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Laying the Foundations for a Convention on Crimes Against Humanity
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Foreword

Sean D. Murphy*

I was absolutely delighted when the editors of this symposium approached me with the idea of dedicating an issue of the *Journal of International Criminal Justice* (the *Journal*) to the International Law Commission (the Commission)'s draft articles on crimes against humanity, which in time may become a convention on the prevention and punishment of crimes against humanity. Indeed, the Commission's work has now reached a stage where critical analysis by others can only be welcomed.

The idea of a global convention focused on crimes against humanity has existed for some time, and was given particular attention after the creation of the International Criminal Tribunal for the former Yugoslavia¹ and, later, the creation of the International Criminal Court.² The central idea in such a convention is to build up national laws and national jurisdiction with respect to crimes against humanity and to place states parties in a cooperative relationship on matters such as extradition and mutual legal assistance. While the creation of international criminal courts and tribunals provides one path for punishing (and one hopes preventing) such crimes, a different path focuses on harnessing national institutions towards that end, so as to develop a worldwide net that provides no refuge for offenders. If successful, a convention on the prevention and punishment of crimes against humanity would join sibling conventions addressing genocide³ and war crimes⁴ and would stand in the tradition of other conventions addressing serious crimes, such as torture⁵ and enforced disappearance.⁶

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1 See M. Cherif Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law* (1994) 457.

2 See L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011); M. Bergsmo and Song, T. (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014).

3 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

4 In particular, the four 1949 Geneva Conventions and their protocols, available online at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (visited 10 July 2018).

5 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

6 International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3.

In 2012, I proposed that the Commission take up the topic of crimes against humanity.⁷ After extensive discussions during 2012–2013, the Commission in 2013 added the topic to its long-term work programme,⁸ thereby signalling to the United Nations General Assembly (the Assembly) that the Commission was seriously considering pursuing the matter. The syllabus for the topic expressly indicated that the objective of the topic is ‘to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity.’⁹ Furthermore, such a convention would address the obligation of a state party to criminalize crimes against humanity under its national laws and to submit to prosecution or to extradite (*aut dedere aut judicare*) offenders who turn up in its territory, even when the crime is committed abroad by and against nonnationals. Unlike the Rome Statute of the International Criminal Court, the convention would address interstate obligations with respect to the crime.¹⁰

The debate within the Assembly’s Sixth (Legal) Committee in the fall of 2013 was largely supportive, such that the Commission moved the topic in 2014 onto the current programme of work and appointed me as special rapporteur.¹¹ In 2015, I submitted a first report to the Commission,¹² which led it to adopt four draft articles with commentary.¹³ In 2016, I submitted a second report,¹⁴ which led to the Commission’s adoption of an additional six draft articles with commentary.¹⁵ In 2017, I submitted a third report,¹⁶ which led to the Commission’s adoption of a final five draft articles, a new paragraph for an existing draft article, a draft preamble and a draft annex.

7 For a more detailed discussion of the Commission’s work on these draft articles, see S.D. Murphy, ‘Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission’, 109 *American Journal of International Law (AJIL)* (2015) 822, at 835–836; S.D. Murphy, ‘Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission’, 110 *AJIL* (2016) 718, at 727–729; S.D. Murphy, ‘Crimes Against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission’, 111 *AJIL* (2017) 970, at 970–978.

8 *Report of the International Law Commission, Sixty-Fifth Session (6 May–7 June and 8 July–9 August 2013)*, UN Doc. A/68/10, §§ 169–170, at 115–116.

9 *Ibid.*, § 3, at 140 (Annex B).

10 *Ibid.*, at 142–148 (Annex B).

11 *Report of the International Law Commission, Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*, UN Doc. A/69/10, § 277, at 265.

12 *First report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/680, 17 February 2015.

13 *Report of the International Law Commission, Sixty-Seventh Session (4 May–5 June and 6 July–7 August 2015)*, UN Doc. A/70/10, at 49–83.

14 *Second report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/690, 21 January 2016.

15 *Report of the International Law Commission, Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, UN Doc. A/71/10, at 241–280.

16 *Third report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017 (hereinafter, ‘Third Report’).

Since these various pieces constituted a complete first draft of the project, the Commission reviewed the entire text ‘on first reading’ and approved it.¹⁷ All told, the draft articles address: scope (Article 1); general obligation (Article 2); definition of crimes against humanity (Article 3); obligation of prevention (Article 4); *non-refoulement* (Article 5); criminalization under national law (Article 6); establishment of national jurisdiction (Article 7); investigation (Article 8); preliminary measures when an alleged offender is present (Article 9); *aut dedere aut judicare* (Article 10); fair treatment of the alleged offender (Article 11); victims, witnesses and others (Article 12); extradition (Article 13); mutual legal assistance (Article 14 and the annex) and settlement of disputes (Article 15).

While the black letter provisions of the draft articles themselves are central, the commentary provides detailed explanation as to the meaning of those rules and precedent for them in prior treaties addressing other crimes. In accordance with its practice, ‘the Commission has not included technical language characteristic of treaties (for example, referring to “States Parties”) and has not drafted final clauses on matters such as ratification, reservations, entry into force or amendment’.¹⁸ Even so, my reports to the Commission analysed certain issues, such as options for addressing the issue of reservations¹⁹ or for establishing a monitoring mechanism for the convention,²⁰ which may be of use to states if negotiations towards a convention ultimately proceed.

Having completed a full first draft, the Commission also decided in 2017 to transmit the draft articles through the United Nations Secretary-General to governments, international organizations and others for comments and observations, requesting that they be submitted by no later than 1 December 2018.²¹ Consequently, the Commission is currently in ‘listening mode’, receiving written and oral comments from others regarding the strengths and weaknesses of its work. On the basis of views received, the Commission in 2019 will be in a position to modify the draft articles (and the commentary) as appropriate, on ‘second reading’, at which point the Commission’s work will be completed. Furthermore, the Commission may then transmit the final draft articles to the Assembly, along with a recommendation as to next steps, such as the elaboration of a convention on the basis of the draft articles, either by the Assembly itself or by an international conference of states.

Important questions may be asked at this stage, such as: is such a convention truly needed? If so, are there provisions within the draft articles that should be deleted or modified? Are there issues not addressed that should be included? Ultimately, is such a convention politically feasible, and will states negotiate,

17 See *Report of the International Law Commission, Sixty-Ninth Session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10 (hereinafter, ‘2017 ILC Report’), at 9–127.

18 *Ibid.*, § 3, at 22.

19 See Third Report, *supra* note 16, at 140–150.

20 See *ibid.*, at 100–113; see also *Crimes Against humanity, Information on Existing Treaty-based Monitoring Mechanisms which May Be of Relevance to the Future Work of the International Law Commission, Memorandum by the Secretariat*, UN Doc. A/CN.4/698, 18 March 2016.

21 2017 ILC Report, *supra* note 17, § 43, at 10.

adopt, ratify and implement it? And, most importantly, if such a convention is brought into force and widely ratified, will it help deter and punish, if not stop, egregious crimes that exist today across the globe? As such, now is a propitious time to convene knowledgeable experts, as is being done in this special issue of the *Journal*, to evaluate the Commission's work, and to address some of these questions.

A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity

Leila Nadya Sadat*

Abstract

In 2017 the International Law Commission (ILC) adopted 15 draft Articles, a draft Preamble, and a draft Annex on Mutual Legal Assistance, comprising the nucleus of what might someday become a new global treaty on crimes against humanity. This essay examines the history of the ILC draft and analyses several of its major provisions in light of the existing corpus of international criminal law as well as the work of the Crimes Against Humanity Initiative that preceded it. The essay concludes that the ILC draft provides an excellent point of departure for the negotiation of a new treaty on crimes against humanity. It incorporates many elements of the Rome Statute, such as the definition of crimes against humanity, and solidifies the obligations of states to prevent and punish crimes against humanity. It also builds upon modern United Nations conventions on corruption and transnational organized crime to construct a robust model for interstate cooperation, and has other progressive and positive elements. At the same time, the Commission's work could be enhanced and the new treaty made more robust by addressing certain deficiencies in the draft, many of which would either reinforce the jus cogens nature of the crime or enhance the preventive regime the draft seeks to bring into existence.

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1. Introduction

In spite of the significant progress made in the field of international criminal justice in recent years, crimes against humanity continue unabated in the world. One need only look at the brutal ‘clearance’ of the Rohingya in Myanmar, the levelling of cities and campaign of torture in Syria, the creation and operation of political prison camps in North Korea, and the sexual violence endemic in the Democratic Republic of the Congo and the Central African Republic to understand that work remains to be done. The successful establishment and operation of the ad hoc international criminal tribunals and the International Criminal Court (ICC) in the 1990s led to an expectation that the perpetrators of crimes against humanity would be punished,¹ but the limited mandates (temporal, jurisdictional and practical) of those institutions have left many thousands of possible perpetrators beyond their reach, even taking into account the burgeoning docket of the ICC.² This suggests that, for the time being, the investigation and prosecution of these crimes must primarily be assumed by national jurisdictions.³

Yet, national jurisdictions need tools to become effective enforcers of international criminal law, particularly as regards crimes against humanity. A majority of states do not have legislation on crimes against humanity, even many States Parties to the ICC Statute,⁴ and often lack provisions specific to the prosecution of crimes against humanity such as the *aut dedere aut judicare* obligation, abolition of statutes of limitations, modes of liability, provisions on mutual legal assistance and extradition and irrelevance of official position. Although crimes against humanity were first prosecuted at Nuremberg in 1945, and defined in Article 6(c) of the London Charter,⁵ unlike war crimes, they were never codified in a specialized convention, even though there are now more than 300 international criminal law conventions worldwide covering everything from genocide to money laundering.⁶ As the late M. Cherif Bassiouni wrote in 1994, this ‘significant gap in the international normative

1 L.N. Sadat, ‘Exile, Amnesty and International Law’, 81 *Notre Dame Law Review* (2006) 955–1036.

2 See e.g. Office of the Prosecutor (OTP), *Report on Preliminary Examination Activities*, 4 December 2017, available online at <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PEENG.pdf> (visited 28 May 2018). Eleven situations are also in the investigatory phase, some of which involve cases in trial or that have been brought to trial.

3 Regional criminal courts, new hybrid or ad hoc tribunals and other mechanisms might be created in the future, such as the jurisdiction contemplated by the Malabo Protocol. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Decision on the Draft Legal Instruments, Assembly/AU/Dec. 529(XXIII), available online at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (hereafter ‘Malabo Protocol’, visited 28 May 2018).

4 International Human Rights Clinic, The George Washington University Law School, ‘Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction’ (2013), at 3.

5 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, Charter of the International Military Tribunal, 82 UNTS 279, at Art. 6(c).

6 J. Paust, M.C. Bassiouni et al., *International Criminal Law: Cases and Materials* (4th edn., Carolina Academic Press, 2013), at 17–18.

proscriptive scheme' was 'regrettably met by political decision makers with shocking complacency'.⁷

As I have written elsewhere, the absence of a global treaty on crimes against humanity poses several challenges to the effective enforcement of international criminal law. First, *it creates an impunity gap*, in which individuals cannot be prosecuted or can be prosecuted only with significant difficulty and delay. Unlike the Geneva Conventions and the Genocide Convention, which have been widely ratified by states, including many states not yet party to the ICC Statute, crimes against humanity remain only partially — and imperfectly — codified in international law. This is a growing problem, exacerbated by the frequency of their commission and recent attempts at eroding the Rome Statute's effective enforcement by ICC States Parties and non-parties alike.⁸

Of course, the absence of a comprehensive inter-state treaty on crimes against humanity does not mean that international law does not prohibit their commission, as the ICC Statute itself makes clear. However, it makes concrete legal action difficult because bringing criminal cases under customary international law (as opposed to legislation) is problematic because of legitimate concerns about fairness to the accused. Moreover, international tribunal statutes vary considerably in their definitions of crimes against humanity and have very limited, retroactive application to crimes committed only during one specific conflict. Finally, the ICC, being a Court of last resort with limited financial and material resources, takes up very few cases.

Secondly, *it leads to a state responsibility gap*, because the definition of crimes against humanity is uncertain and no compromissory clause exists to permit litigation before the International Court of Justice (ICJ) (or elsewhere) regarding their commission. This difficulty was evidenced in *Bosnia v Serbia*,⁹ a case in

7 M.C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law* (1994) 457–494, at 457.

8 For example, the US government has argued the ICC has no jurisdiction over non-state party nationals ever since the time of the Rome Statute's negotiation, and even insisted upon language to that effect in Security Council resolutions referring situations to the Court, but its views seemed inconsistent with the vast majority of states participating in the negotiations (and voting for the Statute). The African Union evoked a similar argument following the issuance of the Court's 2009 and 2010 arrest warrants directed against President Omar Al-Bashir of Sudan. Again, these arguments seemed more political than legal when articulated. Yet, more recently Jordan, an ICC State Party, refused to arrest President Bashir, arguing that Art. 98 ICCSt. protected him while on Jordanian territory, because Art. 27 ICCSt. (and presumably, customary international law) did not remove his immunity, and that Jordan was therefore not obligated under Arts 86 and 89(1) ICCSt. to effectuate his arrest. See The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir', *Al Bashir* (ICC-02/05-01/09-326), Appeals Chamber, 12 March 2018. On 28 March 2018, the Appeals Chamber invited observations from international organizations, States Parties and professors of international law on legal matters raised by Jordan.

9 See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports (2007) 43.

which the ICJ was able to exercise jurisdiction only over the crime of genocide (pursuant to Article IX of the Genocide Convention) leaving virtually all the awful consequences of that conflict including allegations of sexual violence, persecution and ethnic cleansing — outside the scope of the Court's jurisdiction, a highly unsatisfactory result.

Thirdly, as noted above, inconsistent definitions in the statutes of the ad hoc international criminal tribunals, national legal systems and the ICC Statute *have led to a situation of definitional uncertainty* leading to difficult questions regarding whether a particular atrocity was or was not a crime against humanity.

Finally, at present, officials feel that there is a duty to act in response to genocide given the explicit mandate of the Convention which aims at 'prevention' as well as punishment. The absence of a convention on crimes against humanity thus leads to a rhetorical downgrading of crimes against humanity as well as overuse of the Genocide Convention by civil society and states as a legal tool.¹⁰ It also seems problematic that there are elaborate treaties criminalizing and providing for effective inter-state enforcement of less serious offences (such as money laundering), but none for mass murder of thousands or even millions of individuals that cannot be characterized as genocide.

2. The Crimes Against Humanity Initiative

In 2008, the Whitney R. Harris World Law Institute at Washington University School of Law launched the *Crimes Against Humanity Initiative* with three primary objectives: (i) to study the current state of the law and sociological reality as regards to the commission of crimes against humanity; (ii) to combat the indifference generated by an assessment that a particular crime is 'only' a crime against humanity (rather than a 'genocide'); and (iii) to address the gap in the current law by elaborating the world's first global treaty on crimes against humanity.¹¹ The *Initiative* progressed in phases, each building upon the work of the last. Directed by a Steering Committee of distinguished experts,¹² it commissioned an academic study and undertook the drafting of a model text of a

10 L.N. Sadat, 'Elements and Innovations of a New Global Treaty on Crimes Against Humanity', in M. Lattimer and P. Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Hart, 2018).

11 L.N. Sadat, 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity', in L.N. Sadat (ed.) *Forging a Convention for Crimes Against Humanity* (2nd edn., Cambridge University Press, 2013) 323–344, at xxiii–xxiv (hereafter 'Comprehensive History').

12 The Steering Committee is composed of the late Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Mendez, Professor William Schabas and Judge Christine Van den Wyngaert.

Proposed International Convention for the Prevention and Punishment of Crimes Against Humanity.¹³

During the first three years of the *Initiative*, nearly 250 experts were consulted, many of whom submitted detailed comments (orally or in writing) on the various drafts of the proposed convention circulated, or attended meetings convened by the *Initiative* in the United States or abroad. Between formal meetings, technical advisory sessions were held during which every comment received — whether in writing or communicated verbally — was discussed by the Steering Committee as the draft convention was refined. The *Proposed Convention* went through seven major revisions (and innumerable minor ones) and was approved by the Steering Committee in August 2010.¹⁴

The *Proposed Convention* represented an extraordinary effort; however, its publication only began the public debate about the need for a new global treaty for crimes against humanity. Elaborated by experts without the constraints of government instructions (although deeply cognizant of political realities), it has become a platform for discussion by states, the United Nations International Law Commission (ILC), civil society and academics. The *Proposed Convention* not only builds upon and complements the ICC Statute by retaining the ICC's definition of crimes against humanity but also includes robust interstate cooperation, extradition and mutual legal assistance provisions in Annexes 2–6. Universal jurisdiction was retained (but is not mandatory), and the ICC Statute served as a model for several additional provisions, including Articles 4–7 (Responsibility, Official Capacity and Non-Applicability of Statute of Limitations) and with respect to the preamble and final clauses. Other provisions drew upon international criminal law and human rights instruments more broadly, such as the Enforced Disappearance Convention, the Terrorist Bombing Convention, the Convention Against Torture, the United Nations Conventions on Corruption and Organized Crime, the European Transfer of Proceedings Convention, and the Inter-American Criminal Sentences Convention, to name a few.¹⁵

Although the drafting process benefited from the existence of current international criminal law instruments, the creative work of the *Initiative* was to meld these and our own ideas into a single, coherent model convention that establishes the principle of state responsibility as well as individual criminal

13 'Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity', in Sadat (ed.), *supra* note 11, 323–344 (hereafter '*Proposed Convention*'). The Proposed Convention can also be found on page 403 in French and on page 503 in Spanish. These texts, as well as Arabic, Chinese, German, Portuguese and Russian translations, are available online at crimesagainsthumanity.wustl.edu (visited 28 May 2018).

14 Sadat (ed.), *supra* note 11. The first draft was circulated to participants at the Initiative's first meeting in April 2009, held in St. Louis, Missouri, and was prepared by the late Professor M. Cherif Bassiouni, who continued to spearhead the drafting effort as the work progressed.

15 A complete list can be found in the table at the back of the *Proposed Convention*, *supra* note 13, reproduced in Appendices I and II of Sadat (ed.), *supra* note 11, at 398–401, 445–448.

responsibility (including the possibility of responsibility for the criminal acts of legal persons) for the commission of crimes against humanity. Unlike the ICC Statute, which was preceded by several earlier drafts issuing from both ‘official’ and ‘unofficial’ sources,¹⁶ there had never been a serious effort to craft a new specialized treaty on crimes against humanity prior to the *Initiative’s* work. Article 1 of the *Proposed Convention*, describing the nature of the crime and the obligations of states and individuals with respect thereto, is deceptively simple:

Article 1

Nature of the Crime

Crimes against humanity, whether committed in time of armed conflict or in time of peace, constitute crimes under international law for which there is individual criminal responsibility. In addition, States may be held responsible for crimes against humanity pursuant to principles of States responsibility for internationally wrongful acts.¹⁷

The *Proposed Convention* innovates in many respects by bringing prevention into the instrument in a much more explicit way than predecessor instruments, by including the possibility of responsibility for the criminal acts of legal persons, by excluding defences of immunities and statutory limitations, by establishing the irrelevance of official position, prohibiting reservations and by establishing a unique institutional mechanism for supervision of the Convention. Echoing its 1899 and 1907 forbearers, it also contains its own ‘Martens Clause’.¹⁸ It also melded the kind of treaty provisions appropriate to a convention addressing a *jus cogens* offence with the robust inter-state cooperation, mutual legal assistance and enforcement provisions of more recent treaties on transnational crime, a decision that the Commission followed in its work. Elaborating the 27 articles and six annexes of the treaty was a daunting challenge, and one that could not have been accomplished without the dedication and enthusiasm of many individuals, particularly the *Initiative’s* Steering Committee,¹⁹ and, later, its Advisory Council.²⁰

16 L.N. Sadat (formerly Wexler), ‘The Proposed Permanent International Criminal Court: An Appraisal’, 29 *Cornell International Law Journal* (1996) 665–726.

17 *Proposed Convention*, *supra* note 13, Art. 1. The current draft articles of the International Law Commission (ILC) make no reference to state responsibility, assuming that this is presumably understood, even without being made explicit in the treaty.

18 *Proposed Convention*, *supra* note 13, Preamble, cl. 13. This clause was suggested by Morten Bergsmo at the *Initiative’s* 21–23 August 2009 meeting.

19 Each member of the Steering Committee brought tremendous energy and expertise to the project, guiding its methodological development and conceptual design, and carefully reading, commenting upon, and debating each interim draft of the *Proposed Convention* extensively. See e.g. ‘Preface and Acknowledgments’, in Sadat (ed.), *supra* note 11, at xxvi–xxviii.

20 There are currently 52 members of the Advisory Council, who offer advice and general support to the project. See generally online at <http://law.wustl.edu/harris/CAH/docs/CrimesAgainstHumanity-AdvisoryCouncil-Alpha-6.8.17.pdf> (visited 28 May 2018).

3. The International Law Commission's Current Project on Crimes Against Humanity

Three years after the *Proposed Convention* was finalized, the ILC included the topic of crimes against humanity on its long-term work programme, based upon a report prepared by Professor Sean Murphy who had attended the *Initiative's* Washington Capstone Conference in 2010. The report identified four key elements a new convention should have: a definition adopting Article 7 of the ICC Statute; an obligation to criminalize crimes against humanity with national legislation; robust inter-state cooperation procedures; and a clear obligation to prosecute or extradite offenders.²¹ The report also emphasized how a new treaty would complement the ICC Statute.²²

In autumn 2013, states had an opportunity to comment on the Commission's decision at the General Assembly's Sixth Committee. Many states commented favourably including Slovenia, Austria, the Czech Republic, Italy, Norway, Peru, Poland; the United States also welcomed the decision.²³ A major focus of many governments was on ensuring that a new treaty would complement the ICC Statute, as the comments of Malaysia and the United Kingdom (UK), for example, made clear.²⁴ Some states questioned the need for a new treaty, including France, Iran, Malaysia, Romania and Russia.²⁵

21 *Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013)*, UN Doc. A/68/10, Annex B, at 142, § 8.

22 *Ibid.*, at 142–143, §§ 9–13.

23 Statement by Mr Borut Mahnič, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 8 (30 October 2013) (Slovenia); Statement by Mr Gregor Schusterschitz, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 5 (28 October 2013) (Austria); Statement by Mr Petr Válek, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 3 (29 October 2013) (Czech Republic); Statement by Min. Plenipotentiary Andrea Tiriticco, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 5 (29 October 2013) (Italy); Statement on behalf of the Nordic Countries by Mr Rolf Einar Fife, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 3–4 (28 October 2013) (Norway); Intervención de la Misión Permanente del Perú, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 2 (29 October 2013) (Peru); Statement by Ambassador Ryszard Sarkowicz, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 5 (30 October 2013) (Poland); Statement by the United States, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 4 (2013) (USA).

24 Statement by Ms Sarah Khalilah Abdul Rahman, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 1, § 3 (30 October 2013) (Malaysia); Statement by Mr Jesse Clarke, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 5 (28–30 October 2013) (UK).

25 Statement by Mrs Edwige Belliard, 68th Session of the General Assembly, 6th Committee, under agenda item 81, Part I, at 2 (28 October 2013) (France); Statement by Professor Djamchid Momtaz, 68th Session of the General Assembly, 6th Committee, under agenda item 81, at 7 (5 November 2013) (Iran); Statement by Ms Sarah Khalilah Abdul Rahman, *supra* note 24 (Malaysia); Statement by Mrs Alina Orosan, 68th Session of the General Assembly, 6th Committee, under agenda item 79, at 5 (October 2013) (Romania); Statement by the Representative of the Russian Federation, 68th Session of the General Assembly, 6th Committee, under agenda item 79, at 6 (2013). France is now more supportive of the effort,

In May 2014, an Experts' Meeting was held at the Villa Moynier in Geneva bringing together international justice experts and members of the Commission to discuss the possibility of a new convention, its potential content, and the process of building support amongst states. These discussions are summarized in a Report published by the *Initiative* on 17 July 2014.²⁶ Participants noted the long involvement of the Commission on the subject of crimes against humanity and commented upon the historically progressive stance of the Commission in de-linking crimes against humanity from armed conflict in its formulation of the Nuremberg Principles.²⁷ It was also observed that the Commission had nearly completed its work on the obligation to extradite or prosecute (*aut dedere aut judicare*),²⁸ and was therefore in an excellent position to take up the question of a new convention on crimes against humanity.

On 17 July 2014, the ILC voted to move the topic of a new treaty on crimes against humanity to its active agenda and appointed Professor Murphy as Special Rapporteur.²⁹ The General Assembly took note of the Commission's decision,³⁰ and in the Sixth Committee, most states commenting on the topic again expressed support for the Commission's work.³¹

In 2015, the Special Rapporteur submitted his First Report, proposing two draft articles.³² After debate and discussion, four articles emerged from the Drafting Committee, which the Commission adopted.³³ These Articles (1 through 4) define the scope of the draft convention, the general obligations of states (to prevent and punish crimes against humanity whether or not

see Statement by Mr François Alabrune, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 1 (23 October 2017).

26 L.N. Sadat and D.J. Pivnichny, *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity*, Whitney R. Harris World Law Institute, 17 July 2014, available online at <https://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf> (visited 28 May 2018).

27 The Commission noted in 1950 'that [crimes against humanity] may take place also before a war in connection with crimes against peace'. *Report of the International Law Commission on its Second Session, 5 June to 29 July 1950*, Official Records of the General Assembly, Fifth session, Supplement No. 12 (A/1316), UN Doc. A/CN.4/34.

28 *Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere aut judicare)*, UN Doc. A/CN.4/L.829, 22 July 2013.

29 ILC, 66th Session, *Provisional summary record of the 3227th meeting*, UN Doc. A/CN.4/SR.3227, 18 July 2014, available online at <http://legal.un.org/docs/?path=../ilc/documentation/english/summary.records/a.cn4.sr.3227.pdf&lang=EF> (visited 28 May 2018).

30 GA Res. 69/118, 10 December 2014, § 7.

31 See e.g. Statement by Ms Päivi Kaukoranta, 69th Session of the General Assembly, 6th Committee, under agenda item 78, at 3 (27 October 2014) (Finland); Statement by Mr Petr Válek, 69th Session of the General Assembly, 6th Committee, under agenda item 78, at 2 (27 October 2014) (Czech Republic); Statement by Ms Penelope Ridings, 69th Session of the General Assembly, 6th Committee, under agenda item 78, at 3 (28 October 2014) (New Zealand).

32 *First report on crimes against humanity By Sean D. Murphy, Special Rapporteur* (hereafter 'First Report'), UN Doc. A/CN.4/680, 17 February 2015, §§ 120, 177.

33 *Report of the International Law Commission, Sixty-seventh session (4 May-5 June and 6 July-7 August 2015)*, UN Doc. A/70/10, § 115.

committed in time of armed conflict), and define crimes against humanity identically to Article 7 of the ICC Statute,³⁴ while also including an innovative 'obligation of prevention', which had been one of the core pillars of the *Initiative's* work. When the Commission's work was again presented to the Sixth Committee, an increased number (25 of the 38 states commenting on the project) reacted positively,³⁵ while again emphasizing the need for the draft articles to be consistent with the ICC Statute.³⁶ A few states maintained that a convention on the topic of crimes against humanity was unnecessary.³⁷ Others noted that the project was in its infancy and they would continue to develop their views as the Commission's work progressed.³⁸

In May 2016, the Commission considered the Special Rapporteur's Second Report, which proposed six additional draft articles,³⁹ and received a memorandum by the Secretariat providing information on treaty-based monitoring mechanisms.⁴⁰ After debate, the Commission provisionally adopted draft Articles 5 through 10 with commentary.⁴¹ These articles require states to criminalize the offence, provide for command responsibility, eliminate the defence of superior orders, abolish any statute of limitations, impose appropriate penalties and establish the liability of legal persons over the crime.

34 Art. 3(4) provides that this 'article is without prejudice to any broader definition provided for in any international instrument or national law'.

35 See e.g. Statement by Mr August Reinisch, 70th Session of the General Assembly, 6th Committee, under agenda item 83, at 3 (4 November 2015) (Austria); Statement by Mr Tomoyuki Hanami, 70th Session of the General Assembly, 6th Committee, under agenda item 83, at 3 (6 November 2015) (Japan); Statement by Mr Mahlatse Mminele, 70th Session of the General Assembly, 6th Committee, under agenda item 83, at 2 (9 November 2015) (South Africa).

36 See T.L. Slater, *Global Treaty on Crimes Against Humanity and Statements at the UN General Assembly*, 15 December 2015, available online at <http://law.wustl.edu/harris/lexlata/?p=837> (visited 28 May 2018). See also '70th Session of the UNGA Sixth Committee', in *Compilation of Government Reactions to the International Law Commission's Project on Crimes Against Humanity*, Whitney R. Harris World Law Institute, 26 December 2017, available online at <http://law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2017/12/6th-Committee-Governmental-Responses-Dec.-2017.pdf> (visited 28 May 2018) at 13 (hereafter '*Compilation of Government Reactions*').

37 *Compilation of Government Reactions*, *supra* note 36. See e.g. Statement by Ms Maria Telalian, 70th Session of the General Assembly, 6th Committee, under agenda item 83, at 5 (4 November 2015) (Greece).

38 *Compilation of Government Reactions*, *supra* note 36. See e.g. Statement by Ms Rita Faden, 70th Session of the General Assembly, 6th Committee, under agenda item 83, at 4 (6 November 2015) (Portugal).

39 *Second report on crimes against humanity* By Sean D. Murphy, Special Rapporteur (hereafter 'Second Report'), UN Doc. A/CN.4/690, 21 January 2016, Annex II. An important seminar was held in Nuremberg from 20 to 22 November 2015 prior to the drafting of the second report that brought together members of the Commission, international and national legal experts in international criminal law and members of the Crimes Against Humanity's Steering Committee.

40 *Report of the International Law Commission, Sixty-eighth session (2 May–10 June and 4 July–12 August 2016)* (hereafter '2016 ILC Report'), UN Doc. A/71/10, § 79.

41 *Ibid.*, § 85.

The question of liability for legal persons proved controversial for the Commission. It was initially rejected by the Special Rapporteur, however, after vigorous debate, the ILC decided to include it given the potential for legal persons to be involved in the commission of crimes against humanity.⁴² The *Initiative* took a similar view in the *Proposed Convention*.⁴³ The 2016 draft articles also addressed jurisdiction, investigation, preliminary measures, *aut dedere aut judicare*, and fair treatment of the alleged offender. The reaction of governments to the Commission's 2016 Report was again increasingly positive, with only three states (out of 36 commenting) proffering negative views,⁴⁴ and all others ranging from neutral to strongly positive.⁴⁵

In January 2017, after an experts' meeting held at the National University of Singapore in December 2016,⁴⁶ the Special Rapporteur finalized his Third Report. The Report stated that the Special Rapporteur would complete the draft articles in 2017, noting that one state had 'urged the Commission to complete its work on this topic "as swiftly as possible"'.⁴⁷ The Third Report proposed seven new articles and a draft preamble.

The Commission took up the Third Report in May 2017, after which the draft articles and draft preamble were sent to the Drafting Committee chaired by Aniruddha Rajput.⁴⁸ Although there were many technical comments regarding the provisions on extradition and mutual legal assistance, most members of the Commission appeared largely supportive of those articles, which had also been discussed in Singapore, as well as the use of the conventions on transnational crime as the starting point for the Commission's work. Given their complexity and length, however, placing them in an Annex, as the *Initiative* had done in the *Proposed Convention* was suggested. Several members queried whether the draft articles should not have had something on irrelevance of official capacity like Article 27(1) of the ICC Statute. Others took issue with the Special Rapporteur's discussion of the question of amnesty in

42 *Ibid.*, at 264, § 42. On the question of liability of legal persons, see E. van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law', in this special issue of the *Journal*, at Section 6.

43 *Proposed Convention*, *supra* note 13, Art. 8(A)(6).

44 China, Malaysia and India expressed negative opinions. Statement by Mr XU Hong, 71st Session of the General Assembly, 6th Committee, under agenda item 78 (27 October 2016) (China); Statement by Ms Hartini Ramly, 71st Session of the General Assembly, 6th Committee, under agenda item 78 (28 October 2016) (Malaysia); Statement by Dr V.D. Sharma, 71st Session of the General Assembly, 6th Committee, under agenda item 78 (1 November 2016) (India).

45 See also '71st Session of the UNGA Sixth Committee', in *Compilation of Government Reactions*, *supra* note 36.

46 'Asia-Pacific Workshop on a Global Convention for Crimes Against Humanity', Centre for International Law, National University of Singapore, 12–13 December 2016, available online at <http://law.wustl.edu/WashULaw/crimesagainsthumanity/experts-meetings/2016-asia-pacific-consultation-meeting/> (visited 28 May 2018).

47 *Third report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur* (hereafter 'Third Report'), UN Doc. A/CN.4/704, 23 January 2017, § 5.

48 *Report on the International Law Commission, Sixty-ninth session (1 May–2 June and 3 July–4 August 2017)* (hereafter '2017 ILC Report'), UN Doc. A/72/10 (2017), § 40. Twenty members of the Commission participated in the Drafting Committee. *Ibid.*, § 6(b).

the Third Report,⁴⁹ which suggested that there is no 'consensus on whether a complete prohibition on amnesties, even for serious crimes, has attained the status of customary international law'.⁵⁰ During a 'mini-debate' on the subject, several members argued that the *jus cogens* nature of crimes against humanity made it inadmissible to consider amnesties as lawful, suggesting that if the Commission did not include a prohibition, it should at least note in the commentary that failing to punish a crime against humanity would violate a state's obligation (then in Article 5) to criminalize the offence and add something to the preamble on the *jus cogens* nature of the crime. Finally, some members suggested the deletion of draft Article 16 on federal states, suggested modifications to the proposed preamble, and commented extensively on the proposed dispute settlement clause.

The text ultimately emerging at the end of the summer of 2017 is both similar to and different from earlier iterations. The first four articles adopted by the Commission in 2015 remained unchanged. A *non-refoulement* provision was added as draft Article 5, and draft Article 6 on 'Criminalization under national law' was expanded and edited to include a provision on irrelevance of official capacity (subparagraph 5). Earlier draft articles were retained, edited and renumbered, and new draft articles on 'Victims, witnesses and others' (Article 12), Extradition (Article 13), Mutual Legal Assistance (Article 14) and Settlement of Disputes (Article 15) were adopted. The Commission's First Reading omitted the Rapporteur's proposed article on federal states and relationship to competent international tribunals, put detailed provisions on mutual legal assistance in a new Annex, and edited the draft preamble substantially. The Commission's Report was sent to states which discussed it (episodically) from 23rd October to 1st November 2017. Of 55 states commenting, 51 were positive or neutral (predominantly being positive) demonstrating significant and growing support for this proposed global treaty.⁵¹

49 The Third Report relied heavily on the 'Belfast Guidelines on Amnesty and Accountability', University of Ulster and the Transitional Justice Initiative, 2013, available online at <https://www.ulster.ac.uk/research/institutes/transitional-justice-institute/research/current-projects/belfast-guidelines-on-amnesty-and-accountability> (visited 28 May 2018).

50 Third Report, *supra* note 47, § 296.

51 *Compilation of Government Reactions*, *supra* note 36, at 30. Positive and neutral statements were offered by, e.g. Statement by Mr Martin Smolek, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 2 (24 October 2017) (Czech Republic); Statement by H.E. António Gumende, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 2–3 (25 October 2017) (Mozambique); Statement by Mr Seoung-Ho Shin, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 1 (25 October 2017) (Republic of Korea); Statement by the Delegation of Ukraine, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 1 (25 October 2017) (Ukraine). The states expressing reservations were China, India, Iran and Sudan. See Statement by Mr XU Hong, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 3–4 (23 October 2017) (China); Statement by Dr V.D. Sharma, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 2–3 (24 October 2017) (India); Statement by Mr Abbas Bagherpour Ardekani, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 3–4 (25 October 2017) (Iran) and Statement by Mr Omer Dahab Fadl Mohamed, 72nd Session of the General Assembly, 6th Committee, under agenda item 81, at 2

4. A Preliminary Analysis of the Commission's First Reading

The Commission's 2017 draft articles provide an excellent point of departure for the negotiation of a new international instrument on crimes against humanity. Over the past three years the ILC has worked steadily and carefully to produce a draft that touches upon most of the essential points a new treaty will require, and will be largely acceptable to states, as evidenced by the increasing numbers of states' approving of — or at least being neutral towards — the Commission's work. This is no small achievement. When the *Initiative* was first launched, there was scepticism about the need for a new treaty and the utility of the exercise, even among those who recognized its potential value. Some academics did not take to the idea, state officials worried that it just meant more work or could be counterproductive, and many international justice advocates wondered if the new treaty could somehow undermine the ICC. It took years of writing, speaking and conversations, both public and private, before the idea caught on. It certainly helped that the *Initiative* consulted individuals from all over the world in elaborating its draft; and the fact that there was an actual text that could be examined proved useful as well. Rather than debating an abstract concept, it was possible to explore the utility (or not) of particular proposed legal provisions. Some states liked parts of the *Proposed Convention*, but not others; indeed, the annexes of the *Proposed Convention* ultimately gave rise to the initiative for a new Mutual Legal Assistance Treaty initiative taken forward by Argentina, Belgium, Mongolia, The Netherlands, Senegal and Slovenia.⁵² But what really made the difference in international enthusiasm for the project and moving it into the political sphere has been the work of the Commission, which is thus to be commended.

The Commission's draft is significantly shorter than the *Proposed Convention*, but incorporates many of the same elements: it complements and reinforces the ICC by retaining in draft Article 3 the text of Article 7 of the ICC Statute; it has a separate focus on prevention as well as punishment; it incorporates a strong procedural regime for extradition and mutual legal assistance based upon modern UN conventions on corruption and transnational organized crime; it has robust jurisdictional and *aut dedere aut judicare* provisions; and it has a dispute resolution clause which could be invoked before the ICJ (or elsewhere) to resolve disputes regarding the treaty's interpretation and application. Nonetheless, as the Commission continues its work, the remainder of this

(24 October 2017) (Sudan). For an unofficial translation of Sudan's statement, see *Compilation of Government Reactions*, *supra* note 36, at 29.

52 See e.g. S. Cocan, 'Fighting Against Impunity: The Mutual Legal Assistance Initiative for Domestic Prosecution of the Most Serious Crimes', IntLawGrrls, 7 December 2017, available online at <https://ilg2.org/2017/12/07/fighting-against-impunity-the-mutual-legal-assistance-initiative-for-domestic-prosecution-of-the-most-serious-crimes/> (visited 28 May 2018). The Netherlands Statement to the Sixth Committee in 2017 emphasized that 'both initiatives are complementary'.

essay offers some preliminary thoughts about the 2017 draft articles and suggests ideas the Commission may wish to consider in its future work.⁵³

A. The Preamble

The preamble is a critical element of any treaty as it is the part of the document most able to guide courts, tribunals, academics and even government officials as to the understanding of the instrument's 'object and purpose', which will be the basis of interpreting any ambiguous language.⁵⁴ Thus, it is important that the preamble not only set forth the reasons for the convention's adoption, but also situate it as part of a system of international criminal justice. The preamble also ties into the expressive function of international criminal law, allowing the reader to understand the important social values the treaty enshrines and protects.⁵⁵

The 2017 draft Preamble emerging from the Commission took into account the comments of members in May and now contains an explicit reference to the ICC Statute and to the *jus cogens* nature of crimes against humanity. This signals the intended complementarity of the ILC's draft articles with the ICC Statute, which has been a major preoccupation of states and civil society as the new contemplated treaty has taken shape. It also emphasizes the peremptory and non-derogable character of the prohibition, and offers at least a nod to the idea that they cannot be lawfully amnestied.⁵⁶

Missing from the text, however, is a 'Martens clause', which could be drafted along the lines of the *Proposed Convention*, as follows:

Declaring that in cases not covered by the present Convention or by other international agreements, the human person remains under the protection and authority of the principles of international law derived from established customs, from the laws of humanity, and from the dictates of the public conscience, and continues to enjoy the fundamental rights that are recognized by international law.⁵⁷

Given that most commentators tie the emergence of crimes against humanity at Nuremberg to the Martens clause, it seems odd not to include a provision like this in the preamble of a treaty on crimes against humanity. Professor Theodor Meron has observed the 'enduring legacy' and 'continuing currency' of the provision, which has been included not only in the two Hague Conventions but restated in modern humanitarian law treaties and by

53 This essay is part of a longer study on the Commission's 2017 draft articles and only emphasizes some of the key points.

54 Art. 31(1), (2) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

55 See D.M. Amann, 'Group Mentality, Expressivism, and Genocide', 2 *International Criminal Law Review* (2002) 92–143.

56 Conversely, it is not clear why the phrase 'prevented in conformity with international law' was added, which seems to either state the obvious or muddy the waters.

57 *Proposed Convention*, *supra* note 13, Preamble.

conferences and military manuals.⁵⁸ In addition, many experts consulted by the *Initiative* warned of the need not to prejudice the continuing development of customary international law. Including a Martens clause in the preamble could respond to this concern and reinforce draft Article 3(4).

B. Definition of the Crime

Following the *Initiative*, the Commission, from the outset, took the position that it would adopt Article 7 of the ICC Statute as the definition of crimes against humanity in the new convention.⁵⁹ There are many reasons to take this approach even though several participants in our project, in the NGO seminars held after the Commission's meetings in Geneva during the past two years, and even Members of the Commission themselves, have expressed varying levels of frustration with the text of Article 7.⁶⁰ After extensive discussion, we concluded that a new convention would either have to leave the definition open, along the lines of Article 5 of the convention on Enforced Disappearance ('crimes against humanity as defined in applicable international law') or essentially track the Rome Statute definition, which was negotiated by 165 states and has now been adopted by 123, at least in the initial stages of the project. It is possible that those negotiating a new convention will take a different view; but it seemed most sensible to build upon the ICC Statute for this and many other elements of a new inter-state convention in order to solidify and build upon the 'Rome consensus'.⁶¹

C. Immunities

As now noted in the 2017 draft Preamble, crimes against humanity are *jus cogens* offences under international law. It is clear under both treaty and customary international law that there is no immunity *ratione materiae* for crimes against humanity.⁶² This covers immunities in national law as well as before foreign criminal jurisdictions. It would thus seem uncontroversial to include a

58 T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *American Journal of International Law* (2000) 78–89, at 78–79.

59 The Commentary to draft Art. 3(4), notes the wide acceptance of the ICCSt. definition. See 2017 ILC Report, *supra* note 48, at 31, § 8. This was also the basis for the *Proposed Convention's* definition (*supra* note 13).

60 They criticized (as this author) the 'civilian population' requirement, the policy element, and the definitions of gender crimes, and particularly the odd phrasing of Art. 7(3). Sadat, *Comprehensive History*, *supra* note 11, § 27.

61 Proposals have been made to remove aspects of the ICCSt. definition that seem tied to Art. 7's status as a crime defined, by its own terms, '[f]or the purpose of this Statute' (cf. Art. 7 ICCSt.). These include eliminating Art. 7(3) (definition of gender) and the provision of Art. 7(1)(h) (persecution) that ties the crime of persecution to any crime committed 'in connection with any referred to in this paragraph or any crime within the jurisdiction of the Court', including, presumably, the crime of aggression (which was omitted from the ILC 2017 Draft, *supra* note 48).

62 Sadat, *supra* note 1.

provision tracking Article 27(1) of the ICC Statute. If it is left out, there will inevitably be states that argue that immunity is permissible, as a minority of Law Lords did in the *Pinochet* case in the UK, and which seems also to be the new position of the African Union in the Malabo Protocol.⁶³ It is thus a positive development that draft Article 6(5) now addresses the question explicitly.

At the same time, the language of draft Article 6(5) refers only to a 'person holding an official position', and does not track Article IV of the Genocide Convention, the 1950 Nuremberg principles or Article 27(1) of the ICC Statute. For the same reasons that the *Initiative* used Article 7 of the ICC Statute to define crimes against humanity, it may be preferable to use the already negotiated and widely accepted language of Article 27(1) in lieu of the text currently proposed by the Commission. Paragraph 31 of the Commentary to draft Article 6(5) takes the view that this provision only prevents an offender from raising 'the fact of his or her official position as a substantive defense so as to negate any criminal responsibility'⁶⁴ and contains a cryptic reference that this provision 'is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction"'.⁶⁵ It would be unfortunate if the Commission used the opportunity to develop a new treaty on crimes against humanity to roll back understandings about the irrelevance of official capacity as a defence to a prosecution for crimes against humanity.

Finally, it is worth noting that the *Initiative* took the position that procedural immunities should also be set aside in a new treaty, following the example of Article 27(2) the Rome Statute. The *Initiative's* view was supported by the work of the ILC on the 1996 draft Code of Crimes, which stated in the Commentary to draft Article 7 (on immunities) that '[t]he absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.'⁶⁶

D. Amnesties

The section on amnesties in the Third Report⁶⁷ seemed to suggest the lawfulness of amnesties granted to persons accused of committing crimes against

63 Malabo Protocol, *supra* note 3, Art. 46A *bis*.

64 2017 ILC Report, *supra* note 48, at 72, § 31.

65 *Ibid*.

66 See *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, in *Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996*, UN Doc. A/51/10, at 27, § 6. For a further discussion of this question, see L.N. Sadat, 'Official Immunities at the International Criminal Court: The Uneasy Revolution Continues' (forthcoming, 2018). For a critical view of the ILC's approach to immunities in its work on crimes against humanity, see M. Frulli, 'The Draft Articles on Crimes against Humanity and Immunities of State Officials: Unfinished Business?' within this special issue.

67 Third Report, *supra* note 47, §§ 285–297.

humanity. This was a surprising development. The Third Report notes that ‘no international treaty explicitly prohibits amnesties’,⁶⁸ observing, in contrast, that Article 6(5) of Additional Protocol II (AP II) suggested they were lawful. Yet, AP II has little to do with crimes against humanity,⁶⁹ and does not in any event support the grant of amnesty for the commission of *international crimes*, as the International Committee of the Red Cross (ICRC),⁷⁰ and others have noted.⁷¹ Indeed, in 2009, the High Commissioner for Human Rights concluded:

Although crimes against humanity are addressed in various international treaties, including the statutes of every international and hybrid criminal tribunal established since and including the Nuremberg Tribunal, they are not yet the subject of a treaty similar to the Genocide Convention. They have, however, been recognized—in the words of the preamble to the Rome Statute of the International Criminal Court—as among ‘the most serious crimes of concern to the international community as a whole’ which ‘must not go unpunished’ and whose ‘effective prosecution must be ensured.’

An amnesty that exempted crimes against humanity from punishment and/or civil remedies would also be inconsistent with States parties’ obligations under several comprehensive human rights treaties that do not explicitly mention this international crime, including the International Covenant on Civil and Political Rights and the American Convention on Human Rights, but which have been interpreted to require punishment of crimes against humanity.⁷²

Although the *Crimes Against Humanity Initiative* did not articulate a specific prohibition of amnesties in its *Proposed Convention*, the rationale was *not* that amnesties were permissible for crimes against humanity, but that the obligation to prosecute or extradite crimes against humanity implicitly, but clearly, included the prohibition not to amnesty them. As Professor Diane Orentlicher, who wrote the paper relating for amnesties for the *Initiative* observed,

It is widely agreed ... that international treaties that require States Parties to prosecute a defined offense, such as genocide or torture, would be breached by an amnesty exempting perpetrators of these offenses from criminal prosecution. Similarly, ... treaties that explicitly require States Parties to provide a remedy for violations of rights enumerated therein have been interpreted implicitly to proscribe amnesties that prevent victims from accessing an effective remedy.⁷³

68 *Ibid.*, § 286.

69 L.N. Sadat, ‘Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement’, 31 *Emory International Law Review* (2016) 197–270, at 199–213.

70 ‘Customary IHL: Rule 159. Amnesty’, International Committee of the Red Cross, available online at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1r1r1rule159> (visited 28 May 2018).

71 L.N. Sadat, ‘Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable’, in S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 193–213, at 202–203.

72 UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, UN Doc. HR/PUB/09/1, 2009, available online at <http://www.ohchr.org/Documents/Publications/Amnesties.en.pdf> (visited 28 May 2018; citations omitted).

73 D. Orentlicher, ‘Immunities and Amnesties’, in Sadat (ed.), *supra* note 11, 202–222, at 217.

It is true that this does not address the question of the illegality of amnesties for crimes against humanity under customary international law; yet, the Third Report did not cite any cases in which an amnesty for crimes against humanity has been sustained by any national or international court, and recent decisions seem to point in the opposite direction,⁷⁴ with some limited exceptions.⁷⁵ Although there are doctrinal writings suggesting that some amnesties might be lawful, even for crimes against humanity,⁷⁶ the only exception generally admitted has been where a state (such as South Africa) has engaged in a comprehensive and democratic process and issued domestic and conditional amnesties. Article 53 of the ICC Statute is thought to be a grudging admission that the 'interests of justice' may require the international community to respect a carefully negotiated solution that includes conditional amnesties, such as those negotiated during South Africa's transition from apartheid. Yet, increasing dissatisfaction with the South African transition from apartheid has been voiced in South Africa, and the ICC Prosecutor has been clear that such a situation would be 'exceptional'. No such exceptional case has been recognized to date. Thus, to the extent the law has evolved since 1998 it seems to have crystallized the prohibition *against* amnesties for crimes against humanity, not supported their legality.⁷⁷

74 See e.g. D. De Vos, 'Corporate Accountability: Dutch Court Convicts Former "Timber Baron" of War Crimes in Liberia', *Blog of the European University Institute*, 24 April 2017, available online at <https://me.eui.eu/dieneke-de-vos/blog/corporate-accountability-dutch-court-convicts-former-timber-baron-of-war-crimes-in-liberia/> ('finding that a national amnesty that precludes prosecutions of war crimes and crimes against humanity would be "incompatible with the international obligation to prosecute such crimes"; visited 28 May 2018). An official English translation of the case is not yet available. Although states still suggest or adopt amnesty measures, courts often strike them down, especially if they apply to crimes against humanity or the most serious war crimes. See e.g. P. Bradfield, 'Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo', 15 *Journal of International Criminal Justice* (2017) 827–855.

75 See e.g. N. Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity', 37 *Human Rights Quarterly* (2015) 341–382, at 354–355 (noting amnesties sustained only due to the operation of the legality principle); see also Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, *Fofana* (SCSL-2004-14-AR72(E)), Appeals Chamber, 25 May 2004, § 3 (noting states' duty to prosecute crimes whose prohibition has the status of *jus cogens*).

76 See e.g. M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009), at 206–208; M. Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law', 1 *Ethics and Global Politics* (2008) 1–40. On the opportunity of amnesties for crimes against humanity, see also S.M.H. Nouwen, 'Is there Something Missing in the Proposed Convention on Crimes Against Humanity? A Political Question for States and Doctrinal One for the International Law Commission', within this special issue, especially at Sections 2 and 3(A).

77 See e.g. Amnesty International, *International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity*, 28 April 2015, available online at <https://www.amnesty.org/en/documents/ior40/1227/2015/en/> (visited 28 May 2018), at 15–23. Similar views are expressed in H.A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity: The Prohibition of Amnesties, Military Courts, and Reservations', within this special issue, at Section 2.

The ILC did not need to address the question of amnesties under customary international law because the 2017 draft articles only speak to the obligations that the convention itself will impose, not all theoretical possibilities related to the question of amnesty for international crimes. In the two scenarios most relevant to the draft articles, the legality of an amnesty for crimes against humanity granted by a state party to the convention, and the legality of an amnesty before a foreign criminal jurisdiction that is a party to the convention, the amnesty would be presumably be invalid.⁷⁸ The Commentary to draft Article 10 states that ‘the obligation upon a State to [investigate and prosecute] may conflict with the ability of the State to implement an amnesty ...’.⁷⁹ This language should be stronger still in light of current state and international practice, and given the *jus cogens* nature of crimes against humanity.⁸⁰ Indeed, it may be useful for the Commission to include a carefully drafted provision prohibiting states parties to the convention from granting amnesties for crimes against humanity in the draft articles. There were proposals for such a provision during the negotiation of the Enforced Disappearance Convention, but agreement could not be reached.⁸¹ This may indicate the presence of *practical* obstacles to achieving consensus on this point; but a survey of the case law and state practice does not suggest *legal* obstacles to doing so.

E. Prevention

A core pillar of the *Initiative’s* work on crimes against humanity concerned the potential preventive dimension of a new treaty. The *Proposed Convention* included the obligation of prevention in Article 2(1), as well as in Articles 8(12)–(16) on the obligation of states to prevent and throughout other provisions of the *Proposed Convention*. The inclusion of draft Article 4 is thus welcome, but prevention could be strengthened by the inclusion or modification of other provisions, as follows.

1. Reservations

Following the ICC Statute, the *Proposed Convention* has also prohibited reservations.⁸² This was to prevent states from undermining the treaty’s effectiveness and to enhance its preventive dimension. It is also the practice of a surprising number of recent and older international agreements, including, most recently, the Paris Agreement on Climate Change. It thus seems preferable for a core human rights treaty to take this approach. If reservations are prohibited,

78 Sadat, *Exile, Amnesty and International Law*, *supra* note 1.

79 2017 ILC Report, *supra* note 48, at 86–88, §§ 8–11.

80 Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber II, 10 December 1998, § 155.

81 Orentlicher, *supra* note 73, at 220–221.

82 *Proposed Convention*, *supra* note 13, Art. 23.

recent empirical studies⁸³ suggest that opt-out clauses in particular areas may be useful to present states with choices.⁸⁴ There are many points in the current draft articles giving states the right to refuse mutual legal assistance, for example, or to opt-out of dispute settlement.

If the Commission decides to permit reservations, it should specify which articles may be subject to them, as many Members noted during the sixty-ninth session. Moreover, if reservations are permitted, opt-outs of various clauses are redundant and should be eliminated. No doubt the draft articles, when finalized on second reading, will form a carefully calibrated 'package' taken together.

2. Monitoring Mechanisms

A convention without a monitoring mechanism is likely to be an 'orphan'. Although there is some fatigue regarding monitoring mechanisms internationally, and questions of resources arise as well, the Commission's Commentary to the 2017 draft articles is replete with decisions and comments from treaty bodies such as the Human Rights Committee and the Torture Committee, demonstrating how important the interpretive work of these institutions is.⁸⁵ Although some Members expressed the view that this was a policy question, best left to states, the problem the Commission's work is addressing is not an excess of justice capacity, but an excess of crimes. Having a monitoring mechanism of some kind therefore seems important to the treaty's ultimate success.

3. Incitement

During the Commission's 2016 plenary discussion of the Second Report, several Members discussed the need to include 'incitement' as a mode of liability in the ILC draft along the lines of Article III(c) of the Genocide Convention. This issue was raised at the Geneva Academy Seminar held on 6 May 2017 in discussing the first 10 articles as well.⁸⁶ Tracking the language of the Genocide

83 See e.g. J. Galbraith, 'Treaty Options: Towards a Behavioral Understanding of Treaty Design', 53 *Virginia Journal of International Law* (2013) 309–364.

84 This would be consistent with the ILC's past work. See ILC, 'Reservations to treaties', available online at <http://legal.un.org/ilc/guide/1.8.shtml> (visited 28 May 2018) and the practice of human rights bodies. For examples of international treaties with opt-out clauses, see e.g. United Nations Convention Against Transnational Organized Crime, 12 December 2000, 2225 UNTS 209, Art. 35; United Nations Convention on the Assignment of Receivables in International Trade, 12 December 2001, GA Res. 56/81, 56th Sess., UN Doc. A/RES/56/81 (31 January 2002), Arts 39–42.

85 See e.g. the Commentary to draft Art. 5 ('*Non-refoulement*'), which makes extensive reference to the work of the Committee Against Torture and the Human Rights Committee, 2017 ILC Report, *supra* note 48, at 57–58, §§ 7, 10. See also Commentary to draft Art. 8 ('*Investigation*'), *ibid.*, at 80–81, §§ 2–5.

86 Following the Commission's sessions on the project, the Geneva Academy of International Humanitarian Law and Human Rights convened two seminars at the Villa Moynier in May 2016 and 2017.

Convention, the *Proposed Convention* included ‘incitement’ in Article 4(2)(e), to enhance the treaty’s preventive dimension and based upon existing jurisprudence, including the successful prosecution of Julius Streicher by the International Military Tribunal at Nuremberg for crimes against humanity based upon his writings advocating the annihilation of the ‘Jewish race.’⁸⁷ As former US Ambassador for War Crimes Stephen Rapp noted in his keynote address to the *Initiative* at the Brookings Institution, incitement is often a key precursor to the commission of crimes against humanity. For this reason, it may therefore be useful to require states to prohibit, consistent with their obligations under international human rights law, ‘advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence,’⁸⁸ in the Commission’s draft Article on prevention. One could also add incitement as a mode of liability in proposed draft Article 6. Although the Second Report suggested that ‘inducement’ covers ‘incitement,’⁸⁹ that is not entirely clear and including ‘incitement to crimes against humanity’ in this new convention would have real juridical import.⁹⁰

4. State Responsibility

Article 2 (general obligation) of the 2017 draft articles omits a phrase from the *Initiative’s* proposed Article 1 (nature of the crime) that provided: ‘States may be held responsible for crimes against humanity pursuant to principles of State responsibility for internationally wrongful acts’. The First Report observed that this was not intended to suggest that states do not incur responsibility for crimes against humanity, but that such responsibility is implied and therefore need not be explicitly mentioned.⁹¹ Yet, all references to state responsibility have now been eliminated from the text of the draft articles, in both the scope of the convention itself and in the dispute settlement clause

87 He was convicted of crimes against humanity based upon his ‘incitement to murder and extermination’, Judgment of 1 October 1946, International Military Tribunal Judgement and Sentence, 41 *American Journal of International Law* (1947) 172, 296. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, GA Res. 2391 (XXIII), annex, 23 UN GAOR Supp. (No. 18), at 40, UN Doc. A/7218 (1968), *entered into force* 11 November 1970, includes incitement to crimes against humanity in Art. 2 as does the Apartheid Convention in Art. III(a) International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res. 3068 (XXVIII), 30 November 1973, *entered into force* 18 July 1976.

88 *Proposed Convention*, *supra* note 13, Art. 8(1)(C)(12).

89 Second Report, *supra* note 39, § 33; See also 2016 ILC Report, *supra* note 40, at 253, §§ 12–13.

90 For a similar standpoint, see van Sliedregt, *supra* note 42, at Section 2(C). In this same special issue, see also W. Schabas, ‘Prevention of Crimes Against Humanity’, Section 8. See also, e.g. G.S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, 2017); J. Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); R.A. Wilson, *Incitement on Trial* (Cambridge University Press, 2017).

91 First Report, *supra* note 32, § 81.

(draft Article 15).⁹² The Commission's work should be clear that state responsibility continues to attach to the commission of crimes against humanity in order to enhance the convention's preventive effect, as the case of *Bosnia v. Serbia* underscores.⁹³

5. Conclusion

It has been more than 70 years since the Nuremberg Judgment convicted individuals, for the first time in history, of 'crimes against humanity'. It is thus thrilling to witness, at long last, the birth of a new global treaty on crimes against humanity and participate in its evolution from thought experiment to concrete reality. Yet, the continued commission of atrocity crimes in the world and the reluctance of many states to intervene either to bring the crimes to an end or to refer cases of ongoing criminality to the ICC (or national or ad hoc tribunals) is sobering. Twenty years after the adoption of the Rome Statute, many states have yet to ratify it, and the advances enshrined in that instrument are not yet universally accepted. Indeed, at least superficially, this seems to be a period of some retrenchment and regression as regards international human rights norms and justice mechanisms. Syria is just one particularly bloody example of the abject failure of the international community to prevent the commission of atrocity crimes. Security Council sessions have become characterized by charged rhetoric, posturing and even the exercise of the veto, rather than meaningful efforts to achieve consensus, develop solutions and uphold international law. It is easy to become cynical and accept the *status quo*, or to worry that perhaps now is not the time to continue to enhance and develop the international system of global justice. Yet, as Stephen Rapp, former US Ambassador-at-large for Global Criminal Justice recently observed, these strong 'global headwinds' have not stopped arrests and prosecutions from moving forward in cases all over the globe in national legal systems,⁹⁴ nor have they prevented the ICC from doing important work, or the General Assembly from acting when there is a stalemate in the Security Council. A new treaty enhancing the ability of national systems to prevent and punish crimes against humanity could greatly assist with these efforts.

The Commission's work on the topic of crimes against humanity is thus both timely and critically important. As the Commission continues to refine its project, it should cleave to the international criminal law norms established at Nuremberg — and reinforced by the ICC Statute and its own work on the *Draft Code of Crimes* — to consolidate the *acquis de droit pénal international* by

92 Draft Art. 15 seems problematic in several respects. It does not track either Art. IX of the Genocide Convention or any other text, and provides no time limit before which referral to the International Court of Justice will be possible if negotiations fail. This may be a provision that the Commission will want to revisit in the next reading of the text.

93 See *Bosnia v. Serbia*, *supra* note 9.

94 S.J. Rapp, 'International Criminal Justice from the Ground Up', Remarks, American Society of International Law, Annual Meeting, 6 April 2018, Washington, D.C. (author's notes).

crafting text that builds upon and enhances the effectiveness of international criminal law. In this way, the Commission's work will represent not only the codification of international law, but also its progressive development, consistent with important values of peace and security enshrined in the UN Charter and general international law. As the Commission concludes its efforts over the next two years, states and civil society must engage with its work and be ready to carry it forward so as to successfully develop a new convention that meets global expectations to fulfil the promise of the Rome Statute that 'unimaginable atrocities that shock the conscience of humanity' will no longer 'go unpunished'.⁹⁵ As Morten Bergsmo and Song Tianying have observed, this effort 'has the capacity to mobilise broad interest and involvement around the world: to become the new "generational" project to develop international law to protect the individual',⁹⁶ and keep the legacy of the Nuremberg and Tokyo trials alive.

95 Preamble, ICCSt.

96 M. Bergsmo and SONG, T. (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014), at 13.

Prevention of Crimes Against Humanity

William A. Schabas*

Abstract

Like the Genocide Convention, the draft articles on crimes against humanity are not confined to issues of punishment. They also, in the preamble and especially in Article 4, impose an obligation of prevention. It is informed principally by the 2007 judgment of the International Court of Justice as well as the case law of international human rights tribunals. The obligation has an internal dimension, by which states must prevent crimes against humanity within their own jurisdiction. But it also has an external dimension that mandates international cooperation and even intervention which must necessarily be compatible with the Charter of the United Nations. The draft articles are not as robust as the Genocide Convention with respect to the inchoate crimes of incitement and conspiracy. The obligation of non-refoulement is also a dimension of the preventative role of the draft articles.

1. Introduction

Crimes against humanity may usefully be thought of as a cognate of gross and systematic violations of human rights. Many of the definitional developments in crimes against humanity since they were first codified in the Charter of the International Military Tribunal, such as the addition of apartheid, torture, and enforced disappearance, reflect developments in human rights law. The crime against humanity of persecution, as defined in Article 7(1)(h) of the International Criminal Court (ICC) Statute, seems directly tributary of progress in the protection of human rights and dependent upon it for its interpretation. The International Law Commission (ILC), which is now preparing components of a treaty on international law, once even proposed abandoning the label

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‘crimes against humanity’ in favour of ‘systematic or mass violations of human rights’.¹

At the most basic level, then, the prevention of crimes against humanity involves addressing violations of human rights that may not yet warrant qualification as ‘gross and systematic’. Such a broad and holistic view of the prevention of atrocity crimes, including crimes against humanity, is reflected in the work of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide.² It often focusses on a range of transitional justice measures and such issues as addressing the legacy of past atrocities to prevent their reoccurrence.³ But these important matters are surely beyond the scope of an instrument like the draft articles on crimes against humanity currently being studied by the ILC.

According to the ILC Drafting Committee, in its first report, ‘the draft articles’ primary purpose [is] the *prevention* of crimes against humanity’.⁴ Taking the lead from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,⁵ as interpreted by such bodies as the International Court of Justice (ICJ), prevention of crimes against humanity has its place within the draft articles. The notion of prevention appears explicitly in the preamble of the draft articles and in three distinct provisions. Prevention is also implicit in the *non-refoulement* obligation set out in draft Article 5 because it requires states to ensure that crimes against humanity are not perpetrated as a result of rendition from their territory to a place where there is a real risk of their occurrence. The draft articles take some modest steps towards codifying the obligation of prevention, in some respects taking it slightly farther than in the Genocide Convention while in others appearing to fall short of the earlier instrument. The scope of prevention of crimes against humanity remains relatively enigmatic, as it does with genocide. The compelling analogy, and the starting point for any understanding of the prevention of crimes against humanity, is the 1948 Genocide Convention.

2. Prevention and the Genocide Convention

It is not always appreciated that the 1948 Genocide Convention is in some sense a response to the inadequate reach of crimes against humanity. When

- 1 *Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991*, UN Doc. A/46/10, at 103.
- 2 See, for example, *Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide*, UN Doc. A/HRC/37/65, 1 March 2018.
- 3 *Resolution adopted by the Human Rights Council on 30 September 2016: Human rights and transitional justice*, UN Doc. A/HRC/RES/33/19, 5 October 2016, § 7.
- 4 International Law Commission (ILC), *Summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017 (*‘Summary record of the 3366th meeting’*), at 3 (emphasis added).
- 5 Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

Ernesto Dihigo, the Cuban representative to the first session of the General Assembly, took the floor in the Sixth Committee on 22 November 1946 to propose a resolution on the crime of genocide, he explained that, '[a]t the Nürnberg trials, it had not been possible to punish certain cases of genocide because they had been committed before the beginning of the war. Fearing that such crimes might remain unpunished owing to the principle of *non [sic] crimen sine lege*, the representative of Cuba asked that genocide be declared an international crime. This was the purpose of the resolution.'⁶ The initial draft resolution sponsored by Cuba, India and Panama did not have a title. Its operative paragraph called for the Economic and Social Council to prepare a report 'on the possibilities of declaring genocide an international crime and assuring international cooperation for its *prevention* and punishment'.⁷

Inspired by the draft resolution, Saudi Arabia, in one of its more significant contributions to the advancement of human rights, submitted a draft convention on genocide that required future states parties 'to make effective use of every means at their disposal, acting separately or in co-operation to prevent and penalise genocide'.⁸ Resolution 96(I), entitled 'The Crime of Genocide', was adopted unanimously by the General Assembly on 11 December 1946. Operative paragraph 3 'recommend[s] that international co-operation be organised between states with a view to facilitating the speedy prevention and punishment of the crime of genocide ...'. The *travaux préparatoires* demonstrate that the importance of prevention was present from the earliest stages of codification of the law of genocide, indeed, even before the idea of a convention had emerged. The Convention itself acknowledges the significance of prevention and imposes this as a binding treaty obligation.

However, the Genocide Convention provides little in the way of guidance as to the scope of the duty to prevent genocide. The Convention concentrates on criminal prosecution of genocide. Prevention seems to be contemplated in an exceedingly narrow sense, whereby the crime is prevented by prosecuting the perpetrators. Arguably, the existence of the Convention may also provide some measure of deterrence, which contributes to prevention. Over the decades following the adoption of the Genocide Convention, little attention was devoted to fulfilment of the obligation to prevent the crime. For example, the most significant study of the Convention within the United Nations, issued by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1985, acknowledged the issue of prevention but did not offer much in terms of concrete proposals. It urged the establishment of a mechanism to provide 'early warning' although there was no guidance on what would

6 UN General Assembly (GA), Sixth Committee, *Summary Record of the 22nd Meeting*, UN Doc. A/C.6/84, 25 November 1946.

7 *Request from the Delegations for Cuba, India and Panama for the inclusion of an additional item in the Agenda*, UN Doc. A/BUR/50, 2 November 1946 (emphasis added).

8 *Draft protocol for the prevention and punishment of the crime of genocide, proposed by the delegation of Saudi Arabia*, UN Doc. A/C.6/86, 26 November 1946.

be done in the event of serious concerns that the crime might actually be committed.⁹

The 1994 genocide in Rwanda was a turning point. Since then, great attention has been devoted to addressing the dimensions of the prevention of genocide as well as of other atrocity crimes. On the tenth anniversary of the Rwandan genocide, the Secretary-General of the United Nations established a post of Special Advisor on the Prevention of Genocide.¹⁰ In the *Bosnia v. Serbia* case, the ICJ considered the scope of the obligation to prevent genocide, giving it teeth when it found a violation of the Convention by Serbia for its failure to intervene appropriately at the time genocide was perpetrated in Srebrenica.¹¹ Closely related, the doctrine of the ‘responsibility to protect’ has emerged. It imposes a duty on all states to prevent both genocide and crimes against humanity ‘through appropriate and necessary means.’¹² Given this background to the renewed interest in codifying obligations with respect to crimes against humanity, it is quite unthinkable that a new convention be adopted that does not adequately address the issue of prevention.

