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Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note

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Of the three existing core crimes in international criminal law, crimes against humanity is the most elusive one, a chameleonic crime that can change colour over time, since it does not possess an unambiguous conceptual character. The characterizing element of genocide obviously is the specific intent to destroy. War crimes must have a nexus with an armed conflict. The identifying element of crimes against humanity is more difficult to pin down as the contextual elements have changed over time.[1]

Whereas the genocide definition is carved in stone, the definition of crimes against humanity was renegotiated in Rome, leading to the intricate construction of Article 7, the general definition in paragraph 1 being narrowed down by explanations in subsequent paragraphs and in the Elements of Crimes. These explanations most notably 'clarified' that the attack requirement encompasses an active policy requirement. In so doing, the policy requirement that the ad hoc tribunals had dispensed with re-entered the scene of international criminal law. This symposium places the policy requirement in the spotlight.

The following question guides the discussion of this symposium: does Article 7 of the Statute of the International Criminal Court (ICC) represent the true reincarnation of the policy element, or is it an unfortunate diplomatic compromise for whose removal we should strive either through amendment of the Rome Statute or through judicial creativity?

In the first contribution, Halling proposes to revisit the definition of crimes against humanity as agreed in Rome and encapsulated in Article 7 of the ICC Statute. More specifically, he pleads for the removal of the policy requirement. Obviously nothing of this sort was done or even contemplated in Kampala, where aggression dominated the agenda.[2] Nevertheless, Halling's argument merits close attention, not least since 'the policy element debate' keeps rearing its head. In the recent *Kenya* Decision by Pre-Trial Chamber II[3] it was a point of contention, and it was vigorously discussed in

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1 See for one of the earlier overviews displaying the chameleonic nature of crimes against humanity Y. Dinstein, 'Crimes against Humanity after *Tadić*', (2000) 13 LJIL 373.

2 The symposium articles immediately following in this journal provide some 'Impressions from Kampala'.

3 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010.

the Washington University St. Louis project of forging a Crimes against Humanity Convention.[4] Another reason why we decided to devote a short symposium to this issue is that the discussion on the policy requirement echoes deeper existential questions on the nature and limits of international criminal law and additionally on the role of the International Criminal Court as the predominant instrument of international judicial intervention.

In his response to Halling, Schabas submits that instead of perceiving the policy requirement as an inconvenient obstacle, we should view it as an element that in actual fact can assist the Court to do what it is expected to do without being distracted: to catch the big fish rather than the sardines. In addition, the policy element may inhibit institutional overreach – an almost irresistible temptation for any young international organization – as a strictly construed policy element may prevent the Court taking on cases that would be better left to national systems.

As Halling acknowledged, rather than the actual removal of the policy requirement, the more probable outcome of the debate would be something close to a de facto removal of this requirement by stretching the definition of 'organization'. The interpretation of the word 'organization' was at the heart of the ICC Pre-Trial Chamber's *Kenya* Decision of 31 March 2010. It was the subject of intense debate between Judges Trendafilova and Tarfusser as the majority, on one hand, and Judge Kaul as the dissenter, on the other hand. Kaul's dissent, which is on an equal footing with the majority decision in terms of length, has yielded praise. Schabas portrays Kaul's 'compelling dissent' as rare, refreshing, and very eloquent. In the final contribution to this symposium, Kress commends the decision for being 'carefully reasoned' and 'methodologically transparent'.

In his contribution, Kress engages with the judicial discussion that transpires from the *Kenya* Decision. He meticulously sets out how the interpretation of one word – 'organization' – is crucial for the conceptualization and setting of the outer boundary of crimes against humanity. He demonstrates that it has far-reaching implications. It could shift the balance between international judicial intervention and state sovereignty – a balance to which states have carefully agreed when drawing up the Rome Statute. If the balance is to be shifted, Kress submits, it should be states that take that decision. They can do so through the consistent display of a practice that may provide a basis for transforming customary international law on this point. Yet, for the moment, such a transformation may not take place. Until the time when it does, many metaphorical swords will be crossed in judicial and academic debate. Presently, the ball is in the Appeals Chamber's court. We hope that the three vivid contributions in this symposium will foster this important debate, both within and beyond the courtroom.

4 Available at http://law.wustl.edu/crimesagainsthumanity/.

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