A Note on State Policy and Crimes Against Humanity

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On18 February 2010, the International Criminal Court's (ICC) Pre-Trial Chamber II issued a Decision Requesting Clarification and Additional Information in the *Situation in the Republic of Kenya*. Paragraph 12 states: "the Chamber notes that to meet the requirements of a crime against humanity under the Statute, the acts committed must, *inter alia*, be carried out 'pursuant to or in furtherance of a State or organizational policy' within the meaning of article 7(2)(a) of the Statute."

There is an ambiguity in article 7 of the ICC's Statute that is glossed over by the Pre-Trial Chamber II. Article 7(1) states:

> 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 a population…

And then 7(2) states:

> For the purpose of paragraph 1:
> (a) "Attack directed against a population" means a course of conduct involving the multiple commissions of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such an attack;

The ambiguity concerns whether the State policy requirement means the same thing for both the condition of "widespreadness" as well as for "systematicity," or whether different things are meant. An attack can be widespread without being based in a State or organizational policy, whereas it is very difficult to conceive an attack being systematic that was not based in a State or organizational policy.

For an attack on a population to be widespread it is conceptually sufficient that many people be affected. In the pre-ICC debates about crimes against humanity it seemed that the "or" in "widespread or systematic" could be interpreted to mean that State policy was not required to prove a crime against humanity, since only in a systematic attack on a population was the State policy required, not in widespread attacks. The wording of the ICC Statute takes away that ambiguity. But it is replaced with a concern about what the "or" now means. If the Statute drafters wanted to eliminate the distinction between widespreadness due to State policy and systematicity due to State policy it would have been easy to do by substituting "and" for the "or" that was used in "widespread or systematic."

The kind of State policy that is widespread but not systematic is not easy to conceptualize, but the language of the Statute as well as the history of how crimes against humanity have been defined calls for such a conceptualization. And this in turn suggests that there could be two different understandings of the requirement of State policy: one for widespread attacks and one for systematic attacks.

It might be that the State policy requirement of crimes against humanity that is associated with widespreadness is considerably easier to meet than that for systematicity. If there is police involvement or the involvement of various politicians, this might be sufficient in and of itself to establish the weak State involvement associated with widespread attacks, whereas such involvement by police or politicians would have to be linked to a specific policy of the State to satisfy the more stringent State involvement associated with systematic attacks. Yet, the Pre-Trial Chamber II Decision seems not to accept the weaker State policy requirement since it appears that evidence supporting this has already been offered by the Prosecutor and acknowledged but rejected as insufficient by the Chamber in paragraph 13 of the Decision.

There is a considerable amount at stake here since State policies do not often manifest themselves in ways other than the behavior of politicians and police. Similar worries can be expressed about this issue as have been expressed about the debate about whether "or" or "and" should occur in the crimes against humanity definition. As I have argued in my book, Crimes Against Humanity: A Normative Account (Cambridge University Press, 2005), it is generally preferable that the attack be shown to be both widespread and systematic, but such a requirement is extremely hard to meet, and so it might be advisable to allow some cases to go forward where only one of the conditions is proven.

It might be thought that this issue can be resolved by looking to Article 17 of the Statute of the ICC that has been interpreted to require an addition element, gravity. On 10 February 2006 the ICC's Pre-Trial Chamber I issued a Decision on the Prosecutor's Application for Warrants of Arrest in the *Situation in the Democratic Republic of Congo*. Paragraph 51 of that Decision states:

> The Chamber considers that the additional gravity threshold provided for in Article 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.

And paragraph 51 suggests that this heightened gravity standard applies to both systematic and widespread crimes.

Yet, the issue that remains unresolved is whether the State policy requirement is always strong or sometimes weak. The gravity threshold concerns who should be prosecuted not the character of the larger crime that the defendant participated in. State leaders can participate in, and be prosecuted for, crimes that have both a strong and a weak State policy. Gravity seems to go to the type of defendant, not the type of crime.

Regardless of how one comes down on the interpretive questions addressed above, defendants and prosecutors are owed some clarity on exactly what the Pre-Trial Chambers will expect concerning the stringency of the State policy requirement for establishing crimes against humanity. It remains unclear how to understand the State policy requirement given paragraphs 12 and 13 of the 2010 Pre-Trial Chamber II Decision.

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