3. The Draft Articles and Prevention

The fourth recital of the preamble of the draft articles states: ‘[a]ffirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law, ...’¹³ Moreover, the fifth recital declares that states parties are ‘[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes ...’. The third recital of the preamble to the draft articles also addresses prevention although the word itself is not employed. It ‘[r]ecognis[es] further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)’. Obviously, prohibition is a measure of prevention.

According to the general commentary, the Commission intended the preamble to address prevention as distinct from punishment. The commentary

9 Revised and updated report on the question of the prevention and punishment of the crime of genocide, Prepared by Mr. B. Whitaker, UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, §§ 78–84.

10 See W. Schabas, ‘The Special Adviser on the Prevention of Genocide and his Inscrutable Mandate’, in C.T. Majinge (ed.), *Rule of Law through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng* (Cambridge Scholars, 2015) 65–81.

11 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports (2007) 43 (*‘Bosnia v. Serbia’*).

12 2005 *World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005 (*‘World Summit Outcome’*), § 138.

13 The original proposal by the Special Rapporteur (*Third report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, hereinafter *‘Third Murphy Report’*, at 138) read: ‘[a]ffirming that crimes against humanity, one of the most serious crimes of concern to the international community as a whole, must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, ...’

explains that the draft articles have ‘two overall objectives: the prevention and the punishment of crimes against humanity’ and that the fourth recital to the preamble focuses upon the first of them.¹⁴ The commentary observes that this paragraph ‘foreshadows’ obligations that are set out in draft Articles 2, 4, and 5. It adds that in affirming that crimes against humanity ‘must be prevented in conformity with international law’, recital four of the preamble ‘indicates that such crimes are among the most serious crimes of concern to the international community as a whole’.¹⁵ The formulation ‘the most serious crimes of concern to the international community as a whole’ is taken from the ICC Statute, where it appears in the preamble, and in Articles 1 and 5.¹⁶ The general commentary also explains that the fifth recital of the preamble ‘affirms the link between the first overall objective (prevention) and the second overall objective (punishment) of the present draft articles, by indicating that prevention is advanced by putting an end to impunity for the perpetrators of such crimes’.¹⁷ It, too, is derived from a recital in the preamble of the ICC Statute.¹⁸

Article 2 of the draft articles declares that ‘[c]rimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which states undertake to prevent and punish’. It is really a preliminary provision that introduces the substantive articles. The provisions echo the language of Article I of the 1948 Convention on Genocide. Indeed, the word ‘undertake’ was introduced by the Drafting Committee,¹⁹ replacing ‘shall’ in the original proposal of the Special Rapporteur,²⁰ so as to maintain the parallelism with the 1948 Genocide Convention. The Drafting Committee noted that the ICJ had interpreted the word ‘undertake’, as it appears in Article I of the Genocide Convention, as meaning to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, and to accept an obligation.²¹ The quite lengthy commentary to this article recalls the history of crimes against humanity, referring to the first codification in the Charter of the International Military Tribunal, to the Principles adopted by the ILC in 1950, and to more recent initiatives such as the Statute of the International Criminal Tribunal for the former Yugoslavia.²² The general commentary does

14 *Report of the International Law Commission on the work of its Sixty-ninth session (1 May - 2 June and 3 July - 4 August 2017)*, UN Doc. A/72/10 (‘2017 ILC Report’), at 24.

15 *Ibid.*

16 Rome Statute of the International Criminal Court, (2002) 2187 UNTS 3. See *Summary record of the 3366th meeting*, *supra* note 4.

17 2017 ILC Report, *supra* note 14, at 24.

18 Preambular paragraph 3, ICCSt.

19 ILC, *Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015*, UN Doc. A/CN.4/L.853, 2 June 2015 (‘Text of draft articles’), at 1.

20 *First report on crimes against humanity By Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/680, 17 February 2015 (‘First Murphy Report’), Annex, at 87. The Special Rapporteur had considered use of the word ‘undertake’, *ibid.*, § 113.

21 ILC, *Summary record of the 3263rd meeting*, UN Doc. A/CN.4/SR.3263, 5 June 2015 (‘*Summary record of the 3263rd meeting*’), at 6.

22 2017 ILC Report, *supra* note 14, at 25–28.

not provide any further enlightenment on the scope of the obligation of prevention.

Article 4 is the principal provision dealing with the obligation to prevent crimes against humanity. That it should be a distinct provision emerged in the report of the Drafting Committee at the 2015 session of the Commission and underscores the attention attached to prevention. The Drafting Committee described the purpose of the article as being ‘to set forth the various elements that collectively promote the prevention crimes against humanity’. The Drafting Committee gave the provision the title ‘Obligation of prevention’. This is ‘meant to suggest that the obligation has a range of elements rather than a single focus.’²³ The text adopted by the Commission reads as follows:

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:
 - (a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and
 - (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organisations.
2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.²⁴

The general commentary notes that the opening words of the paragraph are formulated in a manner similar to that of Article I of the 1948 Genocide Convention.²⁵ As it did with Article 2 of the draft articles, the Drafting Committee replaced the word ‘shall’ with ‘undertakes’,²⁶ in the interests of consistency.²⁷

The general commentary provides a lengthy elaboration of the scope of prevention and the intent behind Article 4. It begins by reviewing existing treaty practice concerning the prevention of crimes and other acts, especially with respect to treaties dealing with acts that may, depending upon the circumstances, also constitute crimes against humanity. The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in 1973, declares that apartheid is a crime against humanity.²⁸ The

²³ ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7.

²⁴ 2017 ILC Report, *supra* note 14, at 45. The first draft of the provision proposed by the Special Rapporteur (UN Doc. A/CN.4/680, Annex, at 87) read as follows: ‘1. Each state party confirms that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which it undertakes to prevent and punish. 2. Each state party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction. 3. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of crimes against humanity.’

²⁵ 2017 ILC Report, *supra* note 14, at 48.

²⁶ ILC, Text of draft articles, *supra* note 19, at 3.

²⁷ ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 6.

²⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid, (1986) 1015 UNTS 243, Art. I(1).

more recent Convention on enforced disappearance states that '[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity'.²⁹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁰ does not explicitly invoke the concept of crimes against humanity but torture is recognized as such in other instruments, such as the ICC Statute. Finally, the 1948 Genocide Convention, born from dissatisfaction with the limited scope of crimes against humanity affirmed in the judgment of the International Military Tribunal, deals with a category of international crime that has often been described as a form or category of crime against humanity.³¹ More generally, as the commentary explains, echoing a paragraph in the 2007 ICJ judgment,³² an obligation of prevention has for many decades featured in most multilateral treaties dealing with crimes, even those outside of the realm of crimes against humanity and human rights.³³

Interpretation of the obligation of prevention in the draft articles is obviously informed by the ICJ judgment regarding prevention of genocide.³⁴ The general commentary examines the reasoning of the Court in considerable detail.³⁵ Although this portion of the commentary begins with the words '[i]nternational courts and tribunals have addressed these obligations of prevention', no case law other than the ICJ ruling in *Bosnia v. Serbia* is discussed. It may well be that the *Bosnia* judgment is the only judicial consideration of the obligation to prevent, by any court and with respect to any treaty. With reference

29 International Convention for the Protection of All Persons from Enforced Disappearance, (2010) 2716 UNTS 3 ('Convention Against Enforced Disappearance'), Art. 4. See also PP4 of the Convention. On enforced disappearance as a crime against humanity, see W. Schabas, 'Defining enforced disappearance as a crime against humanity', in M. Bideault, M. Boumghar, O. de Frouville and L. Trigeaud (eds), *Mélanges en l'honneur du professeur Emmanuel Decaux, Réciprocité et universalité, Sources et régimes du droit international des droits de l'homme* (Éditions Pédone, 2017) 449–466.

30 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85 ('Convention Against Torture').

31 Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277 ('Genocide Convention'). See, for example, Judgment on Defence Motions to Acquit, *Sikirica et al.* (IT-95-8-I), Trial Chamber, 3 September 2001, § 58, explaining that genocide is a crime against humanity and that it belonged to a 'genus' that includes the crime against humanity of persecution.

32 *Bosnia v. Serbia*, *supra* note 11, § 429.

33 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (1973) 974 UNTS 177, Art. 10(1); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (1977) 1035 UNTS 167, Art. 4; International Convention against the Taking of Hostages, (1983) 1316 UNTS 205, Art. 4; Convention on the Safety of United Nations and Associated Personnel; International Convention for the Suppression of Terrorist Bombings, (2001) 2149 UNTS 256, Art. 15; United Nations Convention against Transnational Organized Crime, (2003) 2225 UNTS 209, Art. 9(1); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, (2003) 2237 UNTS 319, Art. 9(1).

34 *Bosnia v. Serbia*, *supra* note 11, §§ 428–328.

35 2017 ILC Report, *supra* note 14, at 48–51.

to the Court's judgment, the general commentary observes that a breach of the obligation of prevention is not a criminal violation but rather one of international law engaging state responsibility. It recalls the commentary to the articles on state responsibility: '[w]here crimes against international law are committed by state officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them.'³⁶

The general commentary then turns to international human rights law. This issue is developed in more detail in the first Report of the Special Rapporteur.³⁷ Some human rights treaties explicitly comprise a dimension of prevention. For example, states parties to the International Convention on the Elimination of All Forms of Racial Discrimination 'undertake to prevent, prohibit and eradicate all practices of [racial segregation and apartheid] in territories under their jurisdiction'.³⁸ Along similar lines, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the 'Istanbul Convention'), as its title indicates, imposes an obligation to prevent violence against women.³⁹ Although the general commentary does not make such a reference, provisions such as Article 20(1) of the International Covenant on Civil and Political Rights (ICCPR) — '[a]ny propaganda for war shall be prohibited by law' — also have a preventive mission.

The human rights courts and treaty bodies have developed a body of case law with respect to what are sometimes called horizontal obligations. These exist in addition to the basic obligation not to actually violate a norm of human rights that is imposed on a state party to a particular treaty. In this respect, the general commentary devotes a paragraph to reviewing the case law of the European Court of Human Rights. The ILC notes that although the European Convention on Human Rights (ECHR) has no express obligation to 'prevent' breaches, such an obligation has been found by the Court with respect to specific provisions. In this area, there is quite abundant case law of the European Court on the right to life and the prohibition of torture or inhuman or degrading treatment or punishment. In a case dealing with domestic violence, the European Court declared that the state has a positive obligation to take 'preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.⁴⁰ The Court has even extended this to self-harm, holding that Article 2 of the Convention

36 *Ibid.*, at 50, citing *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, at 142, § (3) of the commentary to Art. 58.

37 First Murphy Report, *supra* note 20, §§ 102–104.

38 International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, Art. 3.

39 (2014) CETS 210, Art. 4(2).

40 At the European Court of Human Rights (ECtHR): *Opuz v. Turkey*, Appl. no. 33401/02, 9 June 2009, § 128. Also: *Osman v. the United Kingdom*, Appl. nos 87/1997/871/1083, 28 October 1998, § 115; *Kontrová v. Slovakia*, Appl. no. 7510/04, 31 May 2007, § 49; *Mastromatteo v. Italy*, Appl. no. 37703/97, 24 October 2002, § 67 *in fine*; *Branko Tomašić and Others v. Croatia*, Appl. no. 46598/06, 15 January 2009, § 50.

'obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved'.⁴¹ Along similar lines, states parties must take action to prevent torture and inhuman or degrading treatment being inflicted by persons not acting on behalf of the state.⁴² The ILC cites comparable pronouncements from the Inter-American Court of Human Rights, where the horizontal dimension of human rights treaties was first developed, but it does not refer to similar case law of the Human Rights Committee in application of the ICCPR.⁴³

4. The General Obligation of Prevention

Draft Article 4(1) comprises a chapeau and two sub-paragraphs. Each of these three components creates legal obligations. The chapeau sets out general obligations, whereas the two sub-paragraphs distinguish between specific obligations depending upon whether they arise inside or outside the state's territory. Referring to the general obligation of prevention, the ILC has stressed the importance of the distinction between prevention and punishment. In this respect, it has referred to a pronouncement of the ICJ in *Bosnia v. Serbia* that 'one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent'.⁴⁴ However, it is clearly inadequate to confound the obligation of prevention with that of punishment by contending that the former is observed if the latter is respected. The obligation of prevention has an autonomous and distinct character, described by the ICJ as being 'both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty'.⁴⁵

In the *Bosnia v. Serbia* judgment, the Court concluded that the Convention imposed an obligation upon states not to commit genocide. It derived this obligation from both the classification of genocide as 'a crime under international law' and from the obligation of prevention declared in Article I.⁴⁶ By the adoption of comparable language in the draft articles, it is said that they also, and first and foremost, impose an obligation upon states not to commit crimes against humanity. It is useful to bear in mind that when it recognized an obligation not to commit genocide, the ICJ was interpreting Article IX of the Genocide Convention. The Court was confronted with determining whether

41 *Haas v. Switzerland*, Appl. no. 31322/07, 20 January 2011, § 54.

42 *A. v. the United Kingdom*, Appl. no. 25599/94, 23 September 1998, § 22; *Z and Others v. the United Kingdom*, Appl. no. 29392/95, 10 May 2001, §§ 73–75; *Abdu v. Bulgaria*, Appl. no. 26827/08, 11 March 2014, § 40.

43 For example, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 8.

44 *Bosnia v Serbia*, *supra* note 11, § 426.

45 *Ibid.*, § 427.

46 *Ibid.*, § 186.

the compromissory clause giving it jurisdiction over the ‘interpretation, application or fulfilment of the present Convention’ also authorized it to rule that a State Party had actually committed genocide. Arguments had been raised that the obligations upon states parties were confined to the punishment of the crime by individual perpetrators.

It seems somewhat tautological to contend that an obligation to prevent brings with it an obligation to refrain from doing the very thing that is to be prevented. Criminal law consists of a range of prohibitions, of varying degrees of seriousness. It cannot normally be deduced from the prohibition of an act that there is a corresponding obligation to prevent the act. Some legal systems make the failure to prevent a crime a distinct offence, but this cannot be generalized. The ICJ said ‘[i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.’⁴⁷ That is of course quite true. But does it follow that the prohibition is derived from the obligation of prevention? It was unnecessary for the Court to make such a finding because it did not conclude Serbia had committed genocide. Rather, it found it had breached the obligation of prevention. Be that as it may, the precedent established by the Court makes it unnecessary for the draft articles on crimes against humanity to include an explicit prohibition of the commission of crimes against humanity by states. Moreover, whatever the wisdom of the Court’s reasoning, the positive obligations related to prevention, both internally and externally, pose legal problems of far greater interest and difficulty.

5. The Internal Dimension

The first sub-paragraph of draft Article 4(1) is concerned with territory under the ‘jurisdiction or control’ of a state. The obligation of prevention is described as involving ‘effective legislative, administrative, judicial or other preventive measures’. The formulation is inspired by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁸ The ICJ judgment in *Bosnia v. Serbia* declares that ‘the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur’.⁴⁹ The Court said that to incur responsibility, ‘it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed’.⁵⁰

⁴⁷ *Ibid.*, § 166.

⁴⁸ Convention Against Torture, *supra* note 30, Art. 2.

⁴⁹ *Bosnia v. Serbia*, *supra* note 11, § 432.

⁵⁰ *Ibid.*

The general commentary explains that the term ‘other preventive measures’ was preferred to ‘other measures’, which is the term used in the Torture Convention, in order to ‘reinforce the point that the measures at issue in this clause relate solely to prevention’. Moreover, the Commission declares that the term ‘effective’ is intended to imply ‘that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures’. In its general commentary, the Commission cited with approval General Comment 2 of the Committee against Torture:

States Parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States Parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee’s concluding observations and views adopted on individual communications. If the measures adopted by the State Party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.⁵¹

Turning to the specific types of measures to be pursued by a state, the Commission said the obligation of prevention would usually oblige a state to adopt national legislation, keep the legislation under review, educate government officials as to the state’s obligations, implement training programmes for those involved in law enforcement and, ‘once the proscribed act is committed, fulfil in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.’⁵²

6. Territorial Scope of the Obligation

The first sub-paragraph, where a state party undertakes to prevent crimes against humanity through ‘effective legislative, administrative, judicial or other preventive measures’, declares that it applies not just to the territory of a state party but also to ‘any territory under its jurisdiction or control’. The Chairman of the Drafting Committee, Mathias Forteau, explained that the phrase ‘in any territory under its jurisdiction or control’ was ‘inspired by previous work of the Commission’ and ‘intends to encapsulate the territory *de jure* of the State, as well as the territory under its control *de facto*’.⁵³ According to the general commentary on the draft articles, ‘[s]uch a formulation covers the territory of a State, but also covers activities carried out in other territory under the State’s jurisdiction.’⁵⁴ The general commentary refers to the commentary of the ILC on the draft articles on the prevention of transboundary

51 2017 ILC Report, *supra* note 14, at 51, citing General Comment 2, Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2, 23 November 2007, § 4.

52 2017 ILC Report, *supra* note 14, at 51–52.

53 Statement of the Chairman of the Drafting Committee, Mr Mathias Forteau, 5 June 2015.

54 2017 ILC Report, *supra* note 14, at 53.

harm from hazardous activities, adopted in 2001.⁵⁵ In its earlier statements, the Commission intended application to situations where a state exercises *de facto* jurisdiction even if it lacks *de jure* jurisdiction. Examples include unlawful intervention, occupation and unlawful annexation.

A somewhat similar issue was addressed by the drafters of the Genocide Convention. The result is a so-called ‘colonial clause’, by which a state party may by declaration extend the application of the Convention ‘to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.’⁵⁶ Such clauses no longer figure in modern treaties. However, that has not stopped some states from behaving as if they still exist, or as if they are implied in a treaty. Practice under the ICC Statute provides relevant examples. Although reservations to the ICC Statute are prohibited,⁵⁷ some states parties have purported to exclude certain territories from the jurisdiction of the Court.⁵⁸ This is contrary to the general rule by which ratification provides the Court with jurisdiction over the territory of a state party.⁵⁹ The United Kingdom has acted as if the ICC Statute contains a provision similar to Article 10 of the Genocide Convention. It has made a series of declarations extending the jurisdiction of the Court to certain territories.⁶⁰ By implication, then, the United Kingdom appears to believe that the Court cannot exercise jurisdiction over those territories for which it has not made a declaration, such as the British Indian Ocean Territory, currently the site of an important military base of the United States.

This is not the place for a detailed analysis of issues of territorial jurisdiction. They have led to much debate before the European Court of Human Rights⁶¹ and the Human Rights Committee.⁶² In its comments on the draft articles,

55 *ILC Yearbook ... 2001*, vol. II (Part Two) and corrigendum, at 151; *ILC Yearbook ... 2006*, vol. II (Part Two), at 70, § (25).

56 Genocide Convention, *supra* note 31, Art 10.

57 Art. 120 ICCSt.

58 Territorial exclusion, Denmark (Greenland and Faroe Islands), (2002) 2189 UNTS 499; Territorial exclusion, New Zealand (Tokelau Islands), (2002) 2189 UNTS 499.

59 Art. 12(2) ICCSt.

60 Gibraltar, C.N.271.2015.TREATIES-XVIII.10 (Depositary Notification); Isle of Man, C.N.696.2012.TREATIES-XVIII.10 (Depositary Notification); Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Ascension and Tristan da Cunha, Sovereign Base Areas of Akrotiri and Dhékalia, Turks and Caicos Islands, C.N.161.2010.TREATIES-1 (Depositary Notification).

61 *Catan and Others v. the Republic of Moldova and Russia*, Appl. nos 43370/04, 8252/05 and 18454/06, 19 October 2012, § 106; *Loizidou v. Turkey* (preliminary objections), Appl. no. 15318/89, 23 March 1995, § 62; *Cyprus v. Turkey*, Appl. no. 25781/94, 10 May 2001, § 76; *Banković and Others v. Belgium and Others*, Appl. no. 52207/99, 19 December 2001, § 70; *Ilaşcu and Others v. Moldova and Russia*, Appl. no. 48787/99, 8 July 2004, §§ 314–316; *Loizidou v. Turkey (merits)*, Appl. no. 15318/89, 18 December 1996, § 52; *Al-Skeini and Others v. the United Kingdom*, Appl. no. 55721/07, 7 July 2011, § 138.

62 For example, *Concluding observations on the fourth report of the United States of America*, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, §§ 4, 9, 22. For a broader discussion of jurisdictional issues raised by the ILC draft articles, see A. Coco, ‘The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9 and 11 by the International Law Commission’, within this special issue, at Section 2.

the United Kingdom said that the ILC should also consider further the appropriate jurisdictional scope of the obligation of prevention under draft Article 4.⁶³ The issue does not really concern very many states, as it applies to cases of occupation and annexation, or possible cases where a state's armed forces are present on the territory of another state. But because such situations have an extraordinary potential for the perpetration of crimes against humanity and other violations of international law, it may be useful to provide greater clarification of this point in the commentary.

7. The External Dimension: Cooperation and Intervention

The external dimension of the obligation of prevention is set out in subparagraph 1(b) of Article 4 of the draft articles. Accordingly, states undertake 'to prevent crimes against humanity, in conformity with international law, including through ... (b) cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations'. Nothing resembling the sub-paragraph appears in the original draft of the Special Rapporteur. The formulation was added by the Drafting Committee at the 2015 session of the Commission.⁶⁴ The Report of the Drafting Committee provides only a summary explanation for the text. It focusses on the words 'in conformity with international law', which are added to the *chapeau* of the provision although they appear to be principally if not exclusively directed at subparagraph 1(b).

The draft articles do not say so explicitly but subparagraph 1(b) makes it clear enough that there is an obligation to prevent genocide that extends beyond the jurisdiction of a state party. The author of this chapter still vividly recalls attending a course in July 1994 given at Brown University when the territorial scope of the obligation to prevent genocide was discussed. The Rwandan genocide, which had begun several weeks previously, had not yet run its course. Senior American diplomats who attended as resource persons were challenged about the failure of the United States and other members of the Security Council to take appropriate action at the early stages of the massacres, in April, May and June 1994. They responded that the Genocide Convention only required the United States to prevent genocide within its own borders. The reticence of the permanent members of the Security Council to take action to prevent genocide is described and documented in Samantha Power's book *A Problem from Hell*.⁶⁵

63 UN GA, Sixth Committee, *Summary Record of the 23rd Meeting*, UN Doc. A/C.6/70/SR.23, 27 November 2015, § 37.

64 ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7.

65 S. Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002). See also D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), especially chapter 2.

The conservative view that the obligation to prevent genocide stops at the border soon gave way to an equally extreme position that was seemingly at the other end of the spectrum. Soon it was being argued, often with reference to ‘lessons learned’ from the Rwandan genocide, that prevention of genocide justified military intervention even in the absence of authorization by the Security Council under Chapter VII of the Charter. In early 1999, searching for legal justification of the bombing of Serbia, President Bill Clinton invoked the ‘g-word’ and insisted upon the imperative of intervention to protect the Kosovar population even without a resolution of the Security Council.⁶⁶

Policy debates that followed NATO military activity in 1999 led to the development of the ‘responsibility to protect’ doctrine. Succinctly set out in two paragraphs of a General Assembly resolution,⁶⁷ it is closely related to the obligation of prevention of both genocide and crimes against humanity. Indeed, the Resolution speaks of a responsibility to protect with regard to genocide and crimes against humanity, as well as war crimes and ethnic cleansing, without any distinction between these different categories. The General Assembly resolution makes it explicit that the responsibility to protect has both internal and external dimensions. First, it is the responsibility of each state to protect its own populations, entailing ‘the prevention of such crimes, including their incitement’. Second, the ‘international community ... has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means’. Finally, where a state manifestly fails to protect its population, ‘collective action’ may be contemplated ‘through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis’.

Since the 2005 codification of the responsibility to protect, there have been occasional attempts to contend that intervention outside the framework of the Charter may be permissible to prevent genocide and crimes against humanity. For example, in 2008 senior policymakers in Washington produced a ‘blueprint’ for the prevention of genocide and crimes against humanity that argued for armed intervention even without Security Council authorization. ‘[W]e must never rule out doing what is necessary to stop genocide or mass atrocities’, said the authors.⁶⁸ Two years later, American diplomats attempted to introduce an ‘understanding’ into amendments to the ICC Statute concerning the crime of aggression so as to exclude so-called ‘humanitarian intervention’. Outmanoeuvred by the Iranians at the Kampala Review Conference, they were forced to accept an amendment that added the phrase ‘in accordance with the Charter of the United Nations’ that effectively neutered their efforts.⁶⁹

The claim that threats of genocide, and crimes against humanity, may authorize the use of force in the absence of a Security Council decision returns

66 J. Broder, ‘In Address to the Nation, Clinton Explains Need to Take Action’, *New York Times*, 25 March 1999.

67 World Summit Outcome, *supra* note 12, §§ 138–139.

68 M. Albright and W. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers* (United States Holocaust Memorial Museum et al., 2008), at 97.

69 *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression*, RC/Res.6, 11 June 2010, § 6, Annex III.

again and again, but from the usual sources. Sometimes proponents speak of a right to intervene. But if this exists, surely it constitutes an obligation rather than a right, and one to be exercised in a principled and equitable manner rather than in pursuit of less noble imperatives of great power foreign policy. Anne Peters has argued persuasively that a special obligation is imposed upon permanent members of the Security Council to take appropriate action when atrocities occur.⁷⁰

The 2007 ICJ judgment in the *Bosnia v. Serbia* case is also relevant to the extraterritorial issue. The Court found that Serbia had breached the obligation of prevention set out in Article 1 of the 1948 Convention by its failure to intervene in neighbouring Bosnia and Herzegovina. The judgment is therefore a precedent for the extension of the obligation of prevention beyond the borders of a state. The Court began its discussion of prevention by noting that the capacity of a state to prevent genocide 'depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events'. Manifestly, then, this applies to prevention of genocide outside the territory of the state.⁷¹

'The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide', the Court said.⁷² It explained that the state's 'obligation to prevent, and the corresponding duty to act' commenced when it learned of a serious risk that genocide would be committed. 'From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.'⁷³ The Court considered that in 1995, when the Srebrenica massacre took place, the relationship between the government of the Federal Republic of Yugoslavia and the Bosnian Serbs was 'very close', giving it a 'position of influence ... unlike that of any of the other states parties to the Genocide Convention owing to the strength of the political, military and financial links.'⁷⁴ The Court concluded that the Yugoslav federal authorities should 'have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.'⁷⁵ By its failure to act, Serbia breached its obligation of prevention and thereby engaged its responsibility under the Genocide Convention.

70 A. Peters, 'The Security Council's Responsibility to Protect', 8 *International Organizations Law Review* (2011) 1.

71 *Bosnia v. Serbia*, *supra* note 11, § 430.

72 *Ibid.*, § 430.

73 *Ibid.*, § 431.

74 *Ibid.*, § 434.

75 *Ibid.*, § 438.

Obviously, there was no relevant Security Council resolution authorizing the use of force by Serbia. Thus, the Court's reference to intervention did not at all contemplate military activity but rather lawful measures involving diplomatic activity and other forms of peaceful pressure.

This is the context in which the ILC considered it appropriate to insert the phrase 'in conformity with international law' into the chapeau of Article 4. According to the Drafting Committee, in its 2015 report, 'the measures to be taken by States to fulfil this obligation must be consistent with the existing rules of international law, including the Charter of the United Nations. In other words, States cannot rely on their obligation of prevention as set forth in these draft articles as a justification for the violation of existing rules, in particular those relating to the use of force'.⁷⁶ The point receives further confirmation in the general commentary, where it is noted that in *Bosnia v. Serbia* the ICJ insisted that when engaging in measures of prevention, 'it is clear that every State may only act within the limits permitted by international law'.⁷⁷ According to the ILC, measures undertaken by a state to fulfil the obligation to prevent crimes against humanity, 'must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity'.⁷⁸

This issue returned, at least indirectly, in discussion about the preamble of the draft articles. Two relevant paragraphs were proposed by the Special Rapporteur. The first reaffirmed the purposes and principles of the Charter of the United Nations, 'and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. The second '[e]mphasized in this connection that nothing in the present draft articles shall be taken as authorising any State to intervene in an armed conflict or in the internal affairs of any other State ...'.⁷⁹ Neither the summary records of the meetings of the Commission nor the report provide explanation for the disappearance of these paragraphs from the final version. However, it would be stretching things to imply from the absence of the two paragraphs that the Commission sought to retreat from the unequivocal views it expressed about intervention elsewhere in the 2017 report.

The second sub-paragraph of draft Article 4 does not in fact put any emphasis on the type of unilateral prevention that the ICJ focussed upon in the *Bosnia v. Serbia* case. Consistent with the General Assembly's formulation of the responsibility to protect, multilateral cooperation is quite central to the prevention of crimes against humanity. When sub-paragraph 1(b) was first proposed, the Drafting Committee explained that it had been included in light of

⁷⁶ ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7.

⁷⁷ 2017 ILC Report, *supra* note 14, at 49, citing *Bosnia v. Serbia*, *supra* note 11, § 430.

⁷⁸ *Ibid.*

⁷⁹ Third Murphy Report, *supra* note 13, 164–165.

a general consensus within the Commission about the importance of cooperation as an aspect of the obligation of prevention. The focus was on 'relevant intergovernmental organisations'. According to the Drafting Committee, the relevance of any particular intergovernmental organisation 'would depend on, among other things, the organisation's functions, the relationship of the State to that organisation and the context in which the need for cooperation arose'. The Drafting Committee considered that this included non-governmental organizations that might play an important role in the prevention of crimes against humanity in specific countries.⁸⁰ The general commentary expands upon these remarks, noting that the duty to cooperate in the prevention of crimes against humanity actually arises from the Charter of the United Nations. In particular, Article 1(3) of the Charter identifies one of the purposes of the United Nations as being to 'achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all'. Moreover, articles 55 and 56 of the Charter pledge all Members States 'to take joint and separate action in cooperation with the Organisation for the achievement of' certain purposes, including 'universal respect for, and observance of, human rights and fundamental freedoms for all'.⁸¹

It is regrettable that the draft articles do not confirm more precisely the principle of an obligation of prevention extending beyond the jurisdiction of a state, one that exists regardless of whether 'other States, relevant intergovernmental organisations, and, as appropriate, other organisations' are active. Any concern that an overly broad statement of the principle might appear to authorize the use of force unilaterally can easily be addressed with appropriate language. When the ICJ told Serbia that it bore obligations of prevention even outside its borders, it was insisting upon the impermissibility of remaining silent and inactive in the face of atrocities, wherever they occur. Should this not be affirmed explicitly in the draft articles?

8. The Missing Inchoate Crimes

Despite attempts at parallelism with the 1948 Genocide Convention, one of its significant elements related to the issue of prevention is missing from the draft articles on crimes against humanity. During the drafting of the Genocide Convention, much of the discussion about prevention revolved around the inchoate offences set out in Article III. It lists five 'punishable acts', of which the first is genocide. The other four are conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. The final act, complicity, only applies when the crime of genocide is perpetrated. However, the other three acts are preparatory or incomplete crimes, and their prosecution is governed

⁸⁰ ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7–8.

⁸¹ 2017 ILC Report, *supra* note 14, at 74.

by the Genocide Convention even if the crime of genocide is not itself perpetrated. Provisions of the Convention imposing obligations with respect to adoption of legislation and cooperation in extradition quite explicitly apply not only to genocide but also to the other acts listed in Article III.

Adding the inchoate crimes to the Genocide Convention was not without controversy, particularly the offence of direct and public incitement, given the concern that it could encroach on freedom of expression.⁸² In the Sixth Committee of the General Assembly, Manfred Lachs of Poland insisted that because prevention was also the goal of the Convention, freedom of the press ‘must not be so great as to permit the Press to engage in incitement to genocide.’⁸³ Others also linked the criminalization of direct and public incitement to the preventive role of the Convention.⁸⁴ The crime of direct and public incitement is not always well understood, perhaps because there have been several convictions by the International Criminal Tribunal for Rwanda under circumstances where genocide was indeed committed.⁸⁵ However, in the case of incitement to genocide that is committed, it is unnecessary to establish that the act was ‘direct’ and ‘public’. Incitement, even if ‘private’ and ‘indirect’, is a form of complicity if the crime of genocide is itself perpetrated. The Rwandan genocide, in which hate-filled media played such an important role, led to heightened concern with the phenomenon of incitement. The Security Council has urged states and relevant organizations, with respect to the African Great Lakes region, ‘to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred, and violence in the region.’⁸⁶ Some argue that incitement may extend to a range of forms of what are called ‘hate speech’, such as denial of historic genocides.

The inchoate acts listed in Article III of the Genocide Convention were incorporated into the statutes of the ad hoc tribunals.⁸⁷ The Security Council combined the provisions of Articles II and III so that the definition of genocide also included the ‘other acts’. This amounted to a form of *lex specialis* that created problems of interpretation given that participation in the crimes within the jurisdiction of the ad hoc tribunals were also governed by a general

82 G. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, 2017), at 118–123; L. Berster, ‘Article III’, in C. Tams, L. Berster and B. Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, 2014) 157–190, at 167–174; J. Ohlin, ‘Incitement and Conspiracy to Commit Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 207–227.

83 UN GA, Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide*, UN Doc. A/C.6/SR.84, 26 October 1948.

84 *Ibid.*, statements by Pérez Perozo, Venezuela; and Morozov, Soviet Union; see also Zourek, Czechoslovakia, in UN GA, Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide*, UN Doc. A/C.6/SR.85, 27 October 1948.

85 Judgment, *Nahimana et al.* (ICTR-99-52), Appeals Chamber, 28 November 2007; Judgment, *Ngirabatware* (MICT-12-29), Appeals Chamber, 18 December 2014; Judgment, *Bikindi* (ICTR-01-72), Appeals Chamber, 18 March 2010.

86 SC Res. 1161 (1998), § 5.

87 Art. 4(3) ICTYSt.; Art. 2(3) ICTRSt.

provision. Perhaps recognition of these difficulties at the ad hoc tribunals prompted the drafters at Rome to avoid blending Articles II and III of the Genocide Convention. Instead, Article 25, which is in Part III of the ICC Statute, sets out forms of participation in the crimes that are defined in Part II of the ICC Statute. In principle, Article 25 applies generally and without distinction to all of the crimes within the Court's subject-matter jurisdiction. By exception, 'direct and public incitement', set out in Article 25(3)(e), only applies in the case of genocide. The drafters of the ICC Statute did not extend the inchoate form of incitement, whose mission is prevention, to crimes against humanity or war crimes.⁸⁸ Nor is it applied to the crime of aggression by the amendments adopted in 2010.

The ILC included inchoate incitement of crimes against humanity in the 1951 and 1954 drafts of the Code of Offences against the Peace and Security of Mankind. For example, Article 2(13) of the 1954 draft is a general provision applicable to all of the crimes in the Draft Code, including crimes against humanity. Thus, 'conspiracy' and 'direct incitement' are punishable with respect to 'any of the offences in the preceding paragraphs of this article'.⁸⁹ The commentary to the 1951 draft Code of Crimes says that the provision on 'conspiracy' was derived from the Charter of the International Military Tribunal, implying that it does not extend to the inchoate form of conspiracy. On the other hand, the commentary says that 'direct incitement' is based upon the Genocide Convention, implying that inchoate incitement is contemplated.⁹⁰ The ambiguity of the treatment of this subject in the drafts of the 1950s persisted in the 1991 text adopted by the Commission.⁹¹ However, the 1996 version of the Code of Crimes adopted by the ILC takes a narrower view, providing for criminal liability of a person who '[d]irectly participates in planning or conspiring to commit such a crime which in fact occurs' and '[d]irectly and publicly incites another individual to commit such a crime which in fact occurs'.⁹² In effect, then, it eliminates the inchoate form of incitement. The words 'in effect occurs' were added by the Drafting Committee.⁹³ The commentary states:

Participation only entails responsibility when the crime is actually committed or at least attempted. In some cases it was found useful to mention this requirement in the

88 L. Sadat, 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes against Humanity', in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011) 455–501, at 497.

89 *Report of the International Law Commission covering the work of its sixth session, 3 June - 28 July 1954*, UN Doc. A/CN.4/88, § 54.

90 *Report of the International Law Commission covering the work of its third session, 16 May - 27 July 1951*, UN Doc. A/CN.4/48, § 59. Also *Draft code of offences against the peace and security of mankind*, UN Doc. A/CN.4/44, 12 April 1951, § 131.

91 *Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991*, UN Doc. A/46/10, § 176.

92 *Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996* ('1996 ILC Report'), UN Doc. A/51/10, at 18, Art. 2(e)–f).

93 ILC, *Summary record of the 2437th meeting*, UN Doc. A/CN.4/SR.2437, 6 June 1996, § 7.

corresponding subparagraphs in order to dispel possible doubts. It is of course understood that the requirement only extends to the application of the Code and does not purport to be the assertion of a general principle in the characterization of participation as a source of criminal responsibility.⁹⁴

Footnote 45 follows: ‘This limitation does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably Article III of the Convention on the Prevention and Punishment of the Crime of Genocide.’

The explanation continues several paragraphs later:

The phrase ‘which in fact occurs’ indicates that the criminal responsibility of an individual for inciting another individual to commit a crime set out in articles 17 to 20 is limited to situations in which the other individual actually commits that crime, as discussed in paragraph (6) above. The principle of individual criminal responsibility for incitement was recognized in the Charter of the Nürnberg Tribunal (art. 6 (instigation)), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, sub-paragraph), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1 (instigation)) and the statute of the International Tribunal for Rwanda (art. 6, para. 1 (instigation)). This principle was also recognized by the Commission in the 1954 draft Code (art. 2, para. 13 (ii)).⁹⁵

The reference may be misleading because as far as genocide is concerned the 1996 Code is significantly more restrictive than the 1948 Convention and the statutes of the ad hoc tribunals. It does not seem that the Commission considered the distinction between the inchoate forms of incitement and complicity and those where it is a form of complicity in a crime that has taken place. It should also be borne in mind in considering the relevance of these discussions within the Commission that the purpose of the Code of Crimes is not the same as that of the draft articles on crimes against humanity. The Code of Crimes was intended to deal with acts that threaten the peace and security of humanity. No such requirement is imposed upon crimes against humanity. Consequently, possible justifications for the narrow approach to inchoate crimes taken by the Commission in drafting the Code of Crimes are not necessarily applicable to the draft articles on crimes against humanity.

Attempt is the only one of the inchoate acts in Article III of the Genocide Convention that is found in Article 25 of the ICC Statute and that therefore applies to crimes against humanity. That attempt is the least problematic of the inchoate acts is confirmed by its inclusion in Article 6 of the draft articles where obligations of criminalization in national law are set out in detail. Article 25 requires states to incorporate ‘committing’ along with various forms of complicity (‘ordering, soliciting, inducing, aiding, abetting or otherwise assisting’) and ‘attempting to commit’ crimes against humanity.

The Washington University draft convention on crimes against humanity, which prompted the work of the ILC, contains a provision within the article

94 1996 ILC Report, *supra* note 92, at 20, § 6.

95 *Ibid.*, at 22, § 16.

on individual criminal responsibility recognizing that a person shall be liable who '[d]irectly and publicly incites others to commit crimes against humanity'.⁹⁶ The explanatory note says that the provision draws upon Article 25 of the ICC Statute.⁹⁷ In her contribution to the work on the draft convention, Elies van Sliedregt comments briefly on the issue of inchoate liability, recommending that the inclusion of direct and public incitement 'seems useful and desirable'. On the other hand, she says that recognizing inchoate conspiracy is 'less necessary' given the inclusion of indirect perpetration.⁹⁸ However, although indirect perpetration is adequate to address conspiracy when the crime is actually committed, it does not cover inchoate conspiracy at all. Prof. Van Sliedregt also notes that indirect conspiracy was controversial at Nuremberg and at Rome. The International Military Tribunal dealt with crimes that were actually committed so inchoate conspiracy did not present itself as a problem. Subsequently, inchoate conspiracy was included in the Genocide Convention and in the statutes of the ad hoc tribunals. My recollection is that the distinction between inchoate or 'common-law' conspiracy and conspiracy as a form of complicity was not well understood by those who negotiated the provisions at the Rome Conference. Some of the participants in the drafting of Article 25 believed, mistakenly, that conspiracy pursuant to Article III of the Genocide Convention was adequately addressed in Article 25(3)(d) of the ICC Statute.

The summary records of the ILC indicate that the Drafting Committee decided that incitement as a mode of participation did not belong in the draft articles 'in part because the term "incitement" had not been included in certain international treaties, such as the Rome Statute, and in part because the concept did not exist in some national legal systems. Members of the Drafting Committee had considered that the concept of incitement was covered under the concepts of "soliciting" and "inducing" in subparagraph (c), and that would be reflected in the commentary'.⁹⁹ The omission of 'direct and public incitement' and 'conspiracy' is not discussed in the general commentary on the draft articles although the provision is mentioned indicating that it had not been entirely overlooked by the Commission.¹⁰⁰

The fact that there are unfortunate gaps in Article 25 of the ICC Statute is not a good reason to omit direct and public incitement and conspiracy to commit crimes against humanity from the draft articles. Nor is there validity to the contention that these inchoate forms of crimes against humanity are not included in some national legal systems. This did not inhibit the General

96 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity, in Sadat (ed.), *Forging a Convention*, *supra* note 88, 359–386, at 367.

97 *Ibid.*

98 E. van Sliedregt, 'Modes of Participation', in Sadat (ed.), *Forging a Convention*, *supra* note 88, 223–261, at 254. For a broader discussion of draft Art. 6 of the ILC project, see also E. van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law', in this special issue of the *Journal*.

99 ILC, *Summary record of the 3312th meeting*, UN Doc. A/CN.4/SR.3312, 9 June 2016, at 4.

100 2017 ILC Report, *supra* note 14, at 64, § 13.

Assembly in 1948 when it adopted the Genocide Convention. This discrepancy between the Genocide Convention and the draft articles on crimes against humanity of the ILC should be addressed. A provision might be added along the lines of Article III of the Genocide Convention, and references to various obligations described as applying not only to crimes against humanity but also to such ‘other acts’. In its 2015 resolution entitled Prevention of Genocide, the United Nations Human Rights Council recalled the importance of addressing incitement in the prevention of genocide.¹⁰¹ The same can be said of crimes against humanity. The neglect by the ILC of the inchoate acts, in particular conspiracy and direct and public incitement, confirms the existence of obstacles that obstruct progress in this area.

9. Exceptional Circumstances are No Justification

Paragraph 2 of draft Article 4 states that exceptional circumstances may not be invoked as a justification for the offence. The provision is modelled on an article in the Convention against Torture.¹⁰² The rather archaic reference to ‘state of war or threat of war’ in the Torture Convention is replaced with ‘armed conflict’. The general commentary points out that the words ‘such as’ were included to stress that the examples provided are not intended to be exhaustive.¹⁰³ The formulation is drafted so as to address conduct of non-state actors as well as states. However, it is confined to the context of the obligation of prevention. It is not meant to apply to possible defences in criminal proceedings.¹⁰⁴

The Drafting Committee considered whether paragraph 2 might be better located as a stand-alone provision rather than being linked in the way it is to the obligation of prevention. It left the question unresolved.¹⁰⁵

10. *Non-refoulement*

The draft articles impose a general obligation of *non-refoulement* in the case of crimes against humanity, building upon principles established in international refugee law by specialized human rights treaties, and in the case law of international human rights courts and treaty bodies. Entitled *non-refoulement*, draft Article 5 states as follows:

101 *Prevention of genocide*, UN Doc. A/HRC/RES/28/34, 7 April 2015, § 2. Also *Prevention of genocide*, UN Doc. A/HRC/RES/7/25, 28 March 2008, § 4; *Prevention of genocide*, UN Doc. A/HRC/RES/22/22, 22 March 2013, § 2.

102 Convention Against Torture, *supra* note 30, Art. 2(2).

103 2017 ILC Report, *supra* note 14, at 55.

104 *Ibid.*

105 ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 8.

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

The provision is inspired by Article 16 of the Enforced Disappearance Convention although the two texts are not identical.¹⁰⁶ The Commission preferred this as a model because it is without prejudice to other obligations of *non-refoulement* upon the state arising from treaties or customary international law.¹⁰⁷ *Non-refoulement* is a specific manifestation of the obligation of prevention in that it imposes a duty on a state when there is a 'danger' that a crime against humanity may be committed. It was for precisely this reason that the Drafting Committee thought the provision, which was originally Article 12, should be placed after Article 4.¹⁰⁸

An early formulation of the principle can be found in the fourth Geneva Convention of 1949, which prohibits the transfer of a protected person to a country where prosecution for political opinions or religious beliefs may take place.¹⁰⁹ However, the 1951 Refugee Convention probably provides the best-known provision. It prohibits the expulsion or return of a refugee 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.¹¹⁰ The rule may be set aside where there are 'reasonable grounds' to consider that the individual is a danger to the security of the country or if, after conviction of 'a particularly serious crime', the person 'constitutes a danger to the community'. In contrast with the Refugee Convention, absolute prohibitions of *non-refoulement* are set out in international conventions concerning torture and enforced disappearance.¹¹¹ Although not set out explicitly in the ECHR, the European Court of Human Rights has concluded that there is an obligation of *non-refoulement* where there is a real risk that an applicant would be exposed to the death penalty,¹¹² to torture and inhuman or degrading treatment or punishment.¹¹³ The Human Rights Committee has adopted

106 Convention Against Enforced Disappearance, *supra* note 29, Art. 16.

107 2017 ILC Report, *supra* note 14, at 57.

108 UN Doc. A/CN.4/SR.3366, at 3.

109 Geneva Convention relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 173, Art. 45.

110 Convention relating to the Status of Refugees, (1954) 189 UNTS 150, Art. 33.

111 Convention Against Torture, *supra* note 30, Art. 3.

112 *Al Nashiri v. Poland*, Appl. no. 28761/11, 24 July 2014, § 577. Also: *S.R. v. Sweden*, Appl. no. 62806/00, 23 April 2002; *Ismaili v. Germany*, Appl. no. 58128/00, 15 March 2001.

113 *Chahal v. the United Kingdom*, Appl. no. 22414/93, 15 November 1996, § 79; *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, § 127.

a comparable position with respect to application of the ICCPR.¹¹⁴ The European Court has developed quite a sophisticated body of jurisprudence that will be helpful to those applying Article 5 of the draft articles.

11. Conclusions

At first glance, the treatment of prevention by the draft articles is far more robust than in the 1948 Genocide Convention. Of course, the same can be said of the draft articles as a whole. Although modelled upon the 1948 Genocide Convention, they are much, much longer. In many respects, they develop and expand upon matters that received only vague and summary treatment in the 1948 Convention. From that perspective, the text on prevention as well as other relevant provisions appears prolix and inadequate. The Commission has not adequately echoed the pronouncements of the ICJ concerning an autonomous and unilateral obligation on states to prevent genocide outside their borders, whether or not there are any international initiatives requiring their cooperation. Even more glaring is the treatment accorded to inchoate forms of perpetration, especially incitement and conspiracy. The Genocide Convention is superior to the draft articles in this respect. Instead of progressive development, the draft articles appear to weaken or dilute some important principles that ought to be, some 70 years after adoption of the Genocide Convention, beyond any dispute.

114 *J.D. v. Denmark*, Appl. no. 2204/2012, 26 October 2016, § 11.2; *R.G. et al. v. Denmark*, Appl. no. 2351/2014, 2 November 2015, § 7.4; *X v. Denmark*, Appl. 2007/2010, 26 March 2014, § 9.2; *K. v. Denmark*, Appl. no. 2393/2014, 16 July 2015, § 7.3; *P.T. v. Denmark*, Appl. no. 2272/2013, 1 April 2015, § 7.2.

Criminalization of Crimes Against Humanity under National Law

Elies van Sliedregt*

Abstract

This article discusses Article 6 of the International Law Commission's (ILC) draft articles on crimes against humanity, which deals with criminalization of crimes against humanity in national law. The provision uses neutral and generic terms to describe criminal responsibility. This is appropriate for a treaty like the one which could result from the ILC articles, where it would be left to state parties to enact legislation and to align criminal responsibility for crimes against humanity to existing legal concepts in domestic law. Article 6 is a broad provision, yet it leaves a few gaps. This contribution suggests the insertion and explicit recognition of conspiracy as entailing criminal responsibility for crimes against humanity. Moreover, it proposes a modification of the superior orders defence, allowing reliance on the defence for non-manifestly unlawful orders. The clause on liability of legal persons is welcomed, whereas the provision on superior responsibility is criticized. The latter, mirroring Article 28 of the International Criminal Court's (ICC) Statute, is at the moment vague and unclear. Thus, drafters are encouraged to adopt a 'splitting solution', recognizing a number of separate superior responsibility concepts.

1. Introduction

Ever since the launch of the Initiative for a Convention on Crimes Against Humanity ('the CAH Initiative')¹ in 2010, there has been debate about its relationship *vis-à-vis* the International Criminal Court's (ICC) Statute. The fear was expressed that such a Convention could undermine the ICC, especially

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1 The Initiative was launched at the Whitney R. Harris World Law Institute, Washington University School of Law, St Louis under the leadership of Leila N. Sadat in 2010. See Crimes against Humanity Initiative, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, February 2012, at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf> (visited 28 April 2018).

when the definition of the crime would deviate from that in Article 7 of the ICC Statute.² The decision for such a deviation was not inconceivable since there had been support for proposing a new definition of crimes against humanity ('CAH'). A CAH convention could be an opportunity to 'correct', or make up, for the failure of the Genocide Convention to provide for protection of political and social groups. Having said that, amongst those present at the launch of the Initiative at Washington University, St Louis, there was a strong commitment to the success of the ICC. The Convention proposed by the Initiative should complement the ICC Statute, which does not impose a duty on states to adopt the CAH definition, let alone adopt measures to ensure inter-state co-operation in prosecuting and trying these crimes.³ To end impunity for CAH, the ICC and national jurisdictions should work alongside one another. Rather than adopting a different definition, creating a pluralist legal regime that would amount to legal uncertainty, the proposed Convention should reinforce the ICC. This is why the proposed Convention — currently embodied by the International Law Commission's (ILC) draft articles — has, from the outset, mirrored the CAH definition of the ICC Statute.⁴

The provision on criminal responsibility travelled a different route. While the first draft of the proposed Convention contained a *verbatim* copy of Article 25(3) of the ICC Statute on individual criminal responsibility,⁵ the provision in Article 6(2) of the ILC draft no longer mirrors the ICC provision. The provision on modes of liability is much more succinct and uses broad, neutral terms to describe the different ways in which responsibility for CAH may arise.⁶ There is a good reason for this different approach, as it will be explained below.

This contribution starts by making a few general observations with regard to the provision as a whole (Section 2). Subsequent sections will focus on commission and omission liability (Section 3); superior responsibility (Section 4); the defence of superior orders (Section 5); and liability of legal persons (Section 6).

- 2 See e.g. Statements at the UN GA, 6th Committee, Argentina (UN Doc. A/C.6/70/SR.23, § 72), Australia (UN Doc. A/C.6/72/SR.18, § 87), Japan (UN Doc. A/C.6/70/SR.22, § 130). See also K. Ambos, 'Crimes Against Humanity and the International Criminal Court', in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 279–304.
- 3 M. Cherif Bassiouni, 'Crimes Against Humanity: The Case for A Specialized Convention', 9 *Washington University Global Studies Law Review* (2010) 575–593; M. Bergsmo, 'Introduction', in M. Bergsmo and Song, T. (eds), *On the Proposed Crimes Against Humanity Convention*, FICHL Publication Series No. 18 (Torkel Opsahl Academic EPublisher, 2014) 1–17, at 2.
- 4 *Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017)* ('2017 ILC Report'), UN Doc. A/72/10, § 45, Art. 3.
- 5 Crimes Against Humanity Initiative, *supra* note 1, Art. 4.
- 6 2017 ILC Report, *supra* note 4, § 45, Art. 6(2): 'Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law: (a) committing a crime against humanity; (b) attempting to commit such a crime; and (c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.'

2. General Observations

Article 6 is a broad provision. Its title ‘criminalization under national law’ is somewhat misleading. The provision does more than ensuring domestic criminalization of CAH by referring to modes of liability in section (2) and superior responsibility in section (3). It requires states to exclude reliance on the defence of superior orders in section (4).⁷ Moreover, section (5) stipulates that the official position of a defendant is not a defence.⁸ Section (6) contains a provision on prescription: CAH shall not be subject to statutes of limitation.⁹ In section (7) states are required to put into place a system of punishment that reflects the grave nature of CAH.¹⁰ Section (8) is the most ambitious and probably most controversial clause, providing for the liability of legal persons.¹¹

A. The Approach

The approach to individual criminal responsibility in draft Article 6 is praiseworthy, in that it uses neutral and generic terms to describe secondary liability. This is appropriate for a ‘suppression treaty’ like the convention which could result from the ILC articles, i.e. a treaty which would require enforcement via national justice systems.¹² It would be left to state parties to enact legislation on how to exactly criminalize conduct resulting or associated with CAH. In that sense, the CAH convention would take after conventions like the Torture Convention, the Genocide Convention and the 1949 Geneva Conventions.¹³

The modes of liability in Article 6(2) — ordering, soliciting, inducing, aiding and abetting and attempt liability — will often be captured in legal concepts and theories of liability that already exist in states’ domestic criminal law,

7 2017 ILC Report, *supra* note 4, § 45, Art. 6(4): ‘Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.’

8 2017 ILC Report, *supra* note 4, § 45, Art. 6(5): ‘Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.’

9 2017 ILC Report, *supra* note 4, § 45, Art.6(6): ‘Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.’

10 2017 ILC Report, *supra* note 4, § 45, Art. 6(7): ‘Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.’

11 2017 ILC Report, *supra* note 4, § 45, Art. 6(8): ‘Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.’

12 The expression is used e.g. in K.J. Heller, ‘What Is an International Crime? (A Revisionist History)’, 58 *Harvard International Law Journal* (2017) 353-415, at 370 and elsewhere in the text.

13 See Convention against Torture, Art. 4; Genocide Convention, Art. 5; Geneva Convention I (e.g.), Art. 49.

whether in unwritten common law or in the general part of a (written) criminal code. It is, therefore, highly likely that this section of Article 6 will not require much legislative change at the domestic level. In this respect, it is interesting to recall the position of UK with regard to implementing Article III(e) of the Genocide Convention, which contains the concept of ‘complicity to commit genocide’. The parliamentary secretary, when introducing the statute implementing the Genocide Convention to Parliament, observed that ‘[c]omplicity in genocide has not been included in Clause 2(1) because we take the view that the sub-heading in Article III (of the Genocide Convention) is subsumed in the act of genocide itself in exactly the same way as, under our domestic criminal law, aiding and abetting is a situation in which a person so charged could be charged as a principal in relation to the offence itself’.¹⁴ In commenting on this draft provision, some delegations argued along similar lines: their domestic law already provides for the relevant modes of liability.¹⁵ Other delegations, however, deplored the lack of specificity and would have preferred the provision to mirror the ICC’s provision on individual criminal responsibility.¹⁶ One delegation commented that ‘indirect perpetration’, one of the modes of perpetration in Article 25(3)(a) of the ICC Statute, should have been part of the provision.¹⁷ The assumption seems to be that having specific modes of liability in a Convention on CAH would ensure alignment of domestic criminal law with international criminal law. The idea of harmonization of modes of liability, however, is in my view misguided — as I will explore in the next sub-section.

If at all, suppression treaties should only feature ‘crime specific’ theories of liability,¹⁸ i.e. liability theories that either have an international pedigree or that have been specifically developed to apply to crimes under international law. Superior (or command) responsibility is such a ‘crime specific’ theory. It has a true international pedigree, as it developed in treaty and customary international law. The fact that it features in Article 6(3), as a copy of Article 28 of the ICC Statute, should be understood against that background. The problem, however, with Article 28 of the ICC Statute, and thus with Article 6(3) of the ILC draft, is that the provision’s drafting is flawed and fraught with difficulties, as it will be discussed further below.

14 *Official report, Fifth Series, Parliamentary Debates, Commons 1968-1969*, Vol. 777, 3–14 February 1969, 480–509, cited in W.A. Schabas, *Genocide in International Law* (Cambridge University Press, 2000), at 287.

15 Croatia commented that some of the modes of liability listed in art. 6(2) were already covered in national law: Croatia, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.25, § 48. The Cuban delegation welcomed the fact that it was left to domestic legislatures to criminalize acts that constitute CAH: Cuba, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 65.

16 Spain, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.26, § 5.

17 El Salvador, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.25, § 51.

18 As I have argued earlier when commenting on the first draft of a proposed CAH convention. E. van Sliedregt, ‘Modes of Participation’, in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 279–304.

Other concepts or theories of liability that could be termed ‘crime specific’ are joint enterprise liability and indirect perpetration.¹⁹ While both of these theories, developed and applied by the ICTY and the ICC, respectively, have been modelled on domestic law, they have been further shaped in their application to international crimes.²⁰ Neither of these two latter theories is mentioned in Article 6 of the ILC draft. This is not necessarily a bad choice, since they are contested concepts. In particular, the ‘extended form’ of Joint Criminal Enterprise (also known as JCE III), which is generally viewed as overly expansive giving rise to guilt by association²¹ has provoked debate in scholarly circles as well as on the judicial bench. The same can be said about indirect co-perpetration, which has no clear basis in the ICC Statute and no grounding in international law.²²

B. The Irrelevance of Harmonization

One of the aims of drawing up a CAH convention is to streamline inter-state legal cooperation. This is why the draft Convention mirrors the CAH definition of the ICC Statute. Different crime definitions would result in obligation-overload at the national level, creating an inextricable patchwork of differing obligations for states. Government delegations have, welcomed the CAH convention as an initiative that ‘harmonizes’²³ and maybe even ‘unifies’²⁴ domestic criminal law with regard to CAH. Harmonization of modes of liability

19 *Ibid.*, at 241–248.

20 See E. van Sliedregt, ‘The Curious Case of International Criminal Liability’, 10 *Journal of International Criminal Justice (JICJ)* (2012) 1171–1188.

21 J.S. Martinez and A.M. Danner, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005) 75–169; J.D. Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, 5 *JICJ* (2007), 69–90; M. Badar, ‘“Just Convict Everyone!” – Joint Perpetration: From Tadić to Stakić and Back Again’, 6 *International Criminal Law Review (ICLR)* (2006) 293–302. Notable is also ICTY Judge Lindholm’s observation in his Separate Opinion to the *Simić* judgement ‘I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally The concept or “doctrine” has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law’ Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, *Simić* (IT-95-9-T), Trial Chamber, 17 October 2003, §§ 2–5.

22 This aligns with recent developments in English (common) law from which joint enterprise originates. On 18 February 2016, the UK Supreme Court in the cases of *R v Jogee* [2016] UKSC 8 and (sitting as Privy Council) *Ruddock v The Queen* JCPC 2015/0020 re-stated the principles of joint enterprise, essentially rejecting the broad concept of joint enterprise that had become known as ‘parasitic accessory liability’ (PAL). PAL bears similarities with JCE3 in international criminal law.

23 Brazil, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/72/SR.21, § 11.

24 Belarus, Statement at the UN GA, 6th Committee, <http://statements.unmeetings.org/media2/16154382/belarus.pdf> (last visited 28 April 2018).

is not necessary. Differentiation of standards or definitions of modes of liability will not pose an obstacle to mutual legal assistance. The test of ‘dual criminality’, central to mutual legal assistance, is generally limited to crime definitions. In the same vein, harmonization of modes of liability is not relevant for determining whether a state is ‘unable’ for purposes of complementarity pursuant to Article 17 of the ICC Statute.

At this point, we need to briefly reflect on the interplay between national and international norms/standards of criminal responsibility when prosecuting international crimes domestically. In adjudicating international crimes, domestic courts may feel they need to apply international standards derived from international case or statutory law. After all, by prosecuting international crimes, they represent the interests of the international community; especially when exercising universal jurisdiction.

As argued earlier, with regard to crimes definitions and a liability concept such as superior responsibility, it makes sense to apply international standards and adopt an ‘internationalist approach’.²⁵ They are proper international concepts that require implementation at the domestic level. An internationalist approach, however, is not appropriate with regard to modes of liability because, as van der Wilt writes, ‘it is by no means self-evident that time-honoured general parts of criminal law should yield to their international equivalents, as this would probably cause unwarranted differences in the administration of criminal justice within one legal system’.²⁶ The ILC recognizes this in its Commentary. The draft Convention does ‘not seek to require States to alter the preferred terminology or modalities that are well settled in national law’.²⁷

This view is particularly compelling when we bear in mind that ICC law, and international criminal law more generally, is not yet fully crystallized in the area of individual criminal responsibility.²⁸ In fact, as mentioned earlier, concepts such as JCE and indirect co-perpetration have been contested. They do not necessarily constitute an obvious choice for a national legislator or judge when the alternative is represented by settled and familiar rules of domestic criminal law. This was also noted by the CAH Initiative. While the originally proposed draft text provided for a verbatim copy of Article 25 of the ICC Statute, in its 2014 Geneva meeting the Initiative conceded that ‘a future convention might not prescribe specific modes of liability to be applied in national crimes against humanity prosecutions’. It was noted that ‘international criminal law standards might seem unfamiliar and overly complex to national

25 See H.G. van der Wilt, ‘Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court’, 8 *ICLR* (2008) 229–272; H.G. van der Wilt, ‘Genocide v. War Crimes in the *Van Anraat* Appeal’, 6 *JICJ* (2008) 557–567; E. van Sliedregt, ‘Complicity to Commit Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 162–192.

26 Van der Wilt, *Equal Standards*, *supra* note 25, at 254.

27 2017 ILC Report, *supra* note 4, § 46, commentary to draft Art. 6, § 15, at 65.

28 As one Dutch Court of Appeal justified its decision to ignore international standards in looking for guidance when interpreting aiding and abetting liability: Court of Appeal, The Hague, *Public Prosecutor v. Van Anraat*, 9 May 2007, Decision n. LJN: BA4676, ILDC 753 (NL 2007), § 7.

judges, who would likely be more comfortable applying the modes of liability already present in their national criminal law'.²⁹

Article 6 of the ILC draft, referring to modes of liability that encapsulate concepts familiar to most national criminal justice systems and capturing them in neutral and broad terms, allows for *couleur locale* and hence facilitates implementation at the national level. This approach should be welcomed, even though it leads to pluralism rather than harmonization with regard to theories of liability.³⁰

C. An Underinclusive Provision?

Are there lacunae in Article 6? Probably yes. For instance, one government delegation deplored the absence of 'conspiracy',³¹ an inchoate form of criminal responsibility (i.e. a crime on its own). Unlike modes of liability or accessory/complicity liability, conspiracy liability does not require the crime to have actually been committed, since the mere agreement to commit a crime is sufficient. The draft article also neglects 'solicitation' or 'incitement' as an inchoate form of criminal responsibility, i.e. a conduct to be criminalized regardless of whether the crime solicited or incited actually takes place.³² The absence is noteworthy, since conspiracy and incitement are instead considered punishable as inchoate offences in the Genocide Convention.³³

The concept of criminal responsibility in Article 6 has to be viewed as a broad concept that includes both complicity and inchoate offences, i.e. conspiracy and incitement. The ILC explains that in the relevant international instruments soliciting, inducing, aiding and abetting 'are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence'.³⁴ But this consideration blurs the line between modes of participation in the crime and

29 Crimes Against Humanity Initiative, *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity*, 17 July 2014, § 41, at 16, at <http://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf> (visited 28 April 2018).

30 See A.K.A. Greenawalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal* (2011) 1063–1129.

31 Iceland (Nordic countries), Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 59.

32 In English law, solicitation is a crime in the Offences against the Person Act 1861, § 4. 'To solicit or incite another to commit a crime is indictable at common law, even though the solicitation or incitement has no effect' (*DPP v. Armstrong* [2000] *Crim. L.R.* 379 D.C.). In American law 'solicitation' is an inchoate crime under the Model Penal Code, § 5.02: 'A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission'. W.R. LaFare, *Modern Criminal Law: Cases, Comment and Questions* (2nd edn., West Publishing Corporation, 1988), at 696.

33 Genocide Convention, Art. III(b) and (c).

34 2017 ILC Report, *supra* note 4, § 46, commentary to draft Art. 6, § 13, at at 64.

inchoate offences, with conspiracy and incitement falling within the latter category.

As I have argued elsewhere, the inclusion of conspiracy as an inchoate offence in a CAH convention would be welcome, since it would solve problems of attribution of criminal responsibility to those in leadership positions.³⁵ Conspiracy is a useful concept in capturing the liability of ‘intellectual perpetrators’. It does not require proof of a link to the perpetrators who directly committed the crimes. The latter are often not directly linked to the intellectual perpetrators in the higher echelons of government and/or the military. Trying to create such a link has generated contrived concepts such as JCE and indirect (co-)perpetration.

Conspiracy’s inclusion in a CAH convention would not be obvious since conspiracy has a contentious history in international criminal law. In Nuremberg, the American delegation considered it a key concept of liability.³⁶ However, this notion, of common law origin, proved controversial amongst members of delegations from countries of civil law tradition. It was regarded as broad, vague and unfamiliar.³⁷ The German scholar Jescheck considered it a concept contrasting with continental traditions of criminal law.³⁸ Criminalizing the mere agreement was regarded a violation of individual autonomy and freedom. Despite the scepticism, the conspiracy concept survived, yet without retaining the prominent position it originally had. Conspiracy was only applied with regard to crimes against peace.

Conspiracy is conspicuously absent from Article 25 of the ICC Statute. According to one commentator this was unintentional, and a lacuna glossed over by exhausted drafters.³⁹ Others said it was a conscious choice to move away from conspiracy’s disputed Nuremberg legacy.⁴⁰ Over the years, conspiracy has gained support across a wide number of jurisdictions, especially after 9/11. With the fight against terrorism, continental European jurisdictions have been active in criminalizing the preparatory stages of a crime, in German

35 Van Sliedregt, *Modes of Participation*, *supra* note 18, at 254.

36 American colonel Murray C. Bernays designed the so-called collective criminality theory that would capture liability of Nazi war criminals. See E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012), at 22–26. A definition valid at the time was that of C.S. Kenny, *Outlines of Criminal Law* (Cambridge University Press, 1966), at 335: ‘Conspiracy is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it’.

37 B.F. Smith, *Reaching Judgment at Nuremberg* (Basic Books Publishers, 1977), at 51.

38 ‘Es kommt hinzu, daß der Begriff der conspiracy in sich alle diejenigen Eigenarten des anglo-amerikanischen Strafrechts vereinigt, die wegen ihres grundsätzlichen Gegensatzes zur kontinentalen Strafrechtstradition nicht für das Völkerstrafrecht vorbildlich sein können’. H.H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Röhrscheid, 1952), at 276.

39 W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 438.

40 See J.D. Ohlin, ‘Incitement and Conspiracy to Commit Genocide’, in Gaeta (ed.), *supra* note 25, 207–228, at 222–223.

referred to as *Vorfeldkriminalisierung*. Essentially, the earlier objections to conspiracy seem to have subsided.⁴¹

Against that background, we should rethink conspiracy's once controversial status in international criminal law and welcome its possible inclusion in Article 6 of the ILC draft, albeit at the moment there is just a reference in the ILC commentary. While I doubt conspiracy has a basis in existing international law — either custom or general principles — it has, over the years, gained a less controversial position in domestic law. A suppression treaty like the CAH convention should enable contracting parties to criminalize conspiracy to commit CAH. Still, those jurisdictions that do not traditionally treat conspiracy as an inchoate offence could refrain from applying it in this form and implement it instead as a form of complicity, which is what the Nuremberg tribunal and military courts in subsequent proceedings did with regard to war crimes and CAH.⁴²

I would adopt a similar position with regard to 'incitement', a concept connoting an encouragement to commit a crime, as an inchoate offence.⁴³ While incitement is not a general liability concept under international law, it is adopted in domestic jurisdictions. It may be labelled in different ways, like the mentioned 'solicitation' or 'encouragement',⁴⁴ or present itself as 'failed instigation', describing the situation in which no crime actually occurs or is attempted after the instigation, but the instigator is still held liable.⁴⁵ The case for criminalizing incitement is a moral one: prompting an individual to commit a crime may be even more reprehensible than assisting someone who has already decided to commit a crime. In the law on genocide, incitement entails inchoate liability only if 'direct' and 'public'.⁴⁶ I would suggest these requirements to equally apply for incitement to commit CAH.

3. Commission and Omission

There is no separate mention in draft Article 6 of omission liability. In general, omission liability is implied in provisions penalising positive criminal conduct unless verbs suggesting action are part of the crime's definition.⁴⁷ This so-called 'commission by omission'⁴⁸ can be distinguished from 'genuine' or 'direct' omission liability, which penalizes criminal inaction explicitly, e.g.

