisation of armed forces and the imposition of discriminatory measures – should not be observed as necessary conditions for establishing a policy, but as factors favouring the finding of a policy. At the same time, the un-coordinated character and the small scale of the crimes do not exclude the existence of a policy, but do not favour its acceptance. 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.

88 *Blaškić* Trial Chamber 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*, Judgment, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004 (*Vasiljević* Appeals Chamber judgment), 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.

91 G. Sartor, *Legal Reasoning: A Cognitive Approach to the Law* (Dordrecht: Springer, 2005) 177.

Preliminary research into the process of factor-based reasoning illustrates that this type of reasoning is flexible, but not completely unbounded. Factor-based reasoning is not conducted in a vacuum, but helps to justify the leap from the general legal rules to the decisions in individual cases.[92] It entails a particular process to determine whether the factual circumstances of the case at hand meet the legal standards that are laid down in the elements of crime and the judicial interpretations thereof. In this process, not every factual circumstance can be qualified as a factor. Factor-based reasoning takes as a starting-point that factual circumstances only become factors in light of the object of the legal provision for which they are used.[93] Factors originate from the desire to achieve a certain goal and the belief that acting and deciding in a specific way promotes that goal. 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]

Factor-based reasoning can thus be perceived as a technique that simplifies and operationalises the process of teleological reasoning,[95] a prominent type of reasoning in international criminal law.[96] The weighing and balancing of the established factors constitutes an essential part of the process of factor-based reasoning. After all, the outcome of this process is not determined by the mere existence of a factor, but by the relative strength of the factors favouring and disfavouring a certain outcome.[97] The essential question in this respect is: when is a set of factors sufficient to qualify certain conduct as an international crime or to establish an accused's criminal responsibility for this crime? Different judges may answer this question in different ways. The risk of

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

93 Sartor (n. 91 above) 178; G. Sartor, 'Reasoning with Factors', 19 *Argumentation* (2005) 417, 417-418. See also Van der Wilt (n. 85 above) 272.

94 Sartor (n. 91 above) 179.

95 Sartor (n. 91 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 and J. H. Reestman (eds.), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems* (Groningen: Europa Law Publishing, 2001) 13, 18; M. Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, 13 December 2006, PhD Thesis, available online at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/5434/Thesis.pdf?sequence=1>, 65; J. Powderly, 'Judicial Interpretation at the *ad hoc* Tribunals: Method from Chaos?' in S. Darcy and 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 and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 115, 136-142.

97 Sartor (n. 91 above) 221.

arbitrary and inconsistent law application can, however, be limited by means of analogous reasoning from precedent.

2.5.3 *Precedents in Factor-Based Reasoning*

The use of precedents in legal reasoning has mostly been studied in relation to the common law and its doctrine of *stare decisis*.[98] However, judicial reasoning from precedents is not unique to the common law. In every legal system judges resort to precedents when they decide cases.[99] The way in which precedents are used and the weight that is attached to precedents, however, differs. In international criminal law, precedents are not recognised 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 definitions. Precedents are then used to justify the applicability of these criteria and definitions without observing the factual analogy between the precedent and the present case.[102]

98 D.N. MacCormick and R.S. Summers, 'Introduction' in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 1, 11-12.

99 MacCormick and 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 Chamber judgment, para. 540; *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000 (*Aleksovski* Appeals Chamber judgment), 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', 59 *Vanderbilt Law Review* (2006) 1, 49.

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

When judicial reasoning is observed as a process of weighing and balancing factors, precedents acquire an additional argumentative role. In this respect, precedents are used 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 way as precedent cases, it is argued that the fact that a precedent (X) had outcome (Y) in the presence of factors (Z), justifies that this combination of factors (Z) produces outcome (Y) in future cases as well.[104] A previous decision made on the basis of a specific combination of factors should thus be applied analogically in future similar cases. Where differences between cases occur, judges should ask themselves whether these differences justify a defeat of the precedent in light of the purpose of the legal rule. When observing precedents in this way, it becomes essential that judges explicate the factors underlying their decision. In particular, they have to characterise the factual circumstances of the case before them in light of the relevant factors, judicial definitions and criteria and, ultimately, the elements of crime. Only on the basis of this explication, can judges in future cases evaluate the factual analogies between the precedent and the present case.[105]

It follows from the previous account that factor-based reasoning does not necessarily make the meaning and scope of legal concepts unclear, uncertain or unbounded. Factor-based reasoning rather balances the need for flexibility and substantive justice against 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, judges 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 new cases on the basis of the established ordering. One the other hand, because factors operate in a non-decisive way, factor-based reasoning is susceptible to the possibility that future cases present new factual circumstances that shed such a different light on the circumstances that the Tribunal previously considered sufficient for establishing an element of crime, that it

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 and R.S. Summers, 'Further General Reflections and Conclusions' in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 531, 536-537 and 539.

