Article 7(2) of the Rome Statute of the International Criminal Court says that the “[a]ttack directed against any civilian population,” which is one of the contextual elements of crimes against humanity, must be committed, “pursuant to or in furtherance of a State or organizational policy to commit such attack.”\(^1\) Most academic commentators as well as specialized non-governmental organizations view this as a broad concept that brings a range of “non-state actors” within the ambit of crimes against humanity. Moreover, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has taken the view that at customary law, there is no requirement whatsoever of a state or organizational policy with respect to crimes against humanity.\(^2\)

Cherif Bassiouni disagrees. In his recent three-volume work, *The Legislative History of the International Criminal Court*, he argues:

Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-State actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one State, falls within

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\(^2\) Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, para. 98 (June 12, 2002). *See also* Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, para. 120 (July 29, 2004); Prosecutor v. Kordic et al., Case No. IT-95-14/2-A, Judgment, para. 98 (Dec. 17, 2004).
this category. In this author’s opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, and for that matter, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses. . . . The text [of article 7(2)] clearly refers to State policy, and the words “organisational policy” do not refer to the policy of an organisation, but the policy of a State. It does not refer to non-State actors.3

Given that he is the author of the leading monograph on the subject of crimes against humanity, and chair of the drafting committee at the Rome Conference that finalized the text of Article 7(2), Professor Bassiouni’s views on the state plan or policy element of crimes against humanity certainly deserve detailed consideration.

Although Professor Bassiouni was addressing the interpretation of Article 7 of the Rome Statute, the position under customary international law is the appropriate starting point. Professor Bassiouni, in arguing that “Article 7 does not bring a new development to crimes against humanity,” is himself placing the debate within the context of customary international law. The most authoritative statement against Professor Bassiouni’s position is that of the ICTY Appeals Chamber, buried in a footnote in its judgment in Kunarac. The Appeals Chamber was addressing the issue from the standpoint of customary international law, because of its well-known approach to interpreting the Rome Statute by which its provisions are deemed consistent with custom.4 After noting that “[t]here has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity,” the Appeals Chamber said that practice “overwhelmingly supports the contention that no such requirement exists under customary international law.”5 The Appeals Chamber cited a number of authorities in support: Article 6(c) of the Nuremberg Charter, the Nuremberg Judgment, national cases from Australia, Israel, and Canada, the Secretary-General’s report on the draft ICTY Statute, and various mate-


4 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, paras. 287, 296 (June 12, 1999).

5 Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, para. 98 n.114 (June 12, 2002).