41 See report of the debate in St. Louis on the first draft text of the Convention, in Sadat, *Forging a Convention*, *supra* note 2, at 470, § 45.

42 Van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, at 24.

43 J. Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press, 2016), at 494.

44 In English law, the common law crime of incitement has been abolished and replaced by 'encouragement'. Still, there are a number of statutory offences of incitement, for instance incitement to commit terrorism. See Horder, *supra* note 43, at 494–495.

45 See § 30 German Criminal Code (*versuchte Anstiftung*); Art. 46a Dutch Criminal Code.

46 See Ohlin, *Incitement and Conspiracy*, *supra* note 40, at 214–218.

47 J. Pradel, *Droit Pénal Comparé* (Dalloz, 1995), at 235–236; H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (5th edn, Duncker & Humblot, 1996), at 612–613.

48 In German terminology, '*unechte Unterlassungsdelikte*' and, in Anglo-American terms, 'indirect' omissions.

intentional starvation, which is a war crime in Article 8(2)(b)(xxv) of the ICC Statute. ‘Genuine’ crimes of omission are usually conduct crimes (penalizing conduct), while crimes that qualify as commission by omission are often result crimes (penalizing consequence). A classic example of ‘commission by omission’ in national law is the case of the parent who neglects to feed her or his child. Not feeding the child causes it to die, which amounts to murder.

The drafters of the ICC Statute attempted to draw up a general definition on omission contained in a provision on *actus reus*.⁴⁹ However, the Working Group that was charged with the task could not agree on a definition.⁵⁰ Some delegations argued that only Article 28 creates, and should create, liability by omission.⁵¹ The formulation of the *nullum crimen sine lege* principle in Article 22 was understood as requiring the ICC provisions to state exhaustively the subject-matter of an offence and prohibit application by analogy.⁵² The French delegation had insisted on limiting omission liability to specific crimes, spelt out in the Rome Statute and the Elements of Crimes.

Commission by omission is a construction of doctrine and has its basis in jurisprudence. Some jurisdictions reject the concept, hereby endorsing a very strict legality principle. French courts, in particular, have rejected the construction of liability through commission by omission.⁵³ But such a strict approach is in my view inappropriate, especially for a treaty like a CAH convention, which aims to domestic enforcement. After all, most national jurisdictions accept ‘commission by omission’ which arises from a duty of care. Such duties stem from relationships established by law, contract, balance of power, agency or previous conduct.⁵⁴ Moreover, international courts have accepted a commission by omission-interpretation of crime definitions.⁵⁵ Crimes

49 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add., 14 April 1998.

50 ILC, Report of the Working Group on General Principles of Criminal Law, 29 June 1998, UN Doc. A/CONF.183/C.1/WGWP/L.4/Add.1, at 4 contained a (later deleted) provision entitled ‘Actus reus (act and/or omission)’. See also *Ad Hoc Committee Report, Annex II*, 6 September 1995, UN Doc. A/50/22, at 58; ILC, Preparatory Committee 1996 Report, UN Doc. A/51/22, Vol. I, at 45 and Vol. II, at 90–91; Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13, at 58–59; Preparatory Committee Final Draft, A/CONF.183/2, at 54–55. See Schabas, *Commentary*, supra note 39, at 476–477.

51 E. Wise, ‘General Principles of Criminal Law’, in L.S. Wexler (ed.), *Model Draft Statute for the International Criminal Court based on the Preparatory Committee’s Text to the Diplomatic Conference, Rome, June 15–July 17 1998* (Nouvelles Etudes Penales, 1998), at 48–50.

52 M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002) at 396, § 370.

53 Pradel, supra note 47, at 236.

54 L. Alexander, ‘Duties to Act Triggered by Creation of the Peril: Easy Cases, Puzzling Cases, and Complex Culpability’, in D.K. Nelkin and S.C. Rickless (eds), *The Ethics and Law of Omissions* (Oxford University Press, 2017) 180–196.

55 In *Blaškić* the ICTY Trial Chamber ruled that the offence of ‘inhuman treatment’ (Art. 2(b) ICTYSt., qualifying as ‘grave breach of the Geneva Conventions’) and ‘cruel treatment’ (Art. 3 ICTYSt., qualifying as a war crime) could consist of both, acts and omissions. Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000, §§ 154 and 186. The ICTR Trial Chamber in *Kambanda* ruled that all the acts of genocide could be committed by omission. Judgment, *Kambanda* (ICTR

would lose much of their scope if they were limited to active conduct. This is certainly true, for instance, for the crime against humanity of murder.

But can there be criminal liability even for complicity or aiding and abetting by omission? And can non-intervention qualify as instigation? Again, I would answer in the positive. An analysis of domestic law suggests that courts have accepted the possibility of aiding and abetting by omission. Moral support or intangible assistance by being an approving spectator can, under certain circumstances, be regarded as encouraging or aiding and abetting a crime committed by the principal perpetrator, even though the line between an (intangible) activity and an omission may be a fine one to draw in this context.⁵⁶ International courts have equally allowed for a 'commission by omission' interpretation of modes of liability.⁵⁷ Mere presence is not sufficient; it must have a 'significant encouraging effect'.⁵⁸ In *Mpambara*, the ICTR held that this means that there is a conscious choice to be present.⁵⁹

In sum, the fact that the CAH convention does not contain a separate provision on omission liability should in my view not be taken as an indication that CAH cannot be 'committed' or 'instigated' by way of an omission and through intangible support.

4. Superior Responsibility⁶⁰

Article 6(3) of the ILC draft comprises the theory of superior responsibility. It mirrors Article 28 of the ICC Statute. It is appropriate that a 'suppression

97-23-S), Trial Chamber, 23 September 1998, § 40. See further Schabas, *Genocide*, *supra* note 14, at 156.

56 There must be an act of encouragement coupled with the requisite *mens rea*. Some courts have added to that, that the encouragement must have had some effect on the principal but this is not generally accepted (*Wilcox v. Jeffrey* [1951] 1 All ER 464). Interesting in this respect is also the 'Big Dan's rape case' about witnessing a crime without intervening (*Canbaña*, CNCP, JA 2004-II:822). The French position is, again much more circumscribed. In the case of *Coutant* it was determined that complicity by omission requires a deliberate failure to act before a person in a specific position can be held accountable by way of passive acquiescence in an illegal lottery. See *Coutant*, Crim. 29 Jan. 1936, DH 1936.134, cited in Bell *et al.*, *Principles of French Law* (Oxford University Press, 2008), at 218 and 236.

57 In *Akayesu*, the Trial Chamber held that the defendant, a *bourgmestre*, aided and abetted by being present at the scene of the crime because his inaction coupled with his status had an encouraging effect on the actual perpetrators. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 705. In *Furundžija*, the Trial Chamber convicted the accused of rape as a war crime for continuing his interrogation while the person who was interrogated was subjected to sexual violence. The accused's presence coupled with his position of authority, and the non-intervention amounted to 'intangible assistance' with an encouraging effect. Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 691.

58 See analysis of case law by G. Boas *et al.*, *International Criminal Law Practitioner Library, Elements of Crimes under International Law* (Cambridge University Press, 2008), at 313–315.

59 Judgment, *Mpambara* (ICTR-01-65-T), Trial Chamber, 11 September 2006, § 22.

60 This section draws on my contribution Van Sliedregt, *Modes of Participation*, *supra* note 18, at 257–261.

treaty' on CAH contains a provision on superior responsibility, a 'crime-specific' theory of liability with an international pedigree. Superior responsibility requires implementation at the national level and a number of states, as part of their ratification process of the ICC, have indeed already implemented it as a *sui generis* liability theory in their national criminal law.

Superior responsibility, as codified in the statutes of international criminal tribunals, is a multi-layered concept.⁶¹ It comprises two 'liability models': (i) superior responsibility as a separate crime and (ii) superior responsibility as a mode of liability. Moreover, in temporal terms superior responsibility criminalizes two types of *actus reus*: a pre-crime variant (failure to prevent) and a post-crime variant (failure to punish or report to authorities). Lastly, it varies as to *mens rea*. In its ICC version, it comprises two different knowledge standards: 'should have known' for military superiors and 'consciously disregarded' for non-military superiors.

The implementation of superior responsibility in national law illustrates this multi-layered structure. The German Code of Crimes against International Law,⁶² for example, contains three provisions relating to superior criminal responsibility. A superior who intentionally omits to prevent the commission of crimes deserves the same punishment as the subordinate (Article 1 § 4(1)) and can be qualified as an accomplice, whereas the failure to properly supervise the subordinate (Article 1 § 13) and/or report crimes (Article 1 § 14) are separate crimes of omission and as such punished more leniently. The Dutch International Crimes Act⁶³ provides for a 'splitting solution' as well. Section 9(1) criminalizes a superior who '(a) intentionally permits the commission of such an offence by a subordinate; or (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence'. The cognitive aspect in these provisions requires actual knowledge for 1(a) and constructive knowledge ('must have known') for 1(b). Section 9(2), on the other hand, provides for superior responsibility as a separate offence, a negligent dereliction of duty, which carries a lower sentence than the underlying (subordinate) offence. Other national legislators have opted for one particular interpretation of superior responsibility. The UK International Criminal Court Act 2001 regards superior responsibility as a mode of liability. Section 65 of the ICC Act 2001 incorporates almost *verbatim* Article 28 of the ICC Statute, adding in

61 E. van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?' 20 *New Criminal Law Review* (2009) 420, at 425–427; van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, 204–206.

62 'Gesetz zur Einführung des Völkerstrafgesetzbuches', 26 June 2002, *Bundesgesetzblatt Jahrgang 2002 Teil II*, Nr. 42, 2254. Available in English <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=8789D6CFA5AFE9C941256C77003319DA&action=openDocument&xp.countrySelected=DE&xp.topicSelected=GVAL-992BU7&from=state&SessionID=DZEFZ3ANPT> (visited 28 April 2018).

63 For a more elaborate analysis of the Act, see H. Bevers et al., 'The Dutch International Crimes Act', in M. Neuner (ed.), *National legislation incorporating international crimes* (BWV-Berliner Wissenschafts-Verlag/Wolf Legal Publishers, 2003) 179–197.

paragraph 4: 'A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence'.⁶⁴ The Canadian legislator, on the other hand, interpreted superior responsibility as a distinct offence rather than a way of committing one of the three core crimes.⁶⁵

When commenting on the first draft-discussion paper of the proposed CAH convention, I had argued that superior responsibility should be 'remodelled'.⁶⁶ With the new ILC draft there was finally an opportunity to recognize the different concepts of superior responsibility. The only substantive distinction that is codified in Article 28 of the ICC Statute — apart from the temporal pre-crime/post-crime which is part of all international superior responsibility definitions — and repeated in the ILC draft, is that between military and non-military superiors. This differentiation, however, is unnecessary.⁶⁷ An analysis of customary and conventional international law demonstrates that the three elements that make up superior responsibility — (i) position of control; (ii) knowledge; (iii) failure to prevent or punish/report — give sufficient room to vary according to the type of superior.⁶⁸ Unfortunately, the current ILC draft mirrors the ICC provision, leaving its multi-layered structure intact and its complexities and ambiguity unexplained. Unsurprisingly, some delegations criticized Article 6(3) for being vague and requiring further explanation.⁶⁹

Adopting the text of Article 28 of the ICC Statute is unwelcome also for other reasons. In its 'should have known format', superior responsibility is a mode of liability for intentional crimes in the form of negligence. As such it gives rise to 'a stunning contradiction between the negligent conduct of the superior and the underlying intent crimes committed by the subordinates'.⁷⁰ Also the causal link is unclear with regard to the post-crime scenario since it stipulates that crimes are committed by subordinates 'as a result' of a failure on the part of the superior.⁷¹ There are good arguments to support a negligent type of superior responsibility for military superiors but then it should be construed as

64 UK International Criminal Court Act 2001, c. 17, s. 65, at <http://www.legislation.gov.uk/ukpga/2001/17/contents> (visited 28 April 2018)

65 See Section 5, Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, 29 June 2000, at <http://laws-lois.justice.gc.ca/eng/acts/C-45.9/> (visited 28 April 2018)

66 Van Sliedregt, *Modes of Participation*, *supra* note 18, 259–260.

67 van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, at 200–202.

68 *Ibid.*, at 185–186.

69 Hungary, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 80; Turkey, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/72/SR.20, § 76.

70 K. Ambos, 'Superior Responsibility', in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 823–872, at 852.

71 In *Bemba*, the Trial Chamber agreed with what the Pre-Trial Chamber had already determined when confirming the indictment: proof of such a causal relationship is only required for the pre-crime duty to 'prevent' (future crimes). Indeed, it would be illogical to interpret Article 28 otherwise. Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, § 211. See, however, the somewhat confusing alternative interpretation provided by Judge Steiner in a separate opinion to the judgment.

a separate offence of negligence, as some jurisdictions have done in their implementing legislation.

To properly reflect the said distinctions in terms of culpability, ideally, a CAH convention should provide for three concepts of superior responsibility: (i) intentionally permitting the commission of crimes by subordinates (ii) intentionally failing to report crimes and (iii) negligently failing to supervise subordinates.

5. Superior Orders

Article 6(4) of the ILC draft provides that ‘each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate’. The ILC recognizes that most national jurisdictions will provide for defences in the general part of their criminal law.⁷² With regard to superior orders there should, however, be an exception; it cannot be a defence for CAH. The ILC points to the position in international law and the fact that the defence of superior orders has been excluded in almost all statutes of international and hybrid courts, for all crimes, starting with the Charter of the Nuremberg Tribunal. Moreover, it has been excluded as a defence in a range of treaties, including those banning torture and enforced disappearances.⁷³

The ICC Statute is the first treaty to allow superior orders to be a complete defence, albeit under certain strict conditions and only for war crimes. This can be referred to as the ‘conditional liability approach’ to superior orders. This approach can be traced back to nineteenth century Austro-Hungarian and German military (penal) law.⁷⁴ It was relied upon before the Leipzig Court in the *Llandovery Castle*⁷⁵ and *Dover Castle*⁷⁶ cases, where defendants were charged with the unlawful sinking of hospital ships during the First World War. In the words of the court in *Llandovery Castle*:

However the subordinate obeying an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law ... It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no

72 2017 ILC Report, *supra* note 4, § 46, commentary to draft Art. 6, at 67, § 24.

73 *Ibid.*, at 67–68, §§ 26–27.

74 See N. Keijzer, *Military Obedience* (Sijthoff & Noordhoff, 1978), at 190–191; P. Gaeta, ‘The Defence of Superior Orders: The Statute of the International Criminal Court versus customary international law’, 10 *European Journal of International Law* (1999), 172–191, at 175.

75 German Supreme Court (*Reichsgericht*) at Leipzig, 16 July 1921. *Verhandlungen*, Vol. 368, 2579–2586; English translation in 16 *American Journal of International Law (AJIL)* (1922) 708–724, at 721–723.

76 German Supreme Court (*Reichsgericht*) at Leipzig, 4 June 1921. *Verhandlungen*, Vol. 368, 2556–2557; English translation in 16 *AJIL* (1922), 704–708, at 706–708.

such confidence can be held to exist if such an order is universally known to everybody including the accused, to be without any doubt whatever against the law.⁷⁷

Article 33(1) of the ICC Statute reflects the *Llandovery Castle* reasoning. Three conditions need to be met: (i) there must be an obligation to obey orders, (ii) there can be no knowledge of the unlawful nature of the order, and (iii) the order was not manifestly unlawful. Section 33(2) of the ICC Statute stipulates that orders to commit CAH or genocide are regarded 'manifestly unlawful'.⁷⁸

Article 33 of the ICC Statute has been hotly debated. Gaeta considers it contrary to customary international law, which in her view embraces the 'absolute liability approach': the defence of superior orders is never a (complete) defence.⁷⁹ At best, she says, it can mitigate the sentence. There is, however, quite some evidence to refute the absolute liability approach as the only valid approach to superior orders in international law. The negotiating history of the Nuremberg Statute demonstrates that its 'founding fathers' were neither unanimous nor definite in rejecting the possibility to rely on superior orders as a defence albeit under certain conditions.⁸⁰ They eventually chose for an outright exclusion of superior orders because of the magnitude of the crimes and the type of perpetrators. It was thought that such a plea could not avail the leaders of the Nazi regime. Garraway regards the absolute liability approach in Nuremberg as 'situation specific rather than a general reflection of the views for all war crimes at that particular time'.⁸¹ Dinstein notes that the Tokyo Tribunal took a different approach, and it 'prescribed a more flexible, and a more logical, rule than that enunciated in London. It is not the doctrine of absolute liability, but rather the principle which permits all the circumstances of the case to play their parts, that prevails here'.⁸²

The attempts in the post-war period to formulate a generally accepted rule on superior orders, for the purpose of codification in an international treaty, were in vain. Neither at the drafting sessions for the Genocide Convention, nor at the diplomatic conferences drawing up the 1949 Geneva Conventions

77 *Ibid.*, at 721–722.

78 Art. 33 ICCSt.: '1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.'

79 Gaeta, *Superior Orders*, *supra* note 74, at 175.

80 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (H.M.S.O. 1948), at 98, 279. See also van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, 288–290.

81 P. Duyx et al., 'War Crimes Law and the Statute of Rome: Some Afterthoughts? Report on the Seminar of Rijswijk', 39 *Revue de Droit Militaire et de Droit de la Guerre* (2000) 67–124, at 97.

82 Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Sijthoff, 1965), at 157.

and the 1977 Additional Protocols, could a satisfactory text be adopted.⁸³ After considerable debate, with proposals ranging from a draft proposal eliminating the defence, to a provision allowing the superior orders plea in case of mistake, the delegates decided to drop the issue. The 1954 Draft Code of Crimes did not contain an outright exclusion of superior orders but added the qualification that ‘in the circumstances at the time it was possible for him not to comply with that order’.⁸⁴ The latter formula returned in the 1991 ILC Draft Code where superior orders was not accepted as a defence *per se*. It could be pleaded in connection with duress or choice of evils/necessity. The initiatives of the *Association Internationale de Droit Pénal* (AIDP) and the International Law Association (ILA) in drafting an ICC Statute adopted a similar stance.⁸⁵

When the Statutes of the ad hoc Tribunals were drawn up there was no generally accepted international rule on superior orders and no example other than the Statute of the Nuremberg Tribunal to draw on. It was therefore no surprise that the Statutes follow the Nuremberg-example and provided for the absolute liability approach: superior orders is excluded as a defence.⁸⁶ The Secretary General, in his explanatory report to the ICTY Statute, however, writes that superior orders can be a defence ‘in connection with other defences such as coercion or lack of moral choice’.⁸⁷ The *Erdemović* case at the ICTY, where superior orders was pleaded in combination with the defence of duress, demonstrated that especially when it concerns lower level defendants a defence of superior orders may be appropriate, even when it concerns crimes against humanity. A highly divided Appeals Chamber decided to convict nevertheless, relying on policy arguments to justify its decision but imposing the most lenient sentence in the history of international criminal law.

The case of *Erdemović* left its traces when it came to drafting the ICC Statute. After many long and difficult debates, those in favour and those against the conditional liability approach found a compromise in one rule. Article 33 comprises both the conditional and absolute liability approach. Under certain conditions, phrased as exceptions to the rule that superior orders is not a defence, the superior orders-plea can fully exonerate a defendant but not for crimes against humanity and genocide.

83 *Ibid.*, at 217–225; See also Schabas, *Genocide*, *supra* note 14, at 326–329.

84 *Report of the International Law Commission Covering the Work of its Sixth Session*, 3–28 July 1954, UN Doc. A/2693, Art. 4, at 150.

85 See Arts 33–16 of the Siracusa Draft II in C. Nill-Theobald, *‘Defences’ bei Kriegsverbrechen am Beispiel Deutschlands unter der USA* (Edition Iuscrim, 1998), Annex B, at 459. The ILA Draft Statute did not allow ‘obedience to superior orders as a justification *per se*, but it can be taken into consideration in conjunction with other facts of the case in the context of Excuses ... , Mistake of Fact, Mistake of Law, Duress’. See International Law Association, ‘Report of 64th Conference’, 64 *International Law Association Report of Conference* (1990), at 187.

86 Cf. Art. 6(3) ICTYST. and Art. 7(3) ICTRSt.: ‘[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires’.

87 *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704 (1993), reprinted in 32 *ILM* 1163 (1993), § 57.

Article 33 of the ICC Statute, for the first time, linked the availability of the defence of superior orders to specific crimes. Until then debates on superior orders had assumed the defence was available (or not) with regard to all core crimes. The assumption underlying the differentiation in Article 33 is that war crimes, as a category of crimes, is a less apparent and less serious breach of international law than crimes against humanity and genocide. This structure of Article 33 is, in my view, unwelcome. Not only because such a crime-hierarchy has never been officially accepted and endorsed but also because the distinction between war crimes and crimes against humanity is a fluid one. As Zimmermann comments, even in situations in which the defendant can rely on a defence of superior orders with regard to war crimes, he can still be punished for the same acts as crimes against humanity.⁸⁸ This is unacceptable and would violate the principles of equity and fairness.

A successful plea of superior orders *implies* that an order is not manifestly unlawful. This will indeed often mean that no defence is available for crimes against humanity and genocide. It should, however, be left to courts, on a case-by-case basis, to determine whether an order was manifestly unlawful or not. To exclude this *a priori* is unnecessary. Section (2) of Article 33 is, in my view, superfluous and only there to please those pushing for the absolute liability approach.

Against that background, I would argue that Article 6(4) should qualify the term 'order'. States should ensure that the defence is not available when a crime has been committed by obeying a 'manifestly unlawful' order. In this way, the CAH convention would align with the current position in international law. This would be the appropriate approach to be incorporated at the domestic level, especially in light of the fact that defendants of middle and low rank are likely to be tried at the domestic level.⁸⁹ As *Erdemović* has shown, adhering to the Nuremberg-specific absolute liability rule could not be appropriate when the plea is raised by lower level defendants.

6. Liability of Legal Persons

Liability of legal persons in draft Article 6(8) is a welcome addition to the legal framework ensuring liability for crimes against humanity. Quite a number of government delegations, however, deem it controversial and a concept that requires further consideration.⁹⁰ In their reluctance to embrace it, they point to the diversity of state practice. This had earlier been the reason for those drafting the ICC Statute to abandon an attempt to include liability of legal persons

88 A. Zimmermann, 'Superior Orders', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 957–973, at 972.

89 See Crimes Against Humanity Initiative, *Fulfilling the Dictates*, *supra* note 29, at 4, § 10.

90 See debates at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.26.

in the Statute.⁹¹ There are, in my view, at least four reasons why this opposition to inclusion of legal person-liability should be nuanced and even dismissed.

First of all, as the ILC points out in its Commentary to the draft, the provision is modelled on Article 3(1) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which like the draft CAH convention is a ‘suppression treaty’. It entered into force in 2002 and as of July 2017 has been ratified by 173 states and a further 9 who signed it yet need to ratify it. The Optional Protocol has no reservations or declarations with regard to the liability of legal persons, not even by those states that say they cannot accommodate legal person liability since their law does not allow for it.⁹² Surely, ending impunity for crimes against humanity via establishing liability of legal persons is as worthy a cause as it is the banning of child prostitution and child pornography.

Secondly, the world, and with it state practice, has moved on since the drafting of the ICC Statute. Increasingly, domestic jurisdictions have accepted that legal entities can commit offences and be held accountable, either under civil law or criminal law.⁹³ Moreover, at the international level, we have a normative system in place that provides for monitoring and supervision of corporations to ensure they respect human rights. Corporations can be taken to court for violating international law, in particular human rights. The *Talisman Energy*⁹⁴ and *Kiobel*⁹⁵ cases are notable examples.⁹⁶ In 2014, the Special Tribunal for Lebanon (STL) held that legal persons can be the subject of contempt proceedings. Three TV stations were held in contempt because of revealing names of witnesses that should have been kept concealed.⁹⁷ Corporate liability was read into the Statute. The term ‘person’ was thought to extend to natural and

91 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23*, paragraphs 5 and 6, A/Conf.183/C.1/WGPP/L.5/Rev.2, 3 July 1998. See A. Clapham, ‘The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (Brill, 2000) 139–195.

92 Hungary, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 81

93 C. Wells, *Corporations and Criminal Responsibility* (2nd edn. Oxford University Press, 2001); D.E. Stoichkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010); J. Kyriakakis, ‘Corporations before International Criminal Courts: Implications for the International Criminal Justice Project’, 30 *LJIL* (2017) 221–240.

94 *Presbyterian Church of Sudan v. Talisman Energy Inc* (582 F.3d 244, 259), 2 October 2009. See also, US Supreme Court, *Presbyterian Church of Sudan et al. v. Talisman Energy Inc* (No. 09-1262), Amicus Curiae of international law scholars, 30 April 2010, *Presbyterian Church of Sudan et al. v. Talisman Energy Inc* (No. 09-1262), Amicus Curiae of international law scholars: <http://hrp.law.harvard.edu/wp-content/uploads/2013/07/talisman-amicus-final-filed-4-30-10.pdf> (visited 29 April 2018).

95 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

96 The *Kiobel* case, however, limits extra-territorial jurisdiction of American courts under the Alien Tort Statute. Recently, the US Supreme Court has clarified, and thereby limited, this possibility even more in *Jesner et al v Arab Bank PLC* (No. 16-499), 24 April 2018.

97 Judgment, New TV S.A.L. *Karma Mohamed Thasin Al Khayat* (STL-14-05), 18 September 2015.

legal persons. In justifying this reading the Tribunal referred to Lebanese law and '[a] general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers.'⁹⁸ The latest development that can be mentioned in this respect is the provision on corporate liability in the Malabo Protocol. This Protocol proposes to add international criminal jurisdiction to the future African Court of Justice and Human Rights (ACJHR) and was adopted by the African Union in June 2014. Article 46C(1) of the Malabo Protocol provides for jurisdiction over legal persons alongside natural persons: '[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.'⁹⁹

Thirdly, Article 6(8) of the ILC draft is broad enough to provide for liability of legal persons even for those jurisdictions that traditionally have rejected liability for legal persons. Its wording is sufficiently broad to allow for attribution via individual liability. One of the reasons why some jurisdictions — most notably Germany — do not accept criminal liability of legal persons is the idea that abstract legal entities have 'no body to kick and no soul to damn'. Yet, liability can be attributed to the entity by way of vicarious liability of a company's agent. Vicarious liability is based on the legal fiction that whatever a person does through an agent, he/she is deemed to have done him/herself. In attributing liability to an entity it needs to be determined: (i) whether the elements of the offence were met in the conduct of the agent and (ii) whether the conduct can be ascribed to the entity on the basis of the relationship of agency (e.g. employment). Moreover, Article 6(8) allows for establishing non-criminal liability. This aligns with the reality of domestic jurisdictions that do not accept criminal liability of legal entities but *do* provide for administrative liability of legal persons, e.g. Germany where companies can be liable under the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*).

Fourthly, the prevalence of corporate misconduct condoning or benefiting from human rights abuse in war-torn and instable countries calls for legal person-liability in a CAH convention. Research into business activity, especially on the African continent, has shown that corporations involved in the private security industry, oil industry, mining business, diamond and timber trade commit or are complicit in war crimes and crimes against humanity. Corporations can be direct perpetrators¹⁰⁰ but more often will be complicit by

98 Redacted Version of Decision in Proceedings for Contempt with Order in Lieu of an Indictment, *New TV S.A.L. Karma Mohamed Thasin Al Khayat* (STL-14-05), Contempt Judge, 31 January 2014, at § 26, note 44, citing Clifford Chance LLP, 'Corporate Liability in Europe', January 2012, at <https://www.cliffordchance.com/content/dam/cliffordchance/PDF/European.TechnicalBulletin.pdf> (visited 28 April 2018).

99 African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, Art. 46(C).

100 L.J. van den Herik and J.L. Cernic, 'Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again', 8 *JICJ* (2010) 725–743. E. van Sliedregt and W. Huisman, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity', 8 *JICJ* (2010) 803–828, at 816.

benefiting from, or silently approving human rights violations.¹⁰¹ Corporate complicity may be even more indirect than that. By continuing to do business with dictatorial regimes, business entities have contributed to the political legitimization and economic viability of regimes engaged in CAH. The Truth and Reconciliation Commission in South Africa, for instance, concluded that the Apartheid regime could not have survived without the business support of certain companies, such as IBM and Ford.¹⁰²

Of course, individual businessmen can be prosecuted and punished for aiding and abetting CAH. Experience in the Netherlands has shown that this requires states to provide for a broader concept of aiding and abetting than currently encapsulated in Article 25(3)(c) of the ICC Statute.¹⁰³ The latter provision requires that he who aids or abets or otherwise assists does so with ‘the purpose of facilitating the commission of a crime’. The CAH Initiative at their Geneva meeting in 2014 noted that this mental requirement is too restrictive. The example was used of an arms manufacturer who sells weapons to persons it knows are committing CAH but whose purpose is to make a profit. Hence adhering to the ICC standard would exclude the manufacturer’s liability.¹⁰⁴

7. Conclusion

The way in which the ILC draft ensures criminalization of crimes against humanity in national law is certainly commendable. The ILC approach, which does not set out to achieve harmonization, is in line with the proposed convention’s nature as a ‘suppression treaty’, thus enabling efficient implementation at the domestic level. My suggestions for modification concern the insertion and explicit recognition of conspiracy and incitement as inchoate offences, and a qualification of the superior orders defence, allowing reliance on the defence for non-manifestly unlawful orders. The provision on superior responsibility is probably the one requiring the most work by drafters. This clause, which in its current version mirrors Article 28 of the ICC Statute, is vague and unclear. I would recommend drafters to adopt a ‘splitting solution’, recognizing a number of separate superior responsibility concepts.

Conversely, I welcome wholeheartedly the clause on legal person-liability. While I recognize that liability of legal persons — like the inchoate concept of

101 A. Clapham and S. Jerbi, ‘Categories of Corporate Complicity in Human Rights Abuses’, 24 *Hastings International and Comparative Law Review* (2001) 339–349; W. Huisman, *Business as Usual? The Involvement of Corporations with International Crimes* (Boom Legal Publishers, 2010); M. Punch, *Dirty Business: Exploring Corporate Misconduct, Analysis and Cases* (Sage Publications, 1996); J.G. Stewart, ‘The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute’, 47 *New York University Journal of International Law and Politics* (2014) 121–206.

102 A. Akinwumi, ‘Powers of Reach: Legal Mobilization in a Post-apartheid Redress Campaign’, 22 *Social & Legal Studies* (2013) 25–41.

103 See van der Wilt, *Genocide v. War Crimes*, *supra* note 25.

104 Crimes Against Humanity Initiative, *Fulfilling the Dictates*, *supra* note 29, at 16, § 40.

conspiracy — is not yet crystallized into a (general) concept of criminal responsibility under international law, I would argue that this is not a problem. Being part of a 'suppression-treaty to-be', leaving a 'margin of implementation' and room for *couleur locale*, Article 6 of the ILC draft can have the role of 'nudging' the law. It may move it forward into a desirable direction whilst aligning to existing developments in domestic law, provided of course that the resulting convention does not force domestic jurisdictions to adopt principles or concepts that go against their constitution or foundational principles.

The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes Against Humanity

Preliminary Remarks on Draft Articles 7, 8, 9 and 11
by the International Law Commission

Antonio Coco*

Abstract

The International Law Commission's (ILC) draft articles on crimes against humanity contain some key provisions on the duty to establish national jurisdiction over crimes against humanity, under draft Article 7, and on the duty to investigate the possible occurrence of crimes against humanity, pursuant to draft Articles 8 and 9. This article analyses, first, the duty to establish national jurisdiction over crimes against humanity, focusing in particular on the identification of what constitutes 'territory under a state's jurisdiction' and on the principle of universal jurisdiction. Secondly, it delves into the general duty to investigate situations in which crimes against humanity may have been committed, clarifying the circumstances in which such duty would arise and the requirements that related investigations should satisfy. Thirdly, this article deals with the specific duty to carry out a preliminary inquiry into allegations against suspects who are found on the state's territory — exploring, in particular, the extent to which the pertinent information should be shared with other states and the fair treatment guarantees that draft Article 11 accords to alleged offenders. In suggesting some improvements, this article considers that these draft articles — though representing a welcome development — constitute no more than the bare minimum to be carried out at the international level to prevent and punish crimes against humanity effectively.

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1. Introduction

The International Law Commission's (ILC) draft articles on crimes against humanity constitute a long awaited achievement, which at the same time empowers states and makes them responsible for the prevention and punishment of crimes against humanity. Should the draft articles be translated into an international convention, their provisions would, on one side, represent a solid basis for national authorities to carry out investigations and prosecutions in good faith and, on the other, oblige recalcitrant authorities to undertake such actions as well. Several draft articles aim to achieve this result, especially draft Article 7, concerning the duty to establish national jurisdiction over crimes against humanity, and draft Articles 8 and 9, concerning the duty to investigate the possible occurrence of crimes against humanity. Effective national prosecutions, which are vital to ensure the prevention of further crimes against humanity,¹ will be more likely to occur should these draft articles be effectively and genuinely implemented by states. There are at least three reasons to support the adoption of the said provisions.

Firstly, unfortunately, faith in the International Criminal Court (ICC) project is wavering in current times, threatened by a lack of adequate resources, insufficient political support and unreasonable expectations. Now, more than ever, a decentralized system of national investigations and prosecutions must be strengthened, so that the need for this system to be complemented by an international intervention would arise less often.

Secondly, while the fight against impunity for two other 'core international crimes' — namely war crimes and genocide — has, since a long time, benefited from conventional regulation, national prosecutions on charges of crimes against humanity have never had such a chance. Rather, these prosecutions have been impossible or rendered difficult precisely because of, inter alia, the lack of jurisdiction or adequate legislation.² A clinic study conducted in 2013 at the George Washington University shows that only about 25% of the 83 states under scrutiny had adopted a provision allowing the exercise of national jurisdiction over a non-national suspected of having committed crimes against humanity outside of the country against non-nationals.³ Should these numbers be projected on a global scale, it would mean that only about a quarter of

1 *Report of the International Law Commission, Sixty-ninth Session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10 (hereinafter '2017 ILC Report'), § 46, Commentary to Art. 4, § 17. The full text of the draft articles is reported at § 45 (hereinafter, 'Draft articles on crimes against humanity').

2 Cf. L.N. Sadat's article in this special issue, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity'.

3 A.J. Carrillo and A.K. Nelson, 'Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction Special Report', 46 *George Washington International Law Review* (2014) 481, at 493–495, 497–503. This information is discussed in *First report on crimes against humanity By Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/680, 17 February 2015, § 61 (hereinafter '2015 Murphy Report'). The Special Rapporteur presents findings of the clinical study more in general at *ibid.*, §§ 58–64.

the members of the international community of states already has the tools required to effectively punish crimes against humanity regardless of where they are committed.

Thirdly, due to migration fluxes and the international diaspora of foreign fighters fleeing from regions affected by armed conflict, many perpetrators of crimes against humanity may find themselves in the hands of a state that is neither their state of nationality, nor the state where they have committed their crimes.⁴ This result may cause difficulties for states lacking appropriate jurisdictional powers under national law, which would effectively render such states — albeit unintentionally — a safe haven for criminals. Conversely, it is wholly unacceptable that ‘unwilling’ states may provide sanctuary to perpetrators of crimes against humanity by omitting to exercise jurisdiction over them.⁵ Reminding states of their duty to establish jurisdiction over crimes against humanity may push them into a so-called ‘virtuous cycle’, generating an improvement in prevention and punishment of other crimes covered by international conventions, like terrorism, human trafficking, organized crime and corruption.⁶

This is not to say that the draft articles analysed in this contribution, namely draft Articles 7, 8 and 9, represent a complete novelty in international law. They are actually not new. Similar provisions exist — to simply mention two examples — in the Convention against Torture and in the Convention against Enforced Disappearance, both dealing with conduct that would amount to crimes against humanity if committed as part of a widespread or systematic attack against the civilian population. The existence of a general duty to establish and exercise jurisdiction over crimes against humanity rightly features in the preamble to the ILC’s draft articles.⁷ Moreover, it has widely been accepted that crimes against humanity represent a violation of *jus cogens*.⁸ As a result, refusing to investigate and prosecute the relevant allegations may implicitly constitute wrongful recognition of the legality of the situation or assistance in maintaining it.⁹ More importantly, crimes against humanity, in most cases,

4 For example, Akhavan cites Canada, where people involved in Rwandan genocide like Munyaneza moved. See P. Akhavan, ‘The Universal Repression of Crimes Against Humanity before National Jurisdictions’, in L.N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011) 28, at 41.

5 L.N. Sadat, ‘Codifying the “Laws of Humanity” and the “Dictates of the Public Conscience”: Towards a New Global Treaty on Crimes Against Humanity’, in M. Bergsmo and SONG, T. (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014) 17, at 45–46.

6 *Ibid.*, at 46.

7 Draft articles on crimes against humanity, *supra* note 1, Preamble, § 7.

8 *Ibid.*, Preamble, § 3. See also C. Bassiouni, *Crimes against Humanity in International Law* (Kluwer, 1999), at 210; Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, § 520. See also M.L. Piqué, ‘Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity’, in Bergsmo and SONG (eds), *supra* note 5, 135, at 145.

9 *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, 12 December 2001, Art. 41(2).

constitute serious violations of human rights, considering that the underlying offences harm basic human rights (just an example, the crime against humanity of imprisonment harms the right to freedom from arbitrary detention). The connection with human rights law is particularly evident when state agents are responsible for crimes against humanity, since human rights obligations are traditionally imposed on states. However, such connection may exist even when non-state actors are responsible for crimes against humanity,¹⁰ should it be accepted that non-state actors also have human rights obligations under international law,¹¹ or at least when non-state actors' behaviour functions as catalyst for the state violation of its positive duties to protect human rights.¹² In so far as the said connection exists, as it will be explained in the rest of this article, obligations arising from the relevant human rights treaties already include a duty to establish jurisdiction over, and investigate, alleged violations.

It is not my intention to argue that these draft articles alone are sufficient to close the impunity gap for crimes against humanity. On the contrary, they represent no more than the bare minimum to be carried out at the international level to counter the commission of crimes against humanity. The present contribution analyses, firstly, the duty to establish national jurisdiction over crimes against humanity, focusing on the identification of what constitutes 'territory under a state's jurisdiction' and on the principle of universal jurisdiction (Section 2). Secondly, it delves into the general duty to investigate situations in which crimes against humanity may have been committed, thereby clarifying the circumstances in which such duty may arise and the requirements which the related investigations should satisfy (Section 3). Thirdly, this article deals with the specific duty to carry out a preliminary inquiry

10 The ICC has already a couple of times explained that crimes against humanity can be committed by non-state actors pursuant to a non-state organizational policy. See Judgment Pursuant to Article 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, §§ 1119–1121; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010, § 90 (hereinafter, 'Decision to Authorize an Investigation, Kenya Situation'). This stance has been criticized by Judge Kaul in his Dissenting Opinion, Decision to Authorize an Investigation, Kenya Situation, especially § 51, where he suggests that the 'crimes against humanity' label should be reserved for crimes perpetrated pursuant to an organizational policy by state or state-like actors. See also C. Kreß, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision', 23 *Leiden Journal of International Law* (2010) 855. Kreß argues that customary international law supports Judge Kaul's position. See Kreß, *ibid.*, especially at 867–871.

11 The argument has been put forward by some scholars, most notably, A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006). See also D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing, 2016).

12 See e.g. ECtHR, *Kiliç v. Turkey*, Appl. No. 22492/93, Judgment of 28 March 2000, § 73; IACtHR, *Pueblo Bello Massacre v. Colombia*, 31 January 2006, §§ 139–140 (hereinafter, '*Pueblo Bello Massacre v. Colombia*'); African Commission on Human and Peoples' Rights, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, Comms Nos 279/03 and 296/05, 27 May 2009, § 147. More cases are discussed in L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011), at 180–184.

into allegations against suspects who are found on the state's territory, exploring the extent to which the pertinent information should be shared with other states and the fair treatment guarantees that draft Article 11 accords to alleged offenders (Section 4). Each section contains suggestions to amend the draft articles, with a view to their improvement.

2. The Duty to Establish Jurisdiction under Draft Article 7

Draft Article 7 creates a duty for states to establish jurisdiction for conduct amounting to a crime against humanity based on one of several possibilities: the relevant conduct took place in a territory under the state's jurisdiction;¹³ the conduct was performed by a state's national;¹⁴ if the state deems it appropriate, the victim of the crime was a national of the relevant state;¹⁵ or, in any case, whenever an individual suspected to have committed crimes against humanity is present on any territory under the state's jurisdiction.¹⁶ A provision of this kind was expected to be part of the ILC's work, and it is, indeed, common for treaties imposing an obligation to criminalize certain conduct, as with draft Article 6, to also impose a duty to establish jurisdiction over such conduct.¹⁷ Similar provisions can be found, *inter alia*, in Article 5 of the Convention against Torture and the Article 9 of the Convention against Enforced Disappearance. In addition, the Geneva Conventions contain an implicit obligation to establish jurisdiction, including universal jurisdiction, concerning grave breaches of the Conventions, for example, Article 49(2) of Geneva Convention I.¹⁸ The Genocide Convention does not contain an explicit duty to establish jurisdiction, but Article VI specifies that alleged *genocidaires* must be tried before the courts of the state on whose territory the offence was allegedly committed — hence implicitly providing an obligation to establish

13 Or on board a ship or aircraft registered in the state. See Draft articles on crimes against humanity, *supra* note 1, Art. 7(1)(a).

14 Or, if the state deems it appropriate, by a stateless person who is habitually resident in the state's territory. See *ibid.*, Art. 7(1)(b).

15 *Ibid.*, Art. 7(1)(c).

16 *Ibid.*, Art. 7(2).

17 *Second report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/690, 21 January 2016, § 87 (hereinafter, '2016 Murphy Report').

18 See also Art. 50(2) Geneva Convention II; Art. 129(2) Geneva Convention III; Art. 146(2) Geneva Convention IV. As it is well known, grave breaches of the Geneva Conventions and Additional Protocol I form a particular category of war crimes committed in international armed conflicts. An obligation to establish jurisdiction over all other war crimes, regardless of whether perpetrated in international or non-international armed conflicts, is deemed to exist in customary international law according to the International Committee of the Red Cross (ICRC), *Study on Customary International Humanitarian Law* (2005), available online at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (visited 11 April 2018). Indeed, Rule 158, *ibid.*, obliges states to investigate war crimes allegedly committed by their nationals or armed forces or on their territory. As it will be explained *infra*, investigations represent an exercise of jurisdiction.

jurisdiction based on the territoriality principle. The ICC Statute does not provide for a duty to establish jurisdiction over the relevant crimes. A failure to exercise jurisdiction would simply open the door for the complementary intervention by the Court. Yet, the preamble of the ICC Statute recalls that states have a duty to exercise their jurisdiction over such crimes,¹⁹ which is best understood as a reference to a rule of customary international law, the scope *ratione personae* of which has been left ‘delightfully ambiguous.’²⁰

As it is well known, ‘jurisdiction’ generally designates the state’s power to exercise authority over individuals, objects and events.²¹ A general obligation to establish jurisdiction is, thus, an obligation to assert the existence of such authority by subjecting those individuals, objects or events to a state’s legislation (prescriptive jurisdiction) or by subjecting them to the process of its courts, whether in civil or criminal proceedings (adjudicative or judicial jurisdiction), or by ensuring compliance with that legislation through police or other executive mechanisms (enforcement jurisdiction).²² The draft articles on crimes against humanity are concerned with criminal jurisdiction: draft Article 6 obliges states to ensure that crimes against humanity constitute offences under national criminal law and draft Article 7 obliges states to assert their jurisdiction over such offences.²³ This, practically, means that states are obliged to make their national law — including judicial proceedings and enforcement mechanisms — applicable to conduct amounting to crimes against humanity and consequently to alleged offenders. The objection could be raised that it does not make sense to create a duty to establish enforcement jurisdiction over individuals who are not located on the state’s territory. Indeed, whilst enforcement jurisdiction on any individual, object or event located on a state’s territory is usually absolute,²⁴ its exercise (through, for instance, an arrest)

19 Preamble, § 6, ICCSt. See also Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga* (ICC-01/04-01/07-1497), Appeals Chamber, 25 September 2009, § 85.

20 T.N. Slade and R.S. Clark, ‘Preamble and Final Clauses’, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer, 1999) 421, at 427.

21 Cf. slightly differently worded but similar definitions in J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn., Oxford University Press, 2012), at 456. See also M.N. Shaw, *International Law* (8th edn., Cambridge University Press, 2017), at 483. See also C. Staker, ‘Jurisdiction’, in M.D. Evans (ed.), *International Law* (4th edn., Oxford University Press, 2014) 309, at 309.

22 R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *Journal of International Criminal Justice (JICJ)* (2004) 735, at 736–737. O’Keefe convincingly argues that, for criminal matters, there is no particular reason to distinguish adjudicative jurisdiction from the other two forms of jurisdiction.

23 On the question of whether international law contains an obligation to establish universal jurisdiction over civil claims for torture, see ECtHR, *Nait-Liman v. Switzerland*, Appl. No. 51357/07, Judgment of 15 March 2018. Importantly, whilst controversially denying such universal civil jurisdiction, the Court accepts the existence of universal criminal jurisdiction for acts of torture. See *ibid.*, § 178.

24 Separate Opinion of President Guillaume, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports (2002) 3, at 36–37, § 4.

outside of the state's border without consent of the territorial state would constitute a violation of the territorial state's sovereignty. However, it should not be overlooked that — in order to obtain such consent and potentially arrest a suspect extraterritorially — the state would first need to vest its police with enforcement authority, subordinating its exercise to the territorial state's consent. In other words, an obligation to establish criminal jurisdiction is different from the obligation to exercise such jurisdiction,²⁵ which may instead substantiate itself in a duty to investigate the occurrence of crimes against humanity (draft Articles 8 and 9(2)), to take an alleged offender into custody (draft Article 9(1)) or to prosecute, extradite or surrender them (draft Article 10). Hence, draft Article 7 obliges states to make not only their substantive law but also enforcement action applicable to the conduct and individuals in question, so that they can be liable to be investigated, arrested, detained, prosecuted, and sentenced.

A. Crimes Committed on any Territory under the State's Jurisdiction

In this light, the obligation to establish jurisdiction when the offence is committed in a territory under the state's jurisdiction — despite being quite common in treaty making — may appear to be almost superfluous. States always have regulatory authority within their *de jure* geo-political borders²⁶ and, historically, conduct occurring on board a vessel or aircraft registered in the state has been equated to conduct occurring on the state's territory for jurisdictional purposes.²⁷ Where does the normative value of Article 7 lie, then? The answer is that, by creating an obligation to establish jurisdiction over offences committed 'in any territory under [the state's] jurisdiction', the article unequivocally refers to any territory over which that state has *de facto* control, e.g. territory which is under military occupation or which has been unlawfully annexed or in any case where the state has 'day-to-day ability to act'.²⁸ This

25 *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Council of the European Union, 16 April 2009, § 11; J. Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction', 7 *JICJ* (2009) 945, at 949.

26 J. Klabbers, *International Law* (2nd edn., Cambridge University Press, 2017), at 100. A. Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn., Cambridge University Press, 2012), at 242. See also 2016 Murphy Report, *supra* note 17, § 100. According to the ECtHR, such jurisdiction formally exists even if the state has *de facto* lost control of certain areas which, for example, are under control of a non-state armed group. See, ECtHR *Assanidze v. Georgia*, Appl. No. 71503/01, Judgment of 8 April 2004, §§ 139–140; ECtHR, *Ilascu and others v. Moldova and Russia*, Appl. No. 48787/99, Judgment of 8 July 2004, § 333.

27 2016 Murphy Report, *supra* note 17, § 97. See also K. Ambos, *Treatise on International Criminal Law: International Criminal Procedure*, Vol. III (Oxford University Press, 2016), at 216.

28 2015 Murphy Report, *supra* note 3, § 115.

reading is also confirmed in the commentary to both draft Article 4 (on the obligation to prevent) and Article 7,²⁹ as well as in jurisprudence of the International Court of Justice (ICJ).³⁰ As correctly explained by some states while commenting on the provision at the General Assembly, the duty to establish jurisdiction extends to any place or facility under the state's control, anywhere located.³¹ The obligation would, for instance, clearly extend to an extraterritorial detention camp like the one operated by the USA in Guantanamo Bay.

Moreover, to avoid impunity gaps, and in light of the proposed convention's object and purpose, the obligation in draft Article 7(1)(a) shall extend to all offences committed against individuals within the power or effective control of state agents acting outside of the state's territory. According to numerous authorities, such individuals find themselves under that state's jurisdiction.³² Even though those authorities make reference to the obligation to protect and respect human rights of the individuals in question, there is no good reason to exclude a similar interpretation for the articles on crimes against humanity, especially considering the inextricable link between such criminal category and human rights. Otherwise, states could escape an obligation to establish jurisdiction over offences committed outside of a territory under the state's control by state agents who do not have the state's nationality (and hence would not be covered by Article 7(1)(b)), and who are not present on the state's territory (and thus are not subject to Article 7(2) either). To make such obligation more explicit, a new draft Article 7(1)(a) could add the expression 'or whenever a person is under the physical control of that state'.³³

29 2017 ILC Report, *supra* note 1, § 46, Commentary to Art. 7, § 6. See also *Statement of the Chairman of the Drafting Committee, 68th Session of the International Law Commission*, 9 June 2016, available online at <http://legal.un.org/ilc/guide/7.7.shtml> (visited 28 June 2018), at 8.

30 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 12, at 42, § 118.

31 Iceland (Nordic countries), Statement at General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.24, 27 October 2016, § 61.

32 Cf. Human Rights Committee, *General Comment No. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, § 10 (hereinafter, 'Human Rights Committee, *General Comment No. 31*'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) 136, at 180, § 111. Cf. among others, ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, Judgment of 18 December 1996, § 62; ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001, § 77; Inter-American Commission on Human Rights, *Coard v. United States*, Report n° 109/99, 29 September 1999, § 37.

33 This wording was already included in Art. 10 of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, Washington University, Crimes Against Humanity Initiative, August 2010, available online at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf> (visited 4 July 2018). For a similar proposal, see Piqué, *supra* note 8, at 158–160. There is a possibility that such an addition leads to an 'a *contrario*' argument with respect to human rights treaties. Should the ILC decide to include this suggestion in the final set of articles, the related commentary should specify that the adopted language does not introduce a new standard, but only makes the correct interpretation of human rights treaties explicit, as endorsed by several treaty bodies.

Furthermore, in order to understand the contours of territorial jurisdiction, it must first be clarified what it means that a certain offence is 'committed' on a state's territory. This issue is even more pressing for crimes against humanity, a category of offences characterized by a contextual element, a conduct element and, in some cases, requiring the occurrence of certain consequences. In light of this, where is a crime against humanity 'committed'? Among various possible interpretations of the principle of territoriality,³⁴ in order to match the object and purpose of the ILC's articles on crimes against humanity, it should be considered that a crime is committed on the territory of any state where one of its constituent elements took place³⁵ — a reading adopted, *inter alia*, by the ICC prosecutor.³⁶ Hence, for the purposes of draft Article 7(1)(a), a state should establish jurisdiction as long as the widespread or systematic attack against the civilian population, or part thereof, or any element of any underlying offence, including conduct, circumstances or consequences, takes place on any territory under its jurisdiction.

B. Offenders and Victims

Personal jurisdiction, either in its active or passive form, is not much problematic if not for identification of who could be labelled as an 'offender' and who could be labelled as a 'victim'. As for offenders, a plain reading of draft Article 6(2) clarifies that they include not only those who commit a crime against humanity, but also those who attempt such commission and those who order, solicit, induce, aid, abet or otherwise assist in or contribute to the commission or attempted commission of crimes against humanity. Military commanders or civilian superiors are also 'offenders' if they meet the conditions set forth in draft Article 6(3). Jurisdiction based on the active nationality principle is clearly meant to cover conduct of nationals abroad, including armed forces involved in military operations.

As to the definition of 'victims', surely national law will play a decisive role. The definition adopted by existing international instruments,³⁷ and the

34 For a brief overview, see Shaw, *supra* note 21, at 488–493. Alternatively, C. Ryngaert, *Jurisdiction in International Law* (2nd edn., Oxford University Press, 2015), at 49–100.

35 Ambos, *supra* note 27, at 213–214. See also S.S. *Lotus*, 1927 PCIJ Series A, No. 10, 7 September 1927, at 23; Harvard Research in International Law, 'Draft Convention on Jurisdiction with Respect to Crime', 29 *American Journal of International Law* (1935) 435, at 495: 'A crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part" within the territory when any essential constituent element is consummated there.'

36 *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* (ICC-RoC46(3)-01/18-1), Office of the Prosecutor, 9 April 2018, §§ 28 and 32–42; see also Article 5 Report, *Situation in the Republic of Korea*, Office of the Prosecutor, 23 June 2014, § 39.

37 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, 16 December 2005 § 8; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34, 29 November 1985, §§ 1–2; see also Rule 85 ICC RPE.

comprehensive jurisprudence of human rights treaty bodies³⁸ — reported in the ILC’s commentary to draft Article 12, dealing with victims and witnesses³⁹ — includes anyone who has individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that amount to a crime against humanity, and affected immediate family or dependants of the victim as well as individuals who have suffered harm in intervening to assist victims or to prevent victimization (so-called ‘indirect victims’).⁴⁰ Nothing in the draft articles excludes that victims may also be legal persons.⁴¹

Also, nothing in the draft articles indicates that there is a threshold for the number of victims that could trigger the jurisdiction of their State of nationality.⁴² In this respect, some may question whether the concept of ‘victim’ only covers victims of an underlying offence (for example imprisonment) or ‘victims of the situation’, e.g. those who have suffered harm as a result of the widespread or systematic attack which represents the context for crimes against humanity. Considering that, under draft Article 3(2)(a), ‘attack’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 (i.e. underlying offences), a person who has suffered harm as a result of the attack, by definition, has suffered harm as a result of one of the underlying offences and will, thus, be considered as a victim.

C. Universal Jurisdiction

Draft Article 7(2), containing an obligation to establish jurisdiction whenever an alleged offender is present on a state’s territory, regardless of any other jurisdictional link, deserves special attention. As it will be explained *infra*, this language recalls the principle of universal jurisdiction — conditional on the offender’s presence on the territory — defined by a commentator as the single most important argument in favour of the creation of an international convention on crimes against humanity.⁴³ A duty of this kind has not always been recognized in international law. For instance, while it exists for grave breaches of the Geneva Conventions, the Genocide Convention does not contain a

38 See e.g. ECtHR, *Vallianatos and others v. Greece*, Appl. Nos 29381/09, and 32684/09, Judgment of 7 November 2013, § 47; ECtHR, *Elberte v. Latvia*, Appl. No. 61243/08, Judgment of 13 January 2015, § 137; IACtHR, *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, §§ 159–166; Committee against Torture, *General Comment No. 3*, UN Doc. CAT/C/GC/3, 19 November 2012, § 3.

39 2017 ILC Report, *supra* note 1, § 46, Commentary to Art. 12, §§ 3–4.33.

40 Redacted version of Decision on “indirect victims”, *Lubanga* (ICC-01/04-01/06-1813), Trial Chamber I, 8 April 2009, §§ 44–52. See also V. Spiga, ‘Indirect Victims’ Participation in the *Lubanga* Trial’, 8 JICJ (2010) 183.

41 Cf. Art. 34 European Convention on Human Rights; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, § 176; and Rule 85(b) ICC RPE, which, however, only extends such qualification to entities which have suffered direct harm.

42 The question was raised by Romania. Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.19, 24 October 2017, § 80.

43 Akhavan, *supra* note 4, at 28.

similar rule. Different sources have pointed out that the establishment of universal jurisdiction for core international crimes is certainly a right of states, but not necessarily an obligation under customary international law.⁴⁴ However, the argument for a customary duty to establish universal jurisdiction on crimes against humanity may rely on the *jus cogens* nature of the prohibition to commit such crimes.⁴⁵ Indeed, pursuant to Article 41 of the ILC's Articles on State Responsibility, states have an obligation to cooperate to bring to an end any serious breach of *jus cogens* norms, an obligation not to recognize as lawful such situations and an obligation not to render aid or assistance in maintaining that situation. Refraining from establishing jurisdiction over crimes against humanity arguably violates one or more of these obligations. In any case, an obligation to establish jurisdiction regardless of any territoriality or nationality link is not a novelty in treaty law. Article 5(2) of the Convention against Torture and Article 9(2) of the Convention on Enforced Disappearance contain a similar duty which, as confirmed by the ICJ, is necessary for enabling a preliminary inquiry into an alleged offender and for complying with the obligation to extradite or prosecute.⁴⁶

Of note, the ILC refrains from using the expression 'universal jurisdiction' in the draft articles.⁴⁷ Still, some states called for an explicit reference to this concept.⁴⁸ Would such a reference, if inserted, be legally correct? As a matter of fact, the ILC's draft articles are an embryonic treaty and, as such, would only bind state parties. Thus, it may be argued that the obligation to establish jurisdiction in draft Article 7(2) would not be 'truly universal', but only applicable *inter partes*, i.e. between contracting parties.⁴⁹ Consequently, a certain state party shall only establish jurisdiction over crimes committed either by or against a national of another state party, or on the territory of another state party — what has been labelled as a 'quasi-universal' jurisdiction.⁵⁰ In

44 See e.g. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, § 62; Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998, § 156; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports (2002), 3 at 78, § 51 (hereinafter 'Judges Higgins *et al.* Opinion'); *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 298; *Demjanjuk v. Petrovsky* (1985) 603 F.Supp.1468; 776 F.2d 571.

45 In this sense see C. Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"', 59 *Law and Contemporary Problems* (1996) 63, at 65–66.

46 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports (2012), 422, §§ 74–75 (hereinafter '*Belgium v. Senegal*').

47 2016 Murphy Report, *supra* note 17, § 113, explains why such wording may be inappropriate. Similarly, Judges Higgins *et al.* Opinion, *supra* note 44, § 41, prefer defining it as 'obligatory jurisdiction over persons, albeit in relation to acts committed elsewhere'.

48 See in particular Iceland (Nordic countries), Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.24, 27 October 2016, § 60. A mention of universal jurisdiction is also invoked by Slovenia, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.26, 28 October 2016, § 108. See also El Salvador, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.25, 28 October 2016, § 55, which considers the reference to universal jurisdiction to be 'very appropriate'.

49 Geneuss, *supra* note 25, at 953; Ryngaert, *supra* note 34, at 123–124.

50 Crawford, *supra* note 21, at 469–471; Shaw, *supra* note 21, at 504.

establishing jurisdiction in these cases, a state would act in the interests of the group of states which are parties to the treaty.⁵¹ However, there is support for the position that the said treaty obligation may extend to nationals of states which are not parties to the treaty at least when involving crimes whose prohibition amounts to *jus cogens*,⁵² or that are ‘indisputably prohibited by customary international law’⁵³ — what would make jurisdiction ‘truly’ universal. In establishing jurisdiction in such cases, a state would act as a representative of the entire international community.⁵⁴ Consequently, since crimes against humanity are prohibited by a peremptory norm of international law, the ILC may wish to consider including the expression ‘universal jurisdiction’ in the final version of the draft articles or at least in their preamble, in light of its important symbolic value.

Criticism towards the current version of draft Article 7(2) has already been expressed by some states, which decry that the current draft limits too much the state’s margin of appreciation. According to such critics, the provision should be narrowed down in light of the practical difficulties of investigating crimes with no territorial or personal link with the state, in order to maintain a more coherent criminal policy and avoid an overburdening of national prosecutions with proceedings which would exceed their capacity.⁵⁵ France suggested that the duty to establish jurisdiction should only arise when the suspect ‘habitually resides in the state’s territory’ and when the state deems it appropriate.⁵⁶ In light of the present stage of development of international law in the fight against international crimes, however, these proposals appear to be anachronistic. As explained, the provision on the duty to establish universal jurisdiction is so central to the ILC project that any attempt to undermine it could potentially defeat the purpose of the whole proposed convention.

The obligation to establish jurisdiction based on the universality principle is necessary to ensure that other provisions in the draft articles can be effectively implemented. As noted by the ICJ in *Belgium v. Senegal* with regard to similar

51 *Belgium v. Senegal*, *supra* note 46, § 69. E. Cimiotta, ‘The Relevance of *Erga Omnes* Obligations in Prosecuting International Crimes’, 76 *Zeitschrift Für Ausländisches öffentliches Recht Und Völkerrecht* (2016) 687, at 701.

52 *Ex parte Pinochet* (No. 3) [2000] 1 AC 147, at 275, per Lord Millet; *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571.

53 A. Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’, 1 *JICJ* (2003) 589, at 594. The author cites practice of the United States in this sense, in particular, *United States v. Ramzi Ahmed Yousef*, US Court of Appeal for the 2nd Circuit, 4 April 2003, 327 F.3d 56, at 64–66.

54 M. Langer, ‘Universal Jurisdiction Is Not Disappearing: The Shift from “Global Enforcer” to “No Safe Haven” Universal Jurisdiction’, 13 *JICJ* (2015) 245, at 249. D. Luban, ‘A Theory of Crimes against Humanity’, 29 *Yale Journal of International Law* (2004) 85, at 140–143. The USA seems to have followed such reading in their judicial practice. See e.g. *United States v. Yunis* (No. 2), 681 F.Supp 896, 901 (DDC, 1988).

55 *Observations de la France sur le projet de convention sur le crime contre l’humanité*, 2016, available online at <http://legal.un.org/ilc/guide/7.7.shtml> (visited 28 June 2018), at 2. The same concerns are expressed in France, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.20, 24 October 2016, § 76.

56 France, *Observations*, *supra* note 55, at 3.

provisions in the Convention against Torture, the establishment of universal jurisdiction conditioned to the suspect's presence is necessary to carry out a preliminary enquiry on his or her alleged misconduct, as demanded by draft Article 9(2) in the case of crimes against humanity, and for submitting his or her case to the competent authorities for prosecution, as requested by draft Article 10.⁵⁷ To say it even more explicitly, 'without established jurisdictional ground, the competent authorities of a State party would not be able to fulfil the obligation to prosecute or take a decision on a request for extradition from another State party'.⁵⁸ For this reason it seems odd that draft Article 7(2) creates a duty to establish universal jurisdiction only if the state on whose territory the suspect is present 'does not extradite or surrender the person'. Arrest for the purposes of extradition or surrender necessarily requires some sort of enforcement jurisdiction, and even subjection itself to extradition or surrender may imply the exercise of prescriptive and adjudicative authority — considering that the related processes may be governed at least in part by national law and may include the involvement of national judicial organs. Hence, I would suggest that the mentioned expression is removed from draft Article 7(2). It should not be overlooked that jurisdiction for the purposes of compliance with the obligation to extradite or prosecute may be established on any ground, including — as explained by draft Article 7(3) — any ground other than those listed in draft Article 7, established by a state in accordance with its national law. Universal jurisdiction as per Article 7(2) only acts as a 'residual' jurisdictional ground, to ensure that there is no gap in the repression of crimes against humanity.

In this regard, given the likely coexistence of several states' jurisdiction with regard to crimes against humanity, the ILC's draft articles on crimes against humanity should have inserted a provision on how to solve any potential conflicts of jurisdiction. The Special Rapporteur explains that these are usually solved through cooperation and comity between the competing states and that, in practice, the state where the suspect is located is better positioned to proceed with a prosecution if this state is willing and able to do so.⁵⁹ Moreover, draft Article 15 on the settlement of disputes may be of help in this case. Nevertheless, considering that a clarification in this sense has already been requested at the General Assembly,⁶⁰ the ILC could tackle the issue when working on a final version of the draft articles. Two solutions are

57 *Belgium v. Senegal*, *supra* note 46, § 74.

58 Dissenting Opinion by Judge Xue, *Belgium v. Senegal*, *supra* note 46, § 26. A substantially similar conclusion is expressed by President Guillaume in his Separate Opinion, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports (2002), 3, § 9. For this reason, some scholars have defined the obligation *aut dedere aut judicare* as a form 'primary universal repression'. See Akhavan, *supra* note 4, at 34.

59 2016 Murphy Report, *supra* note 17, § 115.

60 Russia proposed to give priority to states acting on the basis of the territoriality or active nationality principles, since those would be the states with the greatest interest in the matter. See Russian Federation, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.25, 28 October 2016, § 65.

possible: either giving priority to the state where the alleged offender is located, or to the state with the closest jurisdictional link. The latter solution would effectively render universal jurisdiction subsidiary to the exercise of jurisdiction based on another title. Some scholars would favour this outcome at least as a matter of policy,⁶¹ but customary international law does not seem to provide any hierarchy among jurisdictional titles.⁶² Thus, in the event that the ILC decides not to give priority to the custodial state, it should clarify what jurisdictional link must be given priority between multiple ‘traditional’ factors, for example, territoriality and active nationality. Moreover, whatever its choice about the criteria to solve potential jurisdictional conflicts, the ILC should also make clear that a state enjoys priority only ‘provided that such state is willing and able to proceed with a prosecution’. The ILC could thereafter explain — using language that is reminiscent of the provisions on admissibility in the ICC Statute⁶³ — that a state would not be considered ‘willing’ whenever proceedings are being undertaken for the purpose of shielding the accused from criminal responsibility, there has been an unjustified delay or proceedings are not being conducted independently or impartially.

3. The General Duty to Investigate Crimes against Humanity

A. *Different Types of Duties to Investigate*

Draft Article 8 provides that each state has a duty to carry out, through its competent authorities, a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been, or are being, committed in any territory under its jurisdiction. This general duty to investigate is closely linked with the more specific duty to make a preliminary inquiry over the facts in which an individual suspected of having committed crimes against humanity may have been involved. This last obligation is contained in draft Article 9(2) and some of its aspects will be analysed in the next section of this contribution.

At this stage, it is important to note that considerations about competent authorities and requirements of promptness, impartiality and effectiveness are

61 Ryngaert, *supra* note 34, at 231. See also Institut de Droit International, *Resolution on Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes*, 26 August 2005, at Art. 3(c) and (d). Kreß contends that, even though relevant practice is not abundant, a rule in this sense has already evolved. C. Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit International’, 4 *JICJ* (2006) 561, at 579–581. In this sense also Cassese, *supra* note 54, at 593. See also Judges Higgins *et al.* Opinion, *supra* note 44, § 59.

62 Ryngaert, *supra* note 34, at 143. See also ‘The AU-EU Expert Report on the Principle of Universal Jurisdiction’, Council of the European Union, 16 April 2009, § 14, and approving commentary in Geneuss, *supra* note 25, at 957.

63 Cf., in particular, Art. 17(2) ICCSt.

equally applicable to both kinds of investigation. However, the two kinds of investigation present some differences. Firstly, they differ with respect to the scope of investigation. Adopting ICC-specific terminology for mere classification purposes, draft Article 8 concerns 'situations' of crimes against humanity, while draft Article 9(2) concerns 'cases', i.e. specific conducts within them.⁶⁴ They also differ, secondly, with regard to triggering information. A general investigation should be started in presence of reasonable grounds that the state's territory is, or has been, the theatre of crimes against humanity, while a specific investigation is triggered by the presence of a suspect on the state's territory, no matter where he or she may have committed crimes against humanity. Thirdly, the two types of investigations have different goals. A general investigation aims — among other things — at ending ongoing crimes, while a specific investigation appears to be primarily a premise for the choice of whether to prosecute, extradite or surrender the suspect, and a means to verify that the individual in question is being appropriately detained.⁶⁵ This is not to say, of course, that there is no overlap between the two obligations. However, as explained by the Special Rapporteur, the general obligation to investigate arises irrespective of whether the alleged offender is known or present on the state's territory.⁶⁶

While such duties to investigate may appear novel in international law, in fact, they are not. On the premise that crimes against humanity constitute serious violations of fundamental human rights,⁶⁷ the duty to investigate crimes against humanity can be considered as implicit in the duty to investigate human rights violations. With regard to the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee has confirmed the existence of a 'general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies', an implication of the right to an effective remedy enshrined in Article 2(3),⁶⁸ a provision which has to be respected even during times of emergency and armed conflict.⁶⁹ Regional human rights bodies have expressed a similar

64 The ICC jurisprudence has vaguely defined a 'situation' as a set of circumstances subject to investigation and prosecution, 'generally defined in terms of temporal, territorial and in some cases personal parameters'. See e.g. Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101-TEN-Corr), Pre-Trial Chamber I, 17 January 2006, § 65; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/05-01/08-14-tENG), Pre-Trial Chamber III, 10 June 2008, § 16. Most situations have so far been delimited with reference to a particular region or country (e.g. northern Uganda or Central African Republic).

65 2016 Murphy report, *supra* note 17, § 121.

66 *Ibid.*, § 123; cf. also 2015 Murphy Report, *supra* note 3, § 180.