103 Sartor (n. 91 above) 738; Lamond (n. 84 above) 15.

104 Soriano (n. 83 above) 99; Lamond (n. 84 above) 15; Sartor (n. 91 above) 738.

105 M.J. Borgers, 'De Communicatieve Strafrechter' in *Controverses rondom Legaliteit en Legitimatie, Handelingen Nederlandse Juristen-Vereniging 2011-1* (Deventer: Kluwer, 2011) 103, 130-135.

may not come to the same conclusion in these future cases.[106] The law thus remains open for continuous development and improvement.

2.5.4 Implications for the Policy Requirement and Debate

When we observe the judicial decision-making process as a process of factor-based reasoning, it becomes clear 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 definition of the policy element in the Rome Statute allows leeway for a variety of relevant factors that may be balanced in various ways, resulting in a more restrictive or a more liberal understanding of the element. By using this leeway to adapt the law to the facts of individual cases, the ICC can apply the policy element in a way that is very similar to the ICTY's use of the policy factor in the context of the systematic attack-requirement.

Furthermore, the theory of factor-based reasoning holds that factors are formulated in light of the object of a legal rule. Rules that pursue a similar object will thus be evaluated on the basis of similar factors. The ICTY and the ICC acknowledge that the policy element and systematic attack-requirement both seek to exclude isolated and randomly committed crimes from the crimes against humanity concept. According to 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 evidentially relevant circumstance or an element of crime.

This does not mean 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. The previous account merely demonstrates that the meaning, scope and function of the policy do not solely depend on its theoretical characterisation, but are additionally shaped by the application of this requirement/factor to specific factual situations. As a result 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 a relevant circumstance. They show that it is essential that discussions about the value of the policy element are not limited to the abstract characterisation of the law, but take additional account of the application of this element in practice.

106 K. van Willigenburg, 'Casuïstiek en Scherpe Normen in het Materiële Strafrecht', 41 *Delikt en Delinkwent* (2011) 365. Van Willigenburg derives from J. Dancy, *Ethics without Principles* (Oxford: Oxford University Press, 2004).

To date, this has been insufficiently recognised in the academic debate on the policy underlying crimes against humanity. This debate has been primarily concerned with the theoretical characterisation 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 characterisation of the policy, legal scholars fail to take account of the fact that the law is shaped in the context of legal practice. 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 the ICC is analysed and evaluated on the basis of the application of the policy factor/requirement in individual cases. This discourse may demonstrate that an autonomous policy element is not necessarily better suited to exclude isolated, random and individually committed crimes from the scope of crimes against humanity than the policy factor. Whether this is so largely depends on the application of the policy element to the factual context of individual cases.

2.6 Conclusions

The analysis of ICTY and ICC case law shows that these courts apply the policy underlying crimes against humanity in a very similar manner. Their different characterisation of the policy as either an element of crimes against humanity or an evidentially relevant circumstance does not appear to fundamentally affect the policy's function, meaning or scope in practice. This can 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 this leeway in individual cases, courts can give theoretically different concepts an analogous function, meaning and scope. The value of legal concepts is thus not merely determined by their theoretical characterisation, but also by their practical application.

In this light, the focus of the current academic debate on the theoretical characterisation of the policy is deficient. A comprehensive study of crimes against humanity requires additional analyses of the practical application of the policy element. This analysis may show that a further restriction of the law is unnecessary or that legal reforms did not have the expected effect in practice. This chapter is a first step in the direction of a more practical evaluation of crimes against humanity. Further research into the way in which abstract elements and requirements are applied to specific fact situations is, however, desirable. This research should particularly address the character of factor-based reasoning and the influence of such reasoning on judicial decision-making in international criminal law.