67 At least in the cases specified in the introduction to this article.

68 Human Rights Committee, *General Comment No. 31*, *supra* note 32, § 15. See also Human Rights Committee, *Bautista de Arellana v. Colombia*, Views, 27 October 1995, § 8.6; Human Rights Committee, *Rajapakse v. Sri Lanka*, Views, 14 July 2006, § 9.3.

69 Human Rights Committee, *General Comment No. 29*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, § 14. Cf. also, ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, Judgment of 24

stance, though sometimes with regard to specific rights. For instance, according to the European Court of Human Rights (ECtHR), a duty to investigate arises from the obligation to protect the right to life and prevent its violation.⁷⁰ The Inter-American Court of Human Rights (IACtHR) has several times recalled the existence of a general duty to investigate violations of any right protected by the American Convention of Human Rights, in accordance with Article 1,⁷¹ and it has also linked such duty to the effective protection of the right to life,⁷² and of the right to a fair trial.⁷³ General duties to investigate conduct which may amount to crimes against humanity are also established, inter alia, by Articles 3 and 12 of the Convention against Enforced Disappearance and by Article 12 of the Convention against Torture.⁷⁴ The ILC's draft articles on crimes against humanity hold the merit of making such a general duty explicit.

B. Meaning and Characters of Required Investigations

Investigation, under its ordinary meaning, is any search for information in order to determine if the law was violated and, if so, who is responsible. According to draft Article 8 investigations are to be carried out by competent authorities, which are in charge of collecting facts and evidence into a case file for potential prosecutions.⁷⁵

Only investigations meeting certain qualitative requirements, however, would fulfil the obligation contained in the ILC's articles. Two of these requirements can be found in draft Article 8 itself, requiring a 'prompt and impartial' investigation. The Special Rapporteur and the ILC's commentary explain, correctly, that *promptness* refers to the absence of undue delay from the moment in which the competent authorities have received information which would

February 2005, § 209 (hereinafter, '*Isayeva v. Russia*'); ECtHR, *Al-Skeini v. United Kingdom*, Appl. No. 55721/07, Judgment of 7 July 2011, § 164.

70 See e.g. ECtHR, *McCann et al. v. United Kingdom*, Appl. No. 18984/91, Judgment of 27 September 1995, § 161; ECtHR, *Ergi v. Turkey*, 66/1997/850/1057, Judgment of 28 July 1998, §§ 82–85.

71 Cf. e.g. *Pueblo Bello Massacre v. Colombia*, *supra* note 12, §§ 142–145; IACtHR, *Zambrano Velez v. Ecuador*, Judgment of 4 July 2007, § 88 (hereinafter, '*Zambrano Velez v. Ecuador*').

72 IACtHR, *Cruz Sanchez v. Peru (Extrajudicial Executions)*, Judgment of 31 March 2011, §§ 127, 170 and 179 (hereinafter, '*Cruz Sanchez v. Peru (Extrajudicial Executions)*'). See also *Zambrano Velez v. Ecuador*, *supra* note 71, §§ 88–89.

73 IACtHR, *Paniagua Morales et al. v. Guatemala*, Judgment of 8 March 1998, §§ 133–136, concerning a violation of Art. 8 Inter-American Convention against Torture, and §§ 137 *et seq.* concerning a violation of Art. 8 of the American Convention on Human Rights, on the right to a fair trial; see also *Cruz Sanchez v. Peru (Extrajudicial Executions)*, *supra* note 72, § 162 *et seq.*

74 A soft law instrument like the Basic Principles on the Right to a Remedy also contains such an obligation, §§ 3(b) and 4. See also *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, §§ 121 and 1773 (hereinafter, '*Goldstone Report*').

75 *Belgium v. Senegal*, *supra* note 46, § 83. This principle was stated with respect to the preliminary inquiry aimed at a specific alleged offender, but it is applicable to the more general duty to investigate.

warrant the investigation.⁷⁶ *Impartiality* would refer, instead, to the fact that the investigation 'gives equal weight to assertions that the offence did or did not occur', and to the fact that the search for truth would not spare government officials and government records, if appropriate.⁷⁷

At least three fundamental requirements, however, have been left out of the ILC's draft articles on crimes against humanity and should be considered by the ILC for inclusion into a new draft. The first, mentioned at least in the ILC's commentary, is the requirement of *effectiveness*.⁷⁸ In the absence of guidance by the commentary, one could adopt the expression's ordinary meaning, which would point to the authorities' ability to search and collect sufficient information with a view to deciding whether to proceed with prosecutions. Hence, effectiveness would require the commitment of adequate human and economic resources and early clarity as to the strategy to be followed.⁷⁹ Secondly, *independence* is also frequently cited as a requirement for investigations on human rights abuses, pointing out to a sufficient separation between the authorities carrying out investigations and those entities which may be interested in a specific outcome.⁸⁰ The third missing but necessary requirement would be *transparency* of investigations.⁸¹ This does not mean making every single investigative finding public, as this could both prejudice the investigations' effectiveness and violate the suspects' right to be presumed innocent and to a fair trial. Nonetheless, some sort of public scrutiny of the authorities' conduct should be guaranteed, including a chance to secure accountability

76 2016 Murphy report, *supra* note 17, § 126. The ILC's commentary to draft Art. 8, § 2 (in 2017 ILC Report, *supra* note 1, § 46) provides that national authorities shall proceed automatically to investigation once there are reasonable grounds to believe that crimes against humanity have been or are being committed.

77 2017 ILC Report, *supra* note 1, § 46, Commentary to Art. 8, § 4.

78 *Ibid.* The commentary uses the expression 'serious, effective and unbiased', but seriousness and lack of bias could already be construed within the requirement of impartiality explicit in draft Art. 8. See also 2016 Murphy Report, *supra* note 17, § 128.

79 Notably, effectiveness has been deemed to be an essential character of investigation into human rights abuses by the Goldstone Report, *supra* note 74, §§ 121 and 1814; Office of the High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2017), §§ 24–27 (hereinafter, 'Minnesota Protocol'). See also *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 55/89, 4 December 2000; *Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions*, ECOSOC Res. 3, 4 May 1981, § 10. See also, ECtHR, *Zavoloka v. Latvia*, Judgment of 7 July 2009, § 34; ECtHR, *Kaya v. Turkey*, Appl. No. 22535/93, Judgment of 19 February 1998, § 87; IACtHR, *Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005, § 224; IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, §§ 153–158.

80 See Goldstone Report, *supra* note 74, §§ 121 and 1814; Minnesota Protocol, *supra* note 79, §§ 28–31. See also, e.g. African Commission on Human and Peoples' Rights, *Amnesty International et al. v. Sudan*, 15 November 1999, § 51; ECtHR, *Giuliani and Gaggio v. Italy*, Appl. No. 23458/02, Judgment of 24 March 2011, § 300 (hereinafter, 'Giuliani and Gaggio v. Italy').

81 Minnesota Protocol, *supra* note 79, §§ 32–33. See also Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, *The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report* (also known as 'Turkel Report II'), February 2013, §§ 90–94.

for any failure in the discharge of their duties.⁸² The requirement of transparency would also mean that victims and their families must be kept informed about the status and/or outcome of investigations, as appropriate, and to ensure their right to an effective remedy and access information.⁸³

Investigations into alleged crimes against humanity on a state's territory may obviously be more problematic than investigations into an alleged common crime. Indeed, even though it seems that crimes against humanity can be committed pursuant to a non-state organizational policy,⁸⁴ some of the most concerning situations will involve state-driven violence, which would, in turn, create serious doubts about investigations' genuineness. Moreover, the potential emergency context surrounding crimes against humanity could make investigations even more difficult. The lack of proper administrative structures and resources, the unavailability of evidence and security concerns are factors that could endanger a state's ability to fulfil its obligation under draft Article 8. Should the ILC clarify the requirements for a proper investigation and add the suggested attributes, this could be an incentive for states to improve the preparation and structural capacity of their investigative authorities.

Having defined what investigations are and how they should be conducted, one should also understand when the duty to investigate is triggered. Draft Article 8 only says that such duty arises when 'there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed'. However, this expression is not explained in the draft article nor in the commentary, except for the clarification that investigations must be started 'regardless of victims complaints'.⁸⁵ For human rights abuses, triggers for investigations identified in soft law instruments include 'any potentially unlawful death',⁸⁶ and 'an arguable claim ... or ... reasonable grounds to suspect that a serious human rights violation has occurred'.⁸⁷ In the ICC context, where 'a reasonable basis to proceed' is required for the prosecutor to start an investigation,⁸⁸ the threshold has been deemed to be quite low, amounting to 'a sensible or reasonable justification for a belief' that a crime is being or has been committed, and only aims at preventing 'unwarranted, frivolous, or

82 *Giuliani and Gaggio v. Italy*, *supra* note 80, § 303; *Isayeva v. Russia*, *supra* note 69, § 213; IACtHR, *Ibsen Cardenas and Ibsen Pena v. Bolivia*, Judgment of 1 September 2010, § 238. See also Directorate General of Human Rights and Rule of Law, Council of Europe, *Eradicating Impunity for Serious Human Rights Violations: Guidelines and Reference Texts* (2011), at 13 (hereinafter, 'Council of Europe, *Eradicating Impunity*').

83 *Giuliani and Gaggio v. Italy*, *supra* note 80, § 304; ECtHR, *Ahmet Özkan et al. v. Turkey*, Appl. No. 21689/93, Judgment of 6 April 2004, § 314; *Pueblo Bello Massacre v. Colombia*, *supra* note 12, § 144; IACtHR, *Gomes Lund et al. v. Brazil*, Judgment of 24 November 2010, § 257.

84 See Draft articles on crimes against humanity, *supra* note 1, Art. 7(1)(a), and the introduction to this contribution.

85 2017 ILC Report, *supra* note 1, § 46, Commentary to Art. 8, § 2, referring to the similar obligation in Art. 12 Convention against Torture.

86 Minnesota Protocol, *supra* note 79, § 15.

87 Council of Europe, *Eradicating Impunity*, *supra* note 82, at 11.

88 Cf. Arts 15(3), 15(4) and 53(1) ICCSt.

politically motivated investigations.’⁸⁹ Considering that the ICC’s mandate concerns precisely (though not only) crimes against humanity, it seems that such a low threshold would also be appropriate for triggering the national duty to investigate crimes against humanity.

Whilst draft Article 8 is certainly commendable in stipulating the duty of states to investigate crimes against humanity, the choice to limit such duty to crimes committed on the state’s territory is not equally commendable.⁹⁰ On the one hand, these states may be those involved in the perpetration of the crimes and, as explained, expecting a prompt and impartial investigation from such states may appear somewhat naïve. Such duty would have a deeper impact if imposed on a greater amount of states to the extent of their capabilities, including — when appropriate — through regional organizations. On the other hand, a state’s obligation to investigate should be extended to the conduct of its armed forces abroad,⁹¹ especially when operating as part of a United Nations peacekeeping force.⁹² There is no justifiable reason to exclude investigations in such cases — even when the alleged offender is not present on the state’s territory and hence could not be subject to the specific investigation mandated by draft Article 9(2) — given that no one but the state in question would be better suited to verify allegations of misconduct by its own troops.

4. The Specific Duty to Investigate Alleged Offenders under the State’s Jurisdiction, and their Fair Treatment

Draft Article 9 deals in general with preliminary measures to be taken when a suspect is present on the state’s territory, and includes three different obligations: a duty to take legal measures to ensure the suspect’s continued presence on the territory; a duty to carry out an investigation into the alleged facts;

89 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya. *Situation in the Republic of Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010, §§ 35 and 32, respectively. Conversely, the standard of ‘reasonable grounds to believe that the person has committed a crime’ required by Art. 58(1)(a) ICCSt. for the issuance of an arrest warrant seems not to be the appropriate one, as it is concerned not with the trigger of an investigation, but with the issuance of a measure restricting the liberty of a specific individual. It appears obvious to require a higher standard of evidence in those cases. For further analysis of such standard, see M. Klamberg, Commentary to the ICC Statute, Article 58, Case Matrix Network, available online at <https://www.casematrixnetwork.org/cmnn-knowledge-hub/icc-commentary-clicc/rome-statute/#c1231> (visited 12 April 2018).

90 Statement of the Chairman of the Drafting Committee, *supra* note 29, at 9–10.

91 Iceland (Nordic countries), Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.24, 27 October 2016, § 61.

92 See *Crimes against humanity: Information provided by Austria*, 2017, available online at <http://legal.un.org/ilc/guide/7.7.shtml> (visited 28 June 2018), at 2. See also Austria, Statement at the General Assembly, 6th Committee, UN Doc., A/C.6/71/SR.25, 28 October 2016, § 83.

and a duty to share information with other states, with regard to the circumstances warranting the suspect's custody, the results of the investigation and the course of action which the state intends to follow.

The draft article reproduces an obligation that is already contained in a number of international and regional treaties, most notably Article 6 of the Convention against Torture and Article 10 of the Convention concerning Enforced Disappearance and,⁹³ as I explained when dealing with the general obligation to investigate, it builds on already existing positive duties deriving from international and general human rights treaties.

Such obligation, while not revolutionary, is crucial for the effective prevention and punishment of crimes against humanity. It equally applies, for instance, to foreign fighters who left the battlefield to settle back into society and to government officials who travel abroad temporarily: once information pointing out to the fact that they may have committed an offence within the draft articles exists, they must immediately be taken into custody⁹⁴ and an investigation into their alleged conduct must be launched. An effective implementation of draft Article 9 would ensure that no safe haven exists for persons who are responsible for crimes against humanity and that their conduct is closely scrutinized wherever they move. Notwithstanding the fact that draft Article 9 is carefully crafted to achieve this objective, a few issues still warrant a closer look.

A. *The Preliminary Inquiry*

The central part of the article is, ironically, the one to which the ILC devoted the smallest amount of words, i.e. paragraph (2) on the duty to carry out a preliminary inquiry into the allegations of crimes against humanity against a person who is present on territory under the state's jurisdiction. Even though this is called an 'inquiry', it is in fact an investigation into the facts in which the suspect was allegedly involved, in order to understand whether their continued custody is justified and in order to take a decision on the necessary course of action.⁹⁵ In particular, such inquiry shall be aimed at confirming, corroborating or denying suspicions about the person who is allegedly responsible for crimes against humanity. Hence, a simple questioning of the suspect aimed at confirming their identity or inform them of the allegations would not be sufficient.⁹⁶ It is 'preliminary' in the sense that it is not necessarily aimed at a prosecution, but it may well be propaedeutic to such outcome and, in this sense, national investigative authorities should already at an early stage consider this possibility. The inquiry of course is not only aimed at fighting impunity, but also at ensuring fairness in keeping the suspect in custody,

93 More treaties containing a similar provision are listed in the 2016 Murphy Report, *supra* note 17, §§ 139, 142 and 147.

94 *Ibid.*, § 145.

95 *Ibid.*, § 136.

96 *Belgium v. Senegal*, *supra* note 46, § 83 ff.

confirming that there are reasonable grounds for their continued detention.⁹⁷

Investigations shall start as soon as the relevant authorities have information or a suspicion that a person present on their territory is responsible for crimes against humanity. The investigation should start ‘immediately’, i.e. as soon as the information is received. At the latest, this would happen when a complaint is brought against the suspect in question.⁹⁸ Unlike in draft Article 8, nothing in draft Article 9(2) or in the commentary indicates that the suspicion must be reasonable, from which it could be inferred that any suspicion of such heinous offences warrants a closer scrutiny, and such scrutiny should delve deeper and deeper as the suspicion gets more credible. Obviously, however, an arrest or any measure restricting the suspect’s liberty would need to comply with the guarantees and standards set forth in international human rights law and in the applicable national law. As to the person subject to inquiry, it goes without saying, they do not need to allegedly be a direct perpetrator of crimes against humanity. Any mode of liability would engage their criminal responsibility, and hence be the object of investigations.

B. Information Sharing

At the end of the preliminary inquiry, the state shall inform other states who have jurisdiction on the same offence because of the territoriality or nationality (active or passive) principles. The state should also inform such state of any custodial measures taken against the suspect, and of the circumstances warranting custody. Such duty to share information is obviously linked to the possibility of extradition or judicial cooperation between different states, but it is of a general character and should be fulfilled even when there is a firm intention to prosecute — even just to verify whether other states are interested in exercising jurisdiction.⁹⁹ Such intention, as hinted at by the draft Article, should be made explicit at the time of notification. In this respect, it seems that the language adopted by the ILC in draft Article 9(3) could be slightly amended. While the text provides that the *forum deprehensionis* shall ‘indicate whether it intends to exercise jurisdiction’, such jurisdiction has already been exercised by investigating the relevant facts and taking the suspect into custody. Rather, the ILC could require the custodial state to ‘indicate whether it intends to prosecute, extradite or surrender the suspect’.

The draft Article, which certainly aims to facilitate international cooperation in the fight against crimes against humanity, has engendered mixed reactions. France has noted that the duty to inform other states about the results of the preliminary inquiry may be inconvenient for several reasons: it risks compromising the investigations, increasing the chances for information leaks; it may harm the suspect’s right to be presumed innocent; it may be inappropriate if the state to which the information is owed might have somehow

97 2016 Murphy Report, *supra* note 17, § 137.

98 *Ibid.*, § 136. Cf. also implication from *Belgium v. Senegal*, *supra* note 46, § 88.

99 2016 Murphy Report, *supra* note 17, § 148.

been involved in the commission of the crimes, with the potential to lead to international tensions and political pressures on the investigators.¹⁰⁰ For this reason, France proposes to subordinate the duty of information sharing to situations in which the investigating state believes that the communication would not endanger the ongoing investigations.¹⁰¹ Draft Article 9(3) maybe already addresses France's concerns — implicitly — by prescribing that custody of a suspect shall be notified 'immediately', while the inquiry findings shall only be notified 'promptly'. This may signify that investigative results could be shared only when this would not jeopardize the investigations themselves. In the interest of clarity, the ILC may explicitly adopt France's proposal or explain the rule better in the commentary. Information about the suspect's custody, conversely, needs to be shared 'immediately' in any case, in order to ensure early communication between the suspect and a representative of their state of nationality (draft Article 11(2)(a)). This last wording choice ('immediately') has also attracted criticism, as South African representatives at the General Assembly have underlined how this would pose too heavy a burden on the investigating state, which at the time of the arrest may not yet have identified the other states concerned.¹⁰² Obviously, however, the duty to notify other states only arises once these other states have been identified, after having found out basic information about the suspect's nationality and about the facts which are alleged against them.¹⁰³ For instance, states which have jurisdiction based on the principle of passive personality should not (and could not!) be notified until potential victims of such nationality have been identified. Hence, despite the fact that information about detention is already liable to cause undue political tensions and external pressure on investigations, the language adopted in the current version of draft Article 9(3) appears to strike an acceptable balance between the rights of the suspect and the needs of investigations, and should not be modified except as I suggest above.

C. Suspects in Custody and their Fair Treatment

Once a suspect has been taken into custody, or their liberty has been restricted in any other way according to national law (e.g. by withholding their passport), they are entitled to a certain number of guarantees — regardless, of course, of whether they have been restricted due to the procedure spelled out in Article 9 or because the suspect has been subject to extradition.

The *first* guarantee is already spelled out in draft Article 9(3): measures to ensure that the suspect does not flee can only be maintained for such time as

100 France, *Observations*, *supra* note 55, at 4–5. See also France, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.20, 24 October 2016, § 76.

101 's'il estime que cette information n'est pas de nature à mettre en danger les investigations en cours', in France, *Observations*, *supra* note 55, at 3.

102 South Africa, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.20, 25 October 2017, § 7.

103 In this sense, 2017 ILC Report, *supra* note 1, § 46, Commentary to Art. 9, § 3.

necessary for criminal, extradition or surrender proceedings to commence.¹⁰⁴ *Secondly*, whatever ‘measure’ — regardless of whether legal or not¹⁰⁵ — has been taken against a person in connection with allegations of crimes against humanity, that person is to be guaranteed fair treatment and protected to the fullest extent by their rights deriving from applicable national and international law. *Thirdly*, draft Article 11(2) spells out a duty of allowing any person who is ‘in prison, custody or detention’ for allegations of crimes against humanity¹⁰⁶ to communicate with a representative of their state of nationality, or of any state willing to assist them.

Of note, the draft uses the general expression ‘fair treatment’, a good wording choice that certainly includes fundamental guarantees like the presumption of innocence and the principle of legality¹⁰⁷ and which avoids inadvertent limitations of protection potentially deriving from the use of a set list of protected rights.¹⁰⁸ While the language of draft Article 11 is already quite protective, however, some have voiced concern for the ambiguous reference to ‘applicable national law’ (with regard to fair treatment in general) and with regard to the ‘laws and regulations of the State in the territory under whose jurisdiction the person is present’ for communication rights. In this regard, the ILC should dispel any doubts about the primacy of international human rights law over any conflicting national provision. In this light, Amnesty International has proposed to introduce a clearer reference to ‘amplest right to a fair trial in accordance with the highest standards of international law’.¹⁰⁹ Similarly, but perhaps more realistically, Italy proposed that national law should only be applicable inasmuch as it is fully consistent with international human rights law.¹¹⁰

5. Conclusion

The ILC’s articles on crimes against humanity are, regrettably, far from a finished project. I say ‘regrettably’ because the provisions that I have analysed in this contribution actually have the concrete potential to facilitate prevention and punishment of crimes against humanity, and further negotiations carry the risk of regressions. The explicit recognition of duties to establish jurisdiction over crimes against humanity, and to investigate them, would be a

104 2016 Murphy Report, *supra* note 17, § 143.

105 Statement of the Chairman of the Drafting Committee, *supra* note 29, at 14.

106 See Statement of the Chairman of the Drafting Committee, *supra* note 29, at 15, for an explanation of the ILC wording choice.

107 2016 Murphy Report, *supra* note 17, § 169.

108 *Ibid.*, § 179.

109 Amnesty International, *17-Point Program for a Convention on Crimes against Humanity*, 21 February 2018, available at <https://hrij.amnesty.nl/17-point-program-convention-crimes-against-humanity/> (visited 28 June 2018), § 8.

110 Italy, Statement at the General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.18, 23 October 2017, § 139, echoing a statement of similar spirit by Austria at § 67.

tremendous achievement and a most welcome consolidation of 70 years of normative evolution since Nuremberg. The draft articles would clarify once and for all that such duties exist in international law and they would establish a helpful bridge between international criminal law and international human rights law.

But, in so doing, the ILC's draft articles are no more than a bare minimum. I have attempted to highlight the (few) outstanding problems with the current version of draft Articles 7, 8, 9 and 11 and, since the draft articles' wording is open to interpretation in several places, I have also proposed readings that would be most consistent with the object and purpose of the whole project. Needless to say, this is not meant in any way to diminish the quality of the ILC's work. Far from it, the future discussion of the ILC's draft articles in general, and of the provisions on jurisdiction and investigations in particular, should start from the assumption that it sets a standard behind which one should not fall.

The Draft Articles on Crimes Against Humanity and Immunities of State Officials

Unfinished Business?

Micaela Frulli*

Abstract

*The Draft Articles on Crimes Against Humanity adopted by the International Law Commission (ILC) on first reading in 2017 contain a clause stating that the official position of a defendant is not a ground to exclude his or her criminal liability, in line with the one included, for instance, in the Genocide Convention. According to this article, this provision shall be retained in the final version of the Draft Articles and should be read as excluding the possibility for state officials suspected of crimes against humanity to invoke immunity *ratione materiae* before any tribunal. Unfortunately, it seems that the irrelevance of official capacity and the unavailability of functional immunity with respect to allegations of crimes under international law are too often considered as separate notions thus engendering ambiguity on the issue. Therefore, it is regrettable that the different ILC Working Groups and Special Rapporteurs touching on the relationship between immunities of state officials and the prosecution of crimes under international law are working in a compartmentalized manner. On the other hand, the Draft Articles do not contain any provision on immunities *ratione personae* and, in light of the prevailing interpretation of customary rules, the chances that an incumbent state official enjoying personal immunities who allegedly committed crimes against humanity is brought to trial before any tribunal are almost non-existent. Nonetheless, it would be highly preferable that the Special Rapporteur on Crimes Against Humanity and the ILC take up the issue and at least expose the consequences of upholding immunities *ratione personae* of state officials in case of allegations of crimes against humanity.*

'Now I know what a ghost is. Unfinished business, that's what.'
—Salman Rushdie, *The Satanic Verses*

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1. The Irrelevance of Official Capacity Finds Its Place in Draft Article 6

In his third report, Sean D. Murphy, the Special Rapporteur on Crimes Against Humanity of the International Law Commission (ILC) expresses the view that the set of draft articles on crimes against humanity for a future convention on the prevention and punishment of crimes against humanity (Draft Articles) should not contain a provision on immunities accruing to state officials. Murphy submits that there is a need for consistency with other treaties dealing with crimes under international law and maintains that these treaties do not contain any provision on the immunity of state officials.¹ However, this statement does not seem entirely correct. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)² and the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)³ both contain a provision on the irrelevance of the official capacity of state organs who have allegedly committed one of these crimes.⁴ Asserting the inability of an accused to claim his or her official position as a substantive defence to criminal liability is tantamount to holding that state officials may not enjoy immunity *ratione materiae* or functional immunity, because such immunity, according to the prevailing opinion, is considered a question of substantive law. Immunity *ratione materiae* is grounded on the assumption that state agents are not accountable to other states for acts undertaken in an official capacity because such acts must be attributed only to the state and not to the individual who materially acted on behalf of the state.⁵

- 1 The Special Rapporteur states that: 'Consistent with the approach taken in prior treaties addressing crimes, the Special Rapporteur is of the view that the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law.' See ILC, *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, § 284 (hereinafter, 'ILC, Third report on crimes against humanity').
- 2 Art. IV Genocide Convention provides that individuals 'shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'.
- 3 Art. III Apartheid Convention holds that: 'International criminal responsibility shall apply ... to ... representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State.'
- 4 Paola Gaeta persuasively argues that, although Art. VI Genocide Convention limits jurisdiction over this crime to 'the State in the territory of which the act was committed' and to 'such international penal tribunal[s] as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction', the irrelevance of official capacity also applies before domestic courts other than those of the territorial state. See P. Gaeta, 'Immunities and Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 310, at 318–320.
- 5 This rule was enunciated in the well-known *McLeod* case between the USA and the UK. As the British Law Officers put it in 1854: 'The principle of international law that an individual doing a hostile act authorized and ratified by the government of which he is a Member cannot be held individually answerable as a private trespasser or malefactor, but that the Act becomes one for which the State to which he belongs is in such a case alone responsible, is a principle too well established to be now controversial.' See Lord McNair, *Law Officers Opinions II* (Cambridge University Press, 1956), at 230. This is the dominant opinion amongst international

The substantive nature of this type of immunity is well explained by Dapo Akande and Sangeeta Shah: '[T]his type of immunity constitutes (or, perhaps more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state.'⁶ This is the reason why immunity *ratione materiae* survives the cessation of official functions and thus former state officials continue to benefit. Functional immunity must be distinguished from immunities *ratione personae* accruing to a few selected categories of state officials. The latter immunities, which include personal inviolability, have a procedural nature and have the more limited purpose of temporarily exempting specific classes of state officials, so long as they remain in office, from foreign jurisdiction in order to avoid any interference with the smooth conduct of international relations.⁷

Immunity *ratione materiae*, because of its substantive nature, may not be reconciled with international rules establishing individual criminal liability for crimes under international law, because these latter rules emerged precisely to avoid the situation under which a state official could hide behind the state in order to be absolved from individual responsibility. One of the goals behind international criminal law is to overcome the limits of purely collective international responsibility. The irrelevance of the acting individual's official capacity is, therefore, the other side of the same coin of those rules which attach individual criminal liability to certain conduct in the international legal order. This is the reason why the defence based on official capacity was rejected in the Nuremberg Judgment,⁸ a position restated by the Genocide Convention

scholars, although with different approaches. See H. Kelsen, *Principles of International Law* (Rinehart & Co., 1952), at 229–230; G. Dahm, *Völkerrecht I* (W. Kohlhammer Verlag, 1958), at 225, 237, 303–305, 338–339; H.F. Van Panhuis, 'In the Borderline Between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *International & Comparative Law Quarterly (ICLQ)* (1964) 1204; Y. Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*', 15 *ICLQ* (1966) 79; G. Morelli, *Nozioni di diritto internazionale* (7th edn., Cedam, 1967), at 215–216; M. Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', 31 *Zeitschrift Ausländisches und Öffentliches Recht Völk* (1971) 25; A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd edn., Duncker und Humblot, 1984), at 773–774; A. Cassese, *International Criminal Law* (2nd edn., Oxford University Press, 2008), at 302–304; I. Wuerth, 'Foreign Official Immunity: Invocation, Purpose, Exceptions', 23 *Revue suisse de droit international et européen* (2013) 214.

- 6 D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 21 *European Journal of International Law (EJIL)* (2010) 815, at 826.
- 7 See Section 5 *infra* of this article for a detailed analysis of the rationale underlying the rules on immunities *ratione personae*.
- 8 The most famous *obiter dictum* of the Nuremberg Judgment explains this new paradigm: 'The principle of international law which, under certain circumstances, protects the representatives of a state cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.' Another frequently quoted excerpt reads: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law

and the Apartheid Convention. For the same reason, it seems most appropriate that analogous rules are inserted in other treaties regulating the prevention and punishment of crimes under international law, such as crimes against humanity, which are, most likely, planned and ordered by high-ranking state officials and committed by state organs.

Contrary to this view, Murphy underlines that the majority of treaties addressing crimes under international law do not mention the irrelevance of official capacity.⁹ A similar provision is not contained in the four Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), nor in the International Convention for the Protection of All Persons from Enforced Disappearance. However, there may be several reasons explaining this absence. With regard to the Geneva Conventions, their scope is much wider than other treaties dealing with the prevention and punishment of offences from a criminal liability perspective. The Geneva Conventions address states' behaviour with the overarching objective of granting protection to specific categories of victims that ought to be spared from the scourges of war. While important, the criminalization of certain grave acts is a secondary feature of these Conventions.

Another consideration applies with respect to the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. The definition of both crimes of torture and enforced disappearance specifies that an element of the crime is that the state agent participated or acquiesced in the prohibited conduct. Article 1 of the Convention against Torture refers to conduct 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance mentions a series of conduct performed by 'agents of the State or by persons or groups of persons

be enforced.' See *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I (Nuremberg, 1947), at 22 *et seq.*

9 Murphy states that: 'There is no provision on immunity of State officials or officials of international organizations in: the Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions for the protection of war victims; the Convention for the suppression of unlawful seizure of aircraft; the Convention for the suppression of unlawful acts against the safety of civil aviation; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Convention against the taking of hostages; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1985 Inter-American Convention to Prevent and Punish Torture; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; and the United Nations Convention against Transnational Organized Crime.' In addition, '[i]ndeed, while an initial draft of what became the International Convention for the Protection of All Persons from Enforced Disappearance contained an article explicitly excluding immunity of State officials other than diplomats, States decided to drop that article in the final version of the Convention.' See ILC, Third Report on Crimes against Humanity, §§ 281–282.

acting with the authorization, support or acquiescence of the State'. In these cases, it would have been redundant, and even incongruous to a certain extent, to include a specific provision on irrelevance of official capacity, given that this is already implied in the definition of the crimes.¹⁰

Hence, it does not come as a surprise that several members of the ILC Drafting Committee proposed to insert, at least, a paragraph referring to the irrelevance of the official position of state agents.¹¹ These members argued that without a similar explicit provision there would be inconsistency with respect to other treaties, such as the Genocide Convention. The best placement for the new paragraph was considered to be in Draft Article 6 on criminalization and the proposal was to place it right after the paragraphs dealing with command responsibility and the unavailability of the defence of superior orders.¹²

The ILC accepted this suggestion and included the new paragraph in Draft Article 6. Paragraph 5 now reads that any: 'State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.'

2. Drawing a Baseline: Immunity *Ratione Materiae* May Never Be Reconciled with Allegations of Crimes under International Law

In the commentary to Draft Article 6, the ILC emphasizes the elements which support the existence of a rule on the irrelevance of official capacity. The ILC provides a brief overview showing that the defence of official position was unavailable before the international criminal tribunals, which confirms the well-established nature of this rule.

A similar provision was included in the Nuremberg Charter and the Tokyo Charter respectively, which established the International Military Tribunal (IMT),¹³ and the International Military Tribunal for the Far East (IMTFE).¹⁴

10 On the other hand, the absence of provisions addressing immunities in treaties on various forms of terrorism may not be a strong indicator given that acts of terrorism are usually committed by non-state actors or, in rare cases, by de facto organs of a state that do not enjoy any kind of immunity.

11 In July 2017, the ILC Drafting Committee adopted the text of a paragraph to be added to Draft Art. 6.

12 ILC, *Provisional Summary Record of the 3377th Meeting*, UN Doc. A/CN.4/SR.3377, 18 August 2017, at 4. Amongst the three proposals which emerged during the debate, the majority favoured the option to include a clause on the irrelevance of official capacity with respect to the prosecution of crimes against humanity.

13 Art. 7 International Military Tribunal Charter: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

14 Art. 6 International Military Tribunal for the Far East, which has a slightly different version, reads: 'Neither the official position, at any time, of an accused, nor the fact that an accused

Indeed, these two Tribunals consistently applied the rule while prosecuting and condemning some of the major Nazi and Japanese former leaders.¹⁵

It is surprising that the ILC does not mention the rules contained in the statutes of the ad hoc tribunals, which were established by the Security Council in the 1990s. The International Criminal Tribunal for the former Yugoslavia (ICTY) Statute and the International Criminal Tribunal for Rwanda (ICTR) Statute both explicitly provide that ‘the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.’¹⁶ These tribunals tried several former state agents, including high-ranking officials such as Slobodan Milošević, a former head of state,¹⁷ and Jean Kambanda, a former head of government.¹⁸ The Special Court for Sierra Leone (SCSL) Statute — a mixed Tribunal established by an agreement concluded between the United Nations and the Government of Sierra Leone — also included a provision on the unavailability of a defence based on the official position of the accused.¹⁹ Accordingly, the former president of Liberia, Charles Taylor, was tried and sentenced for war crimes and crimes against humanity.²⁰

The International Criminal Court (ICC) Statute contains a more detailed formula stressing that its rules are applicable ‘to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.’²¹ There are already a few cases of former state officials who have been tried and sentenced for crimes falling under the ICC’s jurisdiction. The indictment and trial of Laurent Gbagbo, former president of the Ivory Coast, confirms that a former high-ranking state

acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.’

15 For instance, Von Ribbentrop, Minister of Foreign Affairs of the Third Reich, Tojo Hideki, Japanese Prime Minister and Minister of War and Admiral Karl Dönitz, formal successor to Adolf Hitler as head of state.

16 Art. 7(2) ICTYSt., which is identical to Art. 6(2) ICTRSt.

17 See, generally, the case of *Milošević* (IT-02-54). For documents in the trials of several other former high-ranking officials, full court records and the judicial archive are available online at <http://www.icty.org/> (visited 8 May 2018). See also Section 4 *infra* of this article.

18 See, generally, the case of *Kambanda* (ICTR-97-23). In addition, the ICTR tried several former state officials. Case law of the ICTR is available online at <http://unictr.unmict.org/en/cases> (visited 8 May 2018).

19 Art. 6 (2) SCSLSt. states that: ‘The official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.’

20 See, generally, the case of *Taylor* (SCSL-03-01). The basic documents and the case law of the SCSL are available online at <http://rscsl.org/> (visited 8 May 2018).

21 Art. 27(1) ICCSt.

official may not rely on his or her official position in order to be exempted from the jurisdiction of the ICC.²²

As mentioned above, a clause on the inability of a defendant to use his or her official position as a substantive defence to criminal responsibility is also enclosed in some treaties providing for the prosecution of crimes before international and domestic criminal courts, such as the Genocide Convention and the Apartheid Convention. In addition, former state officials, including high-ranking officials, have been subjected to criminal proceedings before domestic courts on the basis of treaties which do not contain a rule on the irrelevance of official capacity. It suffices to mention the *Pinochet* extradition proceedings, which took place at the end of the 1990s, before courts in the UK. These proceedings applied the Convention against Torture and represented a turning point that paved the way for a series of other cases in the following years.²³

Over time, the ILC, working on different topics, has reaffirmed the principle of irrelevance of official position with regard to allegations of serious crimes under international law. The rule was adopted as Principle III in the Principles of International Law recognized in the Charter of the IMT.²⁴ The principle was then restated, with a slightly different formulation, in both versions of the Draft Code of Offences against the Peace and Security of Mankind, respectively adopted in 1954 and 1996.²⁵ Having taken some of the above elements into account, the ILC concluded that it was appropriate to include such a provision in the Draft Articles on Crimes against Humanity since it reflects the fact that an alleged offender cannot raise his or her official position as a substantive defence in order to negate any criminal responsibility.²⁶

The commentary on Draft Article 6 underlines that paragraph 5 is without prejudice to the ILC's work on the topic of immunity of state officials from foreign criminal jurisdiction. In this regard, it is relevant to examine the emerging work under the guidance of the Special Rapporteur on Immunity of State

22 See, generally, the case of *Gbagbo* (ICC-02/11-01/15). The trial at the ICC is ongoing and documents are available online at <https://www.icc-cpi.int/cdi/gbagbo-goude> (visited 8 May 2018).

23 Since the 1990s, 67 cases against sitting and former heads of states, including trials in domestic courts, international tribunals and hybrid courts, have been recorded. See E.L. Lutz and C. Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press, 2009), at 1–25.

24 See the ILC, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950). Principle III states that: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.' The Principles were adopted by the ILC in response to a request from the General Assembly. See GA Res. 177(II), 21 November 1947.

25 The draft code adopted by the ILC in 1954 provides that: 'The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.' The draft code adopted by the ILC in 1996 holds that: 'The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.'

26 ILC, *Report of the International Law Commission*, UN Doc. A/72/10, 2017, at 69, § 31 (hereinafter, 'ILC 2017 Report').

Officials from Foreign Criminal Jurisdiction, Concepción Escobar Hernández.²⁷ The question of limitations and exceptions to immunities of state officials from foreign criminal jurisdiction was addressed in the Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction,²⁸ within which Escobar Hernández proposed a draft article on the issue.²⁹ This draft article was substantially modified by the ILC in July 2017.³⁰ The current version of Draft Article 7 restates that immunity *ratione materiae* shall not apply in respect of specific crimes, including crimes against humanity. Eventually, different Special Rapporteurs and Working Groups of the ILC have converged on the same conclusions, thereby reinforcing the unavailability of functional immunity as a defence for crimes under international law, including crimes against humanity.

Against this background, it seems imperative that a specific provision is retained in the final text of the Draft Articles.³¹ Hopefully, this could help to establish a point of no return on the issue of the unavailability of functional immunity for state officials and former state officials accused of crimes under international law. It would be crucial to avoid any future misunderstandings

27 The first Special Rapporteur on this topic, Roman A. Kolodkin, from Russia, submitted three reports in which he took a broad view of immunity and a narrow view of exceptions. The current Special Rapporteur, Concepción Escobar Hernández, from Spain, appointed in 2012, started her work almost from scratch taking a quite different approach from that of her predecessor. Until now, this Special Rapporteur has submitted five reports.

28 ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/701, 14 June 2016 (hereinafter, 'Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction').

29 Draft Art. 7 proposed by the current Special Rapporteur is entitled 'Crimes in respect of which immunity does not apply' and reads: '1. Immunity shall not apply in relation to the following crimes: (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances; (ii) Corruption-related crimes; (iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed. 2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office. 3. Paragraphs 1 and 2 are without prejudice to: (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable; (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State.'

30 Draft Art. 7, adopted by the ILC in July 2017, is entitled 'Crimes under international law in respect of which immunity *ratione materiae* shall not apply' and reads: '1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.' See ILC, *Titles of Parts Two and Three, and Texts and Titles of Draft Article 7 and Annex Provisionally Adopted by the Drafting Committee at the Sixty-ninth Session*, UN Doc. A/CN.4/L.893, 10 July 2017. The ILC states that: '2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.'

31 See also the reflections contained in the article authored by L.N. Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity' in this Issue of the *Journal*.

like the one generated by the unfortunate *obiter dictum* in the *Arrest Warrant* Judgment rendered by the International Court of Justice (ICJ) in 2002.³²

3. Dispelling the Ambiguities Surrounding the Nature of the Rule on Irrelevance of Official Capacity

The downside is that the work of the ILC does not shed light on the conceptual nature of the rule providing for the irrelevance of official capacity where there are allegations of crimes against humanity. Does this rule embody an exception to the customary rule on immunity *ratione materiae* accruing to state officials or is it, instead, an autonomous rule complementing the one establishing individual criminal liability for some categories of crimes? The language used by the ILC in different draft articles on various topics is not consistent.

In Draft Article 6, paragraph 5 of the Draft Articles the official position of an accused is not a ground for excluding criminal liability.³³ This follows the Nuremberg Principles and both versions of the Draft Code on Crimes against Peace and Security of Mankind, which do not mention the words 'immunity', 'exception' or 'limitation'. It seems thus that it is considered as a corollary rule complementing the rule establishing individual criminal liability for crimes against humanity. On the other hand, while Article 7 of the Draft Articles on Immunities of State Officials from Foreign Criminal Jurisdiction refers to immunity *ratione materiae* and states that it 'shall not apply' to a precise list of crimes, including crimes against humanity, it does not clarify whether the idea of an exception is accepted or rejected. Different formulations may result from the perspectives which the various Special Rapporteurs approach their work as well as the assigned mandates. However, the ILC should strive to achieve consistency among its two current drafts and, to that effect, it should comment in detail on a few points which could help to dispel some of the ambiguity surrounding the issue.

In the first place, it should be explained that the irrelevance of official capacity and the unavailability of functional immunity for those suspected of crimes under international law *are one and the same thing* and cannot be invoked before any kind of court of criminal law, whether international or

32 The ICJ states that: 'Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.' See *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)*, judgment of 14 February 2002, § 61. The latter sentence seems to suggest that former state officials may still rely on functional immunity after they have relinquished office. However, in addition to the separate opinions which do not concur with this point, this *obiter* was criticized for not corresponding to customary international law. See A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 853; S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', 13 *EJIL* (2002) 877.

33 See Section 1 of this article.

domestic. This would represent a significant clarification. At times, states are inclined to treat the two notions — namely, irrelevance of official capacity and inapplicability of functional immunity in case of prosecutions of crimes under international law — as coinciding and reflecting the same concept, while at other times, they are treated as embodying two different ideas.³⁴

As stated above, there are many theories on the nature and scope of immunity *ratione materiae*. However, most states and scholars agree on its substantive nature and that it serves the purpose of protecting the exercise of state or governmental functions and ultimately state sovereignty — *par in parem non habet iurisdictionem*.³⁵ If that is the basic assumption, however, it cannot but be concluded that the unavailability of immunity *ratione materiae* must coincide with the irrelevance of official capacity and may not be reconciled with those rules establishing that certain conduct entails individual criminal liability in the international legal order. It is, therefore, misleading to treat functional immunity as a procedural bar in cases where there are allegations of crimes under international law.³⁶ By doing so, the prosecution of these crimes by foreign domestic courts is seriously undermined and state officials, or former states officials, may hide behind their states.³⁷ It is akin to granting the power of a double-faced Janus to immunity *ratione materiae*, thereby showing one of the two faces whenever convenient.

For the same reasons, it would also be important that the ILC take a clear stand on whether the unavailability of functional immunity should be

34 Escobar recognizes this duality in the Fifth Report on Immunity of State officials from Foreign Criminal Jurisdiction, § 150.

35 See those references contained in *supra* note 5. Most recently, see R. Nigro, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale* (CEDAM/Wolters Kluwer, 2018).

36 On the contrary, some members of the ILC disagree with the conclusion that immunity *ratione materiae* cannot be automatically excluded in case of allegations of crimes under international law because: '(b) the relevant practice showed no "trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction'. See ILC 2017 Report, at 182, § 8.

37 In situations where there may be no alternative than the prosecution of grave crimes in foreign domestic courts. See the brilliant remarks by Paola Gaeta: 'To maintain that, in cases of international crimes, there is an exception to or derogation from the rules of international law on functional immunities could lead to the contention or belief that states retain their freedom not to exercise it in relation to claims concerning the commission of crimes committed by foreign state officials in the exercise of their official capacity, as a matter of self-restraint, act of courtesy, or in application of treaties concluded to that effect. This construction would be incorrect. It would run counter the fabric of international criminal law, which is based on the assumption that for given acts amounting to international crimes every individual can be held liable, regardless of whether he has acted qua a state official. If States were at liberty to dispose of this basic postulate, the whole logic of the system of international criminal law would simply collapse'. P. Gaeta, 'Immunities of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?' in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 227, at 236–237.

considered as a self-standing rule or as an exception.³⁸ Following from the above analysis, it may not be accurate to formulate the irrelevance of official capacity as an exception or derogation from the rule on immunity *ratione materiae* as, in principle, such an exception was never required. The embodiment of individual criminal liability within international rules was originally coupled with a corollary rule on the irrelevance of official capacity of state organs.³⁹ Not only does the idea of an exception or derogation not reflect the nature of the rule on irrelevance of official capacity,⁴⁰ but it is also dangerous as it suggests that hypothetically such an exception is to be applied at the discretion of the judges and not applied, for instance, upon governmental suggestions of immunity.

It seems that the idea and language of an exception or derogation to functional immunity for crimes under international law stem from using a double-faced notion, which could be both substantive and procedural, as explained above, and also, partially, from the general attempts at defining a comprehensive normative framework of immunities accruing to state officials from foreign criminal jurisdiction. Building on the assumption that immunity *ratione materiae* is a customary rule granting immunity to state agents acting in their official capacity, it logically follows that the next step is to ascertain whether there are exceptions to this rule.⁴¹ However, for the reasons outlined above

- 38 On the contrary, the ILC avoids taking a clear stand on the issue: 'Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official.' See ILC 2017 Report, at 184, § 12.
- 39 In the words of the Israeli Supreme Court in the *Eichmann* case: 'Immunity for acts of state constitutes the negation of international criminal law which indeed derives the necessity of its existence exactly from the very fact that acts of state often have a criminal character for which the morally responsible officer of state should be made penally liable.' See *Attorney-General of the Government of Israel v. Eichmann* (336/61) (1961).
- 40 The ILC, in its past work, seems to have explicitly excluded the idea of an exception at least when it adopted the Draft Code of Crimes against Peace and Security of Mankind in 1996. In commenting on Draft Art. 7, the ILC stresses that: 'A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also *abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act*'. See, ILC, *Yearbook*, Vol. II, Part II (1996), at 26–27, § 1 (hereinafter '1996 ILC Yearbook'). In *ibid.*, at 27, § 3, the ILC recalls that 'the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity'.
- 41 A number of scholars argue against the existence of a general rule on functional immunity accruing to any state official acting in the exercise of official functions. See P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè, 1996); M. Frulli, *Immunità e crimini internazionali: L'esercizio della giurisdizione civile e penale nei confronti degli organi statali sospettati di gravi crimini internazionali* (Giappichelli, 2007); R. Pisillo Mazzeschi, 'The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories', *Questions of International Law* (2015), available online at <http://www.qil-qdi.org/the-functional-immunity-of-state-officials-from-foreign-jurisdiction-a-critique-of-the-traditional-theories/> (visited 9 May 2018); C. Keitner, 'Functional Immunity of State Officials before the International Law Commission: The "Who" and the "What"', *Questions of International Law*

this may not represent the correct reasoning and, in fact, it may create more ambiguity than dispelled. In particular, the idea of an exception leaves room for states to claim that immunity *ratione materiae* may be upheld before domestic courts during the prosecution of crimes under international law. It is along these lines that specific states and scholars are objecting to the work of the Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction,⁴² thus disavowing their commitment to the prosecution of these crimes.

In sum, while an exception may be the appropriate description of what happens when a state official enjoying immunities *ratione personae* — that is, procedural immunities — is accused of an a crime under international law, it should be conceptually limited to those cases, as submitted below.

4. The Difficult Balance Between Immunities *Ratione Personae* and Crimes under International Law: A Thorny Question

The relationship between immunities *ratione personae* of state officials and the prosecution of crimes under international law is a topic of debate among states and scholars and it has also given rise to a string of political and judicial conflicts which have remained unresolved.

The ILC seems to have changed its approach towards this topic over the years. While addressing the issue of immunities *ratione personae* under the framework of the Draft Code of Crimes against Peace and Security of Mankind, the ILC stated that no immunity, not even immunities *ratione personae*, could be invoked by any state official during the prosecution of a crime falling under the scope of the project. Moreover, the ILC emphasized that it would be paradoxical to establish the substantive irrelevance of the official position, on the one hand, and allow state officials to avoid the consequences of liability through invoking procedural immunities, on the other.⁴³

(2015), available online at <http://www.qil-qdi.org/wp-content/uploads/2015/06/05.Functional-Immunity.KEITNER.FIN.pdf> (visited 9 May 2018).

42 See ILC 2017 Report, §§ 92 *et seq.* See R. O’Keefe, ‘An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely’, 109 *AJIL Unbound* (2015) 167. See also J.G. Ku, ‘The Significance of China’s Views on the *Jus Cogens* Exception to Foreign Government Official Immunity’, 26 *Duke Journal of Comparative and International Law* (2016) 503; A. Abashidze and S. Shatalova, ‘International Crimes Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: The Russian Perspective on the Work of the International Law Commission’, 64 *Netherlands International Law Review* (2017) 212.

43 The ILC submits that: ‘As further recognized by the Nuremberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. *It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.*’ See 1996 ILC Yearbook, at

In seeming contradiction, the ILC's comments on Draft Article 6, paragraph 5 of the Draft Articles separated substantive and procedural immunities. The ILC states that: '[P]aragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.'⁴⁴ However, this failure to address the issue of immunities *ratione personae* through the framework of the Draft Articles is unfortunate and it adds up to lack of coordination amongst Special Rapporteurs and Working Groups of the ILC that have worked on the topic of functional immunities (and the irrelevance of official capacity) with respect to allegations of crimes under international law. This compartmentalization of the prevention and punishment of certain grave crimes from the question of immunities of state officials suspected of one of these crimes merely serves to foster inconsistency, hinder a systemic reading of the complex relationship between the two set of rules and misrepresent the different rationales underlying these rules. Indeed, this crucial issue should be tackled in-depth in the various relevant contexts in the search for consistency while striking the necessary balance between immunities and the prosecution of crimes.

To the contrary, the Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction is now left alone (although under the scrutiny of the ILC Drafting Committee and of states) in facing the challenging task to disentangle the relationship between immunities *ratione personae* of state officials and the prosecution of crimes under international law. In the Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, Concepción Escobar Hernández has already partially addressed the issue of an exception to immunities *ratione personae* in cases of state officials accused of crimes under international law. The Special Rapporteur reaches the conclusion that state practice does not support such an exception.⁴⁵ However, the object of the following Sixth Report, yet to be presented, is to address the position adopted by the ILC that the issue of immunities *ratione personae* must be carefully examined in the context of procedural issues and safeguards.⁴⁶

Pending the release of this report with its analysis on this topic and the subsequent reaction of states, a few concise reflections may be made in light of

27 (emphasis added). This could be considered a self-fulfilling prophecy considering the recent practice which was summarized in Section 4 of this article.

44 It also added that this provision is without prejudice to the ILC's work on the topic of the immunity of state officials from foreign criminal jurisdiction. See ILC 2017 Report, at 69.

45 The Special Rapporteur proposed a draft version of Art. 7 entitled 'Crimes in Respect of which Immunity Shall Not Apply', where it was explicitly specified that this draft article did not apply to individuals enjoying immunity *ratione personae* during their term of office. This draft was substantially modified by the ILC. See Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, § 248.

46 An identical footnote has been placed at the beginning of Part Two of current version of the Draft Articles dealing with on immunities *ratione personae* and of Part Three dealing with immunity *ratione materiae*, which reads: 'The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.' See ILC 2017 Report, § 141.

current practice against the background of the *raison d'être* of immunities *ratione personae*.

5. The Current Picture on Immunities *Ratione Personae* and Crimes under International Law: Carrying Fire in One Hand and Water in the Other

The mainstream perspective considers that immunities *ratione personae* and immunities *ratione materiae* do not share the same rationale. The foundation of personal immunities lies in the need to protect certain categories of state officials performing functions that are crucial for the smooth conduct of international relations, such as diplomatic agents and some high-ranking state officials including the so-called 'troika', namely heads of state, heads of government and officials of ministries of foreign affairs.⁴⁷ Immunities *ratione personae* have a procedural nature and may shield selected categories of state officials only while they remain in office. Unlike functional immunity, such immunities do not survive the cessation of official functions as they are not substantive in nature.⁴⁸

With respect to immunities *ratione personae*, it is considered that while these immunities may be invoked before foreign domestic courts prosecuting crimes under international law, they may not bar ICCs and tribunals from exercising jurisdiction over serving state officials.⁴⁹ Immunities *ratione personae* include inviolability or immunity from arrest and detention and absolute immunity from the criminal jurisdiction of foreign courts. As briefly recalled above, these immunities stemmed from the necessity to protect officials representing foreign states abroad from any possible abuse of authority or any risk of interference for politically motivated reasons; the so-called 'functional necessity'

47 As also confirmed the Special Rapporteur of the ILC on this topic: ILC, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/661, 4 April 2013, §§ 56 *et seq.* and by the ILC that adopted Draft Art. 3 entitled 'Persons Enjoying Immunity *ratione personae*', which reads: 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.' See *Report of the International Law Commission*, UN Doc. A/68/10, 11 September 2015, at 52. Some members of the Commission argued that immunities *ratione personae* shall accrue also to other classes of state officials, see H. Huikang, 'On Immunity of State Officials from Foreign Criminal Jurisdiction', 13 *Chinese Journal of International Law* (2014) 1.

48 See Section 1 of this article. See Draft Art. 4 as adopted by the ILC in 2013: 'Article 4. Scope of immunity *ratione personae* 1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office. 2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office. 3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.'

49 See Cassese, *supra* note 5, at 311–312. For a comprehensive study and references to legal literature, see S.A. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* (Martinus Nijhoff Publishers, 1994).

rationale, which is often expressed with the Latin formula *ne impediatur officium*. In striking the balance between different values at stake — the prosecution of crimes under international law and the smooth conduct of international relations — international law gives precedence to the latter. However, this rationale fades into the background when a state official is indicted by an international criminal tribunal, created precisely with the objective to prosecute the most serious crimes under international law with all the guarantees of fairness and impartiality that domestic courts may not always offer. The safeguards offered by international criminal courts and tribunals deprive immunities *ratione personae* of their *raison d'être* and tip the scales in favour of their removal and of the prosecution of relevant serving high-ranking state officials.⁵⁰

Various elements of practice support the existence of such an exception before international criminal tribunals. The ICTY indicted Milošević when he was President of the Federal Republic of Yugoslavia and no state protested against the issuance of an arrest warrant against an incumbent head of state. Charles Taylor was indicted by the SCSL when he was still the President of Liberia,⁵¹ and the ICC issued an indictment and an arrest warrant against the sitting President of Sudan, Omar Al-Bashir. Article 27, paragraph 2, of the ICC Statute is clear in this respect: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

The majority of states seem to support the existence of such a rule as far as the exercise of jurisdiction by international criminal courts is concerned, at the vertical level, and the ICJ confirmed this point of view in the *Arrest Warrant* Judgment. In addition, the contention that immunities *ratione personae* shall not hinder proceedings before an international criminal court was made by a large number of scholars.⁵²

50 On this point see C. Kress, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, 2012) 246–250.

51 The defence in the *Taylor* case argued that the SCSL was obliged to respect the immunities *ratione personae* accruing to incumbent heads of state and introduced a motion to quash the Indictment. The SCSL issued a decision that rejected the motion and maintained that the rules on immunities *ratione personae* have no bearing whatsoever on the exercise of jurisdiction by international criminal courts. See Decision on Immunity from Jurisdiction, *Taylor* (SCSL-03-1-T), Appeals Chamber, 31 May 2004. For analysis see M. Frulli, 'The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Immunities *ratione personae*?' 2 *Journal of International Criminal Justice (JICJ)* (2004) 1118.

52 See Cassese, *supra* note 5, at 309–310; P. Gaeta, 'Official Capacities and Immunities', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press, 2002) 991 *et seq.* The following is relevant, see Art. 11(3) Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (2001), Institut de droit international, which states: 'Nothing in this Resolution implies nor can be taken to mean that a Head of State enjoys an immunity before an international tribunal with universal or regional jurisdiction.' This Resolution is available online at <http://www.idi-iil.org/idiE/resolutionsE/2001.van.02.en.PDF>

On the contrary, immunities *ratione personae* shall be respected by domestic judges, at the horizontal level, irrespective of the gravity of the crime allegedly committed by any foreign state official.⁵³ However, the fact that domestic authorities must respect immunities *ratione personae*, including inviolability, has a fatal impact on the prosecution of crimes under international law by international criminal tribunals. These international bodies rely on states cooperation for the enforcement of their decisions, including arrest warrants. The refusal to arrest Al-Bashir by several states, including State Parties to the ICC Statute, confirms that the rules on immunities *ratione personae* have been given precedence by states bearing an obligation to cooperate with the ICC, and therefore, have de facto prevented the ICC from exercising its jurisdiction over incumbent state officials. The crucial legal issue, also addressed in a series of ICC and national courts decisions,⁵⁴ is whether the exception to immunities *ratione personae* of current state officials ought to be applied by State Parties at the horizontal level also with respect to officials of states that are third parties with respect to a treaty-based tribunal.⁵⁵

Setting aside the judicial and political conflicts that the situation with Al-Bashir have engendered, recent practice suggests a few general reflections on the practical effects of a fragmented regime of exceptions to immunities *ratione personae* of state officials who have allegedly committed crimes under international law.

With respect to the nature of immunities *ratione personae*, as mentioned above, there is widespread agreement that their nature is procedural and that

(visited 9 May 2018). For some interesting reflections on the incompatibility of immunities *ratione personae* with international criminal justice, see H. van der Wilt, 'The Continuing Story of the International Criminal Court and Immunities *ratione personae*', Amsterdam Law School Legal Studies Research Paper No. 48 (2015).

53 Some scholars argue that immunity *ratione personae* is not applicable at the horizontal level if the legal context is a request for surrender by a genuine international criminal court. See van der Wilt, *ibid.*; C. Kress and K. Prost, 'Art. 98', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Beck/Hart/Nomos, 2016) 2117.

54 See the decisions on refusal of various states to cooperate for the arrest of Al-Bashir. Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, *Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014; Decision under Art. 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 6 July 2017; Decision inviting the Republic of Chad to provide submissions concerning its failure to arrest Omar Al-Bashir and surrender him to the Court, *Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 13 December 2017.

55 Scholarship is divided on this issue. For two opposite comments on the issue: P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *JICJ* (2009) 315; D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', 7 *JICJ* (2009) 340.

they must have no bearing on substantive liability. However, there have been too many cases whereby immunities *ratione personae* were de facto transformed into substantive obstacles that hamper the prosecution and punishment of crimes under international law. States repeat, like a refrain, that the fight against impunity is not thwarted by the upholding of immunities *ratione personae* before foreign domestic courts because there are other viable options to prosecute state officials suspected of crimes under international law, but this is a rhetorical statement easily challenged by the facts.

The alternative options were listed by the ICJ in the *Arrest Warrant* Judgment. The first option is the prosecution of the state official before his or her national courts. This may be unlikely to occur since the most serious crimes under international law are often committed with tolerance if not complicity of state authorities. In particular, it does not seem to be a realistic option when the accused is an incumbent high-ranking official, who in addition enjoys immunities on the basis of domestic law.⁵⁶ Most likely, this option becomes viable after a radical change of regime. Several well-known cases illustrate this point, for instance, the trials of Pinochet in Chile,⁵⁷ Ríos Montt in Guatemala⁵⁸ and Fujimori in Peru.⁵⁹ In these cases, however, domestic tribunals brought proceedings against former state officials, who no longer enjoyed immunities *ratione personae*. Admittedly, such proceedings have not proved to be effective tools to punish crimes under international law.

The second option is a waiver of immunity by the national state of the suspected person in order to allow prosecution before a foreign court. However, the likelihood of this event is even lower than prosecution before a state official's own national courts unless there is a regime change and the new

56 The ICJ stated that: '[S]uch persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.' This statement is misleading since it is well-known that in most countries several categories of state officials enjoy immunity from criminal jurisdiction under domestic law while they are in office.

57 See A. Gattini, 'Pinochet Cases', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007), available online at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e859> (visited 9 May 2018).

58 Efraín Ríos Montt, the former military ruler of Guatemala, was convicted on 10 May 2013 of genocide and crimes against humanity by a court in Guatemala City. Three days later the conviction was overthrown by the constitutional court on procedural grounds. See Open Society Foundation, *Judging a Dictator* (2013), available online at <https://www.opensocietyfoundations.org/sites/default/files/judging-dicator-trial-guatemala-rios-montt-11072013.pdf>.

59 In 2009, Alberto Fujimori was convicted and sentenced by a court of Peru to 25 years in prison for murder, kidnapping and crimes against humanity during his presidency. See J.-M. Burt, 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations', 3 *International Journal of Transitional Justice* (2009) 384. However, in 2017, President Kuczynski issued a humanitarian pardon for Fujimori, see *Resolución Suprema N° 281-2017-JUS*, 24 December 2017, available online at <http://busquedas.elperuano.pe/normaslegales/conceden-indulto-y-derecho-de-gracia-por-razones-humanitaria-resolucion-suprema-n-281-2017-jus-1600540-2/> (visited 9 May 2018).

government is willing to deal with past abuses committed by state officials belonging to the previous administration.

The third option is prosecution of suspected state officials by foreign courts after they have left office, that is, when they no longer enjoy immunities *ratione personae*. Yet there are situations where state officials hold a lifetime official position and will most likely never relinquish it, unless there is a change of government. In other words, when there is no regime change, respect of immunities *ratione personae* of incumbent state officials by foreign courts may result in a lack of prospect of prosecution before their own national courts as well as meagre chances of a waiver of immunity by their state. On the basis of the first three alternatives there are few genuine possibilities for prosecution of crimes committed by state officials who enjoy personal immunities before any domestic court.

The fourth and final option is prosecution before ‘certain international criminal tribunals’. Once again, relevant examples reveal that a trial before an international criminal tribunal become much more likely once the suspected state officials enjoying immunities *ratione personae* have stepped down from power. Milošević and Taylor were indicted, respectively, by the ICTY and the SCSL while in office, but they were arrested and tried after they had already relinquished their official position. With respect to sitting heads of state, the situation that arose around Al-Bashir confirms that the exception to immunities *ratione personae* before the ICC is difficult to implement in practice, due to the fact that the majority of states argue in favour of the persistence of immunities *ratione personae* at the horizontal level. The claimed exception to immunities *ratione personae* before international criminal tribunals remains an empty box and no viable options is left to prosecute incumbent high-ranking state officials who allegedly committed crimes under international law.

6. Concluding Remarks: Reality Check

The lack of a provision on immunities *ratione personae* in the Draft Articles and the ensuing need to refer to customary law rules leads to the conclusion that it is unlikely that an incumbent state official enjoying immunities *ratione personae* who allegedly committed a crime under international law would be brought to trial before any tribunal, at least while he or she remains in office. As stated above, it would, nonetheless, be highly preferable that the Special Rapporteur on Crimes Against Humanity takes up the issue and at least exposes the consequences of upholding immunities *ratione personae* in case of allegations of crimes against humanity.

At any rate, it is of the utmost importance that the irrelevance of official capacity and unavailability of immunity *ratione materiae* are endorsed without any hesitation and reaffirmed in the Draft Articles, which may become a

future convention on the prevention and punishment of crimes against humanity. If not, the prosecution of those most responsible for crimes under international law will remain primarily a rhetorical exercise disproved by the actual conduct of states. Unfortunately, actions speak louder than words and until now have turned the scales of justice against an effective prosecution of those bearing the greatest responsibility for crimes under international law, crystallizing an inequitable balance between immunity and impunity.

Extradition and Mutual Legal Assistance in the Draft Convention on Crimes Against Humanity

Harmen van der Wilt*

Abstract

Working on crimes against humanity, the International Law Commission (ILC) has modelled its draft articles on extradition and mutual assistance on corresponding provisions of the United Nations Conventions against Corruption and Transnational Organized Crime. Nevertheless, some provisions are clearly adapted to the special nature of crimes against humanity. This article seeks to explore how the ILC has navigated between producing a flexible and general framework and adapting the system more specifically to the specificities of crimes against humanity. The ILC has been censured for easily transposing already existing regimes that were not designed for such specific contexts. On closer scrutiny, that criticism is not entirely justified. A comparison with the parallel provisions in the Statute of the International Criminal Court (ICC) reveals that the ILC's provisions do not deviate much from the system as adopted by the ICC. This similarity may be indicative of the soundness of the ILC's approach in construing a framework that may contribute to the improvement of interstate cooperation in the suppression of crimes against humanity.

1. Introduction

Draft Articles 13 and 14 of the International Law Commission's (ILC) project on crimes against humanity — a blueprint for a convention on the subject — respectively cover extradition and mutual legal assistance. Moreover, a separate annex to the draft articles addresses a number of primarily procedural issues related to mutual legal assistance. The provision on extradition is connected to draft Article 10, which contains the well-known principle of *aut dedere, aut judicare* that serves to create a closed system of criminal law

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enforcement. The state party on whose territory an alleged offender is present has the option to either prosecute the person or extradite him to another state. The ILC's Commentary on the draft articles qualifies the obligation to submit the case to its competent authorities as a primary one, prevailing over an alternative possibility to render extradition (*primo judicare, secundo dedere*).¹ However, such a hierarchy between the alternative obligations cannot be derived from the literal text of the articles or from general international law. It would make perfect sense for a state to consider extradition of the alleged offender to a state with a stronger jurisdictional claim, rather than starting prosecution itself. The prior mentioning of the duty to prosecute reminds the state party of this obligation, even if an extradition request is not forthcoming. The conjunction in draft Article 10 ('*unless it extradites or surrenders the person to another state or competent international criminal tribunal*') clarifies that a state is relieved from its obligation to prosecute whenever an extradition request is submitted and it decides to grant it, rather than stipulating that even in such a case it should first consider prosecution.

The ILC indicates that it has decided to model both the articles on extradition and mutual legal assistance on analogous provisions on international cooperation in criminal matters in existing conventions. Accordingly, Article 44 of the 2003 United Nations Convention against Corruption and Article 16 of the 2000 United Nations Convention against Transnational Organized Crime (UNCTOC) have served as a blueprint for draft Article 13 on extradition, whereas draft Article 14 on mutual legal assistance *largo sensu* copies Article 46 of the Corruption Convention and Article 18 of the UNCTOC.² The ILC proceeds by asserting that, while it acknowledges that a crime against humanity by its nature considerably differs from corruption or organized crime, the cooperation regime is likely to be quite similar.³ In reality, however, some provisions are clearly adapted to the special nature of crimes against humanity.

The major objective of this essay is to explore how the ILC has attempted to strike a balance between general and more specific elements in its search for an effective and fair system of interstate cooperation on the suppression of crimes against humanity. I will focus therefore on those topics that are of particular importance for crimes against humanity. In the context of extradition, I will dwell upon the relevance of treaties, the political offence exception and the rule of dual criminality. The sections on mutual legal assistance will highlight special investigation methods, like exhumations and examination of grave sites, the identification of victims and the recovery and freezing of assets that have been stolen from them — issues that are obviously important in case of crimes against humanity.

1 *Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August)*, UN Doc. A/72/10 (hereinafter 'ILC Report'), at 100, § 4.

2 *Ibid.*, at 100, § 5 and 111, §§ 4 and 6. See United Nations Convention against Corruption, 31 October 2003, UNTS 2349, 41; United Nations Convention against Transnational Organized Crime (UNCTOC), 15 November 2000, UNTS 2225, 209.

3 ILC Report, *supra* note 1, at 100, § 5.

In the final section, I will briefly reflect on the question whether the current draft articles sufficiently take the specific nature of crimes against humanity into account. To that purpose, I will compare these articles with parallel provisions in the International Criminal Court (ICC) Statute. This comparison does not imply that I consider the cooperation framework of the ICC ideal. To be sure, the system has some weak spots where it does not succeed in imposing stricter obligations on states parties.⁴ However, Part 9 of the ICC Statute, whatever its qualities or flaws, is tailored to law enforcement in respect of core crimes and therefore serves as an important frame of reference for the draft convention.

2. Extradition

A. *The Relevance of Extradition Treaties*

For several reasons, treaties are of major importance in the law and practice of extradition. By concluding treaties, states indicate under what conditions they are prepared to mutually surrender fugitives from justice. Treaties therefore ensure reciprocity and improve legal certainty and predictability. Moreover, a treaty may serve as a yardstick for the degree of confidence in the administration of (criminal) justice in the requesting state. Whenever that confidence is lacking, the requested state will be reluctant to expose a fugitive to a situation where his fair trial rights or even his life may be at risk. To be sure, not all states opt for expressing that confidence in a treaty requirement and the position has been censured for being rather rigid. However, states that do make extradition dependent on a treaty intend to save themselves from the predicament of having to make awkward choices in each and every specific situation.

The draft convention acknowledges the relevance of treaties in extradition at several places. Draft Article 13(3) stipulates that states parties 'may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles'. The opening words of the provision — '[i]f a State that makes extradition conditional on the existence of a treaty receives a request for extradition' — clarify that it serves to accommodate those states whose legislation requires a treaty for extradition. An article of this kind is commonly included in international conventions on the suppression of international and transnational crimes.⁵ The treaty framework for the purpose of the extradition of suspects of crimes against humanity is further reinforced by draft Article 13(1), that prescribes that '[e]ach of the offences covered by the present draft articles shall be deemed to be included as an

4 For a very balanced assessment, see B. Swart and G. Sluiter, 'The International Criminal Court and International Co-operation', in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T.M.C. Asser Press, 1998) 91–120.

5 See, for example, Art. 9 International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UNTS 2149, 256; and Art. 13 International Convention for the Protection of All Persons from Enforced Disappearances, 20 December 2006, UNTS 2716, 3.

extraditable offence in any extradition treaty existing between States', adding that 'States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.' Finally, draft Article 13(5) addresses those states that do not make extradition conditional on the existence of a treaty, enjoining them to 'recognize the offences covered by the present draft articles as extraditable offences between themselves'.

As indicated, these provisions are by no means innovative, but they reflect the primordial importance of a convention on crimes against humanity for the purpose of extradition. Together they aim to confront all possible obstacles and make sure that extradition is always an option. If two states parties maintain no treaty relations on international cooperation in criminal matters whatsoever and the requested state considers a treaty mandatory, it may predicate the extradition on this convention and thus formally comply with its own legislation. If an extradition treaty is in force but it does accidentally not cover crimes against humanity, the requested state is bound to grant the extradition of a suspect of crimes against humanity nonetheless. While that situation will not occur in case of (multilateral) extradition treaties that incorporate the so-called elimination method — implying that extradition is mandatory for all offences that are penalized in both states by a minimum prison sentence of a certain length (usually one year)⁶ — it can arise in case of (bilateral) treaties that only prescribe extradition in respect of certain well-defined offences, if crimes against humanity do not feature on the list. Moreover, draft Article 13(1) ensures that extradition shall be granted for the purpose of a crime against humanity, and not for an ordinary crime, like murder or rape that is included in the list of enumerated offences.

It should be emphasized that Article 13(3) is drafted in optional terms: 'States *may* consider the present draft articles as the legal basis for extradition' (emphasis added). In other words: states that require a treaty basis for extradition are never under an obligation to comply with a request. The same holds true for those states that do not make extradition conditional on the existence of a treaty. They are not obliged to grant extradition either but are only enjoined to adapt their national legislation to the eventuality. The fact that the draft articles nowhere *oblige* states to grant extradition should be read in conjunction with draft Article 13(9) that contains the so-called 'anti-discrimination' clause. The provision mirrors one of the main rationales for the treaty requirement as expounded above: states must have the leeway to refuse extradition whenever the fugitive is likely to be persecuted on religious, political etc. grounds in the requesting state.⁷

6 It should be noted in this context that draft Art. 6(1) of the ILC project obliges states parties to take the necessary measures to ensure that crimes against humanity constitute offences under their criminal law, whereas draft Art. 6(7) adds that states shall take the necessary measures to ensure that crimes against humanity are punishable by appropriate penalties, taking into account their grave nature.

7 The full provision reads as follows: 'Nothing in the [present draft] articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on

Amnesty International and some delegations of states parties have criticized the provision for being too narrow. They favour the inclusion of a general ground for refusal of extradition, in case of impending imposition of the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.⁸ There is some merit in this criticism. After all, harsh punishment, amounting to flagrant human rights violations, may not be inspired by discriminatory motives. The ILC has attempted to counter this criticism by pointing out that the requested state would be allowed to invoke human rights considerations as a ground for refusal of extradition, if its national law — for instance — prohibits extradition where the offence at issue is punishable by the death penalty.⁹ The response is adequate, as the ‘anti-discrimination clause’ is not framed as a mandatory ground for refusal either.

B. Exclusion of the ‘Political Offence’ Exception

According to draft Article 13(2), an offence covered by the draft articles shall not be considered as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Consequently, states are not allowed to refuse extradition on that basis. The provision obviously alludes to the well-known ‘political offence’ exception that has been incorporated in many extradition treaties.¹⁰ Many scholars have addressed the scope and the rationales of this exception.¹¹ In this context, concern for the due process right of the fugitive, the necessity of states to keep aloof from internal political disturbances and a potential sympathy with the cause of political dissidents have been emphasized. It is fair to state that the exception is generally on the wane, a development that has been spurred by the war against terrorism. Contemporaneous treaties on the suppression of specific terrorist offences

account of that person’s gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.’

- 8 See Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, April 2017, available online at <https://www.amnesty.org/en/documents/ior40/5817/2017/en/> (visited 25 May 2018), at 11, favouring the inclusion of general effective human rights safeguards. See also, for example, Switzerland, *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.18, 25 October 2017, § 103, advocating the inclusion of a provision allowing the refusal of extradition to states that still apply the death penalty, unless guarantees are given that the death penalty will not be sought, imposed or carried out.
- 9 ILC Report, *supra* note 1, at 104, § 17. Draft Art. 13(6) provides that extradition ‘shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition’. See more Section D.
- 10 See, for example, Art. 3 European Convention on Extradition, 13 December 1957, ETS 24; and, Art. 3(a) UN Model Treaty on Extradition, 14 December 1990, ILM 1991, 1407.
- 11 See, among others, C. Van den Wyngaert, *The Political Offence Exception to Extradition* (Kluwer, 1980); G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff, 1998), at 203–334.

explicitly reject the political offence exception in terms that are similar to the provision under scrutiny.¹²

The inclusion of a provision on the exclusion of the political offence exception raises the question whether crimes against humanity and other core crimes could ever qualify as political offences. Apparently, the answer is not self-evident, because the drafters of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide took the trouble to clarify that genocide and other enumerated acts ‘shall not be considered as political crimes for the purpose of extradition.’¹³ The infamous *Artuković* case — in which US courts declared the extradition of the fugitive in first instance inadmissible, because the alleged crimes had been committed during a political uprising and were not triggered by personal motives — puts the issue in sharp perspective. *Artuković* was charged by the requesting state (Yugoslavia) with having ordered the death of some 30,000 civilians when he acted as Minister of the Interior of the Croatian Government during the Second World War, a crime that would effortlessly qualify as a war crime and a crime against humanity.¹⁴

Three lines of argumentation have been advanced to counter the claim that crimes against humanity could — in principle — be considered as political offences for the purpose of extradition. The first borrows partially from the terrorist analogy and stresses the heinousness of the crime. In this sense, a US District Court held that ‘if the act complained of is of such a heinous nature that it is a crime against humanity, it is necessarily outside the political offence exception.’¹⁵ Secondly, it has been questioned whether crimes against humanity can ever be instrumental in subverting the existing political order. Such was the explicit reasoning by a Swiss court in the case of *Kroeger*, whose extradition was sought for his alleged complicity in the extermination of Jews, communists and inmates of mental institutions in Poland and Ukraine during the Second World War. The Court succinctly characterized the essence of a political offence as ‘having been committed in the course of a struggle for power in the State and must also be in appropriate proportion to the object pursued, in other words suitable to the attainment of that object’. The Court proceeded by concluding that the case at hand did not fit the archetype: ‘[t]he accused was acting at a time when the nationalist socialist regime stood at the pinnacle of its power. He acted against helpless women, children and sick persons who could not possibly have threatened German dominion.’¹⁶ The Swiss Court

12 See, for example, Art. 11 International Convention for the Suppression of Terrorist Bombing.

13 Art. VII Convention on the Prevention and Suppression of the Crime of Genocide, 9 December 1948, UNTS 78, 277.

14 *US ex rel. Kardazole v. Artuković* (170 F. Supp. 383 (S.D. Cal. 1959)). *Artuković* was ultimately extradited by the United States to Yugoslavia, see *Artuković v. Rison* (784 F.2d 1354 (9th Cir. 1986)). For an extensive discussion of the case, see Gilbert, *supra* note 11, at 389.

15 US District Court S.D. New York, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook* (924 F. Supp. 565 (1996)), at 577.

16 *Kroeger v. The Swiss Federal Prosecutor’s Office*, 72 International Law Reports (Swiss Federal Tribunal, 1966), 606, 612–613. In the *Arambasić* case, a US Court of South Dakota followed a similar approach. *Arambasić’s* extradition was sought by the Republic of Croatia on account of his alleged commission of ‘criminal acts against humanity and international law’. The Court

correctly, although somewhat indirectly, suggested that political offences are typically committed *against* established political power, whereas crimes against humanity usually imply involvement of the state as perpetrator. It is a related, but separate, argument that sustains the conclusion that crimes against humanity are to be excluded from the ambit of the political offence exception. This opinion was more clearly expressed by a French court in the case of *Spiessens* whose extradition was requested by Belgium on the charge of collaboration with the enemy. The Court held that ‘in time of war, in a country occupied by the enemy, collaboration with the latter *excludes the idea of a criminal action against the political organization of the State which characterizes the political offence*’.¹⁷

None of these arguments on its own is perhaps entirely persuasive. After all, the seriousness of a crime does not affect its political character, especially not if it is the only and ultimate means to achieve the desired political outcome. Together, however, they offer a solid reason for denying perpetrators of crimes against humanity, the preferential status of political offenders who may wish to invoke the exception in case of extradition. Gilbert neatly summarizes this position by asserting that ‘there is a developing customary international law to the effect that war crimes and crimes against humanity are not to be regarded as political offences’.¹⁸ The current section in draft Article 13 of the draft convention both reflects and corroborates that development.

C. Dual Criminality

Extradition is usually only granted if the conduct for which the surrender of the suspect is requested constitutes a criminal offence in both the requesting and the requested state. This so-called ‘rule of dual criminality’ relieves the requested state from the obligation to cooperate and apply its criminal law system in respect of conduct which it does not consider criminal itself.¹⁹

found that the ‘evidence show[ed] that the alleged victims were policemen who were unarmed and had surrendered while others were unarmed civilians’ and concluded that such ‘atrocities committed upon these unarmed people were not in furtherance of a political cause’. *Arambasić v. Ashcroft and others*, Judgment on Petition for Writ of Habeas Corpus (403 F. Supp. 2d 951 (D.S.D. 2005)), ILDC 709 (US 2005), 18 November 2005, §§ 39–41.

17 Court of Appeal of Nancy, France, *In re Spiessens*, 16 *International Law Reports* (1949) 275, 276 (emphasis added).

18 Gilbert, *supra* note 11, at 395.

19 Outside the scope of crimes against humanity, the question has arisen whether double criminality requires that the offence for which extradition is sought matches exactly a corresponding offence in the requested state. The Italian Supreme Court denied that such a stringent test was necessary and held that an ‘equivalence of the repressive elements’ of the offences in the two legal systems would suffice. Italy, Court of Cassation, 6th Criminal Section, Judgment No. 30087/2014 (Reporter: G. Nessi), 9 July 2014, ILDC 2215 (IT 2014). See also M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn., Martinus Nijhoff, 1999), at 298–299, where the author points out that this implies an assessment of dual criminality *in abstracto*, ‘inquiring whether or not the crime in the requested state is generally comparable to the crime in the requesting state’.

In treaties, this objective is accomplished by either stipulating that extradition shall be granted in respect of offences punishable under the laws of the requesting state and of the requested state by a prison sentence or detention order of a minimum length and severity,²⁰ or by incorporating a list of offences which constitutes a common denominator of the criminal legislation of both states. The rule of dual criminality is not a general principle of international law, in the sense that states are only allowed to mutually exchange fugitives when the condition is met. To be sure, the Framework Decision on the European Arrest Warrant has abolished dual criminality in respect of 32 ‘listed offences’.²¹ Interestingly, crimes within the jurisdiction of the ICC feature on the list.

The ILC observes that any reference to dual criminality is lacking in its draft articles on crimes against humanity, and advances two reasons for this ‘omission’.²² First, it notes that the draft articles on crimes against humanity define the elements of crimes against humanity in draft Article 3 and subsequently, in draft Article 6, oblige states parties to ensure that crimes against humanity constitute offences in their own national legislation. In view of the intended full harmonization of national legislations, dual criminality is automatically satisfied. Secondly, the ILC indicates that extradition is never mandatory, provided that the requested state submits the case to its own competent authorities for the purpose of prosecution (*aut judicare*). While the former argument is sound, the latter is less convincing. Let us suppose that an extradition indeed falters on the requested state having insufficiently implemented the elements of crimes against humanity in its national criminal law. In the execution of the alternative option — criminal prosecution — it would be confronted with the same legal obstacles that prevented it from complying with the extradition request. It would imply that the requested state would only be able to prosecute the suspect for an ordinary crime like, for instance, murder or rape. Such a diluted, ‘second best’ performance is likely to defeat the very purpose of the Convention. The rather pragmatic second argument, suggesting that any criminal prosecution on lesser charges is better than none, detracts from the more principled aspiration to approximate national legislations that would obviate any concern in respect of dual criminality.

D. Other ‘Miscellaneous’ Provisions on Extradition of General Purport

The previous paragraphs have addressed those aspects of extradition law that are of special relevance for crimes against humanity. Draft Article 13 contains other provisions of general purport that deserve some brief comments.

20 See, for instance, Art. 2(1) European Convention on Extradition at least one year or by a more severe penalty.’

21 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002, at 1, Art. 2(2).

22 ILC Report, *supra* note 1, at 108–109, §§ 32 and 33.

Draft Article 13(6) provides that 'extradition shall be subject to the conditions provided for by national law of the requested state or by applicable extradition treaties, including the grounds upon which the requested state may refuse extradition'. At first blush, this arrangement appears to be very lenient towards any inclination of states to curb their obligations under the convention, but the ILC rightly observes that the article refers to procedural regulations or grounds for refusal that are generally accepted in extradition law, like the prohibition of extradition in case of an impending imposition or execution of the death penalty or a prohibition of extradition on the basis of the rule of specialty.²³ The convention serves as the normative framework to test whether a certain ground for refusal would be permissible, disallowing, for instance, the invocation of a statute of limitations that would be contrary to the states' obligation to abolish statutes of limitations in respect of crimes against humanity.²⁴

States that are inclined to restrict extradition to states on whose territory the offence has allegedly been committed are summoned to change this practice and grant extradition requests issued by states that predicate prosecution on another principle of criminal jurisdiction. Draft Article 13(7) accomplishes this by resorting to the somewhat contrived fiction that the requested state should pretend that the offence has been committed (also) on the territory of the state making the extraterritorial claim.²⁵ The provision corresponds with the exhortation, included in draft Article 7, for states to expand their jurisdiction on the basis of the active and passive nationality principle and makes short shrift with narrow positions inspired by the prevalence of territorial sovereignty.

Finally, draft Article 13(8) makes the interesting suggestion that states whose national legislation does not allow the extradition of their nationals for the purpose of the execution of a sentence might consider taking over the enforcement of the sentence, imposed by the requesting state, as an appropriate alternative. The construction appears in the Convention against Transnational Organized Crime (Article 16(10)) and the Convention against Corruption (Article 44(13)).²⁶

Regrettably, the ILC has decided not to include a provision explicitly addressing the situation in which states could decide to extradite their nationals on the proviso that they are allowed to return to their home country in order to serve there any foreign sentence, arguing that draft Article 13(6) allows for

23 *Ibid.*, at 104, § 17.

24 *Ibid.* See draft Art. 6(5) and compare also the UN Convention on the Non-Applicability of Statutory Limitations of War Crimes and Crimes against Humanity, 26 November 1968, 754 UNTS 73.

25 The ILC (ILC Report, *ibid.*, at 105, § 19) explains that this provision is modeled on Art. 11(4) of the 1999 International Convention on the Suppression of the Financing of Terrorism, UN Res. 54/108, 9 December 1999, available online at <http://www.un.org/law/cod/finterr.htm> (visited 8 June 2018).

26 ILC Report, *ibid.*, at 106, § 22. It should be added that the provision features in Art. 4(6) Framework Decision on the European Arrest Warrant as well.

such arrangements.²⁷ While this is undoubtedly true, the failure to mention it explicitly is a missed opportunity to align with modern developments in the law and practice of international cooperation, and to convey the signal that prosecution in a state with a stronger jurisdictional claim might be preferable to proceedings on the basis of the active nationality principle.

3. Mutual Legal Assistance

A. General Aspects

Mutual legal assistance in criminal matters is a vital aspect of criminal law enforcement in respect of international and transnational crimes, as evidence, witnesses, judicial records — elements that are indispensable for a successful completion of a criminal procedure — are usually scattered over several jurisdictions. The legal regulation of mutual legal assistance is divided between draft Article 14 that applies between states parties as *lex specialis* whenever they seek cooperation in the investigation and prosecution of crimes against humanity and an ‘annex’ to the draft articles that primarily contains procedural rules and applies when the states are not bound by another Multi-Lateral Assistance Treaty (MLAT) or prefer to use the annex instead of that latter treaty.²⁸

Draft Article 14 is structured on a model that is followed in many conventions on the suppression of international crimes and in international and regional instruments dealing specifically with mutual legal assistance.²⁹ The draft of Article 14(1) starts by generally exhorting states to afford each other the widest possible measure of assistance in investigations, prosecutions and judicial proceedings in relation to crimes against humanity, emphasizing that the assistance is to cover the entire scope of the criminal procedure. Paragraph 3 follows by enunciating a number of specific procedural activities that states could deliver on a reciprocal basis. Most performances concern the gathering of evidence and are well known in MLATs:

- taking evidence or statements of persons, including by video conference;³⁰
- effecting searches and seizures;³¹
- examining objects and sites, including obtaining forensic evidence;³²
- providing information, evidentiary items and expert evaluations;³³

27 ILC Report, *ibid.*, at 106, § 23.

28 Draft Art. 14(8).

29 The ILC Report, *supra* note 1, at 111, § 4 mentions Art. 7 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 20 December 1988, UNTS 1582, at 95 as a scholarly example that was reproduced with the necessary modifications in Art. 18 UNCTOC and Art. 46 Convention against Corruption.

30 Draft Art. 14(3)(b).

31 Draft Art. 14(3)(d).

32 Draft Art. 14(3)(e).

33 Draft Art. 14(3)(f).

- providing originals or certified copies of relevant documents and records.³⁴

Another important objective of mutual legal assistance is to apprise people whose attendance at and cooperation in the criminal procedure is required of its imminent occurrence. To that purpose, draft Article 14(3)(a) mentions the identification and location of alleged offenders and, as appropriate, victims, witnesses or others. Paragraph 3(c) indicates that states might, on request, effect the service of judicial documents and paragraph 3(i) refers to facilitating the voluntary appearance of these persons in the requesting state. Interestingly, the draft articles do not limit mutual legal assistance to the investigation and prosecution of natural persons, but stipulate that it should also 'be afforded with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable'.³⁵ The provision refers to Article 6(7) of the draft articles that exhorts states to establish the liability of legal persons for crimes against humanity in accordance with their own national law. According to the ILC, the addition 'and other proceedings' alludes to the broad array of types of corporate liability (criminal, civil, administrative).³⁶

B. Special Provisions of Relevance for Crimes against Humanity

While draft Article 14(3) identifies concrete examples of mutual legal assistance that are common to many MLATs and applicable in respect of all criminal offences, some elements are geared to the special nature of crimes against humanity. The identification of victims as a form of assistance reflects the increasing attention for victims in international criminal justice with a view to their participation in criminal procedure and the reparation of their suffering. The inclusion of this activity in MLATs is of recent date and has particularly been propounded in the context of the suppression of trafficking in human beings. A comprehensive provision on identification features, for instance, in Article 14 of the Association of Southeast Asian Nations Convention against Trafficking Persons, Especially Women and Children (ACTIP).³⁷ Article 14(1) of the ACTIP obliges states to establish guidelines or procedures for the proper identification of victims of trafficking in persons, whilst paragraph 2 prescribes that states parties shall respect and recognize identification in other states on a mutual basis and paragraph 3 instructs the 'receiving party' to notify the identification to the 'sending party', unless the victim otherwise informs. The final part of the sentence expresses concern for the privacy of the victim, whose opinion on whether his/her whereabouts are

³⁴ Draft Art. 14(3)(g).

³⁵ Draft Art. 14(2).

³⁶ ILC Report, *supra* note 1, at 112, § 9.

³⁷ ASEAN Convention Against Trafficking in Persons, Especially Women and Children, 21 November 2015, available online at <http://asean.org/asean-convention-against-trafficking-in-persons-especially-women-and-children/> (visited 25 May 2018).

to be shared with other states should always prevail.³⁸ The use of videoconferences for the purpose of taking evidence or statements displays technological developments and is obviously an asset for all criminal procedures with a transnational element.³⁹ The practice has gained momentum in the context of war crimes trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) and is particularly valuable when large numbers of witnesses are called to bear testimony and lack of resources or fear prevent them from leaving their home country. It is therefore apposite that draft Article 14(3)(b) provides for the possibility.

Even more relevant for the prosecution of crimes against humanity is the sentence ‘including obtaining forensic evidence’, added to the familiar investigative measure of ‘examining objects and sites’. The ILC clarifies that this section was modified ‘to emphasize the ability to collect forensic evidence relating to crimes against humanity, given the importance of such evidence (*such as exhumation and examination of grave sites*) in investigating fully such crimes’.⁴⁰ Indeed, as the legal practice of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have revealed, the exhumation and examination of grave sites has been of paramount importance for the assessment of the number of victims and the *modus operandi* of mass killings, thus corroborating the (contextual) elements of war crimes and crimes against humanity.⁴¹ By their nature, exhumations are invasive on the territorial sovereignty of a state. Whereas the prosecutors’ offices of the ICTY and ICTR, sustained by a resolution of the Security Council, had the competence to conduct such investigations itself, the ICC Statute does not attribute similar powers to the ICC Office of the Prosecutor. Article 99 of the ICC Statute affords the Prosecutor limited powers to exercise directly ‘extraterritorial’ investigations on the territory of a state, but the conditional phrasing that the examination is to be executed ‘without modification of a public site or other public place’, makes immediately clear that exhumations are excluded. For such investigations the ICC is completely dependent on the assistance of states parties.⁴² It makes sense, therefore, that draft Article 14(3)(e) implicitly qualifies exhumation as a form of assistance over which the requested state yields complete autonomy.

38 In a similar vein, see ILC Report, *supra* note 1, at 113, § 12.

39 The procedural aspects of the application of this device are regulated in Art. 18(18) UNCTOC, and — very extensively — in Art. 10 EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000), 29 May 2000, OJ of the EC, No. C 197, 12 July 2000, 1.

40 ILC Report, *supra* note 1, at 113, § 12 (emphasis added). In its commentary on the draft articles, *supra* note 8, at 13, Amnesty International had advocated the explicit inclusion of ‘exhumation and examination of grave sites’ in the provision.

41 For a comprehensive study, see É. O’Brien, ‘The Exhumation of Mass Graves by International Criminal Tribunals: Nuremberg, the former Yugoslavia and Rwanda’ (PhD thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2011).

42 Art. 93(1)(g) ICCSt. explicitly mentions the ‘examination of places or sites, including the exhumation and examination of grave sites’ as one of the ‘other forms of co-operation’.

The provision on the ‘identification, tracing or freezing of proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes’⁴³ may appear at first sight to be the odd person out in a convention that deals with crimes that are usually not motivated by profit. The ILC observes that, in the context of crimes against humanity, assets may have been stolen and that the freezing etc. of those assets may serve the purpose of returning those assets to the rightful owners. After all, the addition ‘or other purposes’ implies that the measures need not only have an evidentiary objective.⁴⁴ The provision on financial measures should be read in tandem with draft Article 14(4) that denies states to invoke bank secrecy as a ground for refusal of mutual legal assistance. The article is modeled on provisions that feature in many conventions on the suppression of international or transnational crime.⁴⁵

Draft Article 14(6) makes clear that the exchange of information is not dependent on a prior request to that effect. In other words, states are allowed to take the initiative in notifying other states of any information that could ‘assist the competent authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by that State pursuant to the present Draft articles’. This so-called ‘spontaneous exchange of information’ originates in the regulative framework of the Schengen Agreement and Convention and has been replicated in other instruments.⁴⁶ It is a valuable addition in treaties on mutual legal assistance, as states may for instance be ignorant about the presence of a suspect of crimes against humanity on their territory. Any information may trigger an investigation and/or subsequent requests for further evidence.

C. *Procedural Regulations in the Annex*

As indicated earlier, the annex contains a number of procedural regulations that serve to facilitate the international cooperation between sovereign states. All these rules are well known and require few comments. Paragraph 2 of the annex stipulates that states are to establish a central authority for the reception and further processing of requests for mutual assistance. In issuing the request, states are to comply with certain formalities as to the format and language of the request which must contain information on the identity of the authority making the request, the motive, the fact pattern, the suspect (if possible), the nature of the assistance and the purpose for which it is sought.⁴⁷

Paragraphs 6–12 of the annex concern the response of the requested state. Worth mentioning in particular are paragraphs 6 and 8. The former stipulates that the request is to be executed according to the national law of the requested

43 Draft Art. 14(3)(h).

44 ILC Report, *supra* note 1, at 113–114, § 15.

45 See, for instance, Art. 7(5) Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances.

46 See, for instance, Art. 18(4) UNCTOC and Art. 7 Convention on Mutual Assistance.

47 ILC Report, *supra* note 1, Annex, at 18, §§ 3 and 4.

state, but that procedures specified in the request should be followed, to the extent that they are not contrary to the national law of the requested state. The provision is well known in MLATs and serves to reconcile the principle of *lex loci regit actum* — entailing that investigative measures are governed by the law of the state where they are executed — with the practical consideration that the results of the act of assistance will be used in criminal proceedings in the requesting state.⁴⁸ Paragraph 8 exhaustively enumerates the grounds that states may invoke for the refusal of a request. Apart from some formal grounds, the provision mentions sovereignty, security, *ordre public* or other essential interests that may be prejudiced by the execution of the request. Moreover, the requested state is allowed to refuse assistance if it would be precluded by its own national law to perform the action in respect of a similar offence, were the state to have jurisdiction over that offence.⁴⁹ The reason for such inhibition could not be that the conduct does not constitute a criminal offence under the law of the requested state, because, as indicated before, states parties are under an obligation to criminalize crimes against humanity in their legislation. In other words, the provision does not introduce double criminality by the back door.

Paragraph 13 of the annex gives expression to the principle of purpose limitation. The requesting state is not allowed to transmit or use information or evidence provided by the requested state for other investigations, prosecutions or judicial proceedings without the prior consent of the latter. The principle is analogous to the specialty doctrine in extradition law. That witnesses and experts who are summoned to bear testimony in the requesting state must obtain a ‘safe conduct’ and are not to be prosecuted or punished for any offences committed prior to them leaving the requested state is a generally accepted principle and practice in international cooperation in criminal matters. Inclusion of this arrangement in paragraph 15 is therefore self-evident. Equally common is the transfer for purposes of testimony or identification of persons that are detained in the requested state. The person in question has to freely consent to the transfer. It makes sense that this person is kept in custody, while remaining in the requesting state and that, after his performance, he is to be transferred to the requested state again, without the latter having to submit an extradition request.⁵⁰

All these provisions are generally known in MLATs and none of them is controversial. At most one could wonder why the drafters have opted to incorporate some provisions in the Annex and not in draft Article 14 itself or vice versa. Would it not have stood to logic, from a systematic perspective, to add ‘bank secrecy’ to the other grounds for refusal in paragraph 8 of the annex? The explanation for this separation is probably that ‘bank secrecy’ is not

48 See for a similar provision, for example, Art. 4 Convention on Mutual Assistance in Criminal Matters.

49 ILC Report, *supra* note 1, Annex, at 19, § 8(c).

50 See the extensive regulation in §§ 17–19 annex (ILC Report, *supra* note 1, at 20) that verbatim follows Art. 18(10–12) UNCTOC.

allowed as ground for refusal, whereas states can at their option invoke the grounds enumerated in paragraph 8. The drafters wanted to make sure that the prohibition of bank secrecy as a ground for refusal would supersede any deviating arrangement in other instrument.

4. Some Final Reflections

In drafting the provisions on extradition and mutual legal assistance the ILC has navigated between producing a flexible and general framework and adapting the system more specifically to the nature of crimes against humanity. Of course, it is difficult to predict whether this arrangement will fully work in practice. In general, the position of the ILC is rather conservative and one wonders whether some provisions could not have been more dauntless, for instance, by further reducing the scope for refusal of legal assistance.⁵¹ One could also contend, however, that the cautious and flexible approach is an asset. On the one hand, the draft articles provide a solid normative base by stipulating that the convention takes precedence over other treaties whenever the former affords greater mutual legal assistance.⁵² On the other hand, draft Article 14(5) explicitly allows and encourages states parties to conclude further-reaching bilateral or multilateral agreements. Initiatives like the recent one on developing a comprehensive treaty on extradition and mutual legal assistance in respect of all core crimes are therefore officially endorsed.⁵³

Another important question is to what extent provisions on extradition and mutual legal assistance should be attuned to the specific nature of the crime they aim to counter. In the context of the deliberations on the UNCTOC, the issue gave impetus to some discussion. The delegation of Australia favoured a more detailed provision along the lines of Article 7 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁵⁴ Taking the advisability of a crime-centred approach as point of departure, would it not have been preferable if the ILC had taken even more the particular exigencies of international cooperation in respect of crimes against humanity into account?⁵⁵ A comparison with the ICC Statute may shed light on this question.

51 Amnesty International, *supra* note 8, at 15, has criticized the grounds for refusal of assistance as intolerably broad and vague.

52 Draft Art. 14(7). It should be observed that the draft convention goes beyond Art. 18(6) UNCTOC and Art. 46(6) Convention against Corruption, lacking a similar rule of priority.

53 The initiative has been taken by Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia. See Parliamentarians for Global Action, *Background Information: Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*, 2017, available online at www.pgaction.org/pdf/Background-Information-MLA-Initiative.pdf (visited 25 May 2018).

54 Commission on Crime Prevention and Criminal Justice, *International Cooperation on Combating Transnational Crime: Question of the Elaboration of the International Convention against Organized Transnational Crime*, Sixth session, UN Doc. E/CN.15/1997/7/Add.1 (1997), at 15.

55 Some delegations have expressed critical comments, accusing the ILC of taking similarities with the regimes that have been employed in respect of other crimes too much for granted.

It is remarkable that the draft articles on extradition and mutual legal assistance do not differ considerably from the parallel provisions in Part 9 of the ICC Statute. Obviously, the ICC Statute does not contain an *aut dedere, aut judicare* device, as the option of national prosecution is generally obsolete if the case has been held to be admissible. The implications of the complementarity principle come to the fore in Article 90 of the ICC Statute, addressing the situation of competing requests. Draft Article 14(3) largely mirrors the corresponding Article 93 in the ICC Statute. The latter explicitly mentions the questioning of any person being investigated or prosecuted (sub-section (c)) and refers to the states' obligation to offer protection to victims and witnesses and the preservation of evidence (sub-section (j)). Such arrangements reflect the limited powers of international judicial institutions in a vertical context of cooperation, rather than the particularity of the crimes. Interestingly, Article 93(1)(g) specifically alludes to the exhumation and examination of grave sites, whereas the ILC has encompassed this investigative measure under the heading of 'obtaining forensic evidence'. The leeway for states parties to invoke grounds for refusal is limited to 'an existing fundamental legal principle of general application in the law of the requested State' (Article 93(3) of the ICC Statute). This is arguably more restrictive than the 'sovereignty, security, *ordre public* or other essential interest' that feature in the annex. I tend to agree with Amnesty International that the current phrasing is overly broad, especially in view of the fact that other treaties dealing with international crimes, like the Geneva Conventions and the Convention against Torture, do not contain a similar qualification of the obligation to cooperate.⁵⁶

It is incontrovertible that the suppression of international crimes involves specific evidentiary issues that pervade mutual legal assistance. The assessment of superior responsibility for war crimes or crimes against humanity often requires information on the chain of military command. States may be reluctant to divulge this information as it may easily collide with their national security interests. Article 72 of the ICC Statute acknowledges this problem and contains a balanced procedure that serves to reconcile the conflicting interests. This procedure originates from the experience of the *Blaškić* case, in which the ICTY Appeals Chamber — confronted with an adamant state (Croatia) — had taken great pains to meet the latter's concerns by introducing devices that would guarantee discretion.⁵⁷ One cannot expect a treaty regulating interstate cooperation to adopt such a provision, because Article 72 of the

See, for example, the statement by the delegation of Portugal: 'we would advise the Commission to proceed carefully when considering adopting solutions that have proved to be successful for other types of crimes. We should avoid falling into the temptation of simply transposing already existing regimes that were not designed for the specific context and legal nature of crimes against humanity.' *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.18, 23 October 2017, available online at <http://papersmart.unmeetings.org/media2/16154208/portugal.pdf> (visited 25 May 2018).

56 See Amnesty International, *supra* note 8, at 15.

57 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, §§ 67–69.

ICC Statute mirrors a vertical structure of cooperation in which international criminal courts and tribunals wield more power over states to accomplish their objectives. In a similar vein, it is highly unlikely that a complete abolition of functional and personal immunities as envisaged in Article 27 of the ICC Statute is feasible in the interstate context. Draft Article 6(5) stipulates that '[e]ach State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position, is not a ground for excluding criminal responsibility.' The admonition is apposite as far as the prosecution of an office holder by his own state is concerned, but would obviously not apply in respect of the prosecution of an incumbent foreign head of state, in view of the finding of the International Court of Justice in the *Arrest Warrant* case that personal immunities still persist in the horizontal context.⁵⁸ Any extradition request for the surrender of a foreign head of state would equally be moot. In this context the delegation of the Republic of Korea has rightly pointed at another, more modest, proposition of the Drafting Committee on immunities, reading that 'immunity *ratione materiae* shall not apply for certain crimes under international law including crimes against humanity'. The delegation favours a careful review of the subject matter in the ILC drafting process.⁵⁹

In short, a comparison of the regulative framework on surrender and mutual legal assistance in the ICC Statute with the parallel provisions in the draft articles warrants two conclusions. First, the fact that the draft articles do not considerably differ from similar provisions in the ICC Statute may indicate that the ILC has opted for staying on the safe side. Secondly, the elements in which the two regimes differ can be attributed to the distinction between vertical and horizontal models of cooperation, rather than to the need of attuning the model of cooperation to the peculiarities of crimes against humanity.

Some delegations have censured the ILC's draft articles for lacking an empirical basis and insufficiently taking the *opinio juris* of states into account.⁶⁰ Although this criticism has some superficial appeal, as far as mutual legal assistance is concerned it is problematic for two reasons. First of all, the consequences of mutual legal assistance, whether positive or negative, do not often transpire in criminal judgments. It may, for instance, be highly difficult to ascertain whether insufficient cooperation has caused the failure of a criminal trial or an acquittal, due to lack of credible evidence. After all, prosecutions of international crimes are notoriously complex and often haunted by evidentiary

58 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment of 14 February 2002, ICJ Reports (2002) 3, § 58. On the subject of immunities, see the contribution by M. Frulli in this special issue of the *Journal*.

59 Republic of Korea, *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.21, § 38.

60 See in particular the statement of the Chinese delegation, arguing that 'many provisions of the related draft articles lacked empirical analysis, as they derived mainly from analogous provisions of existing international conventions on international crimes and required a comprehensive review of the existing practice and *opinio juris* of States'. See China, *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.18, available online at <http://papersmart.unmeetings.org/media2/16154538/china-e-.pdf> (visited 25 May 2018).

problems, due to cultural differences and unreliability of testimonial statements of traumatized witnesses.⁶¹ It would indeed require a sophisticated and comprehensive empirical investigation to find out which shortcomings can be attributed to deficient cooperation. Secondly, and more importantly, domestic prosecutions of crimes against humanity have been scarce. In her seminal article on the ‘state of the art’ in respect of developments in the law of crimes against humanity, Leila Sadat observed that only ‘[a] handful of national jurisdictions incorporated crimes against humanity in one form or another in their domestic legal systems, the best known of which were Canada, Israel, and France,’ without elaborating on the case law.⁶² There has been little practice to offer guidance to the ILC, especially not in the realm of international cooperation. The present draft articles intend to address precisely this lacuna, and the proposed framework on extradition and mutual legal assistance makes for a promising start.

61 See the landmark study of N.A. Combs, *Fact Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2013).

62 L. Sadat, ‘Crimes Against Humanity in the Modern Age’, 107 *American Journal of International Law* (2013) 334–377, at 341. In a similar vein, R. Cryer et al., *An Introduction to International Criminal Law and Practice* (3rd edn., Cambridge University Press, 2014), at 70, noting that ‘domestic prosecutions (of international crimes) are sparse’.

Participation, Reparation, and Redress

Draft Article 12 of the ILC's Draft Articles on Crimes
Against Humanity at the Intersection of
International Criminal Law and Human Rights Law

Carla Ferstman* and Merryl Lawry-White**

Abstract

This article considers primarily draft Article 12 of the International Law Commission's (ILC) draft articles on crimes against humanity, which address questions of victim participation and reparation, as well as the right to complain and the protection of complainants, witnesses, victims and others. In analysing the different aspects of draft Article 12, the authors outline ways in which its provisions could be strengthened. They note that, in several respects, draft Article 12 does not go far enough in articulating victims' rights and leaves too much to be determined by states' domestic law. In so doing, the text risks undermining certain rights recognized and protected under international law and may impede realization of some of the central objectives of the draft articles (and, thus, the convention of which the draft articles are intended to form the basis), including affording justice and eradicating impunity for crimes against humanity, harmonization of relevant laws and facilitating mutual cooperation. The authors also argue that the draft articles as a whole would benefit from a more holistic vision of victims' rights. The formulation of the draft articles should reflect that past, current and future potential victims underlie the rationale for a convention on crimes against humanity. The authors hope that their reflections will prove useful to states and other actors, as they submit comments on the draft articles prior to their finalization by the ILC in 2019.

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1. Introduction

In 2013, the International Law Commission (ILC) included the topic of crimes against humanity in its long-term programme of work.¹ In the same year, the United Nations General Assembly ‘t[ook] note’ of the ILC’s decision.² The overall objective of the draft articles is to form the content of ‘a convention on the prevention and punishment of crimes against humanity’, on the basis that — as framed by the Special Rapporteur — ‘prevention, punishment and inter-State cooperation’ regarding crimes against humanity ‘appears to be a key missing piece in the current framework of international law, and in particular, international humanitarian law, international criminal law, and international human rights law’.³ The ILC’s draft articles on crimes against humanity expressly address questions of victim participation and reparation, as well as the right to complain and the protection of complainants, witnesses, victims and others. These rights, and corresponding obligations, are primarily contained in draft Article 12, which is examined in this article. However, as we argue further, the text of the draft convention would benefit from a more holistic vision of victims’ rights. Victims’ rights, and the role of victims, cannot and should not be restricted to a single article; rather, these issues should be embedded throughout. As suggested by the first line of the Preamble — ‘[m]indful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity...’ — it is past victims and potential future victims that motivate and compel the need for a convention. We also argue that the draft articles do not go far enough in articulating victims’ rights and leave too much to be determined by states’ domestic law. In so doing, the text may risk undermining certain rights recognized and protected under international law and may impede realization of some of the central objectives of a convention, including affording justice and eradicating impunity for crimes against humanity, harmonization of relevant laws and facilitating mutual cooperation.

In preparing this article, we have drawn on a paper we authored for the nongovernmental organization REDRESS, which was submitted to the Special Rapporteur, Mr Sean D. Murphy in March 2018.⁴ We begin by identifying a number of cross-cutting issues that affect the realization of victims’ rights in the draft convention on crimes against humanity. We then proceed to

1 *First report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/680, 17 February 2015 (hereinafter, ‘First Report’), § 1.

2 GA Res. 68/112, 18 December 2013, § 8.

3 First Report, *supra* note 1, §§ 10 ff. See also *Report of the International Law Commission, Sixty-ninth Session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10 (hereinafter, ‘2017 ILC Report’), § 46; General Commentary, §§ 2–3.

4 C. Ferstman and M. Lawry-White, *Fostering Victims’ Rights in the Proposed Crimes Against Humanity Convention: Comments to the International Law Commission*, REDRESS, March 2018, available online at <https://redress.org/wp-content/uploads/2018/04/CAH-Convention-and-Victims-Rights.pdf> (visited 9 July 2018).

analyse each of the sub-paragraphs of draft Article 12, and thereafter also identify areas not currently covered by the text, setting forth concerns arising from them and options to resolve them.

2. The Evolution of Draft Article 12

Draft Article 12, entitled ‘Victims, witnesses and others’, reads:

- (1) Each State shall take the necessary measures to ensure that:
 - (a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and
 - (b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.
- (2) Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.
- (3) Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Paragraph 2 of the ILC’s commentary to draft Article 12 reflects upon the relevant practice underlying the choice to include this article:

[m]any treaties addressing crimes under national law prior to the 1980s did not contain provisions with respect to victims or witnesses and, even after the 1980s, most global treaties concerned with terrorism did not address the rights of victims and witnesses. Since the 1980s, however, many treaties concerning crimes have included provisions similar to those appearing in draft article 12, including treaties addressing acts that may constitute crimes against humanity in certain circumstances, such as torture and enforced disappearance. Some of the statutes of international courts and tribunals that have jurisdiction over crimes against humanity, notably the 1998 Rome Statute of the International Criminal Court, have addressed the rights of victims and witnesses, and the General Assembly of the United Nations has provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity.⁵

5 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 12, § 10. Footnotes omitted.

Throughout the ILC's commentary, the different elements of draft Article 12 are discussed by reference to this practice, as it has evolved over time. While the right to an 'effective remedy' has been included in human rights treaties since the Universal Declaration of Human Rights, the practice of states, human rights bodies and other relevant actors has interpreted and evolved the content of that right. The role of victims and their rights is given even greater prominence in international criminal law and greater specificity and rigour in human rights law. The draft articles, and draft Article 12 in particular, reflect this trend. But, in certain key respects, do not do so fully.

The first draft of Article 12 was presented in the Special Rapporteur's third report to the ILC (hereinafter, Third Report) and addressed the questions of complaints, protection and victims' rights.⁶ The drafting committee subsequently considered draft Article 12 at the ILC's sixty-ninth session. Certain victims' rights had been tangentially touched upon in the Special Rapporteur's second report, particularly in the context of the need for 'prompt' investigations.⁷ At the 68th ILC session (when the Special Rapporteur's second report was submitted), the ILC Secretariat also submitted a memorandum on treaty monitoring mechanisms.⁸ This is discussed in more detail in the final section of this contribution. As is customary, states commented on the draft articles throughout the process, including during the General Assembly Sixth Committee's sessions. Certain states, such as Poland, advocated a more 'victim-centred' approach from 2015 onwards.⁹ The position and concerns of various states are referenced, as relevant, throughout this article.

3. General Approach to the Drafting of the Convention and the Impact for Victims' Rights

In his three reports to the ILC and related writings and statements, the Special Rapporteur has outlined his general approach to the drafting of the articles, which is based on the recognition of multiple purposes for a convention on crimes against humanity, on the consistency of his proposals with existing

6 *Third report on crimes against humanity* By Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/704, 23 January 2017 (hereinafter, 'Third Report'), Ch. IV.

7 The Drafting Committee amended the wording of draft Article 12(1)(a) so that the latter can 'be better aligned with the investigation that is to occur under draft Article 8'. See *Statement of the Chairman of the Drafting Committee, 69th Session of the International Law Commission*, 1 June 2017, available online at <http://legal.un.org/ilc/guide/7.7.shtml> (visited 9 July 2018) (hereinafter, '*Statement of the Chairman of the Drafting Committee*'), at 5.

8 *Crimes against humanity, Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission, Memorandum by the Secretariat*, UN Doc. A/CN.4/698, 18 March 2016 (hereinafter, '*Memorandum by the Secretariat*').

9 Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.26, 28 October 2016, § 54. See also Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/70/SR.21, 6 November 2015, § 68 and Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.19, 24 October 2017, § 93.

international obligations, and on the objective to produce draft articles that could realistically be adopted by the Commission and, in the future, by states. We will now analyse each of these three components in turn.

A. *A Recognition of the Multiple Bases and Purposes of the Convention under International Law*

First, the text encompasses criminal law aspects in recognition that a crime against humanity constitutes a crime under international law giving rise to individual criminal responsibility. Second, it engages state responsibility in recognition that a crime against humanity attributable to a state constitutes an internationally wrongful act giving rise to a state's secondary obligation to afford reparations. Furthermore, it engages states' conventional and customary international law obligations to prevent, prohibit, punish and repair human rights violations, which form the underlying bases for the widespread or systematic crimes captured by the draft articles. If states have particular responsibilities to prevent, prohibit, punish and repair singular acts of torture, extrajudicial executions, disappearances or rape, those responsibilities persist when those same acts are committed in a widespread or systematic matter against a civilian population.

These multiple purposes are inherently linked, as should be the approaches taken to achieving them. States' obligations are not only engaged in a secondary sense when they commit an internationally wrongful act, but also their procedural obligations are engaged at a much earlier stage to give effect to the substantive obligation to prevent crimes against humanity and to ensure the proper application of individual criminal responsibility. Moreover, a state's obligation to afford reparations is not extinguished when an individual is determined to be criminally responsible for crimes against humanity. Depending on the circumstances, a state may be jointly or severally liable for reparations together with the individual perpetrator(s) and thereby subject to damages above and beyond the harm caused by its own unlawful conduct¹⁰ or, at least, adjudged to be liable in proportion to its specific responsibility for the unlawful conduct.¹¹ In either scenario, its responsibility to repair would be engaged.

10 See for instance, Democratic Republic of the Congo, Military Garrison Court of Ituri, *Bongi Massaba case*, Judgment of 24 March 2006, in which the Court ordered Mr Blaise Bongi Massaba jointly with the Democratic Republic of the Congo to pay the stipulated amount of damages to the victims, cited in ICRC, IHL Database, Customary IHL, Practice Relating to Rule 150, Reparation, Section B, Compensation, available online at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2.rulrule150.sectionb> (visited 9 July 2018).

11 This was the approach taken by a Chadian court that had ruled on the crimes allegedly committed by 22 former members of the security services. It determined that the Chadian Government was responsible to pay one half of the sum of reparations awarded in the case. See *Ministère public et Ismael Hachim et autres contre Saleh Younous Ali, Warou Fadoul Ali et Autres*, Decision of 25 March 2015, cited in R. Brody, 'Victims bring a Dictator to Justice: The Case of Hissène Habré', *Brot für die Welt*, 2nd updated edition, June 2017, available online at <https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2.Downloads/Fachinformationen/Analyse/Analysis70-The.Habre.Case.pdf> (visited 9 July 2018), at 15.

Even in those circumstances where the impugned acts or omissions cannot be attributed to the state (in whole or in part), international standards encourage states to ‘endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.’¹²

Certain states have expressed concern about the ‘burden’ that they may bear in respect of reparations.¹³ Some of these concerns arise from a lack of clarity — a question we address further below. Others arise from the practical difficulties to put in place reparations schemes for mass crimes, such as the high financial costs associated with compensating large numbers of individuals and the competing budgetary priorities of the state and the inherent complexity of claims programmes involving large numbers of victims. However, there is a logic to states addressing reparations, even where their international responsibility is not engaged. Indeed, in addition to engaging a state’s due diligence obligations, many of the objectives of reparation fall naturally within a state’s scope of concern. These encompass recognition, rebuilding dignity, reaffirming the rights of victims as citizens, acknowledging the importance of the norms that have been breached, as part of a wider commitment to fostering the rule of law. To distinguish victims based on the perpetrators’ identity as a state or non-state actor would undermine many of the objectives just laid out and jeopardize other objectives of the draft convention, which include contributing to the fight against impunity.

B. Consistency with States’ Existing International Obligations including those Accepted by States Parties to the International Criminal Court

The Special Rapporteur has underscored that the text should align with states’ pre-existing international obligations. In his first report, he indicates that ‘[a] convention on crimes against humanity should build upon the text and techniques of relevant existing treaty regimes, but should also avoid any conflicts with those regimes,’¹⁴ and makes specific reference to the Genocide Convention, the Torture Convention and the Rome Statute. The principle of coherence should apply not only to conventions but also to customary international law, particularly with respect to the legal frameworks applicable to

12 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, 16 December 2005 (hereinafter, ‘*Basic Principles and Guidelines*’), § 16. See also § 15.

13 See e.g. Malawi, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.26, 1 November 2017, § 135: ‘The issue that merits further consideration under this draft article 12 is the extent to which states will bear the burden of reparations, regard being had to the difficulties that may be associated with the discharge of that burden’; Algeria, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.21, 25 October 2017, § 16: ‘Paragraph 3 of [draft Art. 12] was unclear as to what the state’s duty to provide reparation and other remedies for victims entailed.’

14 First Report, *supra* note 1, § 20.

offences that form the underlying bases for crimes against humanity (e.g. torture, enforced disappearances, sexual violence).

In the area of victims' rights, however, the text of draft Article 12 neither aligns with international standards, including the standards articulated in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter, UN Basic Principles and Guidelines)¹⁵ — which 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms';¹⁶ — nor with the ILC's past work on reparations, including the articles on the responsibility of states.¹⁷ And this, despite the commentary's explicit reference to the General Assembly's 'guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity', including the UN Basic Principles and Guidelines.¹⁸ At the same time, there is a need to take into account and reflect those aspects of the draft articles that are specific to it. The draft articles articulate states' obligations vis-à-vis crimes against humanity proceedings that occur largely at a domestic level (whether they concern territorial or extraterritorial bases of jurisdiction). This introduces fundamental differences conceptually and practically from a statute that sets out the procedures of an international court. The inclusion of state responsibility necessitates also a more robust approach to reparations than treaties such as the International Criminal Court (ICC) Statute, which focus exclusively, instead, on individual criminal responsibility.

C. *Focusing on a Text that is 'Adoptable'*

There is debate about how 'progressive' and detailed a draft convention on crimes against humanity should aspire to be: 'too progressive a proposal might not attract many ratifications while too conservative a proposal might miss an opportunity to protect the humanitarian goals the convention hoped to promote'.¹⁹ The Special Rapporteur appears to have taken a cautious

15 *Basic Principles and Guidelines*, *supra* note 12.

16 *Ibid.*, Preamble. See also T. Van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009) 19–40, at 19, 26.

17 *Articles on the Responsibility of States for Internationally Wrongful Acts*, in the *Report of the International Law Commission on the work of its fifty-third session, 23 April-1 June and 2 July-10 August 2001*, UN Doc. A/CN.4/SER.A/2001/Add.1, (hereinafter, 'ARS').

18 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 12, § 3 and fn. 452.

19 L.N. Sadat and D.J. Pivnichny, 'Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity', 16–17 May 2014, available online at <https://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf> (visited 9 July 2018), § 72.

approach to certain controversies by either omitting the disputed provisions from the draft articles' text or affording states greater latitude to implement provisions in accordance with their domestic law, even if this results in the absence of adequate or sufficiently clear baselines for state compliance. The latter approach is particularly evident in respect of victim participation and reparations, despite these issues having been consistently recognized as crucial for the full realization of the rights to truth and to justice.²⁰ Yet, guaranteeing these and other victims' rights is essential for a draft convention that focuses primarily on national proceedings, as distinct from *sui generis* proceedings taking place before the ICC and other international criminal tribunals.

While it is important to develop a text that states feel confident to sign on to and ratify, a draft convention should contribute to the overall clarity of the law concerning crimes against humanity and should not inadvertently lower or weaken pre-existing law. The draft convention must also be sufficiently robust and precise in order to be effective. The overall goal of the text should be to develop a workable framework to clarify obligations and aid states to deal practically with all facets of those obligations without exception. The potential for effective cooperation is also premised on sufficient cross-border consistency.

4. Victims' Rights in the Draft Convention: the Need for a Holistic Approach

As noted earlier, the basis for a draft convention is to address a lacuna in the international and transnational criminal law framework, as the 'prevention, punishment and inter-state cooperation' regarding crimes against humanity appear to be 'a key missing piece in the current framework of international law, and in particular, international humanitarian law, international criminal law, and international human rights law'.²¹ The focus on prevention and punishment is reflected in draft Articles 1 and 2.²² However, addressing an international crime requires more than punishment in the traditional sense of investigation, prosecution and conviction.

Every violation of a right guaranteed under international law generates an obligation to redress the wrong and a corresponding right to a remedy

20 See e.g. Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), Pre-Trial Chamber I, 13 May 2008, §§ 32–39; Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, *Ieng Sary* (Case 002), Pre-Trial Chamber, 29 August 2008, § 5.

21 First report, *supra* note 1, §§ 10 ff.; 2017 ILC Report, *supra* note 3, § 46, General Commentary, §§ 2–3.

22 Furthermore, an obligation to prevent crimes against humanity is included in draft Art. 7 of the ILC's treaty project. For a detailed analysis of the provision, see W. Schabas, 'Prevention of Crimes Against Humanity', in this special issue of the *Journal*.

(*ubi jus, ibi remedium* — where there is a right, there is a remedy). Indeed, the ILC's articles on state responsibility codify the principle that an obligation to make reparation is inherent in an internationally wrongful act,²³ echoing a famous *dictum* from the *Chorzow Factory* case,²⁴ which has subsequently been incorporated into the reasoning of the International Court of Justice and many other international tribunals.²⁵ The international community's increasing emphasis on reparations indicates that victims' rights have an important role to play in affording justice for international crimes and negating impunity. Reparations do more than address victims' needs: 'they avoid a climate of impunity and preserve principles of legality.'²⁶ They also provide some measure of recognition of victims' suffering on the part of society. Furthermore, prevention, punishment and reparation are intrinsically connected to each other — for example, reparation and punishment play a role in prevention; punishment may contribute to reparation and reparation to punishment. A future convention on crimes against humanity will be concerned with combatting impunity from all angles, thus adopting a holistic approach.

As explained by the UN Impunity Principles, 'impunity' is a multi-faceted notion:

Impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished, to provide the victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.²⁷

The Council of Europe recommended a 'holistic approach' be adopted when addressing draft Article 12.²⁸ It referenced in this respect the revised Guidelines on the protection of victims of terrorist acts,²⁹ noting *inter alia* the importance of involving victims of terrorism in the fight against terrorism,

23 ARS, *supra* note 17, Art. 31.

24 *Factory at Chorzow (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, at 29, 47.

25 See, for example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports (2004) 136, § 152; ICJ, *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, ICJ Reports (2005) 168, § 259; IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment on compensatory damages, 21 July 1989, § 25; ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment of 12 May 2014, § 41; ECtHR, *Papamichalopoulos and Others v. Greece*, Appl. No. 14556/89, Judgment of 31 October 1995, § 36; ACHPR, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, Ruling on Reparations, 5 June 2015, § 60.

26 D. Shelton, 'The Right to Reparations for Acts of Torture: What Right, What Remedies?' 17 *Journal on Rehabilitation of Torture Victims and Prevention of Torture* (2007) 96, at 97.

27 *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/Sub.2/1997/20, Annex II, 26 June 1997, § 20(1).

28 Council of Europe, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.22, 26 October 2017, § 31.

29 *Revised Guidelines of the Committee of Ministers on the Protection of Victims of Terrorist Acts*, CM(2017)44-final, 19 May 2017.

implementing a general legal framework to assist victims and providing assistance to victims in legal proceedings. Several states recommended expanding the scope of the draft articles. In 2017, Belarus stated that ‘[d]raft article 1 (Scope) should include a reference to protection of victims, which would complement the focus on prevention and prosecution in the draft articles’,³⁰ and Poland reiterated over multiple years its stance that ‘the draft articles would benefit from the introduction of a victim-oriented approach. ... It should thus be stipulated in draft articles 1 and 2 that the draft articles also applied to “a remedy and reparation for victims”’.³¹ This approach would align more closely with international law’s conception of victims’ rights, as well as furthering the draft articles’ overall objectives.

5. Draft Article 12: ‘Victims, Witnesses and Others’

The phrase ‘victims, witnesses and others’ first appears in the Third Report, under the slightly differently worded heading ‘victims, witnesses and other affected persons’.³² In that report, the Special Rapporteur notes that ‘victims, witnesses and others may wish to come forward with information pertaining to the commission of a crime, which may be of assistance in preventing further crimes, apprehending alleged offenders and prosecuting or extraditing those offenders’.³³ While none of these terms are defined within the text, ‘others’ is explained in the commentary to relate to complainants — natural or legal persons who lodge complaints with the authorities and, as a consequence, are entitled to certain protections, without prejudice to the rights of the accused.³⁴ In the 2017 ILC’s Report, it is clarified further that ‘[t]he term “any person” includes but is not limited to a victim or witness of a crime against humanity, and may include legal persons such as religious bodies or non-governmental organizations’.³⁵

The recognition that anyone can make a complaint is important. There may be many reasons why a direct victim may not wish to file a complaint: the victim may be afraid of repercussions, he or she may be traumatized or in flight. Similarly, it should be possible — and indeed encouraged — for public

30 Belarus, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.20, 28 November 2017, § 54.

31 Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/71/SR.26, 28 October 2016, § 54. See also Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/70/SR.21, 6 November 2015, § 68 and Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.19, 24 October 2017, § 93.

32 Third Report, *supra* note 6. The heading is changed to ‘Victims, Witnesses and Others’ in the 2017 ILC Report, *supra* note 3, § 45.

33 Third Report, *supra* note 6, § 160.

34 *Ibid.*, §§ 160, 180.

35 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 12, § 6.

officials to inform the competent authorities when they see other officials or non-state actors planning or partaking in crimes against humanity.

Only draft Article 12(1) deals with 'others'. The remainder of Article 12 focuses particularly on victims.

A. Draft Article 12(1)(a): the Right to Complain

Draft Article 12(1)(a) should be read in conjunction with a state's obligation to investigate set out under draft Article 8.³⁶ This is to be understood as an obligation that exists independent of the lodging of a formal complaint.³⁷ The Commentary to draft Article 8 could be usefully expanded to capture the principle of effectiveness. The UN Human Rights Committee has affirmed that 'the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'.³⁸ The Grand Chamber of the European Court of Human Rights (ECtHR) has recognized that allegations concerning serious violations of human rights should lead to investigations that are 'capable of leading to the identification and punishment of those responsible', otherwise, 'it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity'.³⁹ Particularly relevant for crimes against humanity, 'certain lines of inquiry, which fail to analyse the systematic patterns surrounding a specific type of violations of human rights, can render the investigations ineffective'.⁴⁰

Draft Article 12(1)(a) is a separate obligation to enable complaints to be made to the competent authorities. Complaints processes must be accessible to all

36 Draft Art. 8 reads: 'Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.' The provision is further analysed in A. Coco, 'The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9 and 11 by the International Law Commission', in this special issue of the *Journal*.

37 This is consistent with the approach taken by the Special Rapporteur: 'Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints that will be made, a violation of article 12 of the 1984 Convention against Torture is possible even if the state has received no such complaints. The Committee against Torture has indicated that state authorities must "proceed automatically" to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with "no special importance being attached to the grounds for the suspicion".' See 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 8, § 2. The African Commission on Human and Peoples' Rights has found, similarly, that 'whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion'. See *Article 19 v. Eritrea*, Communication 275/03, 30 May 2007, § 72.

38 *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 March 2004 (hereinafter: 'General Comment No. 31').

39 ECtHR, *El-Masri v. The former Yugoslav Republic of Macedonia* (Grand Chamber), Appl. No. 39630/09, Judgment of 13 December 2012, § 182.

40 Inter-American Court of Human Rights (IACtHR), *Case of the Rochela Massacre v. Colombia* (Merits, Reparations and Costs), Series C No. 163, 11 May 2007, §§ 156, 158 and 164.

and capable of being exercised in practice and ‘should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children.’⁴¹ Information should be communicated in a manner in which it can best be understood.⁴²

While the draft articles necessarily operate at a level of generality, it would be important for them and the ILC’s commentary to contain language that requires states to operationalize the right to complain and remove barriers to filing complaints. For instance, complaints processes should be non-discriminatory. There should be no fee and no time limit to filing complaints concerning crimes against humanity. Officials should accept complaints regardless of whether they are submitted orally or in writing and irrespective of whether they are accompanied by supplementary evidence. The complaints process must be safe and secure, and cater to victims’ needs for privacy and dignity.

The draft articles should also incorporate specifically a right to access information, which is a condition precedent to an effective complaints process and integral to operationalizing access to justice.⁴³ Access to information, including on how to make a complaint, how to obtain protection and support as well as on the circumstances in which victims may be eligible for compensation have all been incorporated into Article 4 of the EU Victims’ Directive,⁴⁴ and under the Directive, they must be applied — proactively and *ex officio* — in all cases, even without the request of the victim. Similar rights of access to information have been incorporated into national legislation worldwide.⁴⁵ The ECtHR has regularly found violations of the European Convention when states have failed to keep victims informed about the progress of criminal investigations.⁴⁶ Similar findings have been made by the Inter-American Court of Human Rights⁴⁷ and the UN Committee Against Torture.⁴⁸

41 *General Comment No. 31*, *supra* note 38, § 15(1).

42 *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* (hereinafter, ‘EU Victims’ Directive’), Recital, §§ 21–33.

43 See e.g. ECtHR, *Zontul v. Greece*, Appl. No. 12294/07, Judgment of 17 January 2012, in which it was held that by ignoring Zontul’s request for information on the progress of his case, the Greek authorities had deprived him of his right to seek compensation and to participate in proceedings following his complaint regarding torture. See also ECtHR, *Ognyanova and Choban v. Bulgaria*, Appl. No. 46317/99, Judgment of 23 February 2006.

44 EU Victims’ Directive, *supra* note 42, Art. 4(1) and Recital, § 22.

45 These are discussed in REDRESS and ISS, *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions*, September 2015, available online at <https://redress.org/wp-content/uploads/2017/11/Englishvictim-rights-report.pdf> (visited 9 July 2018) (hereinafter, ‘Victim Participation in Criminal Law Proceedings’), at 79.

46 *Zontul v. Greece*, *supra* note 43, § 71; *Ognyanova and Choban v. Bulgaria*, *supra* note 43, §§ 43, 136–137.

47 IACtHR, *Case of the Caracazo v. Venezuela* (Reparations and Costs), Series C No. 95, 29 August 2002.

48 See Committee against Torture (CAT), *Dimitrijevic v. Serbia and Montenegro*, UN Doc. CAT/C/33/D/207/2002, 24 November 2004, § 5.4; CAT, *Hajrizi Dzemail et al. v. Yugoslavia*, UN Doc. CAT/C/29/D/161/2000, 2 December 2002, §§ 9.5–9.6.

B. Draft Article 12(1)(b) — Protection from Intimidation

Draft Article 12(1)(b) makes clear that complainants, witnesses, relatives, representatives and other participants shall be protected against ill treatment and intimidation as a consequence of making a complaint, giving testimony, providing information or other evidence. The right to protection has been recognized by numerous courts and treaty bodies⁴⁹ and has been incorporated into a number of treaties⁵⁰ as well as national legislation in many countries around the world.⁵¹ Adequate protection can prove particularly important in regards to a person's decision to report a crime and to cooperate with investigations and trials.

While this protection is framed in laudably broad terms, there are a few omissions that may limit the effectiveness of the protection. As there is no justification for anyone being subjected to ill treatment or intimidation, the scope of the protection could be broadened to encompass 'associated persons'. Community members who are not relatives, representatives or participants are often targeted or suffer for the actions of others within their communities. Following the words 'evidence given', the ILC could consider adding a catch-all expression, like 'or other forms of cooperation'. In addition, the use of the language 'as a consequence of' does not take account of the situation in which individuals or groups are intimidated in order to prevent them from engaging with the justice system in the first place. More neutral language such as 'in respect of' may capture such situations, as would de-linking draft Article 12(1)(b) from 12(1)(a).

The obligation to protect is qualified by the phrase '[t]hese measures shall be without prejudice to the rights of the alleged offender referred to in draft Article 11.' The rights of the accused must, of course, be respected, but the

49 See e.g. Human Rights Committee (HRC), *Rajapakse v. Sri Lanka*, UN Doc. CCPR/C/87/D/1250/2004, 5 September 2006; HRC, *Delgado Paez v. Colombia*, UN Doc. CCPR/C/39/D/195/1985, 23 August 1990; ECtHR, *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, Judgment of 25 May 1998; *Rochela Massacre v. Colombia*, *supra* note 40, §§ 155, 171.

50 See e.g. Art. 13 UN Convention against Torture; Art. 14(1) International Convention for the Protection of All Persons from Enforced Disappearance; Art. 24 Convention against Transnational Organized Crime; Arts 2(b), 6, 9(b) and 10(2) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Art. 16 Protocol against the Smuggling of Migrants by Land, Sea and Air. Victim and witness protection is a well-established feature of international criminal law. See also Rules 17, 19, 74(5), 76, 87 and 88 ICC RPE and Arts 54(3)(f), 57(3)(c), 64(2) and (6), 68 and 93(1)(j) ICCSt.; Rules 69, 75 and 81(B) ICTY RPE; Rules 34, 65(C), 69, 75, 77 ICTR RPE.

51 See *Victim Participation in Criminal Law Proceedings*, *supra* note 45, at 87–90. See also REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action*, December 2009, available online at <https://redress.org/publication/ending-threats-and-reprisals-against-victims-of-torture-and-related-international-crimes-a-call-to-action/> (visited 9 July 2018); United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, February 2008, available online at http://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/GoodPractices_for.the.Protection.of.Witnesses.in.Criminal.Proceedings.Involving.Organized.Crime.pdf (visited 9 July 2018).

duty of the state to protect is just as prevalent — it is not subjugated. As the commentary to draft Article 12 notes, at paragraph 10:

Subparagraph (b) does not provide a list of protective measures to be taking by States, as the measures will inevitably vary according to the circumstances at issue, the capabilities of the relevant State and the preferences of the person concerned.

In light of the state's duties to protect the rights of the accused, victims and associated persons and the flexibility it is afforded in doing so, language such as 'are not inconsistent with' or 'in a manner not prejudicial to' the rights of the accused might be a more appropriate formulation than 'without prejudice to'. The suggested language mirrors the wording in the ICC Statute and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as noted in the Third Report. Draft Article 12(2) adopts a similar approach.

In addition, draft Article 12(1)(b) does not address victims' wider protection needs. The ILC's commentary notes that 'the term "ill-treatment" relates not just to the person's physical well-being, but also includes the person's "psychological well-being, dignity or privacy"'.⁵² This phrase was included in the ILC's commentary on the recommendation of the drafting committee and is drawn from Article 68(1) of the ICC Statute.⁵³ However, the measures proposed as examples in the ILC's commentary show that the focus is on protection from the actions of others as a result of making the complaint (*in camera* proceedings, relocation of witnesses, etc.). This contribution argues, however, that protection needs to be much wider. International standards recognize that victims are entitled to be treated with compassion and respect for their dignity, taking into account individual victims' personal situations and immediate and special needs, age and gender. There is a positive obligation to ensure that interactions with victims are carried out in a safe environment. Every care should be taken to avoid re-victimization and re-traumatization, to ensure privacy is respected and to minimize inconvenience.⁵⁴

Certain victims, for example, children and specific groups of women and men (depending on the individual, community, the context and the violation suffered), will require particular protective measures. It has been recognized that '[w]omen victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimization, of intimidation and of retaliation connected with such violence.'⁵⁵ Stigmatization, for example, may be a deterrent in victims

52 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 12, § 9.

53 *Statement of the Chairman of the Drafting Committee*, *supra* note 7, at 5.

54 *Basic Principles and Guidelines*, *supra* note 12, § 12(b); *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013 (hereinafter, '*General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*'), §§ 81(h), (k). See also *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 32; and EU Victims' Directive, *supra* note 42, Art. 21 and Recital, § 54.

55 EU Victims' Directive, *supra* note 42, Recital, § 17.

coming forward to complain or participate in proceedings or reparation programmes. For victims who still choose to do so, the consequences — if appropriate protective measures are not in place — may endure for years, if not lifetimes.

It is recognized that particularly vulnerable individuals such as child victims must have access to procedures and forms of support that have been adapted specifically to their needs.⁵⁶ Part of fulfilling these needs is to ensure that victims are provided access to relevant assistance and support services,⁵⁷ including health, psychological, protection, social and other relevant services and the means of accessing such services,⁵⁸ as well as legal or other advice or representation and emergency financial support, where relevant or appropriate. Support should be available from the moment the competent authorities become aware of the victim's identity, and from the earliest possible moment after the commission of a crime, irrespective of whether it has been reported formally.⁵⁹ Article 68(1) of the ICC Statute does list factors that should be taken into account in determining protective measures that include age, gender, health and the nature of the crimes, with particular reference to victims of sexual and gender-based violence and children. The ILC chose not to mirror these considerations in the ILC's commentary. We would argue that they have a place in the text of the draft articles themselves — in line with the approach of the ICC Statute.

C. Draft Article 12(2) — Victim Participation

Participation in proceedings is one manifestation of a victim's right to be heard, as encapsulated, for example, in Article 10 of the European Union Victims' Directive: 'Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence ...'⁶⁰ It is also reflected in many human rights treaties, as applicable to judicial proceedings (including criminal proceedings). Article 12(2) of the Convention on the Rights of the Child, for example, provides that 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

Draft Article 12(2) draws from the wording of Article 68(3) of the ICC Statute. However, it includes a caveat that the right to participate be 'in accordance with [a state's] national law'. While, as noted in paragraph 13 of the commentary to draft Article 12, this provides flexibility and allows states to implement

56 *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, UN Doc. E/CN.15/2005/L.2/Rev.1, 25 May 2005.

57 *Basic Principles and Guidelines*, *supra* note 12, § 12(c).

58 *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, *supra* note 54, §§ 38(e) and (f).

59 EU Victims' Directive, *supra* note 42, Recital, § 37.

60 *Ibid.*

this provision in a way that aligns with their legal systems, it also allows states to compromise the intended objective of this provision altogether. If the ILC wishes to adopt the paradigm encapsulated in the ICC Statute, it might consider retaining flexibility to take into account different legal systems, but insert language similar to that contained in draft Article 11(3) — ‘subject to the proviso that the manner of participation must enable full effect to be given to the purpose for which the rights accorded under draft Article 12(2) are intended’.

Although draft Article 12(2) addresses the right to be heard, it does not contain any qualification for the victim’s informed consent or privacy, nor does it refer to states’ obligations to facilitate victim participation, particularly for vulnerable and marginalized groups, who would invariably require specific support and protection in order to participate. In addition, in order to give effect to victims’ right to participate, states should remove barriers to participation, such as ensuring that victims do not incur any expense as a result of their participation, and facilitating victims’ legal representation. These aspects could usefully be elaborated upon in the ILC’s commentary.

D. Draft Article 12(3): Right to Obtain Reparation

Crimes against humanity are inherently detrimental to victims’ dignity, agency and place in society.⁶¹ Each victim will suffer the effects of the violation in their own way. Reparation is, therefore, not charity, development or simply ‘the right thing to do’. It is the natural consequence of the violation of rights and a crucial component of the conception of rights themselves.

The ILC’s commentary emphasize that states’ obligation to afford reparation have procedural and substantive elements.⁶² However, draft Article 12(3) does not protect victims’ procedural rights to access judicial (or even non-judicial) remedies. The ‘right to obtain reparation’ does not guarantee access to a state mechanism. It is incongruent with states’ pre-existing obligations under human rights treaties — whereby a victim of a single act of torture or enforced disappearance has a right to ‘seek’ reparations before a Court or other appropriate mechanism — to suggest that victims of such crimes when perpetrated in a widespread or systematic manner have no such right. The UN Basic Principles and Guidelines specify that the obligation to respect, ensure respect for and implement human rights and international humanitarian law includes, *inter alia*, the duty to ‘provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, ... and provide effective remedies to victims, including reparation.’⁶³ Effective

61 P. de Greiff, ‘Justice and Reparations’, in P. de Greiff (ed.) *The Handbook of Reparations* (Oxford University Press, 2006) 451–477, at 460.

62 *General comment No. 3 (2012) on the Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, 13 December 2012, §§ 2, 3.

63 *Basic Principles and Guidelines*, *supra* note 12, § 3. Note, however, that the victim’s right to claim (as opposed to receive) reparations for international humanitarian law violations occurring in

remedies include prompt reparations. The draft articles and ILC's commentary omit any specification of this characteristic. The UN Basic Principles and Guidelines underscore states' obligations to afford reparations that are 'adequate, effective and prompt'.⁶⁴

Draft Article 12(3) also fails to include a standard against which reparation is to be determined, even though there is some consistency under international law as to what is required. The ILC's articles on the responsibility of states, drawing on the *Chorzow Factory* case, has described the standard for reparation as 'full' reparation, to wipe out all the consequences of the illegal act and re-establish the *status quo ante*.⁶⁵ Human rights treaties use descriptors such as 'fair', 'adequate', 'appropriate', 'proportionate to the harm' and 'equitable', which, while not lesser standards, 'help to clarify what is required, particularly when re-establishing the *status quo ante* is impossible and it is impractical to quantify the harm precisely'.⁶⁶

In contrast, the ILC's commentary simply notes 'the movement towards a more comprehensive concept of reparation'.⁶⁷ This is a reference to forms of reparation: typically a variety of forms of reparation will be necessary to adequately repair the breach. However, different forms of reparation — taken as a whole — should not amount to tokenism. The goal is to devise reparations to best approximate and respond to the variety of harms suffered.

Including a standard is necessary to ensure that the measures adopted are compliant with a state's international law obligations. Achieving the standard will be facilitated by the flexibility inherent in the *indicative* list of reparative forms and in the expression 'as appropriate', set out in draft Article 12(3). The ILC drafting committee, which added the words 'as appropriate', noted in this conjunction that 'the capacity of a responsible State to provide full compensation to all victims may be limited, especially in circumstances where a State is struggling to rebuild itself in the aftermath of a crisis'.⁶⁸ However, while recognizing that every scenario is different, such argument should not be used to compromise the standard required by international law — but, rather, a reason to re-emphasize it.

Draft Article 12(3) suggests that individual or collective reparation are in the alternative. However, the ILC's commentary notes that 'individual and

an international armed conflict is contested. See C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press, 2017), at 74–83. Furthermore, a victim's ability to claim reparations for a violation that took place outside a court's territorial jurisdiction may be hampered by immunities.

64 *Basic Principles and Guidelines*, *supra* note 12, § 11(b).

65 ARS, *supra* note 17, Arts 30, 31, 34.

66 Ferstman, *supra* note 63, at 87. 'Turning back the clock' on the harm suffered as a result of human rights and international criminal law violations will often be impossible from a victim-perspective. See e.g. M. Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice', 64 *International and Comparative Law Quarterly* (2015) 141–177.

67 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 12, § 17.

68 *Statement of the Chairman of the Drafting Committee*, *supra* note 7, at 5–6.

collective reparations may be appropriate.⁶⁹ Victims of a crime that is ‘widespread or systematic’ will usually have suffered both individually and collectively, and these two separate facets of victimization should be reflected in awards and awarded cumulatively. The ability to ensure a comprehensive reparations award relies upon the flexibility to consider various measures that may be material, symbolic, individual or collective. Rule 97 of the ICC’s Rules of Procedure and Evidence allows for reparation to be awarded ‘on an individualized basis or, where [the Court] deems it appropriate, on a collective basis or both’ (emphasis added).

In sum, coupled with the absence of a standard of reparation, it would be possible for a state to fulfil its obligations under draft Article 12(3) by providing victims with token reparation without any access to judicial oversight. This would compromise a victim’s human rights and negate a state’s obligations encapsulated in the UN Basic Principles and Guidelines to inter alia provide ‘equal and effective access to justice’ and ‘mak[e] available adequate, effective, prompt and appropriate remedies, including reparation.’⁷⁰ It would also create inconsistencies between different ILC texts and — for the reasons explained earlier — compromise the draft articles’ objectives.

6. Aspects Not Covered in the Draft Text

A. No Definition of ‘Victim’

The draft articles do not contain a definition of ‘victim’ of crimes against humanity. The drafting committee considered including a definition in the text but preferred to leave the determination to national legal systems and to provide guidance on definitions in the ILC’s commentary.⁷¹ The ILC’s commentary point out that there are many international conventions addressing international crimes, transnational crimes and human rights that refer to victims but do not define the term.

However, the strategy of ambiguity carries certain risks. The draft articles are designed to facilitate harmonization. Defining ‘victims’ is important for jurisdictional reasons, to recognize those who can provide an evidential basis for prosecutions, to designate participants in proceedings and identify recipients of protection and reparation measures. Considering that more than one state could be involved in the investigation and prosecution of a certain situation of crimes against humanity, ambiguity in the definition of ‘victims’ may create confusion, as well as unequal treatment of victims across borders. The potential for effective inter-state dispute settlement or a delocalized monitoring mechanism is also dependent upon cross-jurisdictional consistency.

69 2017 ILC Report, *supra* note 3, § 46, Commentary to draft Art. 12, § 20.

70 *Basic Principles and Guidelines*, *supra* note 12, §§ 3(c), 2(c).

71 *Statement of the Chairman of the Drafting Committee*, *supra* note 7, at 5–6.

By examining the definitions contained within certain key instruments, it is possible to see the variables that may affect who or what qualifies as a victim. These include the scope of harm, proximity to the harm and the manner in which harm was experienced or inflicted. 'Victims' could also refer to relatives or dependents of direct victims and other entities involved in trying to prevent or mitigate the harm, possibly including non-natural (i.e. legal) persons. It is not clear whether the definition will be construed to include non-natural persons — as in the ICC system.⁷² In respect of natural persons, a broad definition of 'victim' is to be recommended. The specialist Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation notes that 'to accurately reflect and incorporate the perspectives of victims and their advocates, the notion of "victim" must be broadly defined' 'within the context of women's and girls' experiences and their right to reparation'.⁷³

The scope of harm provided in draft Article 12(3) — 'material or moral' — provides some guidance as to who might qualify as a victim, but other key factors, such as the proximity of the harm, are left to discretion. Ambiguity in the text itself adds to the confusion. Draft Article 12(1)(b), for example, mentions 'complainants, victims, witnesses, and their relatives and representatives', possibly hinting at the fact that the relatives and representatives of victims do not qualify as victims themselves. Yet, in respect of certain violations — such as disappearances — it is clear that relatives of those who have been 'disappeared' are victims themselves. This lack of clarity has been identified as a point of improvement by inter alia Algeria, Poland and Estonia — the latter stating that '[t]o ensure that victims' rights are fully recognized and ultimately realized, ... [it is] important to include a definition for the term victim, as it may appear to be a gap for determining exactly which persons qualify as "victims of a crime against humanity"'.⁷⁴

A person's status as a victim is irrespective of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted and regardless of any familial or other relationship between the perpetrator and the victim.⁷⁵ This principle is important in that it recognizes that the term 'victim' and the rights flowing from it are not contingent on the variables of a criminal proceeding. Whether an individual will be investigated and found guilty of a crime will depend on factors such as prosecutorial resources, the existence of

72 Rule 85 ICC RPE.

73 Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation, adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, 19–21 March 2007, available online at <https://www.fidh.org/IMG/pdf/NAIROBIDECLARATIONeng.pdf> (visited 9 July 2018) (hereinafter, '*Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation*').

74 Estonia, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.20, 25 October 2017, § 71; Algeria, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.21, 25 October 2017, § 16; Poland, Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.19, 24 October 2017, § 92. Sweden (Nordic countries), Statement at General Assembly, 6th Committee, UN Doc. A/C.6/72/SR.18, 23 October 2017, § 57, endorsed draft Art. 12, '... although it did not contain a definition of victim of such crimes'.

75 *Basic Principles and Guidelines*, supra note 12, § 5.

sufficient proof that he or she committed the act and had the requisite intent. None of these factors are relevant to the status of a person as a ‘victim’, which depends on whether the person suffered harm as a result of a crime (regardless as to whether the crime is prosecuted or not or there is a conviction as a result of any prosecution). This principle is recognized in the EU Victims’ Directive, which requires states to provide support to victims, regardless of whether they play a role in the proceedings, whether proceedings ever take place or even whether the perpetrator is identified.⁷⁶ The principle has also been incorporated at the national level into criminal injury compensation schemes that afford victims access to support and assistance, as well as certain small payments, regardless of whether a perpetrator is known, fully investigated or prosecuted. Similar approaches have been taken by truth commissions and administrative claims processes and by victim trust funds.

B. No Prohibition on Discrimination

The most vulnerable or marginalized groups in society are often targeted specifically in the commission of crimes, yet excluded from or disadvantaged in reparations processes.

Non-discrimination in the recognition and realization of rights is a fundamental tenet of human rights law reflected in the preambles and provisions of many human rights treaties.⁷⁷ Victims should be heard and their harm responded to in a way that respects their equal dignity and right to redress and reparation. The draft articles, on the other hand, contain no prohibition on discrimination in the realization of victims’ rights: this risks undermining their effectiveness.

The ILC’s commentary could also draw states’ attention to the need to take active measures to ensure the participation and representation of groups that are often marginalized. Ensuring meaningful participation of different victims and victims groups from the outset of the reparations process facilitates the integration of different experiences and perspectives. Decisions on, and the delivery of, reparations should similarly avoid reinforcing pre-existing patterns of discrimination, but rather strive to transform them.⁷⁸

Depending on the legal system, reparations for crimes against humanity may be instituted by a court at the conclusion of a criminal prosecution for said crimes or following a civil claim for damages brought by victims. Equally, reparations may arise as part of a transitional justice process or in furtherance to

⁷⁶ EU Victims’ Directive, *supra* note 42, Art. 8(5) and Recital, §§ 19 and 40.

⁷⁷ See, for example, Art. 3 Convention relating to the Status of Refugees, (1954) 189 UNTS 150; Art. 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85; Art. 2, Convention on the Rights of the Child, (1989) 1577 UNTS 3; Preamble and Art. 3(b) Convention on the Rights of Persons with Disabilities, (2008) 2515 UNTS 3; Art. 2, Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 UNTS 13.

⁷⁸ *Nairobi Declaration on Women and Girls’ Right to a Remedy and Reparation*, *supra* note 73, § 3.

governmental policy. Regardless of the origins, the principle of non-discrimination should apply so as to ensure that particularly marginalized or other vulnerable victims groups who may not have engaged with a court process or whose experiences were not captured by a narrow court process, are not disadvantaged in consequence during reparations proceedings.

For the same reasons, reparations for crimes against humanity should not be made conditional on a prior criminal conviction. There may be many reasons why a criminal proceeding ends in an acquittal or is not pursued to its conclusion (such as the death of the accused or procedural irregularities in the investigation) or why a civil claim against a non-state actor is dismissed. While this will invariably impact on a respondent's personal liability to afford reparations, it does not impact on the wider responsibilities of the state to afford or facilitate the affording of reparations for crimes against humanity. It is fundamental, in order to achieve the draft articles' objectives, that measures taken to fulfil obligations do not entrench discriminatory structures that facilitated the commission of violations in the first place.

C. *Absence of a Monitoring and/or Complaints Mechanism*

At the request of the ILC, the ILC Secretariat produced a memorandum providing information on existing treaty-based monitoring mechanisms that might be of relevance to future work on the draft articles.⁷⁹ This was followed by the Special Rapporteur's consideration of monitoring and dispute settlement mechanisms in his third report.⁸⁰ Mechanisms and related procedures put in place for other treaties have ranged in scope, function, access and enforceability — although not all have been equally effective in helping to ensure that states parties fulfil their commitments under the relevant convention. The Special Rapporteur has proposed a single draft Article on inter-state disputes⁸¹ and has left the possibility open for states parties to a future crimes against humanity convention to select 'one or more mechanisms to supplement existing mechanisms, but that selection would turn less on legal considerations and more on policy factors and the availability of resources.'⁸²

While recognizing the limitations of many monitoring mechanisms, the approach taken by the Special Rapporteur is unfortunate, given that, in practice, inter-state disputes tend only to be invoked in respect of alleged international crimes when they align with the invoking state's national interests. A draft convention would be more effective if accompanied by the creation of a monitoring

79 Memorandum by the Secretariat, *supra* note 8.

80 Third Report, *supra* note 6, Ch. VII.

81 *Ibid.*, § 263. For a more detailed analysis of this provision, i.e. draft Art. 15, see A. Zimmermann and F. Boos, 'Bringing States to Justice for Crimes Against Humanity: The Compromissory Clause in the ILC Draft Convention on Crimes Against Humanity', in this special issue of the *Journal*.

82 Third Report, *supra* note 6, § 262.

mechanism that allows individuals — and groups of individuals or communities, if the latter is included in the definition of victim — to submit complaints directly, rather than relying on states to submit such complaints on their behalf. States and victims, by definition, have different priorities, and there is no guarantee that a state will take up the case of victims should another state fail to comply with its obligations under the future convention.

7. Conclusions

The approval of an ILC mandate to develop draft articles on crimes against humanity, with a view to developing a draft convention should be applauded, as should the thorough work of the Special Rapporteur in developing the draft articles. We are convinced that, once adopted, a convention will play a crucial role in clarifying states' obligations to prevent, prosecute and afford reparations for crimes against humanity. In so doing, it will contribute to specific and general deterrence, the restoration of victims' sense of dignity and engagement in their communities, and the fostering of peace and mutual respect. A convention is also crucial for its potential to improve cooperation between states in the fight against crimes against humanity.

As states and others submit written comments to the ILC (throughout December 2018), and the text finalized in 2019, we hope our reflections will be useful. We have identified a number of areas for improvement, many of which draw upon core tenets of international criminal law and human rights law and should be of central concern to states as they consider the international and national rule of law following the commission of crimes against humanity. Fundamentally, the imperative of tackling crimes against humanity lies, in the words of the preamble to the draft articles, in the 'millions of children, women and men [who] have been victims of crimes that deeply shock the conscience of humanity'.⁸³ Consciousness of the suffering and needs of these 'millions' should come first in any transnational convention.

83 2017 ILC Report, *supra* note 3, § 45, Preamble.

Bringing States to Justice for Crimes against Humanity

The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity

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Abstract

Draft Article 15 of the International Law Commission's project on crimes against humanity — dealing with the settlement of disputes arising from a proposed convention — attempts to strike a balance between state autonomy and robust judicial supervision. It largely follows Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, which renders the jurisdiction of the International Court of Justice (ICJ) conditional upon prior negotiations. Hence, the substance of the clause can be interpreted in light of the recent case law of the ICJ, especially in the case Georgia v. Russia. In addition, this contribution discusses several issues regarding the scope ratione temporis of the compromissory clause. It advances several proposals to improve the current draft, addressing its relationship with state responsibility — an explicit reference to which is currently missing — as well as the relationship between the ICJ and a possible treaty body. It also proposes to recalibrate the interplay of the requirement of prior negotiations with, respectively, the possibility of seizing a future treaty body and the indication of provisional measures by the ICJ.

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1. Introduction

During diplomatic negotiations leading to the adoption of a multilateral treaty — such as a proposed convention on crimes against humanity, currently a series of draft articles being discussed before the International Law Commission (ILC)¹ — the part on final clauses tends to be treated with some form of benevolent negligence.² Not the least, such a part may include compromissory clauses to be eventually included in the treaty despite the opposition of reluctant, sovereignty-focused states seeking to ensure that, even where they may become parties to the treaty in question, they would not be subject to any form of mandatory third-party settlement mechanism.

Yet, years after negotiations have ended, such compromissory clauses and their interpretation may become relevant. Noteworthy and recent examples include: the *Bosnian and Croatian Genocide* cases brought before the International Court of Justice (ICJ) under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),³ adopted over 40 years earlier; the *Georgia v. Russia* case, handed down in 2008, which was triggered pursuant to Article 22 of the Convention for the Elimination of All Forms of Racial Discrimination (Convention for the Elimination of Racial Discrimination)⁴; and finally, *Belgium v. Senegal*, originated under Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),⁵

It is thus laudable that the ILC generally, and its Special Rapporteur in particular, drafted an elaborate compromissory clause as part of the proposed convention on crimes against humanity. Nonetheless, the draft compromissory clause raises questions, which are analysed by this article.

- 1 See the draft articles' full text, approved by the ILC at the end of the first reading, in *Report of the International Law Commission on the work of its Sixty-ninth session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10, Chap. IV ('2017 ILC Report'), § 45, at 10–20. Commentaries follow at § 46, *ibid*.
- 2 A striking example of the political and legal relevance of final clauses concerning possible amendments to a multilateral treaty is the process leading to the Kampala amendment to the International Criminal Court (ICC)'s Statute concerning the crime of aggression. See A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *Journal of International Criminal Justice (JICJ)* (2012) 209.
- 3 As to the saga of these cases *cf. inter alia* *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, ICJ Reports (2007) 43 ('*Bosnia v. Serbia*'); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, ICJ Reports (2015) 3 ('*Croatia v. Serbia*').
- 4 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70 ('*Georgia v. Russia*').
- 5 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422 ('*Belgium v. Senegal*').

2. Current Content of Draft Article 15

The current version of draft Article 15 — as adopted by the ILC at the end of the project's first reading — starts by stressing, in paragraph 1, the particular relevance of negotiations to settle disputes arising under the future convention. Paragraph 2 then provides for the jurisdiction of the ICJ over any dispute arising between contracting parties concerning the interpretation or application of the treaty, unless they jointly agree to submit the dispute to arbitration. A crucial point is then the opt-out clause contained in draft Article 15(3), which enables states to become contracting parties without being subject to the ICJ's jurisdiction or even entering a reservation to that effect. The current version of draft Article 15, as adopted by the ILC, reads:

Article 15 — Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.
2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.
3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.
4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

3. Genesis of Draft Article 15

Leaving aside the propriety of the separate obligation to negotiate contained in draft Article 15(1) and the opt-out mechanism in draft Article 15(3) and (4), international treaty practice provides a variety of compromissory clauses that could serve as a model for the core provision of draft Article 15, namely paragraph 2 establishing the ICJ's jurisdiction.⁶ Two conventions that codified 'true' international crimes and that contain such clauses,⁷ namely the Genocide Convention and the Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), seem to have

6 United Nations, *Final Clauses of Multilateral Treaties: Handbook* (United Nations Publication, 2003), at 88–94.

7 On the distinction between 'true' international crimes and treaty-based crimes, see N. Boister, "'Transnational Criminal Law'?" 14 *European Journal of International Law* (2003) 953, at 955 (international criminal *stricto sensu*, or so-called 'core crimes vs. crimes of international concern', or treaty crimes); K. Ambos and A. Timmermann, "Terrorism and Customary International Law", in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014) 20, at 23 (international core crimes and treaty-based crimes) and footnote 19 therein (with further references).

served as a starting point for the draft compromissory clause in the proposed convention on crimes against humanity. Article IX of the Genocide Convention contains what could be referred to as a ‘one-tier system’, providing for recourse to the ICJ in case of a dispute arising under the Convention without any prior mandatory resort to negotiations or any mandatory previous attempt to settle the dispute by way of arbitration.

The Apartheid Convention in its Article XII has, *mutatis mutandis*, adopted the same ‘two-tier model’ contained in Article 22 of the Convention for the Elimination of Racial Discrimination. Contrary to the latter, however, Article XII of the Apartheid Convention does not provide for the possibility of seizing the ICJ unilaterally, since:

Disputes between States Parties arising out of the interpretation, application or implementation of the [Apartheid] Convention which have not been settled by negotiation shall, at the request of *the States Parties* to the dispute, be brought before the International Court of Justice, save where the parties to the dispute have agreed on some other form of settlement.⁸

Notwithstanding the close substantive relationship of the proposed convention on crimes against humanity with the Genocide and Apartheid Conventions, the Special Rapporteur’s initial proposal for the dispute settlement provision was modelled on Article 66 of the Convention against Corruption, which had adopted the three-tier model contained in various suppression conventions and human rights treaties.⁹ This approach had previously been adopted in Article 35 of the Convention against Transnational Organized Crime, as well as in Article 15 of its Protocol to Prevent, Suppress and Punish Trafficking in Persons.¹⁰ The Special Rapporteur’s first draft of Article 15(2) was originally worded as follows:

- (1) States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.
- (2) Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
- (3) Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not consider itself bound by paragraph 2 of this draft article. The other

8 Art. XII Apartheid Convention (emphasis added). See A. Zimmermann, ‘Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice’, 12 *Law and Practice of International Courts and Tribunals* (2013) 5, at 14, footnote 37. See also the declarations by Argentina and Mozambique that confirm that Art. XII Apartheid Convention requires the consent of both parties, as well as the ‘reservation’ by Nepal to Art. XII.

9 *Third report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017 (‘Third Murphy Report’), §§ 259–260.

10 *Ibid.*, § 260.

States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

- (4) Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.¹¹

The choice of such a three-tier model, requiring first an attempt to negotiate, and then a further attempt to settle the dispute by way of arbitration, and upon exhaustion of these two mechanisms, the seising of the ICJ, may have been based on two reasons. First, as the Special Rapporteur's third report submitted, such a 'multi-step dispute settlement process of negotiation, arbitration and judicial settlement is often used in *treaties addressing crimes in national law*'.¹² The Special Rapporteur further pointed out that this multi-step 'process provides a channel for inter-state negotiation "in the shadow" of a possible resort to arbitration or judicial settlement'.¹³ Secondly, the Conventions against Corruption and Transnational Organized Crime constitutes a successful example, having obtained almost universal acceptance, with only 40 or so states opting out of mandatory dispute settlement.¹⁴

It is certainly correct that the prospect of eventually being brought to arbitration or the ICJ provides an incentive for states to take negotiations seriously. On the other hand, the first argument of the Special Rapporteur is worthy of critique given that, as the preamble to the draft articles itself confirms, crimes against humanity are among the core crimes under international law, 'shock the conscience of humanity', and are one of the 'most serious crimes of concern to the international community' as a whole.¹⁵ On the contrary, corruption and transnational organized crime — while certainly worthy of a coordinated international response — simply do not stand on the same moral and normative level. Indeed, since the rise of international criminal law, crimes against humanity constitute the archetype of 'true' international crimes providing for proper international criminal responsibility of the individual and corresponding international enforcement.

Because of such an inherent international criminal nature, the most natural model for the dispute settlement provision in the ILC's draft convention on crimes against humanity would have been Article IX of the Genocide Convention, or at least Article XII of the Apartheid Convention, rather than criminal law instruments dealing with treaty-based crimes. This is even more puzzling since the Special Rapporteur's third report had recognized earlier that 'a crime against humanity by its nature is quite different from a crime of corruption'.¹⁶ Yet, the Special Rapporteur gave no reason why neither the

11 *Ibid.*, § 263.

12 *Ibid.*, §§ 247 and 263 (emphasis added).

13 *Ibid.*, § 247.

14 *Ibid.*, § 261.

15 2017 ILC Report, *supra* note 1, § 45, Preamble, §§ 1 and 4.

16 Third Murphy Report, *supra* note 9, § 83.

Genocide nor the Apartheid Conventions served as the primary model drawn upon.¹⁷

Such a critique was also uttered by some other members of the ILC. According to Escobar Hernández, the draft article on dispute settlement (then draft Article 17) demonstrated the flaws of a ‘copy-and-paste’ approach that attempts to extend models established by transnational criminal law instruments to the fundamentally different context of crimes against humanity.¹⁸ Moreover, several members preferred a more robust system of judicial supervision modelled after Article IX of the Genocide Convention, or other possibilities such as a choice between arbitral and judicial settlement or, by way of compromise, mandatory arbitration if states did not consent to the ICJ’s jurisdiction.¹⁹ Others questioned the choice of making an unsuccessful attempt to arbitrate a procedural precondition for the ICJ’s jurisdiction and pointed to Article XII of the Apartheid Convention as an appropriate model.²⁰ A second reason for concern was the provision contained in draft Article 15(3) allowing states to opt out of an otherwise mandatory dispute settlement mechanism. They argued that such a provision would undermine the effectiveness of any future convention and, in any event, considered that it was not proper for the ILC itself to make such proposal.²¹

Other features of the proposed draft article drew criticism as well. According to Reinisch, the requirement to settle disputes ‘within a reasonable time’ would prevent effective dispute settlement as states could insist that a reasonable time had not yet elapsed.²² Tladi, in turn, suggested to consider conforming to more appropriate examples, such as Article 22 of the Convention on the Elimination of Racial Discrimination, or Section 30 of the Convention on the Privileges and Immunities of the United Nations.²³

Other members viewed the Special Rapporteur’s proposal more positively, however, underlining the importance of negotiations in inter-state dispute settlement, as part of the well-established trinity of negotiations, arbitration and

17 *Provisional summary record of the 3350th meeting*, UN Doc. A/CN.4/SR.3350, 31 May 2017 (*‘Provisional summary record of the 3350th meeting’*), at 3 (Escobar Hernández).

18 *Ibid.*, at 6 (Escobar Hernández).

19 *Ibid.*, at 6 (Escobar Hernández) and 11 (Jalloh); *Provisional summary record of the 3352nd meeting*, UN Doc. A/CN.4/SR.3352, 31 May 2017 (*‘Provisional summary record of the 3352nd meeting’*), at 6 (Galvão Teles).

20 *Ibid.*, at 3 (Ruda Santolaria) and 5 (Wood); *Provisional summary record of the 3353rd meeting*, UN Doc. A/CN.4/SR.3353, 2 June 2017 (*‘Provisional summary record of the 3353rd meeting’*), at 6 (Vázquez-Bermúdez).

21 *Provisional summary record of the 3350th meeting*, *supra* note 17, at 6 (Escobar Hernández) and 11 (Jalloh); cf. *Provisional summary record of the 3349th meeting*, UN Doc. A/CN.4/SR.3349, 2 June 2017 (*‘Provisional summary record of the 3349th meeting’*), at 10 (Park); *Provisional summary record of the 3353rd meeting*, *supra* note 20, at 3 (Ouazzani Chahdi).

22 *Provisional summary record of the 3350th meeting*, *supra* note 17, at 8 (Reinisch); *Provisional summary record of the 3352nd meeting*, *supra* note 19, at 5 (Wood) and 6 (Galvão Teles).

23 *Provisional summary record of the 3348th meeting*, UN Doc. A/CN.4/SR.3348, 31 May 2017, at 11 (Tladi).

judicial settlement.²⁴ The opt-out provision was considered to be justifiable, since it aimed at the widest participation of states to the proposed convention and existing international rules already govern the peaceful resolution of disputes.²⁵

Finally, Kolodkin recommended that the Commission's commentary to the draft article mention that negotiations to settle the dispute, as well as negotiations to organize an arbitration, must be genuine and undertaken in good faith.²⁶ Furthermore, since the Special Rapporteur had recognized that draft Article 4 — on the obligation of prevention — implied an obligation for states not to commit crimes against humanity, a reference to state responsibility should be added to the jurisdictional clause, in order to recall the wording of Article IX of the Genocide Convention.²⁷

As it appears from the current version of draft Article 15, the ILC Drafting Committee changed the initial draft considerably. It decided to not amend paragraph 1, however, as such provision is by now common to many treaties, including the Convention against Corruption.²⁸

With regard to draft Article 15(2) and the issue of arbitration, the Drafting Committee, however, did not retain the Special Rapporteur's proposal, as the pre-eminence of arbitration was considered 'inappropriate in the context of crimes against humanity'.²⁹ Rather, the Drafting Committee decided to adopt Article 22 of the Convention on the Elimination of Racial Discrimination as the appropriate model, although without reference to a treaty monitoring body, since the choice of setting up such a treaty body has been left to states for a future diplomatic conference. Moreover, draft Article 15(2) and Article 22 of the Convention on the Elimination of Racial Discrimination differ in that the latter precludes recourse to the ICJ if 'the disputants agree to another mode of settlement', whereas according to draft Article 15(2), this consequence only follows if 'States agree to submit the dispute to arbitration'.

The opt-out clause — following, as mentioned, the model of the Convention against Corruption, but also of the International Convention for the Protection of All Persons from Enforced Disappearance —³⁰ was ultimately retained, as it may constitute a compromise between the need to allow for exceptions to mandatory dispute settlement and the possible decision of outlawing reservations to substantive rules in the future treaty.³¹

24 *Provisional summary record of the 3349th meeting*, *supra* note 21, at 12 (Nguyen); *Provisional summary record of the 3351st meeting*, UN Doc. A/CN.4/SR.3351, 12 June 2017 ('*Provisional summary record of the 3351st meeting*'), at 4 (Kolodkin), at 12 (Šturma).

25 *Ibid.*, at 8 (Hmoud); *Provisional summary record of the 3352nd meeting*, *supra* note 19, at 12 (Huang); *Provisional summary record of the 3353rd meeting*, *supra* note 20, at 6 (Vázquez-Bermúdez).

26 *Provisional summary record of the 3351st meeting*, *supra* note 24, at 4 (Kolodkin).

27 *Ibid.*, at 4 (Kolodkin) and at 12 (Šturma); *Provisional summary record of the 3352nd meeting*, *supra* note 19, at 5 (Wood); cf. *Provisional summary record of the 3353rd meeting*, *supra* note 20, at 3 (Ouazzani Chahdi).

28 *Provisional summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017 ('*Provisional summary record of the 3366th meeting*'), at 6.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

Without further explanation, the Drafting Committee also deleted the phrase ‘within a reasonable time’. Despite numerous suggestions to include a reference to state responsibility, the Chairman of the Drafting Committee provided no reasons to explain why such a phrase was finally not included.³²

4. Analysis of Draft Article 15

A. Article 15(1): The Obligation to Negotiate

Draft Article 15(1), which is loosely based on Article 66(1) of the Convention against Corruption,³³ is ‘to be understood in a broad sense to indicate an encouragement to states to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies.’³⁴ It ought to be also noted that Article 15(1) contains a positive obligation to reach a negotiated solution. Hence, the lack of such negotiations constitutes not only a jurisdictional hurdle before vesting the ICJ with a dispute, but also a separate violation of Article 15(1) itself. Furthermore, in line with the ICJ’s holding in the *North Sea Continental Shelf* cases, the parties are obliged to enter into meaningful negotiations with a view to arriving at an agreement, with an understanding that a party’s position during the negotiations must be open to change.³⁵

Besides, the obligation to negotiate contained in draft Article 15(1) is not subject to the opt-out mechanism provided for in draft Article 15(3), as currently drafted. The latter, indeed, provides that states may only opt out of mandatory judicial settlement.³⁶

B. Article 15(2): The Dispute Requirement

Draft Article 15(2) contains, first, the common requirement that a dispute has arisen concerning the interpretation or application of the proposed convention of crimes against humanity. This formula reflects the long-standing jurisprudence of the ICJ as to the notion of ‘dispute’. It ought to be noted, however,

32 One member proposed a wording to this effect along the model of Art. IX Genocide Convention so that the dispute settlement provision should read: ‘Any dispute between two or more States concerning the interpretation or application of the present draft articles, *including those relating to the responsibility of a State for crimes against humanity*’ (emphasis added). See *Provisional summary record of the 3351st meeting*, *supra* note 24, at 4 (Kolodkin).

33 2017 ILC Report, *supra* note 1, at 116.

34 *Ibid.*, at 117 (quoting verbatim the *travaux préparatoires* of the comparable provision in the Convention against Transnational Organized Crime and its supplementary protocol, internal quotation marks omitted). See *Official Records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime*, UN Doc. A/AC.254/33, 17–28 July 2000, § 34.

35 *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, judgment of 20 February 1969, ICJ Reports (1969) 3, at 47, § 85.

36 Cf. Third Murphy Report, *supra* note 9, § 259.

that the Court has recently — namely in *Georgia v. Russia* and, even more so, in the various *Marshall Islands* cases — significantly accentuated the requirements for a ‘dispute’ to come into existence, requiring that the respondent state ‘was aware, or could not have been unaware, that its views were “positively opposed” by the applicant.’³⁷ Hence, should draft Article 15(2) be adopted as it currently stands, this could only be understood as a tacit approval of such a tightened meaning of ‘dispute’ at least for purposes for the future convention — a significant hurdle for a case under the future convention to be possibly brought before the ICJ.

C. Article 15(2): The Requirement to Settle the Dispute by Negotiations

The separate positive obligation to try to settle disputes arising under the proposed convention on crimes against humanity primarily through negotiations under draft Article 15(1) may provide an argument for future respondent states that the procedural, negotiation-related requirement contained in draft Article 15(2) must be interpreted more strictly than the requirements laid down by the ICJ in *Georgia v. Russia*. Indeed, given that the ILC’s commentary understands the phrase ‘shall endeavour to settle disputes ... through negotiations’ contained in draft Article 15(1) as a broad obligation to use various means of peaceful dispute settlement, including conciliation, mediation and recourse to regional bodies, the procedural requirements under draft Article 15(2) could be understood in the same way. Such an interpretation would then, in effect, require state parties not only to genuinely negotiate in good faith, but to eventually also exhaust other possible avenues of (non-binding) third-party dispute settlement before bringing such dispute before the ICJ.

In any case, given that draft Article 15(2) is modelled on Article 22 of the Convention on the Elimination of Racial Discrimination, any future applicant trying to bring a case under Article 15 of the proposed convention on crimes against humanity must surmount the main procedural hurdle to show that such a dispute ‘is not settled through negotiation’,³⁸ as understood in the recent case law of the ICJ, especially in *Georgia v. Russia*, and as further confirmed by the Court in its later jurisprudence.³⁹ Such reliance on the ICJ’s jurisprudence is further warranted by the fact that the ILC’s commentary cites the relevant case law, including the judgment on preliminary objections in *Georgia v. Russia*.⁴⁰ Thus, if states were to retain the current formula ‘is not settled’, they must be presumed to have been aware of this jurisprudence.

³⁷ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, judgment of 5 October 2016, § 41.

³⁸ See, generally, K. Wellens, *Negotiations in the Case Law of the International Court of Justice: A Functional Analysis* (Ashgate, 2014), at chapter 3.

³⁹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, order of 19 April 2017, § 43 (*Ukraine v. Russia*); *Belgium v. Senegal*, *supra* note 5, § 57.

⁴⁰ 2017 ILC Report, *supra* note 1, at 117, § 3.

Accordingly, *Georgia v. Russia* and subsequent jurisprudence would then constitute the controlling line of authority for draft Article 15(2).

In *Georgia v. Russia*, the Court held that the ‘terms of Article 22 of CERD, namely “[a]ny dispute ... which is not settled by negotiation or by the procedures expressly provided for in this Convention”, establish preconditions to be fulfilled before the seisin [*sic*] of the Court.’⁴¹ This holding is based mainly on the ordinary meaning of the phrase, with the ICJ arguing that it would be rendered superfluous if it were to be interpreted as meaning merely that the dispute had not been resolved *as a matter of fact*, regardless whether negotiations had been undertaken or not.⁴² As the Court pointed out, ‘if, as a matter of fact, a dispute had been settled, it is no longer a dispute.’⁴³ Such a reading would render the phrase in question meaningless, contrary to the principle *ut res magis valeat quam pereat* — that words shall be construed to have appropriate effect.⁴⁴ Accordingly, the phrase ‘which is not settled by negotiation’ in the ICJ’s view indicates an affirmative duty to negotiate in order to seize the Court.⁴⁵ Although the ICJ considered that recourse to supplementary means of interpretation were not mandatory, it further observed that the drafting history ‘do[es] not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.’⁴⁶ In that regard, it must be noted that the French version of the ILC’s text has retained the formula ‘*qui n’aura pas été réglé*’, which just like the French text of Convention on the Elimination of Racial Discrimination, by using the grammar of *futur antérieur*, implies that an attempt to negotiate has been made.⁴⁷ It would be advisable, however, in order to dispel any further doubts on the matter to use the formula ‘*has not been settled by negotiations*’ instead of ‘*is not settled*’ in the English version of draft Article 15(2). Such change would bring the English text more in line with the French text of draft Article 15(2) of the proposed convention on crimes against humanity as well as Article 22 of the Convention on the Elimination of Racial Discrimination.

Regarding the notion of negotiations, the ICJ noted in its jurisprudence that negotiations are not mere protests or the exchange of opposing views, and that in this regard the two conditions — ‘negotiations’ and ‘dispute’ — are distinct.⁴⁸ Consequently, negotiations require, at a minimum, ‘a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.’⁴⁹ While this does not imply an obligation to reach an agreement, parties must pursue negotiations with a

41 *Georgia v. Russia*, *supra* note 4, § 141; *Ukraine v. Russia*, *supra* note 39, § 59.

42 *Georgia v. Russia*, *supra* note 4, at 126, § 133.

43 *Ibid.*, §§ 133–134.

44 *Ibid.*, § 134.

45 *Ibid.*, § 134.

46 *Ibid.*, § 147.

47 *Ibid.*, § 135.

48 *Ibid.*, § 157.

49 *Ibid.*, § 157.

view to resolving the dispute.⁵⁰ The precondition of negotiations is therefore only fulfilled if negotiations have failed, or have become futile or deadlocked.⁵¹ The ICJ also found that negotiations can take place in multilateral fora, but must relate to the subject matter of the treaty whose compromissory clause is invoked.⁵² Once again, by incorporating *mutatis mutandis* the wording of Article 22 of the Convention on the Elimination of Racial Discrimination, the proposed convention on crimes against humanity would thereby also incorporate this concept of negotiations, as developed by the ICJ's jurisprudence.

D. Scope Ratione Temporis of Draft Article 15

1. Possible Retroactive Effect of the Substantive Obligations Arising Under the Proposed Convention on Crimes against Humanity

The question as to the scope *ratione temporis* of draft Article 15 — and its possible retroactive effect — is not purely theoretical. It should be explored whether the future convention on crimes against humanity, upon adoption and entering into force, could potentially apply to crimes against humanity, which are allegedly being perpetrated in this moment in the context of many conflicts, regimes or crises, such as in Syria, Myanmar and North Korea.

As confirmed by the ICJ's 2015 merits judgment in the *Croatian Genocide* case, *mutatis mutandis*, the Court's jurisdiction *ratione temporis* under draft Article 15(2), once exercised, would be 'limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the [Genocide] Convention'.⁵³ Accordingly, the temporal scope of Article 15(2) of the future convention on crimes against humanity, and thus also the related jurisdiction *ratione temporis* of the ICJ, is necessarily linked to the temporal scope of the substantive provisions of the future convention.⁵⁴

As is well known, Article 28 of the Vienna Convention on the Law of Treaties, reflecting customary international law on the matter,⁵⁵ establishes a presumption of non-retroactivity of treaties, providing that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'

With regard to the Genocide Convention, the ICJ considered that such intention could not be found either in the text or in the history of the negotiations.⁵⁶ Non-retroactivity also concerned the obligation to prevent and punish acts of

⁵⁰ *Ibid.*, § 158.

⁵¹ *Ibid.*, § 159.

⁵² *Ibid.*, §§ 160–161.

⁵³ *Croatia v. Serbia*, *supra* note 3, § 93.

⁵⁴ *Ibid.*

⁵⁵ *Belgium v. Senegal*, *supra* note 5, § 99.

⁵⁶ *Croatia v. Serbia*, *supra* note 3, § 99.

genocide.⁵⁷ In light of Article 28 of the Vienna Convention on the Law of Treaties and jurisprudence arising from the *Croatian Genocide* case, states would have to indicate clearly and unequivocally whether they intend to provide retroactive effect to the proposed convention on crimes against humanity, possibly including retroactive jurisdiction *ratione temporis* for the ICJ. On the contrary, should the future convention contain no such indication, it will neither bind contracting parties in relation to facts prior to its entry into force, nor accordingly provide for the Court's retroactive jurisdiction.

In turn, however, such consideration raises a further question about the continuous character of at least some of the obligations arising under the future convention.

2. The Proposed Convention and the Issue of Continuous Violations

In the *Croatian Genocide* case, the ICJ held that 'the substantive provisions of the Convention do not impose upon a state obligations in relation to acts said to have occurred before that state became bound by the Convention'.⁵⁸ That included, in the Court's view, the obligation to punish acts of genocide. The Court had taken the same position in *Belgium v. Senegal*, holding that the obligations to criminalize acts of torture, to establish jurisdiction over such acts and to prosecute such acts do not apply retroactively either.⁵⁹ Hence, the Court seems to have excluded that non-fulfilment of these obligations may amount to continuous (treaty) violations within the meaning of Article 14(2) of the ILC's Articles on State Responsibility, which provides that '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with that international obligation.'

Nevertheless, Article 3(2)(b) of the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, excludes the relevant Committee's competence *ratione temporis* in relation to individual complaints for 'facts that ... occurred prior to the entry into force of the present Protocol for the State Party concerned *unless those facts continued after that date*'.⁶⁰ Such provision, thereby, presupposes that at least some of the relevant violations do possess a continuous character. The Inter-American Court of Human Rights had already interpreted forced or involuntary disappearance as a continuing wrongful act, that is, one that continues for as long as the person concerned remains unaccounted for.⁶¹ Consequently, in order to exclude any

57 *Ibid.*, §§ 93–98; cf. also *Belgium v. Senegal*, *supra* note 5, §§ 99–100.

58 *Croatia v. Serbia*, *supra* note 3, § 100.

59 *Belgium v. Senegal*, *supra* note 5, §§ 99–100.

60 (Emphasis added). Cf. also *I.D.G. v. Spain*, Comm. No. 2/2014, UN Doc. E/C.12/55/D/2/2014, 13 October 2015, § 9.3.

61 *Blake v. Guatemala*, 24 January 1998, IACHR Series C, No. 36, § 67; cf. also ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', II *Yearbook of the International Law Commission* (2002) 31, at 60, § 4.

'retroactive' jurisdiction of the Committee on Enforced Disappearances, Article 35(1) of the Convention against Enforced Disappearances had to explicitly provide that '[t]he Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.'

In the absence of a similar formula, the compromissory clause in the proposed convention on crimes against humanity could be used to bring cases about crimes whose perpetration commenced prior to the convention's entry into force, if allegedly possessing a continuous character.

The issue of an 'indirect retroactive effect' may also arise from other substantive obligations — with the ensuing effect of accordingly broadening the ICJ's jurisdiction *ratione temporis* under draft Article 15. For instance, draft Article 8 of the ILC project mandates a criminal investigation 'whenever there is reasonable ground to believe that acts constituting crimes against humanity *have been* or are being committed in any territory under [a state's] jurisdiction',⁶² even if such crimes were not of a continuous character. In contrast, Article IV of the Genocide Convention establishes that '[p]ersons committing genocide ... shall be punished', rather than doing so with regard to '[p]ersons *having committed or committing* genocide'. The present perfect tense is used when an action has been completed at some indefinite time in the past or it indicates that an action continues from the past to the present.⁶³ By using the present perfect tense ('have been committed'), draft Article 8 could thus be perceived as evidence of an intention to rebut the presumption against retroactivity—similar to the words 'irrespective of the date of their commission' contained in Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The ICJ specifically relied on Article 1 of said Convention in the *Croatian Genocide* case, to support its finding that nothing in the Genocide Convention revealed an intention of states to apply the obligation to punish retroactively.⁶⁴

As a matter of fact, the European Court of Human Rights held in *Šilih*⁶⁵ that its temporal jurisdiction extends to facts which occurred prior to the date of ratification, when it comes to the procedural obligation to investigate violations of the right to life ('procedural limb') arising from Article 2 of the European Convention on Human Rights. In the Court's view, this forms a distinct obligation, separate from the obligation not to violate the right to life, as such.⁶⁶ In other words, as long as the obligation to investigate possible violations of the right to life is not being fulfilled after the entry into force of the European

62 (Emphasis added). A similar wording appears in draft Art. 12(1)(a) on victims, witnesses and others.

63 B. Garner, *Garner's Modern English Usage* (4th edn., Oxford University Press, 2016), at 896–897.

64 *Croatia v. Serbia*, *supra* note 3, § 96.

65 Cf. generally E. Bjorge, 'Right for the Wrong Reasons: *Šilih v. Slovenia* and Jurisdiction *Ratione Temporis* in the European Court of Human Rights', 83 *British Yearbook of International Law* (2013) 115, at 132.

66 European Court of Human Rights (ECtHR), *Šilih v. Slovenia*, Appl. No. 71463/01, 9 April 2009, § 159.

Convention on Human Rights, the date of the related deaths is immaterial. To reach such conclusion, the European Court of Human Rights relied on the position of the Inter-American Court and the Human Rights Committee, both assuming temporal jurisdiction over procedural complaints relating to deaths that had taken place outside their temporal jurisdiction.⁶⁷ The European Court, however, limited this jurisdictional stretch when stating that its temporal jurisdiction over procedural complaints is not open-ended. Rather, such jurisdiction requires ‘a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect’.⁶⁸

As a matter of caution, it may thus be advisable to include a clause similar to Article 35 of the Convention on the Elimination of Racial Discrimination in the proposed convention on crimes against humanity, if states wish to preclude the ICJ’s jurisdiction over disputes related to facts that have taken place prior to the convention’s entry into force.

3. *The Future Convention and the Issue of Standing*

A different, yet closely related, third question is whether draft Article 15 allows a future contracting party to bring a case against another contracting party for alleged violations of the future convention that occurred *prior to the former* becoming a party, but *after the latter* had done so. This question of standing or legal interest, namely, the right to invoke the responsibility of a state,⁶⁹ while obviously different in nature from the issue of the Court’s jurisdiction *ratione temporis*, will also determine whether the ICJ would be able to adjudicate over certain temporal categories of crimes.

The draft preamble in the current ILC project, by recognizing that crimes against humanity ‘threaten the peace, security and well-being of the world’ and affirming that crimes against humanity ‘are ... of concern to the international community as a whole’,⁷⁰ confirms the *erga omnes partes* character of the obligations to be enshrined in the proposed convention on crimes against humanity, in line with Article 48(1)(a) of the ILC Articles on State Responsibility.

As pointed out by the ICJ in *Belgium v. Senegal*, states that invoke responsibility for violations of such obligations act in the common interest of all States Parties,⁷¹ as ‘procedural trustees’. Thus, it is irrelevant whether the case is brought by a state party that was itself already bound by the treaty at the relevant time (the time that the alleged treaty violation took place), or whether instead such state only became a party at a later stage. Rather, it would suffice

67 *Ibid.*, §§ 111–118 and 160.

68 *Ibid.*, § 163.

69 See *Belgium v. Senegal*, *supra* note 5, § 68 (quoting *Barcelona Traction*); *South West Africa (Liberia v. South Africa)*, judgment of 18 July 1966, ICJ Reports (1966) 6.

70 (emphasis added).

71 *Belgium v. Senegal*, *supra* note 5, § 68.

that the *respondent* state was bound by the convention on crimes against humanity at such time, and that the *applicant* state is a party at the time the case is brought before the ICJ.

The Court has so far left the question open in *Belgium v. Senegal*,⁷² as well as in its *Croatia Genocide* judgment.⁷³ It ought to be noted, however, that a strikingly similar issue arose as early as 1961 in *Austria v. Italy* before the (then) European Commission of Human Rights. Italy (the respondent) had ratified the European Convention on Human Rights in 1955 while Austria (the applicant) had only done so in 1958. Nonetheless, Austria had claimed that Italy violated rights under Article 6 of this Convention between 1955 and 1958.⁷⁴ Italy then challenged the Commission's jurisdiction *ratione temporis*, arguing that Italy had no obligations under the ECHR towards Austria until Austria's accession.⁷⁵ The Commission, however, rejected the challenge and upheld jurisdiction to entertain Austria's application, covering all acts and domestic proceedings prior to Austria's ratification of the European Convention on Human Rights.⁷⁶ In doing so, it argued that the European Convention on Human Rights establishes a common public order, rather than a mere bundle of reciprocal rights.⁷⁷ When invoking the responsibility of another contracting party, states do not exercise a right of action to enforce their own rights, but rather allege a violation of the 'public order of Europe'.⁷⁸

Admittedly, it could be argued that such a conclusion must be based on an express statement in a treaty enshrining *erga omnes* obligations, and may not merely be implied by the text.⁷⁹ However, the ICJ's reasoning in *Belgium v. Senegal*, its reliance on the common interest of the parties and on its prior *dictum* in *Barcelona Traction* indicates that the Court may follow the European Commission of Human Rights' position in *Austria v. Italy*. In *Belgium v. Senegal* the Court quite broadly formulated that '[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party'.⁸⁰ It is submitted that this consideration would equally apply to the proposed convention on crimes against humanity, unless negotiating states were to include in the final treaty a clause stating otherwise.⁸¹

72 *Croatia v. Serbia*, *supra* note 3, § 119.

73 *Belgium v. Senegal*, *supra* note 5, §§ 103–105.

74 European Commission of Human Rights, *Austria v. Italy*, Appl. No. 788/60, 11 January 1961, 4 Yearbook (1961) 116, at 136.

75 *Ibid.*, at 132.

76 *Ibid.*, at 134–136.

77 *Ibid.*, at 138.

78 *Ibid.*, at 140.

79 *Belgium v. Senegal*, *supra* note 5, separate opinion of Judge Skotnikov, ICJ Reports (2012) 422, at 484, §§ 17–20.

80 *Belgium v. Senegal*, *supra* note 5, § 69.

81 The *Whaling in the Antarctic* case may further reinforce this conclusion, even though Japan did not challenge Australia's standing and the Court did not directly address the standing issue. See H. Sakai, 'After the Whaling in the Antarctic Judgment: Its Lessons and Prospects from a

E. Further Open Questions Arising Under Draft Article 15

1. The Missing Reference to State Responsibility

As several members of the ILC pointed out, a reference to the ‘responsibility of a State for crimes against humanity’ should be added to draft Article 15(2) of the proposed convention on crimes against humanity, in line with Article IX of the Genocide Convention. Admittedly, Article XII of the Apartheid Convention, which regulates a specific crime against humanity, contains no such ‘unusual feature’, to quote the judgment in the *Bosnian Genocide* case.⁸² However, the lack of such phrase could invite respondent states to argue that the *Bosnian Genocide* case should not be followed when interpreting the future convention on crimes against humanity.

As held by the Permanent Court of International Justice held in *Chorzów Factory* and confirmed in subsequent ICJ’s jurisprudence:

*It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.*⁸³

Consequently, draft Article 15(2) provides the ICJ with jurisdiction over issues of state responsibility — secondary obligations in the terminology of the ILC Articles on State Responsibility — if a state breaches any of the provisions in the proposed convention. The real question is, however, whether the proposed convention contains an implied (primary) obligation of states not to themselves commit crimes against humanity through their state organs, or whether it only contains a primary obligation (to again use the ILC’s terminology) to prevent and punish crimes against humanity committed by private actors (the acts of which are not attributable to the said state). Arguably, this is implicit in draft Article 3(2)(a) which specifies that an ‘attack directed against any civilian population’ must be ‘in furtherance of a State or organizational policy to commit such attack’. Furthermore, the famous dictum in the ILC’s Commentary on the Articles of State Responsibility applies with equal force to crimes against humanity, one of the core crimes under international law: ‘Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question

Japanese Perspective’, in M. Fitzmaurice and D. Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill, 2016) 308, at 314–315 and cf. *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, judgment of 31 March 2014, ICJ Reports (2014) 226, at 246, § 40 (‘The nature and extent of the claimed maritime zones are therefore immaterial to the present dispute, which is about whether or not Japan’s activities are compatible with its obligations under the ICRW’)

82 *Bosnia v. Serbia*, *supra* note 3, § 169.

83 *Factory at Chorzów (Jurisdiction)*, judgment of 26 July 1927, PCIJ Series A, No. 8, at 21 (emphasis added).

or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved.⁸⁴

However, as a matter of fact the language of draft Article 2 only contains primary obligations of prevention and punishment. Taking into account the lack of an express obligation in this sense, a 'state-responsibility clause' along the lines of Article IX of the Genocide Convention may confirm an implied (primary) treaty-based obligation of states not to commit crimes against humanity through their own organs and agents, as the ICJ has previously held with respect to the Genocide Convention in *Bosnian Genocide*.

In that case, it was disputed whether the Genocide Convention contains an implied obligation for states not to commit acts of genocide themselves — irrespective of a parallel obligation arising under customary international law, for which the Court lacked jurisdiction. Despite the lack of an express obligation to this effect, the Court decided that the Genocide Convention's 'obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.'⁸⁵ According to the ICJ, this follows from the express categorization of genocide as a 'crime under international law'. Secondly, according to the Court, '[i]t would be paradoxical if States were thus under an obligation to prevent [under Article III of the Genocide Convention], so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs.'⁸⁶ The clause 'including responsibility of a State for genocide' was described by the Court as an 'unusual feature' in dispute settlement provisions. Yet, although Article IX of the Genocide Convention is an essentially jurisdictional provision, the state responsibility clause, in the Court's opinion, at least confirmed the Court's *argumentum a fortiori* outlined above.⁸⁷

The ILC's commentary to draft Article 4 of the proposed convention, which addresses the obligation to prevent crimes against humanity, relies on the *Bosnian Genocide* judgment to argue that under the convention states themselves may not commit crimes against humanity through their organs.⁸⁸ However, the missing 'unusual feature' in draft Article 15 of the proposed convention may cast doubt on extending the *Bosnian Genocide* case analysis to the proposed convention on crimes against humanity. Even though the state responsibility clause was not the controlling factor in the Court's analysis of the Genocide Convention, future judges and counsel may draw on any clause that does not include state responsibility in draft Article 15 as a vehicle for distinguishing the *Bosnian Genocide* case. This is confirmed by the pleadings in the provisional measures phase in *Ukraine v. Russia*. Russia, inter alia, argued that the relevant compromissory clause — Article 24 of the International Convention for the Suppression of the Financing of Terrorism — did not,

84 *Report of the International Law Commission, Fifty-third Session (23 April-1 June and 2 July-10 August 2001)*, UN Doc. A/56/10, at 364.

85 *Bosnia v. Serbia*, *supra* note 3, § 166.

86 *Ibid.*

87 *Ibid.*, §§ 166 and 168.

88 2017 ILC Report, *supra* note 1, at 49.

unlike Article IX of the Genocide Convention, contain a reference to state responsibility for financing of terrorism. According to Russia, consequently, the International Convention for the Suppression of the Financing of Terrorism would not contain an obligation for a state not to finance acts of terrorism.⁸⁹

Hence, to dispel any doubt about future ICJ jurisdiction on the primary obligation of states not to commit crimes against humanity themselves under the future convention, the ILC and negotiating states should consider including a 'state responsibility clause' in draft Article 15(2), akin to the one contained in Article IX of the Genocide Convention. In the alternative, the addition of a substantive provision in draft Articles 2 and 4 should be considered. This would clarify, even in the treaty text, that states are prohibited from committing crimes against humanity themselves.

This primary obligation implicit in the draft articles would of course not affect an existing prohibition of states not to commit crimes against humanity under customary international law or applicable human rights treaties. However, these obligations would not be within the Court's jurisdiction under draft Article 15. For this reason, the ILC should have been clearer in spelling out a primary obligation of states not to commit crimes against humanity under the draft articles, which could then be enforceable through the dispute settlement provision.

2. *Negotiations Requirement and Provisional Measures*

As said, if the negotiations requirement as currently contained in draft Article 15(2) of the proposed convention is retained, a future applicant would have to show that an attempt has been made to settle the dispute by way of negotiations prior to bringing the case before the ICJ — in line with the Court's jurisprudence since *Georgia v. Russia*. This also limits the possibility to have the Court adopt provisional measures, should the proposed convention constitute the sole relevant jurisdictional basis in a given situation. This could induce states to negotiate longer in order to satisfy the Court that it has at least *prima facie* jurisdiction.

In the context of an ongoing widespread or systematic attack against civilians, any delay may have dire consequences for the affected population. In such situations, it would be sensible to enable the Court to prescribe provisional measures without requiring states to first undertake lengthy negotiations. At the same time, negotiations retain their value as a procedural precondition for the merits phase. The power of the ICJ to dispense the negotiations requirement before adopting provisional measures would enhance the effectiveness of these measures, which would themselves inform the ensuing negotiations before possibly entering the merits phase. Furthermore, since provisional measures against a state allegedly violating the future convention on

⁸⁹ ICJ, *Verbatim Record (Ukraine v. Russia)*, 7 March 2017, CR 2017/2, at 38–39 (Zimmermann); ICJ, *Verbatim Record (Ukraine v. Russia)*, 9 March 2017, CR 2017/4, at 44 (Zimmermann).

crimes against humanity would presuppose that such allegations are plausible,⁹⁰ the state addressee of such measures may have a genuine incentive to settle the dispute already by way of negotiations.

Accordingly, an additional paragraph 2bis should be added to the current draft Article 15, dispensing with the requirement of negotiations before provisional measures can be requested, while retaining, at the same time, negotiations as a procedural hurdle to enter the merits phase of a case before the ICJ. Or, to put it otherwise, and contrary to the Court's jurisprudence in *Ukraine v. Russia* and *Georgia v. Russia*,⁹¹ such additional paragraph 2bis could provide that the requirement of negotiations must be satisfied at the time of the Court's decision on preliminary objections, but not yet at the time when the application is filed.

3. *The Opting Out Clause in Draft Article 15(3) and 15(4)*

The ILC justified the opting out provisions contained in draft Article 15(3) and 15(4) for two reasons. First, such provisions are common in treaties and, secondly, they may constitute a *quid pro quo*, making a possible prohibition of reservations to substantive provisions more acceptable to states.⁹² It ought to be noted, however, that even without such a compromise, the impact of the opting out provision would be limited, since the ICJ has held on several occasions — absent an express prohibition of reservations to dispute settlement provisions — that reservations to dispute settlement provisions are compatible with the object and purpose of a treaty even when it comes to human rights treaties, reservations to Article IX of the Genocide Convention being a particularly relevant case in point.⁹³

4. *Relationship with a Possible Treaty Body*

The ILC has deliberately left the door open to the possible creation of a treaty body, akin to those known other universal human rights treaties, in the proposed convention. Should such treaty body be created, the question of its relationship with proceedings before the ICJ would arise — an issue that has already been discussed in quite some detail with regard to Article 22 of the Convention on the Elimination of Racial Discrimination in *Georgia v. Russia*

⁹⁰ *Ukraine v. Russia*, *supra* note 39, § 63.

⁹¹ *Ibid.*, § 59; *Georgia v. Russia*, *supra* note 4, § 141.

⁹² *Provisional summary record of the 3366th meeting*, *supra* note 28, at 6.

⁹³ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006, ICJ Reports (2006) 6, at 32, § 67. See also *Legality of Use of Force (Yugoslavia v. Spain)*, order of 2 June 1999, ICJ Reports (1999) 761, at 772, §§ 32–33; and *Legality of Use of Force (Yugoslavia v. United States of America)*, order of 2 June 1999, ICJ Reports (1999) 916, at 924, §§ 24–25.

and *Ukraine v. Russia*.⁹⁴ In order to strengthen such treaty body, it may then be advisable to make the possibility of seizing the ICJ dependant on having previously resorted to such treaty body, in line with the wording of Article 22 of the Convention on the Elimination of Racial Discrimination. Such solution should not however set aside the possibility of requesting provisional measures without having previously exhausted such treaty-based dispute settlement mechanism.

Should such a provision be added, it should also make clear whether the exhaustion of negotiations and resort to such inter-state complaint mechanism would be cumulative or alternative in nature, given that this issue has *mutatis mutandis* arisen twice with regard to Article 22 of the Convention on the Elimination of Racial Discrimination.⁹⁵

5. Conclusion

In light of the foregoing considerations, we, therefore, propose to redraft Article 15(2) and add a new paragraph *2bis* as follows:

Article 15 — Settlement of disputes

... 2. Any dispute between two or more States concerning the interpretation or application of the present draft articles, *including the responsibility of a State for crimes against humanity, that has not been settled [neither] through negotiation [nor by the procedures expressly provided for in this Convention]* shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

2bis. Notwithstanding paragraphs 1 and 2 of this draft article, provisional measures may be requested in accordance with the Statute of the International Court of Justice without the need [neither] for prior negotiations [nor for the use of the procedures expressly provided for in this Convention]. ...

When working on the draft articles in the proposed convention crimes against humanity, and on draft Article 15 in particular, the Chairman of the ILC considered it as the Commission's 'responsibility to do what it could to ensure that the future convention was ratified by as many States as possible', but was

94 *Georgia v. Russia*, *supra* note 4, §§ 119, 183 and the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports (2011) 142, at 155–157; ICJ, *Verbatim Record (Ukraine v. Russia)*, 7 March 2017, CR 2017/2, at 65–67 (Forteau); ICJ, *Verbatim Record (Ukraine v. Russia)*, 8 March 2017, CR 2017/3, at 34 (Zionts); ICJ, *Verbatim Record (Ukraine v. Russia)*, 9 March 2017, CR 2017/4, at 53–55 (Forteau). The issue will likely be litigated again in the recent case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Application instituting proceedings, 11 June 2018, § 19, fn. 28 (arguing that the procedure under Arts. 11–13 CERD is not a precondition for seizing the Court and citing the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja in *Georgia v. Russia*). See also ICJ, *Verbatim Record (Qatar v. United Arab Emirates)*, 27 June 2018, CR 2018/12, at 24 (Donovan).

95 *Ukraine v. Russia*, *supra* note 39, § 60; *Georgia v. Russia*, *supra* note 4, § 183, *ibid.* See also Zimmermann, at 9–11.

concerned that ‘in the current climate, it could not be taken for granted that that would happen’, given that ‘[i]n recent years, there had been a marked slowdown in the conclusion and ratification of multilateral treaties,’ and that states may have become even more sensitive, not the least when it comes to third-party settlement of disputes.⁹⁶

It is against this background that the ILC came up with a somewhat less ambitious compromissory clause than was expected — which, furthermore, raises a couple of technical questions. It remains to be seen whether states would be willing to accept such clause or whether they would opt for an even higher jurisdictional threshold, whereby the Court could only be seized by common agreement. Unfortunately, current developments may indicate that only a limited number of states would be willing to draft — let alone to eventually accept — a compromissory clause that effectively allows the ICJ to dispense justice against states that are responsible for crimes against humanity.

96 *Provisional summary record of the 3353rd meeting, supra* note 20, at 13–14.

Three Propositions for a Future Convention on Crimes Against Humanity

The Prohibition of Amnesties, Military Courts, and Reservations

Hugo A. Relva*

Abstract

The draft articles on crimes against humanity provisionally approved by the International Law Commission in 2017 contain several provisions which have the potential to help end impunity for these crimes. However, since the future convention, if adopted, shall codify crimes against humanity for decades to come, the new instrument should seek to enshrine the highest standards of international law, including customary international law and progressive developments in the fields of international criminal law and human rights law. The purpose of this article is to suggest three propositions which may significantly narrow impunity. First, the article explains why a prohibition of amnesty for all those suspected of criminal responsibility for crimes against humanity is today a rule under customary international law and should, therefore, be incorporated within the convention. Secondly, the article also recommends incorporation of a provision whereby those suspected of criminal responsibility shall only be tried before competent jurisdictions of ordinary law in each State Party, to the exclusion of military courts or commissions. Finally, the article suggests that, in full accordance with the Statute of the International Criminal Court, the future convention prohibits any reservations.

1. Introduction

When, in 2014, the International Law Commission (ILC) decided to start drafting articles with a view to a future international convention on crimes against humanity, Amnesty International welcomed that decision. The organization

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held the view that such an instrument could help clarify states' obligation at the national level to investigate and prosecute those suspected of being criminally responsible for crimes against humanity. However, Amnesty International also made clear that the standards set in the Statute of the International Criminal Court (ICC) and under international human rights law should be fully respected and forms the baseline for the new treaty.

In this regard, since 2015, Amnesty International has published several papers calling on the ILC to incorporate certain provisions into the text of the draft articles on crimes against humanity.¹ Among the initial recommendations, the organization suggested a provision permitting all State Parties to exercise universal jurisdiction over crimes against humanity, a clause on the obligation to extradite or prosecute (*aut dedere aut judicare*), and three rules considered fundamental for the convention to become an effective tool against impunity: the prohibition of amnesties; the prohibition of military courts; and the prohibition of reservations.

Amnesty International later suggested an amendment to the language on superior orders and prescription of law, so as to include, as in Article 33 of the ICC Statute, those who may have committed a crime against humanity 'pursuant to an order of a Government', an expression absent in the original proposal by the Special Rapporteur.² The organization also suggested the removal of the words 'or control' from the expression 'in any territory under its

- 1 *Report of the International Law Commission, Sixty-ninth Session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10, at Chapter IV (hereinafter, '2017 ILC Report'). On Amnesty International's position, see Amnesty International, *International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity*, 28 April 2015, available online at <https://www.amnesty.org/en/documents/ior40/1227/2015/en/> (visited 27 June 2018); Amnesty International, *Joint letter to the International Law Commission Special Rapporteur on Crimes against Humanity*, 23 February 2016, available online at <https://www.amnesty.org/en/documents/ior53/3512/2016/en/> (visited 27 June 2018), signed by 12 non-governmental organizations (NGOs); Amnesty International, *International Law Commission: Second Report on Crimes against Humanity: Positive Aspects and Concerns*, 5 May 2016, available online at <https://www.amnesty.org/en/documents/ior40/3606/2016/en/> (visited 27 June 2018); Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, 7 April 2017, available online at <https://www.amnesty.org/en/documents/ior40/5817/2017/en/> (visited 27 June 2018); Amnesty International, *Joint Letter to the Special Rapporteur of the International Law Commission on Crimes against Humanity*, 27 January 2017, available online at <https://www.amnesty.org/en/documents/ior53/5579/2017/en/> (visited 27 June 2018), signed by 15 NGOs; and Amnesty International, *Amnesty International Conditional Support to the Draft Articles on Crimes against Humanity Adopted by the International Law Commission in First Reading*, 20 October 2017, available online at <https://www.amnesty.org/en/documents/ior40/7328/2017/en/> (visited 27 June 2018).
- 2 See *Second report on crimes against humanity By Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/690, 21 January 2016 (hereinafter, '2016 Murphy Report'), §§ 55-62 and 84: '[T]he fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate'. See also *Report of the International Law Commission, Sixty-eighth Session (2 May–10 June and 4 July–12 August 2016)*, UN Doc. A/71/10 (hereinafter, '2016 ILC Report'), draft Art. 5(4). The new wording can now be found in draft Art. 6(4).

jurisdiction or control', contained in several provisions.³ Likewise, the organization proposed to amend the original wording of the provision on the right to consular assistance so as to cover, like in Article 36(1) of the Vienna Convention on Consular Relations,⁴ persons who are 'in prison, custody and detention', rather than just persons who are 'in custody'.⁵

Over the years, the ILC has incorporated a number of laudable provisions into the draft articles including: the obligation to extradite or prosecute (*aut dedere aut judicare*, draft Article 10); the non-applicability of statutory limitations (draft Article 6(6)); the exclusion of 'dual criminality' as a requirement for extradition (see draft Article 13); the clause on *non-refoulement*, though its language could still be enhanced (draft Article 5);⁶ and a general allusion in the Preamble to the ICC Statute and the rights of victims, as well as to the peremptory character (*jus cogens*) of the prohibition of crimes against humanity, among others.

However, some positive proposals originally made by the Special Rapporteur, and supported by NGOs, were not retained by the ILC after debate. Among them, the application of the convention to all parts of federal states without any limitations or exceptions, which is particularly important in the case of federal states not party to the Vienna Convention on the Law of Treaties (VCLT),⁷ and the draft clause providing that in case of conflict between the rights and obligations of states under the future convention and the rights and obligations under the constitutive instrument of an international criminal tribunal the latter would prevail.⁸ In addition, it is concerning that a recommendation to incorporate in the draft articles a provision on the 'right to truth' — like in Article 24(2) of the International Convention for the

3 See *Statement of the Chairman of the Drafting Committee, 67th Session of the International Law Commission*, 5 June 2015, at 9. For Amnesty International, the original sentence set out two separate forms of competence *ratione loci*, jurisdiction and control, implying two separate concepts, whereas fundamental human rights conventions (e.g. Art. 2 of the International Covenant on Civil and Political Rights (ICCPR); Arts 2 and 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture); and Art. 9 of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention against Enforced Disappearance) mention only 'jurisdiction', thus covering both *de jure* and *de facto* jurisdiction. The original wording suggested by the Special Rapporteur may have led to unintended yet adverse consequences on the interpretation of those existing conventions.

4 Vienna Convention on Consular Relations.

5 See 2017 ILC Report, *supra* note 1, § 45, draft Art. 11(2). For a more extensive consideration of draft Art. 11, see A. Coco, 'The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9 and 11 by the International Law Commission', in this Special Issue.

6 Amnesty International, *Commentary to the Third Report on Crimes against Humanity, supra* note 1, at 11.

7 Art. 29 VCLT.

8 The Commission concluded, in the first case, that such a provision 'formed part of the final clauses of a treaty that should be left to the discretion of States in the course of negotiating and adopting a new convention'. In the second one, the ILC adduced 'that such a draft article was not needed'. See *Statement of the Chairman of the Drafting Committee, 69th Session of the International Law Commission*, 1 June 2017, § 16.

Protection of All Persons from Enforced Disappearance — was not even considered by the ILC.

Finally, in late 2017, the General Assembly transmitted its draft articles to governments, international organizations and others for comments and observations to be received by 1 December 2018. Amnesty International published a 17-Point Program for a Convention on Crimes against Humanity,⁹ which summarized its recommendations to states and the ILC.

This article focuses on perhaps the three most important proposals among the 17 made by Amnesty International — those on amnesties, military courts and reservations — the first one necessitating a more detailed analysis.

2. Amnesties and Crimes Against Humanity

Amnesties for crimes against humanity should be prohibited in the future convention, as they prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families. In this regard, international law has evolved over the last decades — in particular since the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in the early 1990s, and later the adoption of the ICC Statute — to consider amnesties for crimes against humanity, as well as for genocide and war crimes, not to be compatible with international law.

A. *The International Law Commission's View*

The ILC's commentary on the current version of the draft articles notes that an amnesty law enacted by a state would not preclude prosecution by another state with concurrent jurisdiction over the offence. The commentary goes on to say that 'within the State that has adopted the amnesty, its permissibility would need to be evaluated, inter alia, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others'.¹⁰ Despite this language, which appears to set an insurmountable obstacle for amnesties at national level, the draft articles do not contain any explicit prohibition on amnesties.

The absence of such a prohibition deprives the future treaty — which seeks to 'put an end to impunity for the perpetrators of these crimes', as stated in the draft Preamble — not only of a fundamental provision in the fight against impunity but also of a provision which could have codified a rule of customary international law.

⁹ Amnesty International, *17-Point Program for a Convention on Crimes against Humanity*, 20 February 2018, available online at <https://hrij.amnesty.nl/17-point-program-convention-crimes-against-humanity/> (visited 27 June 2018).

¹⁰ 2017 ILC Report, *supra* note 1, § 46, Commentary to draft Art. 10, § 11.

B. The Prohibition of Amnesties in International Criminal Tribunals

In the *Furundžija* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the ban of amnesties for torture derives from the peremptory character (*jus cogens*) of the prohibition of such a crime. The Tribunal held, in particular, that:

It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.¹¹

The question of amnesties was also raised before the Special Court for Sierra Leone (SCSL) with regard to Article IX of the Lomé Peace Agreement, containing an amnesty provision for crimes committed in the course of the war. In the *Fofana* case, rejecting the defence's jurisdictional challenge, the SCSL Appeals Chamber concluded that there is a 'crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law'.¹² The same opinion was expressed in the *Augustine Gbao* case.¹³

C. The Prohibition of Amnesties in Regional Courts and Commissions

Since 2001, when the Inter-American Court of Human Rights (IACtHR) delivered its judgment in the *Barrios Altos v. Peru* case,¹⁴ this regional Court has repeatedly stated that amnesties and other similar measures of impunity for human rights violations and crimes under international law, including crimes against humanity, are prohibited. For example, the Court observed that 'acts committed in La Cantuta to the detriment of the victims of extra-legal execution or forced disappearance, are crimes against humanity that cannot go unpunished, are non-extinguishable and cannot be the subject-matter of amnesty'.¹⁵ In *Almonacid Arellano v. Chile*, the Court reiterated that: 'The crime committed against Mr. Arellano cannot be susceptible of amnesty pursuant to the basic rules of international law since it constitutes a crime against humanity'.¹⁶

11 Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998, § 155.

12 Decision on preliminary motion on lack of jurisdiction: illegal delegation of jurisdiction by Sierra Leone, *Fofana* (SCSL-2004-14-AR72(E)), Appeals Chamber, 25 May 2004, § 3.

13 Decision on preliminary motion on the invalidity of the Agreement between the UN and the Government of Sierra Leone on the establishment of the Special Court, *Gbao* (SCSL-2004-15-AR72(E)), Appeals Chamber, 25 May 2004, § 9.

14 Judgment, *Barrios Altos v. Peru*, IACtHR, 14 May 2001, § 44.

15 Judgment, *La Cantuta v. Peru*, IACtHR, 29 November 2006, § 225.

16 Judgment, *Almonacid Arellano et al. v. Chile*, IACtHR, 26 September 2006, § 129. See also, Judgment, *Dos Erres v. Guatemala*, IACtHR, 24 November 2009, § 129; Judgment, *Gomes Lund v. Brazil*, IACtHR, 24 November 2010, § 180; and Judgment, *Gelman v. Uruguay*, IACtHR, 24 February 2011, § 225.

Similarly, in *Ould Dah v. France*, the European Court of Human Rights (ECtHR) declared, after concluding that ‘the prohibition of torture has attained the status of a peremptory norm or *jus cogens*’, that:

The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State, as can be seen for example from Article 17 of the Statute of the International Criminal Court, which does not list this situation among the grounds for dismissing a case as inadmissible.¹⁷

In *Abdulsamet Yaman v. Turkey*, the ECtHR also found that ‘where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible’.¹⁸

Similarly, in the *Zimbabwe Human Rights NGO Forum v. Zimbabwe* case, the African Commission on Human and Peoples’ Rights opined that ‘[t]here has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights [violations] has become a rule of customary international law’.¹⁹ Furthermore, in the *Malawi African Association and Others* case, the Commission was of the view that ‘an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter’.²⁰

In sum, either as a legal consequence arising from the *jus cogens* character of the prohibition of crimes against humanity or as a rule under customary international law, international and regional courts and commissions have consistently held that amnesties shall not apply to crimes against humanity. Leading authorities and experts have agreed with this view.²¹

17 Decision, *Ould Dah v. France*, ECtHR, 17 March 2009.

18 Judgment, *Abdulsamet Yaman v. Turkey*, ECtHR, 2 November 2004, § 55.

19 Decision, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, African Commission on Human and Peoples’ Rights (ACHPR), 15 May 2006, § 201.

20 Decision, *Malawi African Association and Others v. Mauritania case*, ACHPR, 11 May 2000, § 83.

21 G. Werle, *Principles of International Criminal Law* (2nd edn., TMC Asser Press, 2009), at 77 (‘general amnesties for crimes under international law are impermissible under customary international law’); C. Van der Wyngaert and T. Ongena, ‘*Ne bis in idem* Principle, Including the Issue of Amnesty’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 705, at 727 (‘there is a customary international law prohibition against amnesty for crimes that come under the jurisdiction of the court, making such amnesties null and void and not binding upon the ICC’); T. dal Maso Jardim, ‘Les amnisties’, in H. Ascencio, E. Decaux and A. Pellet (eds), *Droit International Pénal* (2nd edn., Pedone, 2012) 565, at 572 (‘si la répression des certain crimes internationaux est une norme impérative et qu’elle est à la nature d’une obligation erga omnes, cette règle est valable pour la Sierra Leone et, dès lors, sa loi d’amnistie devrait également être annulée quant à ces crimes’).

D. *The Position of United Nations' Organs, Agencies, and Bodies*

The United Nations' (UN) Secretary-General, on more than one occasion, has held the view that amnesties may not apply to crimes against humanity and other crimes under international law. For example, when the Lomé Peace Agreement was signed between the parties to the armed conflict in Sierra Leone, he instructed his representative to sign the agreement with the explicit proviso that: 'The United Nations holds the understanding that the amnesty and pardon in article IX of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of humanitarian law.'²²

The Agreement between the Government of Cambodia and the UN on the investigation of crimes under international law committed in that country in the past, which includes genocide, crimes against humanity, and grave breaches of the Geneva Conventions, declares that Cambodian authorities 'shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement'.²³ The provision is an important indicator of the general view that amnesties for serious crimes are prohibited, since the UN insisted on its inclusion, which was accepted by a Member State.

The view of UN treaty bodies, independent experts and special rapporteurs seem also to be unanimous in rejecting amnesties for crimes against humanity. For example, in its Concluding Observations on Sierra Leone, the Human Rights Committee (HRC) recommended the state to 'ensure that the amnesty provision is not applied to the most serious human rights violations that amount to crimes against humanity or war crimes'.²⁴ The Committee against Torture (CAT) also noted in its Concluding Observations on Uruguay that this state 'should continue to work to ensure that crimes against humanity,

22 *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc. S/1999/836, 30 July 1999, § 7. A similar statement was made in the report *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, § 64(c) ('Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court'). See also UN Secretary-General, Statement No. SG/SM/14069-SC/10525, 19 January 2012 ('I encourage the Council to include the promotion of transitional justice measures more broadly in the mandates of peacekeeping and political missions. I also encourage the Council to reject any endorsement of amnesty for genocide, war crimes, crimes against humanity or gross violations of human rights and international humanitarian law').

23 *Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea*, GA Res. 57/228(B), 13 May 2003, Art. 11(1).

24 HRC, *Concluding Observations on Sierra Leone*, UN Doc. CCPR/C/SLE/CO/1, 17 April 2014, § on 'Amnesty Laws'. See also HRC, *Concluding Observations on Croatia*, UN Doc. CCPR/C/HRV/CO/2, 4 November 2009, § 10(d).

including acts of torture and enforced disappearance, are not subject to any statute of limitations, amnesty or immunity'.²⁵

Similarly, the Committee on the Elimination of Discrimination against Women, in its Concluding Observations on Ukraine in 2017, recommended the state:

[T]o reject demands for amnesty to be given to those persons suspected, accused or convicted of war crimes, crimes against humanity or gross violations of human rights, including conflict-related sexual violence, recalling that amnesties are impermissible if they interfere with victims' right to an effective remedy, including reparation, or if they restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.²⁶

The Committee on Enforced Disappearances (CED), in its Concluding Observations on Bosnia and Herzegovina, recommended the state to 'repeal any provision that may have the effect of exempting perpetrators of enforced disappearance from any criminal proceedings or sanction against them ... remove the possibility of granting amnesty for international crimes, including enforced disappearance'.²⁷ The UN Committee on the Rights of the Child, in its Concluding Observations on Uganda recognized 'that the Amnesty Act of 2000 has contributed to the return, demobilization and reintegration of thousands of children forcefully recruited by the [Lord's Resistance Army], however is concerned that the criteria for granting amnesties are not in compliance with the international legal obligations of the State party, notably the Rome Statute of the International Criminal Court'.²⁸

Finally, the former UN Special Rapporteur on Torture, Sir Nigel Rodley, after analysing 'consistent international jurisprudence' stated 'that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law'.²⁹

E. The International Committee of the Red Cross and the Prohibition of Amnesties for War Crimes and Crimes Against Humanity

Rule 159 of the study by the International Committee of the Red Cross (ICRC) on customary international humanitarian law states that '[a]t the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed

25 CAT, *Concluding Observations on the Third Periodic Report of Uruguay*, UN Doc. CAT/C/URY/CO/3, 10 June 2014, § 16.

26 Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Ukraine*, UN Doc. CEDAW/C/UKR/CO/8, 7 March 2017, § 11(d).

27 CED, *Concluding Observations on the Report Submitted by Bosnia and Herzegovina under article 29 (1) of the Convention*, UN Doc. CED/C/BIH/CO/1, 3 November 2016, § 86.

28 Committee on the Rights of the Child, *Concluding Observations: Uganda*, UN Doc. CRC/C/OPAC/UGA/CO/1, 17 October 2008, § III.

29 *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/56/156, 3 July 2001, § 33.

conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.³⁰

While this rule is clearly applicable to war crimes committed in non-international armed conflicts, it appears to be also applicable, *mutatis mutandi*, to crimes against humanity. Indeed, the Commentary to Rule 159 explains that ‘when it adopted paragraph 5 of Article 6 of Additional Protocol II, the USSR declared, in the reasoning of its opinion, that it could not be interpreted in such a way that it allow war criminals or other persons guilty of crimes against humanity to escape severe punishment. The ICRC agrees with this interpretation.’³¹ Dieter Fleck, a leading commentator in the field, has also read Article 6(5) of Additional Protocol II as excluding amnesties for crimes against humanity.³²

F. The Prohibition of Amnesties in National Legislation

The ILC’s commentary to draft Article 10 (*aut dedere aut judicare*) makes a reference to eight pieces of national legislation which prohibit amnesties for crimes against humanity. However, regrettably, the ILC does not assess whether such legislation reflects a general and uniform state practice on the issue of amnesties for serious crimes and whether it may also reflect corresponding *opinio juris* on the point. In this respect, there are many more examples the ILC could have cited.

In Africa, the laws of Burkina Faso,³³ Burundi,³⁴ the Central African Republic,³⁵ Comoros,³⁶ Côte d’Ivoire,³⁷ the Democratic Republic of the Congo,³⁸ and the Gambia,³⁹ all prohibit amnesties for crimes against humanity

30 J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), at 611 (Rule 159).

31 *Ibid.*, at 612.

32 D. Fleck, ‘The Law of Non-International Armed Conflicts’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn., Oxford University Press, 2009), at 633 (‘As amnesties are related to the mere participation in hostilities, they apply to certain offenses under domestic law connected with such participation, but not to war crimes and crimes against humanity’). *Contra*, see W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012), at 188 (‘It might be safer to say that although state practice is evolving, and that amnesties in peace agreements are increasingly viewed with disfavour, a prohibitive legal rule has not crystallized’).

33 Burkina Faso, *Loi n° 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé*, Art. 14.

34 Burundi, *Loi n° 1/05 du 22 avril 2009, Code Pénal du Burundi*, Art. 171.

35 Central African Republic, *Loi n° 08-020 portant amnistie générale à l’endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles du 13 October 2008*, Art. 2.

36 Comoros, *Loi n° 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome*, Art. 14.

37 Côte d’Ivoire, *Loi n° 2003-309 du 8 août 2003 portant amnistie*, Art. 4.

38 Democratic Republic of the Congo, *Loi n° 014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques*, Art. 4; see also *Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal*, 29 février 2016 (*Journal Officiel*), Art. 34bis.

39 Gambia, *Law of 13 December 2017*, Art. 19.

and other crimes under international law. In the Americas, the laws or constitutions of Argentina,⁴⁰ Colombia,⁴¹ Dominican Republic,⁴² Ecuador,⁴³ Guatemala,⁴⁴ Nicaragua,⁴⁵ Panama,⁴⁶ Paraguay,⁴⁷ Uruguay⁴⁸ and Venezuela⁴⁹ prohibit amnesties for crimes under international law, including crimes against humanity. Likewise, in Mexico, two acts recently enacted ban amnesties, pardons and other similar measures of impunity for torture and enforced disappearance, respectively.⁵⁰

In Europe, Law No. 04/L-209 of Kosovo provides amnesty for a very long list of crimes but excludes genocide, crimes against humanity and war crimes.⁵¹ Also, the Macedonia Law on Amnesty (2002) provides an ample amnesty for nationals who may have prepared or committed criminal acts related to the armed conflict. However, the law makes clear that it does 'not apply to persons convicted for criminal acts against humanity and international law'.⁵² Finally, in Asia, the Act defining and penalizing enforced or involuntary disappearance in the Philippines bans amnesty for that crime under international law.⁵³

G. The Prohibition of Amnesties in National Courts

Several supreme or constitutional national courts have found that, on the basis of international law, amnesties may not apply to crimes under international law, including crimes against humanity.

The Supreme Court of Argentina, in the *Simón* and *Mazzeo* cases,⁵⁴ on the basis of international law, found that an amnesty law may not preclude the in-

40 Argentina, *Ley 27.156. Prohibición de indultos, amnistías y conmutación de penas en delitos de lesa humanidad*, 31 July 2015 (Official Gazette), Art. 1.

41 Colombia, Peace Agreement, signed on 24 November 2016, Sec. 40.

42 Dominican Republic, *Ley no. 550-14, Código Penal de la República Dominicana*, Art. 95.

43 Ecuador, *Constitución de la República del Ecuador*, Art. 80.

44 Guatemala, *Ley de Reconciliación Nacional*, 27 December 1996, Art. 8.

45 Nicaragua, Criminal Code, *Ley 641*, Art. 130.

46 Panama, *Código Penal de Panamá*, Art. 115(3).

47 Paraguay, *Ley 5.877*, 29 September 2017 (Official Gazette), Art. 10.

48 Uruguay, *Ley 18.026*, 4 October 2006, Art. 8.

49 Venezuela, *Constitución de la República Bolivariana de Venezuela*, Art. 29.

50 Mexico, *Ley general para prevenir, investigar y sancionar la tortura y otros tratos o penas crueles, inhumanos o degradantes*, 26 June 2017 (Official Gazette), Art. 17; *Ley General en materia de desaparición forzada de personas, desaparición cometida por particulares y del sistema nacional de búsqueda de personas*, 17 November 2017 (Official Gazette), Art. 15.

51 Kosovo, Law No. 04/L-209 on Amnesty, 11 July 2013, Art. 4.

52 Macedonia, Law on Amnesty, Official Gazette 18/2002, Art. 3.

53 Philippines, Republic Act No. 10353, 23 July 2012, Sec. 23.

54 Corte Suprema de Justicia de la Nación (CSJN) (Argentina), *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, causa N°17.768C, 14 June 2005, at 3; CSJN, *Mazzeo, Julio L. y otros s/ rec. de casación e inconstitucionalidad*, 13 July 2007, § 19.

investigation and prosecution of crimes against humanity. A Federal Court of Rio de Janeiro, Brazil, took a similar view in the case of *Rubens Beyrodt Paiva* in 2014, concerning an enforced disappearance committed in 1974, amounting to a crime against humanity.⁵⁵ The Supreme Court of Chile has repeatedly concluded that crimes against humanity may not be subject, on the basis of international law, to the 1978 Amnesty Law.⁵⁶ The Constitutional Court of Peru, in the *Santiago Martín Rivas* case, concluded that the two amnesty laws enacted in Peru in the 1990s under Alberto Fujimori's regime could not apply to the investigation and prosecution of crimes against humanity,⁵⁷ consistently with the IAcTHR's previous judgment in *Barrios Altos v. Peru* case.⁵⁸

The same approach, this time making reference to the *El Mozote v. El Salvador* case,⁵⁹ was followed by the Supreme Court of El Salvador. The latter found, in 2016, that the 1993 Amnesty Law — covering all those responsible for crimes committed during the internal armed conflict — could not apply to those who have committed crimes against humanity or war crimes.⁶⁰ Likewise, the Supreme Court of Colombia, while examining the ICC Statute's constitutionality before proceeding to its ratification, found that Colombian law only allows amnesties to cover political offences, to the exclusion of those defined in the ICC Statute and of human rights violations.⁶¹

Moving to Africa, the Central High Court in Addis Ababa, Ethiopia, concluded in the *Col. Mengistu Haile Mariam et al.* case that: 'It is, however, a well-established custom and belief that war crimes and crimes against humanity are not subject to amnesty and aren't barred by limitation.'⁶² And, in Uganda — where the Amnesty Act 2000 exempts from criminal prosecution any Ugandan who has engaged in war or armed rebellion against the government — the Supreme Court in *Thomas Kwoyelo* unanimously concluded that acts of a grave nature, like genocide or wilful killing of civilians, 'do not qualify for grant of amnesty under the Amnesty Law.'⁶³

55 Tribunal Regional Federal da 2ª Região (Brazil), 181-*Habeas Corpus Criminal*, Turma Espec.I, Penal, *Previdenciário e Propriedade Industrial*.

56 Corte Suprema (Chile), *Rol N° 3302-09*, 18 May 2010, 1st, and also *Rol N° 2263-10*, 27 April 2011, 5th.

57 Tribunal Constitucional del Perú, Lima, *Exp. N.º 4587-2004-AA/TC*, 29 November 2005, § 63; Corte Superior de Justicia de Lima (Primera Sala Penal Especial), *Julio Rolando Salazar Monroe et al.*, 03-2003-1° SPE/CSJLI, 8 April 2008, § 216.

58 *Barrios Altos v. Peru*, *supra* note 14.

59 Judgment, *El Mozote and Nearby Places v. El Salvador*, IAcTHR, 25 October 2012, § 296.

60 Sala de lo Constitucional de la Corte Suprema de Justicia (El Salvador), *Case 44-2013/145-2013*, 13 July 2016.

61 Suprema Corte de Justicia de Colombia, *Sentencia C-578/02*, 2002, §§ 2.1.7. and 2.2.

62 Central High Court (Ethiopia), Addis Ababa, *Col. Mengistu Haile Mariam et al.* case, 23 May 1995. The Court also added: '[n]either the Transitional Government of Ethiopia nor any other party has the power to call for national reconciliation and thereby grant amnesty or pardon in relation to war crimes and crimes against humanity.'

63 *Uganda v. Thomas Kwoyelo*, Constitutional Appeal No. 01 of 2012, Judgment, 8 April 2015, at 41. See P. Bradfield, 'Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo', 15 *Journal of International Criminal Justice* (2017) 827.

In light of the above, the ILC's exclusion of a general prohibition of amnesties from the text of the draft articles on crimes against humanity seems to be untenable.⁶⁴ The contemporary practice of states, which constitutes the cornerstone of the Commission's work, and which in many cases have reversed previous amnesty laws, in addition to the nearly uniform interpretation given by international, regional and national courts and tribunals, as well as by UN organs, bodies and experts, confirms that such a general prohibition would reflect a rule of customary international law.

3. Military Jurisdictions and Crimes Against Humanity

The Special Rapporteur has rightly observed in his second report that virtually no treaty, among all those addressing crimes under international law and human rights violations within a national legal system, expressly prohibits the use of military courts⁶⁵ — the Inter-American Convention on Forced Disappearances being the exception to the rule.⁶⁶ Nonetheless, core international human rights instruments provide that in the determination of any criminal charge against a person, everyone shall be entitled to a fair and public hearing 'by a competent, independent and impartial tribunal established by law'.⁶⁷

Military jurisdictions, including military courts and commissions, even if established by law, are not genuinely independent.⁶⁸ They are special tribunals lacking separation from the executive branch of government. Judges, prosecutors and counsels are normally serving members of the armed or security forces, who are subject to orders of military superiors and to military discipline and assessments, and are usually appointed by the ministry of defence or the head of government. Arguably, they are also less capable than ordinary civilian courts to resist interference, pressures or improper influence from superiors

64 See, *contra*, D. Orentlicher, 'Immunities and Amnesties', in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2013) 202, at 222.

65 2016 Murphy Report, *supra* note 2, § 189.

66 Art. IX, Inter-American Convention on Forced Disappearance of Persons ('Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions'). A total of 15 states are, so far, parties to this regional instrument. Only Mexico made a reservation to Art. IX at the time of depositing the instrument of ratification in 2002, but withdrew it in 2014.

67 For example, Art. 14 ICCPR; Arts 12 and 13 Convention against Torture; Art. 11(3) Convention against Enforced Disappearance, *supra* note 3.

68 Amnesty International, *Fair Trial Manual* (2nd edn., 2014), available online at <https://www.amnesty.org/en/documents/POL30/002/2014/en/> (visited 28 June 2018), at Chapter 29. For a study on military courts, see F. Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, Vol. 1 (International Commission of Jurists, 2004) and Comisión Colombiana de Juristas, *Tribunales Militares y graves violaciones de derechos humanos* (2011), available online at <http://www.coljuristas.org/documentos/libros.einformes/tribunales.militares.pdf> (visited 28 June 2018).

or any branch of government. Not to mention that, when military jurisdictions proceed about human rights violations or international crimes allegedly committed by military personnel, the *esprit de corps* may preclude genuine criminal investigations. Furthermore, military courts and commissions often afford only limited rights to the accused. Even when military courts' decisions can be reviewed by ordinary civilian courts, the human right standard for fair trial may not be satisfied since, as the IACtHR has determined, the judge must also be independent in the proceedings of first instance.⁶⁹

The ILC's draft articles should prohibit resort to military jurisdictions to proceed against persons suspected of being criminally responsible for crimes against humanity. The latter shall only be tried, when proceeding at the national level, before ordinary civilian courts.

A. The Prohibition of Military Jurisdictions under International Law

UN treaty bodies and experts seems to share the view that military jurisdictions should be prevented from exercising jurisdiction over crimes against humanity and, more in general, human rights violations. The HRC,⁷⁰ the CAT,⁷¹ the UN Working Group on Arbitrary Detention,⁷² the Working Group on Enforced or Involuntary Disappearances,⁷³ the UN Special Rapporteur on violence against women,⁷⁴ and the UN Special Rapporteur on the independence of judges and lawyers⁷⁵ are among them. Furthermore, the 1992 Declaration on the

69 Judgment, *Radilla-Pacheco v. Mexico*, IACtHR, 23 November 2009, § 281.

70 HRC, *Concluding Observations on Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999, § 9(2) ('that the law be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature'). See also, HRC, *Concluding observations on Peru*, UN Doc. CCPR/C/PER/CO/5, 29 April 2013, § 17.

71 CAT, *Concluding observations of the Committee against Torture on Colombia*, UN Doc. CAT/C/COL/CO/4, 4 May 2010, § 16 ('The Committee reiterates its concern that the military justice system continues to assume jurisdiction in cases of gross human rights violations, including extrajudicial executions carried out by the security forces, thereby undermining the impartiality of those investigations').

72 *Report of the Working Group on Arbitrary Detention, Addendum, Mission to Equatorial Guinea*, UN Doc. A/HRC/7/4/Add.3, 18 February 2008, § 100(f) ('the jurisdiction of military courts should be limited exclusively to military offences committed by armed forces personnel and they should have no jurisdiction to try civilians').

73 *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/2006/56, 27 December 2005, § 599 ('in combating disappearances, effective preventive measures are crucial. Among them, it highlights ... bringing to justice all persons accused of having committed acts of enforced disappearance, ensuring that they are tried only by competent civilian courts').

74 *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum, Mission to the Democratic Republic of the Congo*, UN Doc. A/HRC/7/6/Add.4, 28 February 2008, § 108(b) ('Amend existing legislation to ensure that civilian courts have jurisdiction over all crimes against humanity, regardless of the perpetrator's function').

75 *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, UN Doc. A/HRC/29/26/Add.3, 26 May 2015, § 113 ('legislation on military courts should be revised to ensure that the military court system only has jurisdiction to try military personnel who have committed military offences or breaches of military discipline, when such offences do not amount to serious human rights violations, and to transfer from military to civilian courts

Protection of All Persons from Enforced Disappearance provides that persons alleged to have committed such a crime (which may amount to a crime against humanity) under international law ‘shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.’⁷⁶ The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity contains a very similar provision.⁷⁷ Likewise, although the 2006 Enforced Disappearance Convention does not explicitly prohibit the use of military jurisdictions, the CED has consistently interpreted the treaty as prohibiting military courts ‘in cases of gross human rights violations, including enforced disappearance.’⁷⁸

In this connection, and in a rather unusual response to a governmental initiative, in 2014, 12 UN Special Rapporteurs expressed concern that a proposed legislative act in Colombia — aimed at expanding the scope of military courts — ‘would unjustifiably extend the jurisdiction of military and police courts to offences that should clearly fall under the jurisdiction of ordinary courts.’⁷⁹

At the regional level, the IACtHR has repeatedly held that military criminal jurisdiction shall have a restricted scope for operation, limited to the protection of special legal interests related to the specific functions of the military, and excluding human rights violations or crimes against humanity.⁸⁰ The Court also found that crimes like enforced disappearance ‘are openly contrary to the duties of respect and protection of human rights and, therefore, are excluded from the competence of the military jurisdiction.’⁸¹

the investigation and jurisdiction of cases involving gross human rights violations committed with the alleged involvement of military and security forces’).

76 UN Declaration on the Protection of all Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, § 16(2).

77 *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, Addendum, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (hereinafter, ‘Orentlicher Report’), Principle 29, ‘Restrictions on the jurisdiction of military courts’: ‘The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court’.

78 CED, *Statement on enforced disappearance and military jurisdiction*, 8th Session (2015), available online at <https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1.Global/INT.CED.SUS.7639.E.pdf> (visited 28 June 2018), § 10.

79 *Open letter by Special Procedures mandate-holders of the United Nations Human Rights Council to the Government and the Congress of the Republic of Colombia*, 29 September 2014, available online at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15116&LangID=E> (visited 28 June 2018).

80 *Almonacid Arellano et al. v. Chile*, *supra* note 16, §§ 131–133. See also, Judgment, *Durand and Ugarte v. Peru*, IACtHR, 16 August 2000, § 117; Judgment, *Mapiripán Massacre v. Colombia*, IACtHR, 15 September 2005, § 202.

81 *Radilla-Pacheco v. Mexico*, *supra* note 69, § 277.

B. The Prohibition of Military Jurisdictions under National Law

Over the last decades, several constitutions have restricted the competence of military jurisdictions solely to offences of a military nature, excluding ordinary crimes, human rights violations and crimes under international law. The constitutions of Bolivia,⁸² Cape Verde,⁸³ Ecuador,⁸⁴ El Salvador,⁸⁵ Paraguay⁸⁶ and Venezuela⁸⁷ are among them. The 2006 law implementing the ICC Statute in Uruguay provides that genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial executions are not subject to the competence of military courts.⁸⁸ The recently enacted Law No. 5877 of Paraguay contains the same prohibition.⁸⁹ Likewise, military courts were abolished in Argentina in 2008, so that genocide, crimes against humanity and war crimes, like any other crime under national law, are under the competence of ordinary civilian courts.⁹⁰

Some of these examples prompted the ILC's Special Rapporteur on crimes against humanity to conclude that:

While such developments at the national and international levels remain ongoing, they may suggest an emerging view that the guarantee of a 'fair trial' means that a military court, tribunal, or commission should not be used to try persons alleged to have committed crimes against humanity, unless the alleged offender is a member of the military forces and the offence was committed in connection with an armed conflict.⁹¹

In sum, the emerging jurisprudence of regional and national courts, and international agencies and bodies, would support a rule that excludes the jurisdiction of military courts to try crimes against humanity. Several states where military jurisdictions had, in the past, competence to proceed for these crimes, even against civilians, have abrogated the relevant legislation in the last decades. Only ordinary civilian courts are fully able to guarantee the fundamental right to a fair trial and, for that reason, they should be preferred to military jurisdictions. Consequently, the ILC should incorporate in its final draft a prohibition for military jurisdictions to proceed against those suspected of criminal responsibility for crimes against humanity.

82 Bolivia, *Nueva Constitución Política del Estado Plurinacional de Bolivia*, Art. 180(3).

83 Cape Verde, *Constituição da República de Cabo Verde* (2010), Art. 210(1).

84 Ecuador, *Constitución de la República del Ecuador* (2008), Art. 160.

85 El Salvador, *Constitución de la República* (1983) (as amended), Art. 216(3).

86 Paraguay, *Constitución Nacional* (1992), Art. 174.

87 Venezuela, *Constitución de la República Bolivariana de Venezuela*, Art. 261.

88 Uruguay, *Ley 18.026* (2006), *supra* note 48, Art. 11.

89 Paraguay, *Ley 5.877* (2017), *supra* note 47, Art. 13.

90 Argentina, *Ley 26.394* (2008), Art. 1.

91 2016 Murphy Report, *supra* note 2, § 192.

4. Reservations to a Convention on Crimes Against Humanity

As it is well known, a reservation is a unilateral statement made by a state when signing, ratifying or acceding to a treaty whereby the state purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.⁹² As the commentary explains, the ILC has taken the decision, in accordance with its practice, not to draft ‘final clauses on matters such as ratification, reservations, entry into force or amendment’.⁹³

The Special Rapporteur, bearing in mind that states may wish to receive further guidance on this matter, set forth the five potential courses of action on reservations. First, the draft articles could be silent on the issue, thus permitting reservations compatibly with the Vienna Convention regime,⁹⁴ like the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Secondly, the draft articles could be silent on reservations in general, but expressly allow a reservation to the treaty’s dispute settlement mechanism, like the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁹⁵ Thirdly, the draft articles could prohibit reservations in general, with one or more explicit exceptions for specific provisions, like the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights.⁹⁶ Fourthly, the draft articles could establish that reservations are possible for certain provisions, but not for other ones, like the 1951 Convention Relating to the Status of Refugees.⁹⁷ Finally, the draft articles may expressly prohibit all reservations, like in the ICC Statute.⁹⁸

Therefore, it will be for states, when negotiating to translate the draft articles on crimes against humanity into a convention, to decide on the matter of reservations choosing one of these five possible avenues. On one side, allowing at least certain reservations may encourage wider participation by states which, otherwise, could be reluctant to become parties. On the other, a total ban on reservations could be appropriate in the case of a convention against crimes against humanity, to ensure that all States Parties assume the same obligations in repressing these heinous crimes and to ensure consistency with the ICC Statute, with which the future convention will necessarily interact. In other words, the issue of reservations for the future convention on crimes against humanity is subject to the traditional debate between those advocating for the broadest possible acceptance of the new instrument, on one side, and those

92 *Report of the International Law Commission, Sixty-third session (26 April–3 June and 4 July–12 August 2011)*, Chapter IV, *Guide to Practice on Reservations to Treaties*, UN Doc. A/66/10/Add.1 (hereinafter, ‘*Guide to Practice on Reservations to Treaties*’), § 1.1.

93 2017 ILC Report, *supra* note 1, § 3.

94 Arts 19–23, VCLT, *supra* note 7.

95 Art. 42(2) Convention against Enforced Disappearance.

96 Art. 2(1) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

97 Art. 42 Convention Relating to the Status of Refugee.

98 Art. 120 ICCSt. (‘No reservations may be made to this Statute’).

concerned about undermining the treaty's integrity and effectiveness, on the other.

In this regard, it is worth mentioning that the ILC had observed in the past that 'there is well-established practice in this area: there are more reservations to human rights treaties and codification treaties than to any other type of treaty'.⁹⁹ Consequently, unless a prohibition on reservations is adopted in future negotiations, states will be free to formulate them, compatibly with the default VCLT regime on this issue. In this case, any State Party could decide, for instance, to: exclude or re-define some particular crimes against humanity; broaden the scope of application of defences which would normally be prohibited by the future convention, like superior orders; modify the extent of national courts' jurisdiction, and/or the provision on *aut dedere aut judicare*; or reduce the suspects' rights, like the right to consular assistance. Moreover, in the absence of a body monitoring the future convention's implementation — and at the moment the draft articles do not provide for such monitoring body — it would ordinarily be up to each contracting party to determine whether a particular reservation is in compliance with the object and purpose of the treaty.

The Special Rapporteur recognized that a complete prohibition of reservations 'might avoid some types of reservations that radically alter obligations of the convention'.¹⁰⁰ As observed by Antonio Cassese, reservations 'may impair the integrity of multilateral treaties',¹⁰¹ and '[t]o be workable, this regime should always rely on the possibility that there is an international body to monitor and assess the admissibility of reservations, and rule on the matter'.¹⁰² Some may argue that the possibility to raise objections — unilateral statements made by a state in response to a reservation formulated by another state, whereby the former state purports to preclude the reservation from having its intended effects —¹⁰³ is a sufficient answer to invalid reservations. However, as the HRC explained, the VCLT 'provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties'.¹⁰⁴ Indeed, a state may have no interest in

99 ILC, *Guide to Practice on Reservations to Treaties*, *supra* note 92, § 3.1.5.3, Commentary, § 12.

100 Admittedly, the Special Rapporteur, however, continues by noting a prohibition of reservations 'would also deny States any opportunity to calibrate the interface of the convention with uncontroversial aspects of their national criminal law, some of which may be constitutional and therefore difficult to change'. *Third report on crimes against humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, § 326.

101 A. Cassese, *International Law* (2nd edn., Oxford University Press, 2005), at 174.

102 *Ibid.*

103 ILC, *Guide to Practice on Reservations to Treaties*, *supra* note 92, § 2.6.1, 'Definition of objections to reservations'.

104 *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, § 17. See also C. Walter, 'Article 19: Formulation of Reservations', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer-Verlag, 2012) 239, at 267.

objecting to a reservation which will not directly and immediately affect its national interests.

In light of the above, a total ban on reservations would better serve the purposes of the future convention on crimes against humanity. It would alleviate the shortcomings of not having a treaty monitoring body, ensure that all States Parties are subject to the same obligations and create more certainty about the extent of such obligations to the benefit of all states and the general public.

5. Concluding Remarks

It is unquestionable that the draft articles, as provisionally approved by the ILC in 2017, contain several remarkable provisions, such as the *aut dedere aut judicare* clause for all crimes against humanity. However, to become a truly decisive tool against impunity, the draft articles on crimes against humanity should be considerably enhanced in several aspects. Sometimes, a light reformulation of a provision may suffice, as in the case of the rather cumbersome clause on the non-applicability of statutes of limitations, which could be reworded in a more ‘self-executing’ sense, as in Article 29 of the ICC Statute.¹⁰⁵ At other times, the addition of a few words on human rights safeguards could make a substantial difference, like the *non-refoulement* clause.¹⁰⁶ Nonetheless, stronger action is needed in the case of some fundamental provisions which are missing from the current draft, including: a provision defining victims for the purposes of the future convention, which could be inspired by modern international legal instruments — for example, the Enforced Disappearance Convention,¹⁰⁷ the Rules of Procedure and Evidence of the International Criminal Court¹⁰⁸ or the Convention on Cluster Munitions;¹⁰⁹ a provision on the ‘right to truth’;¹¹⁰ a provision making clear that statutes of limitations do not apply to civil tort suits; a provision dealing with the situation of federal states.

A political compromise — designed to secure the broadest possible participation by states to the future convention — carries the risk of resulting in the

105 Art. 29 ICCSt. (‘The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations’).

106 Amnesty International, *Commentary to the Third Report on Crimes against Humanity*, *supra* note 1, at 11.

107 Art. 24(2) Convention against Enforced Disappearance.

108 Rule 85 ICC RPE.

109 Art. 2(1) Convention on Cluster Munitions.

110 See *Question of the impunity of perpetrators of human rights violations (civil and political)*, Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, § 17; Orentlicher Report, *supra* note 77, Principle 2 (‘The inalienable right to the truth’); W. Schabas, ‘Time, Justice and Human Rights: Statutory Limitations on the Right to Truth?’ in N. Adler (ed.), *Understanding the Age of Transitional Justice: Crimes, Courts, Commissions, and Chronicling* (Rutgers University Press, 2018) 37.

adoption of 'lowest-common-denominator' provisions, or even regressive ones, contrary to the convention's purported goal of ensuring impunity for perpetrators of crime against humanity. To provide 'willing' states with the necessary tools to achieve this goal, therefore, it is necessary for the future convention on crimes against humanity to include a provision prohibiting amnesties for such crimes, and to also incorporate a ban on military jurisdictions and reservations.

Is there Something Missing in the Proposed Convention on Crimes Against Humanity?

A Political Question for States and a Doctrinal One for the International Law Commission

Sarah M.H. Nouwen*

Abstract

Part of a special issue on the proposed Convention on the Prevention and Punishment of Crimes against Humanity, this essay does not comment on what is in the draft Convention, but on what is not in it: consideration of the demands of a negotiated settlement to end armed conflict or political oppression. In the context of a negotiated settlement, the essence of transitional justice is the pursuit of justice in a way that facilitates the simultaneous pursuit of peace and reconciliation. Reading the draft articles and commentaries through this transitional-justice lens, the essay reflects upon the proposed Convention's implications for attempts to transition from conflict to peace and from oppression to democracy. With the aim of opening up a debate, it poses a political question to states — essentially about the meaning of justice and who should decide on that meaning — and a doctrinal question to the International Law Commission — about the current status of amnesties in international law.

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1. A Duty to Prosecute Crimes against Humanity — Under All Circumstances?

There is more to the notable speed and ambition with which the International Law Commission (ILC) has advanced its work on draft articles for a Convention on the Prevention and Punishment of Crimes against Humanity than its Special Rapporteur's remarkable energy and legal and diplomatic skills. One explanatory factor is a growing consensus that crimes against humanity are 'orphans', lacking their own suppression treaty, unlike their 'sibling' international crimes: genocide and war crimes.¹ The availability of recent models for suppression treaties — the Convention against Torture and the Convention against Enforced Disappearances — must also have assisted. But perhaps the most significant explanation is the Commission's approach to this project: rather than trying to codify existing custom, it has focused on progressively developing the law.² This has allowed the Commission to avoid the laborious process of ascertaining the status of customary law.

Arguably, however, the 'progressive development of international law' requires even more work and more inclusive debate than the codification of customary law. For in this pre-law phase, choices are made about what the law should become, in light of a vision of what society should look like, in other words, what would amount to 'progress'. These are inherently political choices that cannot be left to lawyers alone.³

This debate is required particularly for what is at the heart of the draft articles: the obligation to respond to crimes against humanity through criminal proceedings. Most of the draft Convention's obligations on states are dedicated to criminalization, investigation, prosecution, extradition, the trial and mutual legal assistance. Criminal proceedings with a view to meting out punishment may seem the corollary of understanding crimes against humanity as crimes: a crime is 'a legal rule the violation of which results in the liability

1 For genocide, see Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277. With respect to war crimes, suppression-treaty obligations exist only for one category of war crimes, namely the so-called 'grave breaches': see Geneva Conventions I–IV, all dated 12 August 1949, 75 UNTS 31 and onwards, and Protocol I, 8 June 1977, 1125 UNTS 3. On the idea of 'siblings', see S.D. Murphy, 'Foreword', in this special issue of the *Journal*.

2 This is acknowledged implicitly by Special Rapporteur S.D. Murphy in the *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, at 139. The fact that the draft articles' seventh preambular recital ('recall[s] that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity') uses 'recalls' might suggest that the ILC believes there already is such a duty. The commentary, however, gives no evidence for this statement, instead explaining that the recital 'foreshadows' obligations set forth in the draft articles. *Report of the International Law Commission, Sixty-ninth Session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10, 9 (hereinafter '2017 ILC Report'), commentary to the Preamble, at 24, § 8.

3 See also, with respect to the ILC's work more generally, K. Daugirdas, 'The International Law Commission Reinvents Itself', 108 *AJIL Unbound* (2014) 79, at 80.

of the violator to punishment'.⁴ The liability to punishment differentiates criminal law from bodies of law that 'merely' prohibit. However, practically, crimes against humanity are committed in, and often intertwined with, complex political and social contexts, and in some instances the criminal-law response may make it more difficult to address these contexts. It may even become an obstacle to ending and preventing crimes against humanity. In those scenarios it matters that the concept of a crime in international law merely leads to *liability* to punishment and does not by definition *require* punishment or the proceedings through which punishment can be imposed. There can thus be agreement that crimes against humanity are crimes — indeed, among the most horrific crimes — and also that they must be prevented, and yet be disagreement as to whether they should under all circumstances solicit the response prescribed in the draft articles: criminal proceedings with a view to imposing criminal sanctions.⁵

The proposed Convention would amount to a significant intensification of the criminal-justice approach to crimes against humanity and may seriously reduce societies' freedom to forego criminal proceedings. First, states parties in which the crimes were committed would be under an obligation to instigate criminal proceedings for crimes against humanity — an obligation of which the customary status is unclear and that is absent from the Rome Statute of the International Criminal Court (ICC). Secondly, in states parties where the crimes were not committed but a suspect is present, the Convention would transform what is probably currently an authorization under customary international law into a duty: they would be obliged to exercise criminal jurisdiction.⁶

In a day and age in which 'fighting impunity has become both the rallying cry and a metric of progress for human rights',⁷ questioning the centrality of criminal proceedings may be out of tune with some governments' official statements. But it is essential. The belief in trials and punishment as a way to promote international law is relatively recent and contingent; it is not a teleological outcome.⁸ State practice sometimes flat out contravenes this article of faith and, as this article will argue, there are other empirical and normative arguments that challenge its dominance.

In order to illustrate that criminal proceedings and criminal sanctions are not necessarily the most appropriate response to crimes against humanity,

4 R. O'Keefe, *International Criminal Law* (Oxford University Press, 2015), at 48, § 2.4.

5 See also, and more generally, M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007).

6 *Cf. contra* A. Coco, 'The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9 and 11 by the International Law Commission', in this special issue of the *Journal*, arguing that such a duty exists already as a matter of customary law.

7 K. Engle, Z. Miller and D.M. Davis, 'Introduction', in K. Engle, Z. Miller and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) 1, at 1.

8 K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', 100 *Cornell Law Review* (2015) 1069; S. Moyn, 'Anti-Impunity as Deflection of Argument', in Engle et al. (eds), *Anti-Impunity*, *supra* note 7, at 68.

this article focuses on the situation of a negotiated settlement after a civil war or political oppression. This is one of several circumstances in which states are confronted with the question of how to address large-scale human rights abuses and international crimes, in other words, how to engage in ‘transitional justice’. Unlike situations of a total victory of one side of the conflict (e.g. post-World War II Germany; post-genocide Rwanda), or the gradual reform of an incumbent authoritarian government (e.g. post-Franco Spain; Pinochet’s Chile), the situation of a negotiated settlement (e.g. between the National Party and the African National Congress, ‘ANC’, in South Africa; between the Government of Colombia and the Revolutionary Armed Forces of Colombia) usually involves negotiations on the key pillars of the future society, including on how that society should deal with its past. If a treaty were to prescribe that states must prosecute crimes against humanity under all circumstances, this would seriously limit the influence of the directly affected society in defining the meaning, shape and execution of ‘their justice’.

Proponents of the criminal-justice approach will argue that this is exactly the objective of the treaty: rendering prosecutions beyond the pale of negotiations on the ground that crimes against humanity are ‘of concern to the international community as a whole.’⁹ The purpose of this article is to stimulate a debate among states, and ideally other actors, too, about the political and normative question whether crimes against humanity must be prosecuted and punished through criminal sanctions under all circumstances. If the answer is negative, a doctrinal question emerges: whether the draft articles in their present form sufficiently qualify the duty to prosecute. If they do not, text should be introduced to accommodate negotiated settlements that aim to pursue justice, peace and reconciliation in an integrated manner.

This article thus aims to push the debate in the opposite direction of where Hugo Relva takes it in his contribution to this special issue.¹⁰ Representing Amnesty International, he argues that there are several things missing in the draft articles, among them, a prohibition on amnesties. While I agree that there is something missing, I argue that what is missing is an explicit qualification of the duty to submit cases for prosecution in cases of negotiated settlements, given that there are good reasons to qualify this duty, including, in some circumstances, respect for amnesties. However, unlike Relva’s article, this piece does not focus on amnesties per se. Amnesties easily become a red herring: they are easy to rally against but a prohibition on amnesties in and of itself does little to secure meaningful accountability. Instead, we should look at the reasons why states sometimes do not want to prosecute and whether these reasons in some circumstances deserve accommodation, or not.

The article begins with the normative and political question: should criminal trials and punishment always be the response to crimes against humanity? Directing this question for now primarily to states, the primary actors to

9 2017 ILC Report, *supra* note 2, at 22, fourth preambular recital.

10 H.A. Relva, ‘Three Propositions for a Future Convention on Crimes Against Humanity: The Prohibitions of Amnesties, Military Courts, and Reservations’, in this special issue of the *Journal*.

provide comments on the draft articles, the article illustrates the significance of this question with a transition that once was internationally welcomed but would probably have clashed with the obligations in the proposed Convention. The article then analyses doctrinally whether under the proposed provisions it would be possible to argue that in situations of a negotiated settlement, there can be exceptions to the duty to prosecute. In the absence of an explicit exception, but in the presence of some open-ended language that could be read as qualifying the duty to prosecute, the ILC's commentaries on the permissibility *vel non* of an amnesty under international law will be analysed. This leads to this article's second key question: a doctrinal one, for the ILC. The ILC's commentary surveys relevant instruments, (quasi-) judicial opinions and practice, but what are the legal ramifications of those materials? This article concludes that although the duty to prosecute crimes against humanity under customary law is ambiguous and the draft articles in and of themselves seem to qualify the duty to prosecute to some extent, there is a risk that adjudicators and implementers will interpret this qualification away, no longer allowing leeway for negotiated settlements that provide for a justice arrangement other than criminal proceedings and ordinary criminal sanctions. Against that background, an example is given of language that would explicitly allow for consideration of the demands of a negotiated settlement.

2. The Burning Political and Normative Question

The burning political question for states and others to engage with is how to weigh the strong normative argument in favour of a duty to prosecute — an expression of condemnation of an international crime — against the implications of, and justifications for, negotiated settlements. At a more fundamental level, the question arises whether it is desirable or even possible to resolve this issue now for all possible future scenarios. Another fundamental question is which society (the local, national, regional or international, that of victims or survivors) should have a say, or the final say.

For an illustration of the justice question in a negotiated settlement, we can turn to South Africa's 'miracle transition' from apartheid to a united, democratic and non-racial state. The South African example is helpful because, on the one hand, it has been the scenario that has featured most prominently as a potential alternative to prosecution in debates related to the present one, for instance, whether the ICC should respect domestic transitional-justice arrangements or whether amnesties can be compatible with international law.¹¹

11 For the idea that the ICC must have respect for transitional-justice arrangements as in South Africa, see for instance Kofi Annan, speaking in his capacity as UN Secretary-General: 'Some people ... have suggested that in the future such an exemplary process of national reconciliation might be torpedoed, since the Statute empowers the Court to intervene in cases where a State is "unwilling or unable" to exercise its national jurisdiction. ... [T]hat argument is a travesty. The purpose of that clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take

On the other hand, the South African transitional arrangement beautifully illustrates the painful trade-offs that negotiated settlements may require. Precisely because it was not ‘ideal’, neither in design nor in implementation, the South African transitional-justice arrangement is an ‘ideal’ case study for the purposes of this article.¹²

advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.’ See UN Press Release, ‘Secretary-General Urges “Like-Minded” States to Ratify Statute of International Criminal Court’, (SG/SM/6686), 1 September 1998, available online at <https://www.un.org/press/en/1998/19980901.sgsm6686.html> (visited 23 July 2018). For discussion of the legal significance of the South African amnesty law having received widespread international approval, see, for instance, in judicial opinion, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), *Ieng Sary* (002/19-09-2007/ECCC/TC), Trial Chamber, 3 November 2011, § 52 and, in the scholarly literature, C. Kreß and L. Grover, ‘International Criminal Law Restraints on Peace Talks to End Armed Conflicts of a Non-International Character’, in M. Bergsmo and P. Kalmanovitz (eds), *Law in Peace Negotiations* (2nd edn., Torkel Opsahl Academic EPublisher, 2010) 41, at 50.

- 12 The South African transitional-justice model has been criticized on various grounds. Some criticism goes to the negotiated settlement, which prioritized political justice over social and criminal justice (see M. Mamdani, ‘Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa’, 43 *Politics & Society* (2015) 61, at 67). Those who criticize this prioritization usually do not argue, however, that there has not been enough criminal justice, but that there has not been enough socio-economic justice. See, for instance, W. Gumede, ‘Failure to Pursue Economic Reparations has, and Will Continue to Undermine Racial Reconciliation’, in M. Swart and K. van Marle (eds), *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (Brill Nijhoff, 2017) 59. Also often criticized are the limitations on the mandate of the Truth and Reconciliation Commission (TRC), or the TRC’s interpretation of its own mandate (see e.g. M. Mamdani, ‘Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa’, 32 *Diacritics* (2002) 32) and the TRC’s epistemology and methodology (see e.g. C. Bundy, ‘The Beast of the Past: History and the TRC’, in W. James and L. Van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Ohio University Press/David Philip Publishers, 2000) 9). But again, these criticisms do not imply that there should have been more criminal justice. The same applies to the criticism that the government failed to pay sufficient reparations, especially in light of the fact that it had barred civil cases, a criticism levelled even by commissioners of the TRC (see e.g. A. Boraine, ‘South Africa’s Truth and Reconciliation Commission from a Global Perspective’, in C. Sriram and S. Pillay (eds), *Peace versus Justice* (University of KwaZulu-Natal Press, 2009) 137, at 139–140 and 150). The criticism that the South African process failed to target ‘beneficiaries’ of apartheid is not a criticism of a lack of prosecution either (M. Mamdani at a panel discussion reflected in A. Krog, *Country of My Skull* (2nd edn., Random House, 2002), at 112–113). Criticism that does go directly to the amnesty comes from those who had wanted prosecutions or at least have the possibility of civil claims (see Constitutional Court of South Africa, CCT 17/96, Judgment of 25 July 1996, in *Azanian People’s Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1997] 4 LRC 40, at 53 (§ 19) (hereinafter, ‘AZAPO’)) and those who argue that the amnesty was incompatible with international law (Z. Motala, ‘The Promotion of National Unity and Reconciliation Act, the Constitution and International Law’, 28 *International Law Journal of Southern Africa* (1995) 338, at 339–340). Others have criticized the fact that individuals who did not, or not successfully, apply for amnesty were not prosecuted either, or indeed, were

A. The South African Transitional-Justice Model: In Theory and in Practice

In terms of design, the South African transitional-justice model is often portrayed as one of amnesty in exchange for truth, mediated through a truth commission. However, the truth-in-exchange-for-amnesty model was a relatively small part of a larger settlement that required many more deviations from any duty to prosecute. The essence of that settlement was that the National Party agreed to majority rule and dismantling apartheid, in exchange for the ANC not challenging the legality of the previous legal regime, along with everything that had occurred within the confines of law produced by that regime, including apartheid and the economic privilege of the white minority. In jurisprudential terms, the ANC adopted H.L.A. Hart's approach to law, rather than that of Lon Fuller,¹³ in that it accepted the previous regime's legal acts as 'law' even though apartheid violated 'the inner morality of law'.¹⁴ Indeed, it agreed not to challenge the legality of the previous legal order even though the United Nations (UN) Security Council had declared the 1983 Constitution, which had entrenched apartheid, as 'null and void'.¹⁵

The respect for the legality of the previous regime influenced the boundaries of the truth commission's mandate. The category of 'gross violations of human rights' that it was mandated to investigate consisted only of acts that had been illegal under the previous regime (killing, abduction, torture or severe ill-treatment).¹⁶ It did not include the most widespread and systematic attack

subsequently granted pardons (see e.g. A. Mudukuti, 'Apartheid-era crimes still haunt us', *The Star*, 13 August 2015, available online at <https://www.iol.co.za/the-star/apartheid-era-crimes-still-haunt-us-1899266> (visited 23 July 2018)). Others have argued that the amnesty arrangement has been hijacked: '[t]he proponents of restorative justice have, it seems, been outmanoeuvred by those who see the value of amnesty/forgiveness for lubricating the apparatuses of political and state power.' (H. van der Merwe and M.B. Lykes, 'Transitional Justice Processes as Teachable Moments', 10 *International Journal of Transitional Justice (IJT)* (2016) 361, at 363). Again others have criticized the process for imposing reconciliation on victims (see R.A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001)). But see, for the counterargument that this criticism fails to recognize the *Weltanschauung* within which reconciliation at that time in that place must be interpreted, A. Krog, 'Rethinking Reconciliation and Forgiveness at the South African Truth and Reconciliation Commission', in Swart and Van Marle, *supra* in this footnote, 11. Krog (at 13) also argues that black people's disillusionment with the transition is due to white people not fulfilling their part of the deal: 'Black people ... opted for reconciliation, because they assumed white people would change and take up their responsibility to repair and restore what they had destroyed. After 20 years of democracy it has become clear that whites are *not* changing to that extent and this ignites the ire.'

13 See H.L.A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) 593; and L.L. Fuller, 'Positivism and Fidelity to Law — a Reply to Professor Hart', 71 *Harvard Law Review* (1958) 630.

14 L.L. Fuller, *The Morality of Law* (Yale University Press, 1963), at 159–160.

15 See SC Res. 554, 17 August 1984, § 2.

16 Promotion of National Unity and Reconciliation Act, Act 34 of 1995, § 1(1). The TRC encouraged E.W. De Klerk to apply for an amnesty, but he relied exactly on the position that what he had done had not been criminal: '[A]mnesty is there to get a pardon for a crime of which you believe you could be found guilty in court. ... Amnesty is not there, that is, [it is] not the correct

on the largest part of South Africa's civilian population: apartheid,¹⁷ probably already at that time a crime against humanity.¹⁸ The respect for the legality of the previous regime also meant that multiple Indemnity Acts, provisions and regulations continued to shield members of the South African military from civil and criminal liability,¹⁹ obviating their need for an amnesty.

In terms of implementation, the South African transitional-justice model was only partially put into effect. The Truth and Reconciliation Commission (TRC) collected testimonies from victims, granted amnesties to those who applied for them if they disclosed the facts of their politically motivated crimes, and published an extensive report, recommending, inter alia, that the state provide reparations to victims. However, the state instigated less than a dozen of criminal proceedings for the thousands of people who had defied the amnesty process, or whose amnesties were rejected. Most of these prosecutions failed or ended in a plea bargain.²⁰ And, compared to what the TRC had recommended, the state paid only a very small amount of reparations.

channel in which to express your sorrow, your acceptance of responsibility, your repentance for things which are not crimes.' Discussed and cited in A. Boraine, *A Country Unmasked* (Oxford University Press, 2000), at 159.

17 For an example of the disillusioning consequences in practice, see the observation by Mahlubi Mabizela, a member of the TRC's research department: 'Farm labourers saw the TRC's coming as a sort of Messiah. But the policy decision was that their suffering was not covered by the Act, it was not a gross violation. The statement takers were the ones who had to say, sorry, we are not talking to you.' (quoted in Bundy, *supra* note 12, at 19).

Criticizing the TRC for staying within the boundaries set by the TRC Act and based upon respecting the legality of the previous legal order, Mahmood Mamdani has invoked a question posed by Hannah Arendt with respect to the Holocaust: 'What happens when crime is legal, when criminals can enthusiastically enforce the law? Perhaps the greatest moral compromise the TRC made was to embrace the legal fetishism of apartheid. In doing so, it made little distinction between what is legal and what is legitimate, between law and right.' M. Mamdani, 'A Diminished Truth', in James and Van de Vijver (eds), *supra* note 12, 58 at 60.

18 'Memorandum of Law in Support of Concluding that Apartheid is a Crime against Humanity under International Law', reproduced in R. Slye, 'Apartheid as a Crime against Humanity: A Submission to the South African Truth and Reconciliation Commission', 20 *Michigan Journal of International Law* (1999) 267. Cf. contra P. Eden, 'The Role of the Rome Statute in the Criminalization of Apartheid', 12 *Journal of International Criminal Justice (JICJ)* (2014) 171.

19 On which, see A. du Bois-Pedain, 'Accountability through Conditional Amnesty: The Case of South Africa', in F. Lessa and L.A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press, 2012) 238, at 244–245.

20 See O. Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Martinus Nijhoff Publishers, 2009); A. du Bois-Pedain, 'Post-Conflict Accountability and the Demands of Justice: Can Conditional Amnesties Take the Place of Criminal Prosecutions?' in N. Palmer, P. Clark and D. Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia, 2012) 459. A former National Director of Public Prosecutions has testified how the ANC government intervened to discourage criminal proceedings in apartheid-era cases (Sworn affidavit Vusi Pikoli in the case of *Thembisile Nkadameng v the NDPP and others*, available online at <http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Vusi-Pikoli-Affidavit-Simelane.pdf> (visited 23 July 2018)).

Five key implications emerge from the negotiations of the South African settlement, the settlement itself, and its implementation when they are considered in light of the proposed duty to prosecute crimes against humanity.

First, the process of negotiating in and of itself required the parties to de-emphasize, if not abandon, the criminal frame: the pursuit of a negotiated settlement necessitated treating members of the other party as political, rather than criminal, opponents. The National Party had to change its frame of the ANC as a 'terrorist organization', while the ANC could not approach the National Party as a *hostis humani generis* that had committed crimes against humanity, including apartheid.

Secondly, the South African negotiated settlement that was eventually reached prioritized, as Mahmood Mamdani has argued, political justice over criminal and social justice.²¹ That is to say, the primary objective was a transition in power. The settlement did not directly address the enormous economic inequality; this was believed to get remedied, over time, through the transition in power. Promoting reconciliation through truth telling was prioritized over criminal justice.

Thirdly, apartheid, arguably the 'grossest' human rights violation of all, was not treated as a crime for the commission of which one risked prosecution if one did not apply for amnesty.²² A future without apartheid was one of the main objectives of the settlement, but it pursued this future by not challenging the fact that apartheid had been legal under South African law.

Fourthly, while there may be controversy as to whether apartheid as such was at the time a crime against humanity,²³ it is evident that other crimes against humanity — widespread and systematic persecution on racial grounds, torture, enforced disappearances and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health — were committed and yet not prosecuted.

Finally, while the transitional-justice model that South Africa has become internationally famous for was one of truth telling induced by the carrot of individual amnesties and the stick of prosecution, the practice was one of hardly any prosecution, with or without amnesty.

B. The International Response to the South African Transitional-Justice Model: Then and Now

While some South Africans opposed the absence of systematic prosecutions and specifically the fact that the amnesty barred even civil claims,²⁴

21 Mamdani, *Beyond Nuremberg*, *supra* note 12, and Bundy, *supra* note 12, at 11–12.

22 See also J. Dugard, 'Reconciliation and Justice: The South African Experience', 8 *Transnational Law & Contemporary Problems* (1998) 277, at 296.

23 See the articles by Slye and Eden cited *supra*, note 18. The controversy mostly depends on the standards adopted for the formation of customary international law and, particularly, *jus cogens*.

24 See e.g. AZAPO, *supra* note 12. See also J. Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, 2004) 6.

internationally South Africa's transition was widely admired.²⁵ It was not just the fact that South Africa transitioned that received praise, but also how it transitioned. After the transition, the UN General Assembly welcomed the negotiating process and accepted its outcomes. It did so even though prior to the transition, the General Assembly had labelled apartheid a crime against humanity and had adopted the Convention against Apartheid, which calls for its prosecution.²⁶ Nelson Mandela became the world's greatest political figure of his time not because he was seen as giving in to political necessity, but because he symbolized the presumed willingness of the oppressed majority to pursue reconciliation rather than vengeance, which in practice meant a different type of justice than criminal justice. Indeed, states did not argue that South Africa was under a duty to prosecute. Nor did states rely on extraterritorial grounds of jurisdiction to do so themselves, provisions in the Apartheid Convention notwithstanding.²⁷ In not doing so, they respected the course that South Africa had chosen.²⁸ This was a respect for the overall policy; there was no international involvement suggesting 'ok, amnesty for this person, but not for that person'. Such deference to national discretion was crucial; unravelling elements of the settlement could have undermined the entire settlement.

25 See e.g. GA Res 48/258, 6 July 1994, passed without a vote, operative clauses 1 and 2, according to which the GA: 'Expresses its profound satisfaction at the entry into force of South Africa's first non-racial and democratic constitution...' and 'Congratulates all South Africans and their political leaders on their success in bringing apartheid to an end and in laying, through broad-based negotiations, the foundations for a new, non-racial and democratic South Africa with equal and guaranteed rights for each and all'. See also GA Res. 48/159 A, 24 January 1994, which was passed, also without a vote, during the negotiating stages of the transition.

26 J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', 51 *International and Comparative Law Quarterly* (2001) 91, at 115.

27 Some foreign involvement in South Africa's transitional justice arrangement emerged a decade after the transition when South African victims' organizations brought *civil* cases against foreign companies under the US Alien Tort Statute. See e.g. *Khulumani v. Barclays National Bank Ltd*, 504 F.3d 254 (2d Cir. 2007). These eventually failed due to the US Supreme Court's restrictive reading of the Statute in *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 569 U.S. 1 (2012). On the controversy about the impact of this litigation on South Africa's transitional arrangement, see R. Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa* (Stanford University Press, 2017), Chapter 1.

28 See also the call to this effect in Truth and Reconciliation Commission of South Africa, *Report* (1998) (hereinafter, 'TRC Report'), Vol. 5, Chapter 8, at 349, § 114: 'The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.' See also Vol. 1, Appendix, at 94, § 1–2: '[T]he Commission — as part of the international human rights community — affirms its judgement that apartheid ... was a crime against humanity. ... This sharing of the international community's basic moral and legal position on apartheid should not be understood as a call for international criminal prosecution of those who formulated and implemented apartheid policies. Indeed, such a course would militate against the very principles on which this Commission was established.'

If the argument is that now, 25 years after South Africa's transition, there is international consensus that crimes against humanity must always be prosecuted — i.e. that South Africa should have prosecuted the crimes against humanity that were committed and that had President FW. De Klerk travelled to Oslo to collect his Nobel Peace Prize today, rather than in 1993, Norway should arrest him for involvement in crimes against humanity — we must analyse the arguments that support this position. We can distinguish among two broad types of arguments.

One set of arguments rests on empirical claims and relates to the consequences of, or need for, a particular transitional-justice arrangement. For instance, a report on amnesties by the UN High Commissioner for Human Rights states:

The United Nations policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations, represents an important evolution, grounded in long experience. Amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.²⁹

The problem with this type of argument is the weak social science on which it is based. With respect to the 'failure' argument, it shows no awareness of the risk of the attribution error that Mark Freeman has warned against: 'citing amnesty as the cause of a bad situation rather than as merely the reflection of it.'³⁰ Vice versa, the fact that amnesties may sometimes not have been necessary could be the result of a better situation.

A related argument is that states that have given amnesties often subsequently overturn these, or are under pressure to do so, because the demand for criminal accountability reverberates through generations.³¹ Argentina, Cambodia and Spain indeed provide telling illustrations. But again, that does not deny the necessity of the amnesty to achieve that transition in the first place. As stability increases, criminal justice may become more possible.³² Jack Snyder and Leslie Vinjamuri argue on the basis of an empirical analysis that the first step in creating a peaceful political order is not the universal adoption of just rules, but a political bargain among contending groups and the creation of robust administrative institutions that can predictably enforce the law. *Ergo*: 'Justice does not lead; it follows.'³³ Historical understanding

29 Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, HR/PUB/09/1 (2009), at v.

30 M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009), at 26.

31 *Rule-of-Law Tools*, *supra* note 29, at 1–2, claiming that amnesties are often not sustainable, giving Argentina as example.

32 See also Freeman, *supra* note 30, at 26.

33 J. Snyder and L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', 28 *International Security* (2003) 5, at 6.

remains key, as Dan Markel reminds his assumed, and presumably western, readers of his 1999 article on the justice of amnesty:

With the relative calm of our own period of post-war revitalization and reconciliation, we risk forgetting how precarious the existence of early modern life was and, indeed, how precarious political life still is in many parts of the world today, like South Africa. For this reason, it is necessary to recall our own cultural history to gain a little more understanding of the efforts towards reconciliation elsewhere in the world.³⁴

The more cogent type of argument for the prosecution of crimes against humanity rests on a normative, rather than empirical, claim: the ‘international community’ insists on their prosecution because these are crimes under international law, irrespective of what the society directly affected considers the best way to address them. This accountability norm has become stronger and more dominant over the past two decades, due to influential reports, the creation of international criminal tribunals and the case law of human rights courts.³⁵ The emergence of this norm over the last two decades may explain why South Africa ‘got away’ with not prosecuting in the mid-1990s,³⁶ while it is likely that it would face more international pressure to prosecute today.³⁷ However, even the strongest proponents of a duty to prosecute have suggested that there should be an exception for a situation as in South Africa.³⁸ This

34 D. Markel, ‘The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States’, 49 *University of Toronto Law Journal* (1999) 389, at 445. See also TRC Report (*supra* note 28) Vol. 1, Chapter 1, at 5, § 22: ‘We have the luxury of being able to complain [about the amnesty] because we are now reaping the benefits of a stable and democratic dispensation.’

35 See, *inter alia*, L. Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 26 June 1997; D. Orentlicher, *Promotion and Protection of Human Rights: Impunity*, UN Doc. E/CN.4/2004/88, 27 February 2004. Those studies, especially Orentlicher’s, argued that there was a growing trend of combating impunity through criminal prosecution, at the exclusion of amnesties. For other encapsulations of this view, see L.N. Sadat, ‘Exile, Amnesty, and International Law’, 81 *Notre Dame Law Review* (2006) 955; and L.J. LaPlante, ‘Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes’, 49 *Vanderbilt Journal of International Law* (2009) 915.

36 ‘Norm’ is used here in the political-science, rather than legal, understanding of the term, namely as ‘collective expectations for the proper behaviour of actors with a given identity’. See P.J. Katzenstein, ‘Introduction: Alternative Perspectives on National Security’, in P.J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, 1996) at 5.

37 In her report, Orentlicher praised the South African TRC on various accounts, but implied that truth and reconciliation commissions were no longer acceptable as an alternative, but only as a complement to criminal trials. See Orentlicher, *supra* note 35, § 10. Note, however, that in her scholarly work, Orentlicher said she would not insist ‘on prosecutions if doing so would block a peace agreement that would end human carnage’. D. Orentlicher, ‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency’, 1 *IJTT* (2007) 10, at 21. It is unclear whether the South African arrangement was considered to have ended ‘human carnage’.

38 See e.g. Sadat, *supra* note 35, at 1034, noting that ‘[y]et international criminal justice is not and should not be a “one size fits all” proposition, nor is it a panacea for the world’s ills. The South African experience suggests that although the criminal law is an important tool, where a society is able to come together in a democratic process and engage in deliberation concerning

requires an evaluation of the justifications for the South African transitional-justice arrangement at the time: would they still hold today?

C. *Evaluating the Justifications of the South African Transitional-Justice Arrangement at the Time*

Prominent South Africans have defended the country's way of dealing with the past on different grounds. We can refer to these as: (1) political necessity; (2) transitional-justice objectives; (3) the republican argument and (4) the practical argument.

1. *Political Necessity*

Writing the majority's decision in the Constitutional Court case dealing with a challenge to the amnesty, Justice Mahomed DP adopted a 'realist' justification where he reasoned 'but for a mechanism providing for amnesty, the 'historic bridge' [the reference in the constitution to the transition from apartheid to democracy] itself might never have been erected: the National Party would not have agreed to political reform including ending apartheid if it had not received reassurances that its key actors could avoid prosecution.³⁹

Is the claim of political necessity still an acceptable justification not to prosecute? Since the time of the South African transition, the argument that peace should prevail in case it clashes with criminal justice has been rejected not only on the basis of questionable empirical claims, discussed above, but also on normative arguments: peace built on a negotiated settlement that foregoes criminal prosecutions does not deserve the name peace. Unlike some of the empirical arguments mentioned above, this view recognizes that political realities may be such that insistence on criminal justice might perpetuate bloodshed. However, it holds that law should not give in to these realities.

There are two difficulties with this argument: one in terms of consequences; the other in terms of the implicit prioritization of values through a definition. In terms of consequences, this position effectively encourages parties to pursue a total victory rather than their second-best option of a negotiated settlement. First, by insisting on the criminal-law frame, this position may

the fate of perpetrators of atrocities under a former regime, some of which may be prosecuted, others not, that decision should be respected.' See also at 987.

39 *AZAPO*, *supra* note 12, at 53 (§ 19). See also TRC Report, *supra* note 28, Vol. 1, Chapter 1, at 5, § 21: 'There were those who believed that we should follow the post World War II example of putting those guilty of gross violations of human rights on trial as the allies did at Nuremberg. In South Africa, where we had a military stalemate, that was clearly an impossible option. Neither side in the struggle (the state nor the liberation movements) had defeated the other and hence nobody was in a position to enforce so-called victor's justice.' See also A. Boraine, 'Truth and Reconciliation in South Africa: The Third Way', in R.I. Rotberg and D. Thompson (eds), *Truth v. Justice* (Princeton University Press, 2000) 141, at 143–144 and D.N. Ntsebeza, 'The Uses of Truth Commissions: Lessons for the World', *ibid.*, 158, at 160 and 168.

obstruct peace talks: as discussed above, negotiations usually require treating the opponents primarily as political, rather than as criminal, actors. Secondly, from a purely rational perspective it is unlikely that any negotiating party will accept an outcome that leads to life-long imprisonment for its key members. Unless international actors are willing and able actually to stop the armed conflict, the outcome of a position that insists on criminal trials and ordinary criminal punishments will thus be continued violence. How does one justify insistence on the must-prosecute-and-punish norm to those who suffer its consequences, and for whom ‘truce at gunpoint’ might have been preferable to no truce at all?⁴⁰

In terms of implicit prioritization of values, if peace is defined as peace only if criminal justice is done, peace in and of itself is no longer recognized as a value. It is true that while international law has traditionally been strong on promoting the value of peace among states, it has been much weaker in doing so for the value of peace within a state. It is, however, notable that particularly states trying to secure and internationally defend negotiated settlements have done so by stressing their responsibility to promote peace.⁴¹ Hitherto, judicial opinion has been stronger in interpreting human rights provisions as requiring prosecutions, rather than peace. However, the fact that the majority of the judges of the Inter-American Court of Human Rights, the international court known to be harshest on amnesties, has joined a concurring opinion that advocated the idea of a human right to peace, does suggest an increasing awareness of the need to promote peace within a state as a value in and of itself. In the opinion, the Court’s President distinguished amnesties agreed upon in the context of a negotiated settlement from other types of amnesties, and argued:

States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.⁴²

40 See also J. Dugard, ‘Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?’ 12 *Leiden Journal of International Law* (1999) 1001, at 1006: ‘International opinion, often driven by NGOs and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution.’

41 The Colombian peace agreement provides some examples: see the 11th preambular recital (‘Emphasizing that peace has come to be universally described as a superior human right and as a prerequisite for the exercising of all other rights and duties incumbent upon individuals and citizens’); and consider the title of the special justice arrangement (‘the Special Jurisdiction for Peace’). Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (the Colombia Final Agreement), 24 November 2016, available online at <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> (visited 23 July 2018).

42 Inter-American Court of Human Rights (IACtHR), *The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, 25 October 2012. Concurring Opinion of Judge D. García-Sayán, at § 37.

Seen in this light, compromising criminal justice in the pursuit of peace is not a sacrifice of law on the altar of Realpolitik, but a settlement within international law to promote its distinct values simultaneously.

2. Transitional-Justice Objectives

South African institutions and individuals have also defended the country's transitional-justice arrangement on the ground that it provided for those most affected a more meaningful form of justice than criminal prosecutions.⁴³ Two elements of this argument must be considered: who are considered those most affected, and different understandings of meaningful justice.

With respect to those most affected, human rights law tends to focus on the individual victims of specific human rights violations. The definition of victim in the South African transitional-justice arrangement followed this human-rights approach, also in focusing on violations of human rights related to bodily integrity.⁴⁴ However, the settlement as such was underpinned by a desire to serve the far broader community of people who had suffered under apartheid.⁴⁵ While such suffering was not technically treated as a human-rights violation, the settlement made it possible to eradicate its root cause: apartheid. The South African transitional-justice arrangement thus tried to foster respect for both the human rights of individual victims of violations of bodily-integrity rights, and for the interests of society as a collective — interests that international human rights law, with its inherently individual focus, has challenges in protecting.

Indeed, respect for the principle of *ubuntu*, referred to in the constitutional postamble, requires treating even perpetrators as part of a society affected by crimes. *Ubuntu* implies, in the words of Bishop Tutu, chairman of the TRC, that '[w]hat dehumanizes you inexorably dehumanizes me'.⁴⁶ Antjie Krog writes that this was 'the unspoken foundation on which the TRC initially was built: that apartheid destroyed people's humanity so that many people turned into murderers'.⁴⁷ As a poignant illustration of this worldview, which she describes as 'interconnectedness-towards-wholeness', she provides an excerpt from a statement by Cynthia Ngewu, a witness who testified to the TRC and

43 See also K. Asmal, 'Stopping Crimes through Negotiations: The Case of South Africa', *Guest Lecture Series of the Office of the Prosecutor*, The Hague, 14 March 2006, at 9: 'Retributive justice would purge our society of people, but not of apartheid.'

44 Promotion of National Unity and Reconciliation Act, *supra* note 16, § 1(1).

45 See also AZAPO, *supra* note 12, at § 43: 'The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured "untold suffering and injustice" in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many.'

46 D. Tutu, *No Future Without Forgiveness* (Rider, 1999), at 35.

47 Krog, 'Rethinking Reconciliation', *supra* note 12, at 12.

whose son, Christopher Piet, had been murdered: '[t]his thing called reconciliation ... if I am understanding it correctly ... if it means this perpetrator, this man who has killed Christopher Piet, if it means he becomes human again, this man, so that I, so that all of us, get our humanity back ... then I agree, then I support it'.⁴⁸ From the epistemological and ontological worldview of *ubuntu*, a key question with respect to 'crimes against *humanity*' would thus be how they can be responded to in a way that fosters 'a fullness of humanity that includes all people'.⁴⁹

Constitutional Court justices and the TRC have argued that the transitional-justice arrangement was also better in pursuing transitional-justice ideals — truth, justice, reconciliation and reconstruction⁵⁰ — in line with the postambular consideration in the *interim* constitution that there was 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization'.⁵¹ Justice Mahomed, for instance, argued that the chosen arrangement promoted the ideal of truth: 'That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous deeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do'.⁵²

The significance of the argument that South Africa's negotiated settlement provided a more meaningful form of justice than criminal justice is that it presents the tension not as peace versus justice but as criminal justice versus other forms of justice.

In other situations of conflict, for instance, northern Uganda and Darfur, too, people have put forward diverging visions of which form of justice should be prioritized: the restoration of relationships, putting an end to ongoing abuses, redistribution, non-criminal law forms of punishment or equality.⁵³ The conceptions of justice are not necessarily mutually exclusive. But the real division is over which — and whose — vision of justice should be prioritized if they clash in specific instances or if resources are limited. The explanation for the differences in prioritization of distinct conceptions of justice is not necessarily found in cultural differences; the alternative conceptions of justice probably exist, to a greater or lesser extent, in all societies.⁵⁴

48 *Ibid.*, at 15 and 18.

49 *Ubuntu* as defined by C. Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet', 49 *Emory Law Journal* (2000) 205, at 209.

50 AZAPO, *supra* note 12, at 53, § 17; TRC Report, *supra* note 28, Vol. 1, Chapter 5, at 125 *et seq.*; A. Sachs, *The Soft Vengeance of a Freedom Fighter* (3rd rev. edn., Souvenir Press, 2011), Epilogue.

51 Constitution of the Republic of South Africa, Act 200 of 1993, 'National Unity and Reconciliation'.

52 AZAPO, *supra* note 12, at 53, § 17. See also TRC report, *supra* note 28, Vol. 1, Chapter 1, at 5 § 22 and Chapter 5, at 128 § 91.

53 See, more elaborately, S.M.H. Nouwen and W.G. Werner, 'Monopolising Global Justice: International Criminal Law as a Challenge to Human Diversity', 13 *JICJ* (2015) 157.

54 *Ibid.*, at 164.

How societies prioritize these conceptions of justice will depend on the particular demands of the particular context. As instances in which societies have changed their views on the acceptability of a specific transitional-justice arrangement of the past illustrate — consider Argentina, Spain, Cambodia — with changes in the context, the prioritization of concepts of justice may also change. Neither this article nor even the ILC is going to solve the millennia-old debate over the best definition of justice. However, what matters for the purpose of drafting this Convention is to recognize that the matter has not yet been resolved.

3. *The Republican Argument*

The ‘republican’ argument justifies the South African transitional arrangement on the basis that this was an arrangement agreed upon by the South African people and came about through democratic and inclusive processes.⁵⁵ In and of itself, this argument cannot be sufficient: democratic and inclusive processes can result in substantive injustices. However, the argument can bolster the substantive arguments discussed above.

4. *The Practical Argument*

The ‘practical’ argument for the South African justice model is that prosecutions would have overwhelmed the criminal justice system, directing its limited human and financial resources away from contemporary crime and would have often failed due to difficulties in securing evidence.⁵⁶ This argument also goes some way in explaining the only partial implementation of South Africa’s transitional-justice model, namely the very limited successful prosecution of those who did not apply for amnesty or whose applications were rejected. The other explanation is that prosecutions were considered risky in light of the seeming fragility of the transition — former security members were still considered a threat⁵⁷ — and were not what the ANC wanted to be focusing on: prosecutions can be financially, politically and socially costly, and the new government wanted to invest in the future.

55 See, for instance, TRC Report, *supra* note 28, Vol. 1, at pages 1, 9, 53, 104 and 109. The republican argument is implicit in Kofi Annan’s statement, *supra* note 11; in the TRC report as quoted *supra* note 28, and in Sadat, as quoted *supra* note 38. See also K. Asmal, *supra* note 43, at 5 (‘what we mean by justice must be rooted in the circumstances of the people in whose name it is being dispensed’). However, *cf. contra*, Wilson, *supra* note 12, at 7–8.

56 See also L. McGregor, ‘Individual Accountability in South Africa: Cultural Optimum or Political Facade?’, 95 *American Journal of International Law* (2001) 32, at 36.

57 On the threat posed by the security establishment, see TRC Report, *supra* note 28, Vol. 1, Chapter 1, at 5, §§ 22–23.

D. What Exactly is the Convention After?

In searching for a substantive bottom line in how states should respond to crimes against humanity, it may be helpful openly to discuss the philosophy of international criminal law that should underpin the future Convention. What exactly should the proposed Convention be after? Should it be about punishment, and if so, what should be considered punishment? Should it be about accountability? Should it be about condemning conduct? Should it be primarily about victims? If it is agreed that the proposed Convention must be about putting people in prison, then the draft articles should indeed not provide much scope to allow alternative conceptions of justice to substitute criminal justice. But all the other objectives could be served, and sometimes be served better, by avenues that do not necessarily involve incarceration.

Some people have for instance argued that punishment should not be about locking offenders up, but confronting them on a day-to-day basis with the havoc they have wrought and working for the affected communities.⁵⁸ Accountability can be pursued in venues other than criminal trials.⁵⁹ It could be served, for instance, by amnesties conditional upon truth telling since, in the words of the South African TRC, '[t]he amnesty applicant has to admit responsibility for the act for which amnesty is being sought.'⁶⁰ Moreover, as Antje du Bois-Pedain has also argued, amnesty mechanisms such as the South African one where the applicant had to prove the political objective of their act by demonstrating belonging to a political group, had the effect of also creating a form of accountability for organizations and institutions behind the applicant, thus recognizing the collective dimensions of the crimes — an inherent weakness of criminal justice, which must focus on the individual.⁶¹

Conduct can be condemned, too, without putting offenders in prison. The word 'only' in the oft-cited quote from the Nuremberg judgment that 'crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced' leads to an exaggeration. In some instances, non-criminal sanctions may be more effective in enforcing international law than individual punishment. Perhaps the best way of condemning conduct,

58 Nouwen's discussion with two Acholi elders, Gulu, September 2008, cited in Nouwen and Werner, *supra* note 53, at 171. For arguments for a broader notion of *poena*, see also M. Drumb, 'Impunities', *Washington & Lee Legal Studies Paper No. 2017-17*, 17 November 2017, available online at <https://papers.ssrn.com/sol3/papers.cfm?abstractid=3070346> (visited 19 May 2018).

59 See also McGregor, *supra* note 56, at 37.

60 TRC Report, *supra* note 28, Vol. 1, Chapter 1, at 8–9, § 35. For another example of a mechanism that is an alternative to ordinary criminal trials, but serves transitional-justice objectives, see S. Garibian, 'Ghosts Also Die: Resisting Disappearance through the "Right to the Truth" and the *Juicios por la Verdad* in Argentina', 12 *JICJ* (2014) 515.

61 A. du Bois-Pedain, 'Communicating Criminal and Political Responsibility in the TRC process', in E. du Bois and A. du Bois-Pedain (eds), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press, 2009) 62.

for instance apartheid, is by radically breaking with it. If trials are an obstacle to doing so, they are not the ultimate condemnation.

Finally, respect for victims' rights does not necessarily require criminal proceedings and sanctions either. An often neglected element of respect for victims' rights is the duty not to assume that victims want one particular thing.⁶² To paraphrase one of Kamari Clarke's interlocutors: when victims want justice, that need not mean they want law.⁶³ Victims will often have diverging wishes and needs, especially when the category is broadly conceived.⁶⁴ Armed conflict, for instance, may not have been labelled a crime in and of itself, but usually still creates its own 'victims' as it involves enormous limitations if not abuses of human rights. A state trying to transition from conflict or oppression to a situation of the absence of violence and inclusive democracy should consider the interests of those 'victims' too, and indeed, also of those potential future victims: '[t]he quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow.'⁶⁵ States face the daunting challenge of ensuring the rights of all these 'victims', as much as possible.⁶⁶

E. Who Should Have the Final Say?

Even though 'victims' play an increasing role in international criminal law, the field's primary objective is upholding international legal norms through criminal proceedings for the benefit of international society at large.⁶⁷ But prosecutions, even mere threats of prosecution, have an impact on specific people and specific societies in concrete situations. Who should have the final say if the demands for justice among victims and survivors, the local, national, regional and international society diverge? And is it possible to determine now that crimes against humanity must always be prosecuted, given the diversity of contexts within which they are committed? Acknowledging the validity of these questions does not mean abandoning the project of a draft convention on crimes against humanity. All that is needed is ensuring that the text of the

62 See also F. Mégret, 'The Strange Case of the Victim Who Did Not Want Justice', *IJTJ* (2018), forthcoming.

63 K.M. Clark, "'We Ask for Justice, You Give Us Law': Justice Talk and the Encapsulation of Victims', in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 272.

64 See, more elaborately, S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law & Contemporary Problems* (2013) 235.

65 Anonymous, 'Human Rights in Peace Negotiations', 18 *Human Rights Quarterly* (1996) 249, at 258.

66 See also McGregor, *supra* note 56, at 39, commenting on the South African transition: 'no process will ever satisfy everyone; instead, the mission was to devise a system that would address as many people's needs as practically possible.'

67 Possibly due to the convergence with individual human rights law, 'victims' are increasingly also considered as beneficiaries of international criminal law. See Kendall and Nouwen, *supra* note 64.

future Convention sufficiently qualifies the duty to prosecute to consider the demands of, and possibly diverging views about, a negotiated settlement.

Against this background, we now turn to assessing whether the draft articles as currently formulated allow for deviations from the must-prosecute-and-punish model in the context of a negotiated settlement.

3. An Analysis of the Draft Articles and a Doctrinal Question for the ILC

Let us walk through the draft articles with four different scenarios in mind. First, one in which a state adopts a general amnesty for crimes committed during a civil war or oppressive regime without making an exception for crimes against humanity (for instance, Mozambique, after the conclusion of the General Peace Agreement in 1992).⁶⁸ Secondly, a scenario in which a state adopts an amnesty act that allows for the grant of an individual amnesty in respect of acts and offences, not excluding crimes against humanity, associated with political objectives committed in the course of past conflict, if certain conditions are fulfilled, for instance, full disclosure of all the relevant facts (for example, South Africa in 1995).⁶⁹ Thirdly, a scenario in which there is no amnesty for crimes committed during the conflict, but no criminal proceedings either (as in Sudan and South Sudan after the 2005 Comprehensive Peace Agreement). Finally, a scenario in which a peace agreement provides for investigations and prosecutions, but also for ‘special and alternative sanctions’, for example, community service and house arrest instead of imprisonment, and a reduced maximum term of sanctions, if the individual concerned has fulfilled certain conditions, for instance providing the full truth, reparations to victims and guarantees of non-recurrence (consider the 2016 Colombian Peace Agreement with the FARC-EP).⁷⁰

In analysing the draft articles, it may be helpful to distinguish between obligations on the state in the territory of which the crimes were committed and states where alleged perpetrators are present other than the state on the territory of which the crimes were committed.

A. The State on the Territory of which the Crimes were Committed

We can go straight to the draft articles related to investigation and prosecution. While South Africa’s transitional arrangement was in part made possible by the fact that apartheid was not a crime against humanity under domestic law, the duty to initiate criminal proceedings, rather than the duty to criminalize as such, would have been the biggest obstacle to the settlement.

68 Lei no. 15/92 de 14 de Outubro (Lei da Amnistia).

69 Promotion of National Unity and Reconciliation Act, *supra* note 16.

70 Colombia Final Agreement, *supra* note 41, Chapter 5.

1. *The Duty to Investigate*

Draft Article 8 obliges the state to ‘ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is a reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction’.⁷¹ The text of the provision itself does not suggest that these investigations in and of themselves must be criminal investigations; impartial investigations could also be carried out by, for instance, a truth commission or fact-finding commission. Accordingly, the Mozambique and Sudan-South Sudan scenarios would be in violation of the obligation in Article 8 due to the absence of any investigation, but the South African one would not.⁷² However, without specifying the take away from these quotes, the commentary cites a recommendation made by the Committee against Torture that would suggest that a truth commission’s investigations might not comply with the duty to investigate, as it requires that investigations be ‘under the direct supervision of independent members of the judiciary’.⁷³

2. *The Duty to Take Preliminary Measures*

Draft Article 9 obliges a state to take preliminary measures when allegations have been made against a specific offender and this offender is on its territory. These preliminary measures include, ‘upon being satisfied ... that the circumstances so warrant’ to take the person into custody, and to make immediately a preliminary inquiry into the facts. An exception to the obligation could be embodied in the phrase ‘upon being satisfied ... that the circumstances so warrant’ — a phrase the ILC’s commentary leaves unexplained. It probably refers to the evidentiary threshold for taking people into custody set by the state’s domestic law, rather than any considerations of the interests of a negotiated settlement. The commentary cites the International Court of Justice (ICJ) which has analysed a similar provision in the Convention against Torture to the effect that ‘the choice of means for conducting the inquiry remains in the hands of the States Parties’,⁷⁴ but the requirement of custody suggests that the

71 The requirement of a ‘prompt’ investigation makes perfect sense from the perspective of securing evidence, but for states emerging from a long situation of armed conflict, let alone states still in it, it may prove challenging. The commentary draws on the parallel requirement in the Convention against Torture (see 2017 ILC Report, *supra* note 2, commentary to draft Art. 8, at 80, § 2), but torture under that convention by definition implies state involvement, whereas crimes against humanity can also be committed by non-state actors, including in territories where the state has little civilian representation (in the form of police, prosecutors and judges).

72 Leaving aside the requirement of promptness. See previous footnote.

73 2017 ILC Report, *supra* note 2, commentary to draft Art. 8, at 81, § 4. The South African Commission’s Amnesty Committee was chaired by a judge, but the Commission as a whole was chaired by Archbishop Desmond Tutu.

74 2017 ILC Report, *supra* note 2, commentary to draft Art. 9, at 83, § 5, citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422, at 454, § 86.

article does not allow alternatives to criminal proceedings. Indeed, the commentary also quotes the ICJ in the same case to argue that the purpose of the preliminary measures is ‘to enable proceedings to be brought against the suspect ... and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.’⁷⁵ Whereas in a broad understanding, impunity can be countered in ways other than through criminal trials, in the context of the proposed Convention with its focus on criminal justice, Article 9 is likely to be interpreted to require preparations for criminal trials.

3. *The Duty to Submit the Case for Prosecution or Extradite*

Draft Article 10 provides the crux of the regime: the obligation to ‘submit the case to [the] competent authorities for the purpose of prosecution’, the only exception to which is extradition or surrender to another state or international criminal tribunal. The article gives some leeway in that it does not require prosecution; it obliges only to ‘submit the case ... for the purpose of prosecution’. Prosecutorial authorities may decide to prosecute, or not to.⁷⁶ The commentary mentions as one relevant factor the sufficiency of evidence of guilt.⁷⁷ The commentary cites the ICJ again where it interprets the analogous obligation in the Convention against Torture and the Convention for the Suppression of Unlawful Seizure of Aircraft to explain that the formulation was meant to ‘respect ... the independence of States parties’ judicial systems.’⁷⁸ However, the discretion is limited by the second sentence of the relevant provisions in those conventions, and of Article 10 in the draft articles on crimes against humanity, providing as it does that the authorities ‘shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State’. Still, if the domestic law grants prosecutorial authorities substantive discretion even in the case of serious crimes, or allows amnesties for other grave crimes, crimes against humanity would not always have to be prosecuted.

The real issue arises sooner, however, in that the effect of an amnesty is likely to be that a case will not even be submitted for prosecution. Indeed, the ILC’s commentary explicitly acknowledges that the obligation contained in Article 10 ‘may conflict with the ability of the State to implement an amnesty’.⁷⁹ It is in this respect that the proposed Convention could potentially change the normative landscape fundamentally. Whether this change will

75 2017 ILC Report, *supra* note 2, commentary to draft Art. 9, at 83, § 5, citing *Belgium v. Senegal*, *ibid.*, at 451, § 74.

76 An utterly pedantic point reflecting a non-native speaker’s uncertainty about the English language: according to the commentary, the prosecutorial authorities ‘may or may not decide to prosecute’; shouldn’t the ‘not’ go before ‘to prosecute’ rather than ‘decide’, in that the discretion does not relate to whether to decide, but whether to prosecute?

77 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 84, § 3.

78 *Ibid.*, at 84, § 4, citing *Belgium v. Senegal*, *supra* note 74, at 451.

79 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 86, § 8.

indeed be fundamental depends on whether the said obligation codifies or progressively develops the law and, specifically, on international law's current position on amnesties.

The ILC's commentary leaves the issue open. It dedicates three paragraphs to observations about amnesties, setting forth that there are several kinds of amnesties; that the possibility of including a provision on amnesty was debated during the negotiation of the ICC Statute and the Convention on Enforced Disappearance but that no such provision was included; what international courts have said about amnesties; the position of the UN Secretariat; and some state practice prohibiting amnesties. But it does not specify the legal take away from these observations. Rather, it concludes its observations in a fourth paragraph:

With respect to the present draft articles, it is noted that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence. Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations to victims and others.⁸⁰

The first sentence of this conclusion is true and obvious: amnesties granted in national instruments do not bind other states. The second sentence, however, begs the question: can amnesties be compatible with the obligations to criminalize, to fulfil victims' rights and to prosecute or extradite? An amnesty does not run counter to criminalization; it does not render conduct in accordance with the law, but removes the ordinary criminal-law consequences of such conduct, and only for those who benefit from the amnesty. Indeed, an amnesty can be given only on the basis that conduct is considered criminal in the first place. With respect to victims' rights, while victims have the right to obtain reparation, it is less clear that they also have a right to criminal proceedings. While the case law of human rights courts is mixed, the draft article pertaining to victims' rights in the ILC's articles on crimes against humanity does not create such a right.⁸¹

The essential outstanding question is thus whether an amnesty, or more specifically, some forms of amnesty, can be compatible with a state's obligations under the present draft article to submit a case for prosecution or extradite. It is in this area that the ILC could make a crucial contribution. Composed of the world's leading international lawyers, it could analyse the legal implications of all the factors that it lists. For instance, it mentions that amnesties can have different legal origins and be general or conditioned by certain requirements. Do the conditions that the ILC gives by way of example — 'disarmament of a

⁸⁰ *Ibid.*, at 88, § 11.

⁸¹ Draft Article 12 grants victims rights in criminal proceedings, but not the *a priori* right to criminal proceedings. On draft Article 12, see also C. Ferstman and M. Lawry-White, 'Participation, Reparation, and Redress: Draft Article 12 of the ILC's Draft Articles on Crimes Against Humanity at the Intersection of International Criminal Law and Human Rights Law', in this special issue of the *Journal*.

non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed, or an expression of apology to the victims or their families by the alleged offender’ — actually matter for the obligation contained in draft Article 10 and, if so, how? Which words in draft Article 10 make these relevant considerations? And do all of the conditions have to be fulfilled, or are some enough? For instance, the South African amnesty was conditional upon disclosure of facts, not an apology.

Similarly, what is the legal take away of the fact that provisions on amnesties were discussed in the context of the ICC Statute and the Convention on Enforced Disappearances, but not included? And what is the significance of the International Criminal Tribunal for the former Yugoslavia stating that an amnesty adopted in national law in relation to the offence of torture ‘would not be accorded international legal recognition’?⁸² Does it say anything more than the obvious fact that an international criminal court would not be bound by a domestic amnesty instrument (unless its statute provides for its applicability)? The fact that a foreign or international court does not have to apply a domestic legal instrument does not render that instrument per se prohibited under international law. The same issue arises with respect to the ILC’s observation that the instrument establishing the Special Court for Sierra Leone (SCSL) provided that an amnesty adopted in national law is not a bar to the Court’s jurisdiction.⁸³

The ILC’s commentary equates in this respect the SCSL with the Extraordinary Chambers in the Courts of Cambodia (ECCC) but this is factually incorrect. As a footnote in the ILC’s commentary reflects, the law establishing the ECCC provides that ‘[t]he scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.’⁸⁴ In other words, precisely because these Chambers are part of the domestic legal system rather than an international court — and in that sense fundamentally different from the SCSL — domestic legal instruments granting amnesty could not *a priori* be ignored. In the *Ieng Sary* decision that the ILC’s commentary also cites, the ECCC found that it could sidestep domestic amnesties, but the ECCC’s reasoning suffers from adopting considerations from other courts without justifying the application of those legal grounds in the proceedings at hand. Moreover, in *Ieng Sary*, the

82 Judgment, *Furundžija* (IT-95-17-1-T), Trial Chamber II, 10 December 1998, § 155, as cited in 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 86–87, § 9.

83 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 87, § 9.

84 Fn 423 in the ILC’s commentary (2017 ILC Report, *supra* note 2, at 87). The footnote refers to Art. 40 of the Extraordinary Chambers of Cambodia Agreement, but this should be Art. 40 of the ‘Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea’. The relevant article in the cited Agreement is Art. 11, but it is the Law, not the Agreement, that established the Chambers.

ECCC distinguished cases that upheld amnesties on grounds on which they can hardly be distinguished.⁸⁵

The weakness of the *Ieng Sary* decision is characteristic of the weakness of the argumentation on which the ‘emerging consensus’ against amnesties, to which the ILC’s commentary refers, has been built: it is based on an amalgamation of incommensurable legal arguments. The commentary illustrates this where it says that ‘the European Court of Human Rights and the African Commission on Human and Peoples’ Rights ... have found amnesties to be “impermissible” or as “not precluding” accountability under regional human rights treaties:⁸⁶ impermissible and not precluding are two different things and cannot be added up in order to get to a prohibition on amnesties. Similarly, (obiter) arguments that try to construct a prohibition on amnesties on the basis of the *jus cogens* status of a crime⁸⁷ — arguably suffering from similar weaknesses as the ICJ identified in arguments to deny immunities on the basis of a *jus cogens* prohibition of the alleged conduct⁸⁸ — are fundamentally different in character from those that hold that amnesties are incompatible with a duty to prosecute under conventional international human rights law. The latter’s existence, scope and legal basis vary per region in the world and human rights duties to prosecute might be subject to derogations under human rights law. As Miles Jackson has persuasively argued, the fact that some human rights are absolute does not automatically lead to duties flowing from that right, for instance, a duty to prosecute, enjoying the same status.⁸⁹

Since, in the system of sources of international law, the value of decisions of international courts lies not in the outcome but in the reasoning,⁹⁰ the ILC could make a crucial contribution by evaluating the various decisions that the

85 For example, the ECCC in *Ieng Sary* correctly cites the Ugandan Constitutional Court decision in *Kwoyelo* as one upholding an amnesty, but that case gives little support for the claim that was because of ‘the process by which the amnesty was enacted, the substance and scope of the amnesty, and whether it provided for any alternative form of accountability.’ (*Ieng Sary*, *supra* note 11, § 52 citing Uganda, Constitutional Court, Judgment, *Kwoyelo (alias Latoni) v. Uganda*, 22 September 2011, 150 ILR 802.) While indeed adopted in a democratic process, the Ugandan Amnesty Act 2000 was broad in both scope and substance (it covered even future crimes), without providing for an alternative form of accountability. The ECCC identifies as an apparently relevant fact that the Ugandan Amnesty Act 2000 was not a ‘blanket amnesty’, but the amnesty was conditional only upon renouncing violence, for which signing the amnesty application form was sufficient. See Amnesty Act, 2000, Laws of Uganda, Chapter 294.

86 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 87, § 10.

87 For putative implications of the *jus cogens* status of torture, see *Furundžija*, *supra* note 82, § 155, which the commentary refers to (see *supra* note 82), but does not comment upon.

88 *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, at 140–142. See also Lord Hoffman in *Jones v. Saudi Arabia* on upholding immunity for *jus cogens* crimes: ‘The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture.’ House of Lords, *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 14 June 2006, [2006] UKHL 26, § 44.

89 M. Jackson, ‘Amnesties in Strasbourg’, *Oxford Journal of Legal Studies* (2018) 1.

90 Hence their inclusion in Art. 38(1)(d) ICJSt. as a *subsidiary* source of international law.

commentary now merely lists. It would be good if the ILC could examine not only the judicial considerations against amnesties, but also those in favour. A footnote in the current commentary cites the European Court of Human Rights in *Marguš* where it speaks of a 'growing tendency in international law' against amnesties, but omits the judgment's subsequent sentence, which seems to leave the door open for some types of amnesties: 'Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims ...'⁹¹

Equally, with respect to state practice, the ILC should then pay attention not only to states that have adopted laws that prohibit amnesties, but also to states that have adopted amnesties that do not exclude crimes against humanity from their scope.⁹² Similarly, it should recognize that some of the states that have adopted laws prohibiting amnesties have also adopted differently-titled instruments with the same effect as an amnesty.⁹³ It could also consider as relevant practice that the framework decision on the European Arrest Warrant provides amnesties as a mandatory ground for refusal to execute, without excepting the crimes within the jurisdiction of the ICC, which normally give rise to surrender pursuant to the European Arrest Warrant.⁹⁴ And it would be helpful to see the ILC's view on the legal significance of the UN's position on amnesties: a UN policy not to support peace agreements that contain amnesties is just that — a policy; it does not translate into an international legal prohibition on amnesties. Moreover, UN practice has shown that its opposition to amnesties is more a matter of form than substance: it has been willing to be involved in the implementation of peace agreements accompanied by an amnesty, as long as that amnesty was incorporated in a separate document.⁹⁵

While the status of amnesties under customary and conventional law remains controversial, it is clear that draft Article 10's wording of a duty to submit a case to the authorities would run counter to the negotiated settlement in three of our four scenarios.⁹⁶ In situations of de facto amnesty,

91 *Marguš v. Croatia*, Appl. No. 4455/10, Judgment, 27 May 2014, § 139.

92 See L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart, 2008) and L. Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment', in Lessa and Payne (eds), *supra* note 19, 69.

93 For an example of which see S. Vandeginste, 'Bypassing the Prohibition of Amnesty for Human Rights Crimes under International Law: Lessons Learned from the Burundi Peace Process', 29 *Netherlands Quarterly of Human Rights* (2011) 189.

94 See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), Official Journal of the European Communities L 190/1, 18.7.2002, Arts 3(1) and 2(2).

95 See 'Commentary: Marc Weller, University of Cambridge', S. Van Hoogstraten, N. Schrijver, O. Spijkers and A. de Jong (eds), *The Art of Making Peace: Lessons Learned from Peace Treaties* (Brill/Nijhoff, 2016) 54, at 65, with respect to Yemen.

96 One further relevant doctrinal question, not addressed in the ILC's commentary, is whether states could avoid responsibility for breaching their obligations under the future Convention

no one was prosecuted. In situations of *de jure* amnesty, the amnesty act barred cases being put forward for prosecution. And indeed, in South Africa, even individuals who did not apply for an amnesty were still not prosecuted for practical and political reasons.

4. A Duty to Punish?

Of our four scenarios, only the Colombian one is thus far compatible with the obligations in the ILC's draft articles on crimes against humanity. The Colombian agreement does envisage investigation and prosecution, but the question arises whether its alternative-sanctions regime would be considered compatible with a future convention on crimes against humanity. Draft Article 6(7) provides that '[e]ach State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.' Assuming that a state has legislated accordingly, it could be argued that a subsequent settlement that provides for an alternative-sanctions regime for a specific context (for instance, house arrest or community service) does not necessarily contradict this obligation.

That said, given the emphasis on punishment in the working title of the future Convention and in the article setting forth the 'general obligation' under the Convention combined with the preambular anti-impunity commitment and impunity literally meaning 'freedom from punishment', there is a real chance that interpreters of the Convention will take a more a restrictive reading. In the different but related context of the ICC we have seen a similar tendency. The Office of the Prosecutor (OTP) has indicated that — for the purposes of rendering a case inadmissible on grounds of complementarity — the sentences imposed at the domestic level must be consistent 'with a genuine intent to bring the convicted persons to justice', and that this means that they 'adequately serve appropriate sentencing objectives for the most serious crimes.'⁹⁷ In other words, the OTP reads 'to bring ... to justice' as meeting sentencing objectives.⁹⁸

by relying on circumstances precluding wrongfulness. Relying on this escape route is risky. First, the threshold for fulfilling the relevant criteria is generally high. Secondly, some of the specific requirements for, or exclusions from, the circumstances could pose difficulties in the case of negotiated settlements. For instance, *force majeure* will be difficult to maintain in that the absence of prosecution is not involuntary. Both distress and necessity will fail if the state has been involved in the creation of the situation, as is often the case in situations of negotiated settlements.

97 ICC Statement, "Transitional Justice in Colombia and the role of the International Criminal Court", keynote speech by James Stewart, Deputy Prosecutor of the ICC, 13 May 2015, at 13, available online at <http://www.iccnw.org/documents/DPs.Keynote.Speech.on.Transitional.Justice.in.Colombia.and.the.Role.of.the.ICC.English.pdf> (visited 19 May 2018).

98 *Ibid.*

5. *Implications of the Obligations for States on the Territory of which the Crimes have been Committed for Negotiated Settlements*

The draft articles seem to provide only limited leeway for negotiated settlements. They oblige authorities to submit a case for prosecution rather than to prosecute, and it could be argued that they leave scope for deviating from standard punishments. However, from the perspective of negotiating a settlement, this limited leeway will usually provide insufficient guarantees. First, as already discussed above, submitting cases for prosecution means accepting the criminal frame that parties to a negotiated settlement may wish, and need, to avoid. Secondly, parties may not be willing to sign if they risk prosecution.

Moreover, it is very likely that the interpreters of the future Convention will adopt an interpretation that prioritizes the criminal approach, thereby narrowing the limited leeway that the wording of the current draft articles may grant. The ILC's commentaries themselves foreshadow this risk by extensively drawing on analogies with other suppression treaties, especially the Convention against Torture, without considering the different characters of the crimes addressed.⁹⁹ In other words, the interpretation on the basis of analogy is based on the parallel response (criminal trials and punishment) rather than the underlying acts. Experience with the interpretation of the ICC Statute also suggests that the interpretation of provisions in a treaty with a stated objective of ending impunity tends to further the criminal approach, to the detriment of alternatives.¹⁰⁰ For instance, the ICC Statute grants the Prosecutor discretion not to investigate and prosecute if that would not serve the 'interests of justice'.¹⁰¹ Some states might have hoped that this would encourage, or at least allow, the Prosecutor not to intervene in, for instance, a situation like South Africa. However, the OTP has interpreted the concept of the interests of justice narrowly, on the ground that as a starting point prosecution must be considered in the interests of justice and that a consideration of the interests of justice does not include a consideration of the interests of peace.¹⁰²

With or without leeway, one key challenge that the draft articles pose for states trying to negotiate a settlement is that they focus on individual suspects, rather than on a state's overall transitional-justice policy. Draft Articles 9 and 10 create obligations to investigate and prosecute, or extradite, specific individuals suspected of crimes against humanity, the inquiry into the facts having

99 See e.g. 2017 ILC Report, *supra* note 2, commentary to draft Art. 4, at 51, § 13; and commentary to draft Art. 9, at 83, § 5. On the different characters, see *supra* note 71.

100 This is consistent with Martti Koskenniemi's observation of structural biases at work in specialized regimes of international law. See M. Koskenniemi, 'The Politics of International Law – 20 Years Later', 20 *European Journal of International Law* (2009) 7.

101 Arts 53(1)(c) and 53(2)(c) ICCSt.

102 ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice*, 17 September 2007, available online at <http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestssofjustice.pdf> (visited 23 July 2018).

to be 'immediate'. Even if states decide to take the criminal route and prosecute some people for crimes against humanity, they could still be held in violation of the Convention if they did not immediately consider the cases of others.¹⁰³ Negotiated settlements often concern situations in which many people have been involved in the commission of crimes against humanity. Even the ICC, with a budget of more than 150 million euros per year and a staff specialized in international crimes, prosecutes less than a handful of accused per year. It might be desirable for the future Convention to reflect in the duties it creates the nature of the events it is addressing: the large number of people often involved in crimes against humanity. States trying to emerge from conflict or oppression need a transitional-justice policy, part of which addresses how the prosecutorial task should be approached.

The need for consideration of an overall transitional-justice policy, rather than an assessment as to whether a state has adequately addressed each and every individual potential offender, is inspired not just by the number of people involved. It is also inherent in the need for the simultaneous pursuit of the sometimes conflicting objectives of peace, justice (in its multiple dimensions), truth and reconciliation to the maximum extent, with specifically designed procedures for the interaction among the various transitional-justice mechanisms (for instance, a truth commission and courts), a logical timeline, and ultimately, finality, providing legal certainty to all involved. As it stands, with their focus on individual suspects, the current draft articles seem to grant little leeway to take such an overall policy into account. Nor is there consideration for timing or the need for respect for the finality of a transitional-justice arrangement as a whole.

B. States where Alleged Perpetrators are Present, Outside the State on the Territory of which the Crimes were Committed

With respect to the category of states other than the state where the crimes were committed, for instance the case of Norway receiving EW. De Klerk, we can be brief. The same Articles 9 and 10 apply, thus the same duties to take suspects into custody and to submit their case for prosecution or to extradite them. Due to the obligation to take these decisions in accordance with domestic law, and 'in the same manner as in the case of any other offence of a grave nature under the law of that State', the foreign state is unlikely to have much

103 A possible counterargument is that since the authorities 'shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State', they could enjoy discretion not to prosecute because when confronted with overwhelming numbers they ordinarily do not prosecute all crimes either. However, such discretion may be less present in the case of crimes of a grave nature. Part of the problem is that very often the context in which crimes against humanity are committed is not the same as that of 'any other offence of a grave nature'.

legal ground not to prosecute in the interests of a *foreign* negotiated settlement.¹⁰⁴

The shift in the normative landscape for foreign states is both less and more significant than with respect to the state where the crimes were committed. It is less significant in that states were never bound to respect foreign negotiated settlements or foreign legal instruments, such as amnesties, emanating from those settlements. It is more significant, however, in that foreign states were far less likely to prosecute in the first place, whereas the proposed Convention would oblige them to arrest the alleged offender if on their territory and to submit the case for prosecution or extradite. In other words, if a state party, Norway would have to arrest De Klerk.

States should consider the consequences of this normative shift, again in light of considerations of Realpolitik, ideals and the republican and practical argument. With respect to the Realpolitik argument about the impact on a negotiated settlement, it could be argued that the risk of foreign prosecution is less destabilizing to a negotiated settlement than that of domestic prosecution. Suspects would just have to accept that foreign travel has become riskier than it was and possibly pay the price of a *de facto* 'country arrest'. On the other hand, negotiated settlements that depend on finding a foreign safe haven would become more difficult in the case of widespread ratification of the proposed Convention.

From the perspective of promoting ideals, however, foreign states themselves may not wish to be under a duty to prosecute if in some instances they actually want to pay tribute to a state's negotiated settlement. Do states now want to be under an obligation to prosecute members of the FARC, instead of congratulating Colombia on the settlement it has reached? Negotiated settlements often involve multiple values and multiple understandings of some of those values — for instance, justice. Even though most of these values and understandings find some protection in international law, they at times compete. If states want to continue to be able to balance these carefully, also in their foreign relations, on a case by case basis, a future convention on crimes against humanity must accommodate this.

4. Conclusion

As the ILC's open-ended commentary on the current status of international law on amnesties illustrates, the draft Convention on Crimes against Humanity is more an exercise in the 'progressive development of international law' than in its codification. But progressive development of law can be a dangerous

104 With respect to the question of circumstances precluding wrongfulness, raised *supra* note 96: If a foreign state did refrain from prosecuting on those grounds and were to be found in breach of the Convention as a result, it would have an even smaller chance of successfully invoking necessity than the state where the crimes were committed: in prosecuting, it would not have risked its own peace process.

experiment, and some people will be its subjects. All the more important is a thorough debate among states and within states about the fundamentally political choices that are being made in these draft articles about how to address crimes against humanity. This debate could take place once states negotiate the envisaged treaty. In practice, however, that stage is likely to be too late to address fundamental questions about the object and purpose of the entire endeavour — the train will be considered to have left the station.¹⁰⁵

Engaging with the fundamental political questions that this article has raised will strengthen, rather than weaken, the proposed Convention. More of a risk to the Convention is that states — which are not single-issue organizations — will not want to lose political capital by being seen as challenging the ascendant anti-impunity mantra and instead challenge the Convention at the later stages of ratification or implementation. That is, they will let this train leave the station on an unaltered track, but then either decide not to ratify the Convention, or to ratify it in the expectation to ignore it if that ever became necessary in a concrete case. Even if states did ratify, implement and comply with the Convention, the Convention could hardly be considered ‘progress’ if, due to insufficient qualifications of a duty to prosecute, it foreclosed negotiated settlements, thereby possibly becoming an obstacle to ending crimes against humanity.

In not explicitly considering situations of a negotiated settlement, the current draft articles follow what Oren Gross and Fionnuala Ní Aoláin have labelled in the context of human rights in a state of emergency as the ‘business as usual model’: in not providing for a right to derogate from human rights obligations in times of emergency, the legal instrument aspires to a perfect reality.¹⁰⁶ However, the consequence is, so they argue, that in times of emergency the system will be adjusted in less transparent ways. A second model that they present is that of ‘extra-legal measures’, in which ‘under extreme circumstances, public officials may act extra-legally when they believe that such action is necessary for protecting the nation and the public in the face of calamity’.¹⁰⁷ It is then up to ‘the people’ to decide whether to treat the conduct as extra-legal or to give it a stamp of approval. Apart from the problem that this partially subverts law’s power as law, it is also questionable, in the context of international law, whether there is one ‘people’ and how to deal with multiple ‘peoples’ disagreeing with each other on whether or not the extra-legal conduct should be retroactively brought within the boundaries of the law. This article is based on the premise that, in the context of negotiated

105 See M. de Hoon in the context of the crime of aggression: when she asked diplomats at the Review Conference of the Rome Statute as to whether including the crime of aggression in the jurisdiction of the ICC was a good idea, the response was ‘the train has left the station’. M. de Hoon, *The Law and Politics of the Crime of Aggression* (PhD thesis on file at VU University of Amsterdam), at 181, available online at <http://dare.uvu.vu.nl/handle/1871/55318> (visited 23 July 2018).

106 O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), 10 and Chapter 2.

107 *Ibid.*, at 11. See also Chapter 3.

settlements, the third category that Gross and Ní Aoláin identify is preferable, namely that of ‘accommodation’: by providing for qualifications of the duty to prosecute within the law, the point is also to regulate and restrict the exceptions.¹⁰⁸ It is precisely because of respect for the law that the law itself should provide for the exception.

This does not require a fundamental overhaul of the draft articles. Indeed, a few words could suffice. The exact provisions and language would depend on the outcome of the debate that this article has sought to stimulate. If states suggest, for instance, that potential cases must be submitted for prosecution, but that prosecutors should have leeway not to prosecute out of respect for a negotiated settlement, it could be phrased along the following lines:

- (1) The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Subject to paragraph 2, those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.
- (2) Where a State, in the fulfilment of its duties to promote human rights and to end crimes against humanity, oppression and armed conflict, has adopted accountability processes other than criminal proceedings, the competent authorities mentioned in paragraph 1 may determine that it is not in the interests of justice to prosecute. In taking this decision, the competent authorities must consider, among others, the procedures that led to or followed the adoption of the processes other than criminal proceedings, the objectives pursued and respect for victims’ rights.

Similarly, provisions could be included to allow for the consideration of mitigating circumstances in decisions about punishment,¹⁰⁹ or alternatives to criminal investigations.

108 *Ibid.*, at 9 and Chapter 1.

109 As in the Convention on Enforced Disappearances, where Article 7(2)(a) provides that each party may establish: ‘[m]itigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance.’

Laying the Foundations for a Convention on Crimes Against Humanity

Concluding Observations

Claus Kreß* and Sévane Garibian**

Abstract

How far have we come in laying the foundations for a Convention on the Prevention and Punishment of Crimes Against Humanity? The co-editors of this symposium conclude that solid groundwork has been laid and hope that the current momentum will be maintained. At the same time, they caution against a 'rush to conclusion' as they see room for considerable refinement of many of the proposed provisions as well as the need for a genuine attempt to address the unresolved questions of immunity ratione materiae and amnesty. At this juncture, it is not easy to predict whether a meaningful new draft convention can be presented without further deepening the divide among states about international criminal justice. But it can safely be stated that every additional investment in intellectual energy and time to arrive at the formulation of such a draft is worthy of the effort. The adoption of a Convention on Crimes Against Humanity and preferably one that also updates the Genocide Convention would mark another milestone in the evolution of the international criminal justice system.

1. Introduction

'A specialized convention on Crimes Against Humanity is clearly needed — one which cures the defects of earlier formulations and takes into account the many tragic experiences of the last 50 years before the passage of time validates such arguments.'¹ In 1994 the late Chérif Bassiouni voiced this call for 'a

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1 M.C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law* (1994) 457–494, at 457–458.

specialized convention on Crimes Against Humanity'. Since then, much has happened, including the adoption of Article 7 of the Rome Statute of the International Criminal Court (ICC Statute) that provides for the first comprehensive definition of crimes against humanity in an international treaty. But Bassiouni's call had gone further than that. For he had written: "Today, looking back upon a further half century of wasted opportunities, we should move not only to establish a permanent International Criminal Court, but to elaborate a specialized convention on "Crimes Against Humanity" to reinforce the Nuremberg precedent, cure its defects and respond to the dire needs manifest since then."²

Bassiouni went on to identify a number of key elements for such a specialized convention, among them the duty *aut dedere aut iudicare* and the provision for extraterritorial titles of national criminal jurisdiction.³ Hereby, Bassiouni alluded to what Sean Murphy, in his foreword to this special issue, calls 'the central idea in such a convention', that is 'to build up national laws and national jurisdiction with respect to crimes against humanity, and to place states parties in a cooperative relationship on matters such as extradition and mutual legal assistance'.⁴ Other elements for such a convention that come to mind by looking at the Genocide Convention⁵ are prevention and dispute settlement.

While Bassiouni's was a rather lone call in 1994, today few appear to doubt the usefulness of complementing the Genocide Convention by a specialized convention on crimes against humanity.⁶ The concern that such a convention could run counter to the purposes underlying the ICC Statute appears to have been put to rest. In her contribution to this symposium, Leila Sadat powerfully restates the fairly long list of persuasive considerations in support of the adoption of such a convention.⁷ One of her points bears special mention: "The

2 Bassiouni, *ibid.*, at 466.

3 *Ibid.*, at 480–482.

4 See S.D. Murphy, 'Foreword', in this Special Issue of the *Journal*.

5 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

6 For references, see L.N. Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity', in this Special Issue of the *Journal*.

7 For an earlier argument by the same author, see L. Sadat, 'Codifying the "Laws of Humanity" and the "Dictates of the Public Conscience": Toward a New Global Treaty on Crimes Against Humanity', in M. Bergsmo and T. Song (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014) 17–46; for three more extensive pleadings in support of the adoption of a specialized convention on crimes against humanity, see R. Mignot-Mahdavi, 'Vers une Convention sur les crimes contre l'humanité?' in J. Fernandez (ed.), *Justice pénale internationale* (CNRS Éditions, 2016) 97–111; P. Akhavan, 'The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute', in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (CUP, 2011) 28–42; G.H. Stanton, 'Why the World Needs an International Convention on Crimes Against Humanity?' Sadat (ed.), *ibid.*, 345–358; see also R.J. Goldstone's foreword to the book edited by Sadat (ed.), *ibid.*, xvi–xviii, and H. Corell's foreword to the book edited by Bergsmo and Song (eds), *ibid.*, iii–vi; see, finally, M.C. Bassiouni revisiting and

absence of a convention on crimes against humanity ... leads to a rhetorical downgrading of crimes against humanity as well as overuse of the Genocide Convention by civil society and states as a legal tool.' This, it may be added, leads to frequent disappointment in light of the narrow definition of genocide as a crime under international law⁸ and the ensuing fact that crimes against humanity occur far more often than genocide.⁹

At the time of the production of this special issue, the contours of a specialized convention on crimes against humanity have come within sight. This is due, first, to the work done under the auspices of the Crimes Against Humanity Initiative launched by the Whitney R. Harris World Law Institute at Washington University School of Law. Sadat led the effort and Bassiouni, among many other distinguished experts, contributed to it. In her contribution to this special issue, Sadat summarizes the process that resulted, in 2010, in the submission of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity.¹⁰ Subsequently, the International Law Commission (ILC or Commission) took the matter up, and, in 2017, on first reading, adopted a complete set of draft articles on crimes against humanity (Draft Articles) for a future 'Convention on the Prevention and Punishment of Crimes against Humanity'.¹¹ The second reading is scheduled to begin at the ILC's 2019 session.

In his foreword to this special issue, Sean Murphy, the Commission's Special Rapporteur for this project, succinctly summarizes the working process that has brought the ILC this far. He concludes:

Important questions may be asked at this stage, such as: is such a convention truly needed? If so, are there provisions within the draft articles that should be deleted or modified? Are there issues not addressed that should be included? Ultimately, is such a convention politically feasible, and will states negotiate, adopt, ratify, and implement it? And, most importantly, if such a convention is brought into force and widely ratified, will it help deter and punish, if not stop, egregious crimes that exist today across the globe?

We are convinced of the usefulness of a well-done 'Convention on the Prevention and Punishment of Crimes Against Humanity' and all the contributors to this special issue seem to share this view. This special issue does not therefore question the very idea of adopting a convention on crimes against

confirming his call of 1994 in 'Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention', Sadat (ed.), *ibid.*, 43–58.

8 For a view on that definition by one of the authors of this conclusion, see C. Kreß, 'The ICC's First Encounter with the Crime of Genocide: The Case Against Al-Bashir', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2015) 669–704.

9 On the outstanding relevance of crimes against humanity in contemporary practice, see S. Garibian, 'Généalogie d'un concept centenaire: le crime contre l'humanité. De sa naissance à l'ébauche d'une Convention internationale', in B. Cotte et al. (eds), *70 ans après Nuremberg. Juger le crime contre l'humanité* (Daloz, 2017) 39–53, at 49.

10 For the specific references, see Sadat, *supra* note 6.

11 *Report of the International Law Commission, Sixty-Ninth Session (1 May–2 June and 3 July–4 August 2017)*, UN Doc. A/72/10 (hereinafter '2017 ILC Report'), at 9–127.

humanity. It rather focuses on Murphy's questions as to whether there are provisions within the draft articles that should be deleted or modified and as to whether 'there are issues not addressed that should be included'. In doing so, the contributors to this symposium inevitably had Murphy's further consideration in mind whether such a convention is politically feasible and whether states might negotiate, adopt, ratify, and implement it.

This conclusion highlights a number of the many suggestions for improvement of the Draft Articles formulated in the various preceding contributions. It also touches on some controversial points and presents a few further observations.

2. Conceptual Issues

A. The Definition of Crimes Against Humanity: Legal Text of Reference

The evolution of the concept of crimes against humanity as a crime under international law constitutes a long and fascinating process which may be traced back to the inclusion of the Martens clause in the 1899 Hague Convention.¹² The adoption of Article 7 of the ICC Statute in 1998 marked the culmination of this process in the form of the first comprehensive definition of crimes against humanity in a treaty provision. It bears emphasizing that support for the definition contained in Article 7 was strengthened by the subsequent participation of many states — which have not yet ratified the ICC Statute — in the formulation and consensual adoption of the Elements of Crimes regarding that definition.

Article 7 confirms the emancipation of crimes against humanity, achieved essentially through the case law of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), as autonomous crimes, conceptually disconnected from the other crimes under international law. It anchors the definition of crimes against humanity in what one of the present authors has called the 'second generation' of international criminal law.¹³

Draft Article 3 chooses Article 7 of the ICC Statute as the reference for the proposed convention. This appears to be instrumental in dispelling possible doubts that the convention might somehow create conflict with the work of the ICC. In her contribution, Sadat too, finds it 'most sensible to build upon the ICC Statute for this and many other elements of a new interstate

12 For succinct recent summaries of this process, see R.S. Clark, 'History of Efforts to Codify Crimes Against Humanity: From the Charter of Nuremberg to the Statute of Rome', in Sadat (ed.), *supra* note 7, 8–27; Garibian, *supra* note 9; for one detailed account, see S. Garibian, *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept* (Bruylant, Éditions Juridiques Associées/LGDJ and Schulthess, 2009).

13 For a recent summary of this position, see C. Kreß, 'Actes de terrorisme: nouvelles formes de crimes contre l'humanité?' Cotte et al. (eds), *supra* note 9, 89–98.

convention in order to solidify and build upon the “Rome consensus”.¹⁴ Reproducing Article 7 of the ICC Statute without any substantive change means not embracing any proposal for an expansion of the definition. One might regret that an opportunity to move the law forward would be missed.¹⁵ Considering, however, the serious challenge for the rule of law in the international relations that results from the disturbing rise of naked power politics and crude nationalism, this cautious approach is to be commended.

Perhaps, the same recommendation is not that clearly warranted the other way around. In a thoughtful chapter on the prospects of a future convention on crimes against humanity, Morten Bergsmo and Song Tianying express the view that such a convention ‘has the capacity to mobilise broad interest and involvement around the world: to become the new “generational” project to develop international law to protect the individual’.¹⁶ At the same time, the two authors suggest that, especially given the current international climate, ‘the reservations, views and proposals of States such as China, India, Indonesia, Israel and Russia’ should be genuinely engaged with in order to avert the danger of ‘divid(ing) the world over international criminal law’.¹⁷

Bergsmo and Song are implying a more fundamental question: if, for example, China and Russia were opposed to the adoption of crimes against humanity convention, could a decision to nevertheless go ahead weaken consensus around the basics of international criminal law as a whole? Could it be seen as pushing the envelope further, inviting increased polarization in the domain of international criminal law? This broader reflection is still valid, and it will probably remain with us for some time. Another difficulty is that the ‘reservations, views and proposals’, that the countries mentioned may entertain, are not always being entirely clearly articulated.

At the same time, the room for compromise will not be unlimited if core principles are not to be undermined. Let this be explained with a view to China’s position on the subject, in light of the meticulous analysis of the attitude this country has adopted over the past decades, which this *Journal* will publish in its next issue.¹⁸ It appears that China has yet to fully embrace the

14 For this reason, Corell, *supra* note 7, vi, for example, expresses the strong hope that the Draft Articles will reproduce Art. 7 ICCSt. without change. In the same vein, for example, D. Robinson, ‘The Draft Convention on Crimes Against Humanity: What to Do with the Definition?’ in Bergsmo and Song (eds), *supra* note 7, 103–134, at 105–106.

15 For some such proposals, see V. Oosterveld, ‘Gender-Based Crimes Against Humanity’, Sadat (ed.), *supra* note 7, 78–101; C. Price, ‘The Proposed Convention on Crimes Against Humanity and Human Trafficking’, Bergsmo and Song (eds), *supra* note 7, 247–274; on the discussion about cyber attacks in the context of the definition of crimes against humanity, see Mignot-Mahdavi, *supra* note 7, at 104–105.

16 M. Bergsmo and T. Song, ‘A Crimes Against Humanity Convention. After the Establishment of the International Criminal Court’, in Bergsmo and Song (eds), *supra* note 7, 1–16, at 13.

17 *Ibid.*, at 14.

18 D. Zhu, ‘China, Crimes Against Humanity and the International Criminal Court’, forthcoming in the *Journal*; see also W. Shang and Y. Zhang, ‘The *Aut Dedere Aut Judicare* Provision in the Proposed Convention on Crimes Against Humanity: Assessment from a Chinese perspective’, in Bergsmo and Song (eds), *supra* note 7, 345–365, in particular at 360.

abandonment of any necessary connection between a crime against humanity and the existence of an (international) armed conflict, a legal proposition, which is implicit in Draft Article 3's reproduction of the definition contained in Article 7 of the ICC Statute and explicitly laid out in Draft Article 2. Yet, the legal proposition in the question constitutes the result of a long evolution, the exposition of which forms the subject of the strongest part of the commentary on Draft Article 2,¹⁹ and this proposition goes to the heart of any meaningful concept of crimes against humanity. It is thus hard to see how there could be any step back in that respect. Yet, there might be other ways to accommodate genuine concerns of the countries mentioned (and perhaps of other countries).

B. The Nature: A Crime under International Law

Draft Article 2 characterizes crimes against humanity as crimes under international law. This is welcome. Yet, the commentaries fail to provide for full terminological clarity. Regrettably, it is not apparent, for example, whether the term 'international crime', which the commentaries also use,²⁰ is used as a synonym for 'crime under international law' or as a concept which also embraces the fairly long list of crimes, which would be far better referred to as 'transnational crimes'.

The commentaries on Draft Article 2 tell us that the characterization of a certain conduct as a crime under international law implies its criminalization irrespective of national law. But this leaves open the important question whether there can be a 'crime under international law', which is rooted exclusively in an international treaty, accepted as binding only by part of the community of states.²¹ It is probably too much to expect from the ILC to clarify such an important conceptual and terminological issue.²² But one would have at least expected that the Commission clearly states its view as to whether the definition of crimes against humanity, as contained in Draft Article 3, is fully anchored in (general) customary international law. After all, the third paragraph of the Draft Preamble characterizes the prohibition of crimes against

19 2017 ILC Report, *supra* note 11, §§ 5–9, at 26–28.

20 See, for example, § 2 of the Commentary on Draft Article 1, 2017 ILC Report, *supra* note 11, 24–25.

21 Take the example of torture. Torture forms the object of an international treaty regime even in case the conduct is not committed as an underlying offence of a crime against humanity. Yet, the commission of torture as a single act has never been included within the jurisdiction of an international criminal court. It is therefore open to question whether the commission of a single act of torture constitutes a crime under (general) customary international law. It would also warrant further consideration whether the international treaty regime on torture has criminalized torture as a matter of that international treaty law so that one might call every single act of torture coming within the international treaty's scope of application *ratione personae* a crime under conventional international law.

22 See C. Kreß, 'International Criminal Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. V (OUP, 2012) 717–732.

humanity as a peremptory norm of general international law.²³ It is then difficult to see how any part of the definition of the same crime could not have a customary status. The Draft Articles provide important and welcome authority for the proposition that Article 7 of the ICC Statute does indeed reflect customary international law.

The commentary on Draft Article 3 does not take a view as to whether any part of the definition of the crime is more demanding than customary international law. This abstention is most apparent with respect to the policy requirement. The commentaries rehearse the relevant case law and, in particular, the denial of the customary law status of the policy requirement by the latest ICTY case law.²⁴ But the commentaries avoid taking a position on the matter.²⁵ In view of the Commission's main goal to pave the way for a future convention, such a cautious approach is perhaps understandable. On the other hand, one may regret that the ILC did not use this valuable opportunity to clarify the state of customary international law with respect to this important point.

C. *The Underpinnings: The Absence of a Theory of Crimes Against Humanity*

Building on the third paragraph of the ICC Statute's preamble, paragraph 2 of the Draft Preamble declares that crimes against humanity 'threaten the peace, security and well-being of the world'. The commentaries elaborate that crimes against humanity, 'by their gravity', constitute 'egregious attacks on humankind itself'.²⁶ The clarification, that crimes against humanity are offences against humankind and not 'just' against 'humaneness', is welcome.²⁷

Yet, the commentaries fail to acknowledge that neither the case law nor the doctrinal debate to date have produced clarity as to why precisely crimes

23 This is in line with the position taken by the ICTY; see, notably Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, § 520.

24 2017 ILC Report, *supra* note 11, §§ 22–27, at 37–40.

25 For the position of one of the authors of this conclusion, that the ICTY has failed persuasively to explain the abandonment of the policy requirement as a requirement under customary international in the course of its jurisprudence, see C. Kreß, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision', 23 *Leiden Journal of International Law* (2010) 855–873, at 870; for a concurring (and far more devastating) critique of the change of direction within the ICTY's case law, see Bassiouni, *supra* note 7, 54.

26 2017 ILC Report, *supra* note 11, § 2, at 23.

27 Note, however, the German expression '*Verbrechen gegen die Menschlichkeit*' ('humaneness') (for an example of the early German debate on the essence of crimes against humanity, see H. Feldmann, *Das Verbrechen gegen die Menschlichkeit* (West-Verlag Essen/Kettwig, 1948), at 40; for the same linguistic issue in Russian, see V. Tochilovsky, 'Crimes Against Humaneness?' forthcoming in the next issue of this *Journal*. The Commentary does not address this quite fundamental divergence in the translation of the English term 'Crimes Against Humanity' in other languages. On the inclusion of the word 'humanity' in the joint declaration of 1915, which, to the present authors' best of knowledge, constitutes the first appearance of the concept '*crime contre l'humanité et la civilisation*' at the level of diplomatic intercourse, see Garibian, *supra* note 12, at 84–85.

against humanity constitute an attack against humankind and not ‘just’ an attack upon those individuals who form the civilian population under attack. This observation is likely to be dismissed by some as coming from the ivory tower of academia. But those who have engaged more closely with the interpretation of the chapeau requirements of the definition should have a sense that clarity on this foundational level is required for ‘sensibly’ construing the language concerned. Just take the following key questions: Are crimes against humanity invariably conduct that amounts to a violation of the existing customary international human rights law? At what point and why does a policy to commit such violations on a widespread or massive scale threaten international peace and security? The commentaries mention some of the important literature,²⁸ but do not engage with it. It would probably be too much to expect that the Commission would articulate a theory of crimes against humanity. But one would have hoped that to avoid an appearance of clarity where there is not such clarity, the commentaries could address uncertainties and controversies surrounding important foundational questions.

D. The Proper Delineation: Neutrality as to the Interpretation of the Definition

The commentaries also do not engage with the many uncertainties regarding the proper construction of the proposed definition of the crime.²⁹ The Commission avoids critical dialogue with the competent (in particular: international) criminal jurisdictions and confines itself to an exercise of stocktaking.

28 For a few more recent essays, see R. Merkel, ‘Die Intervention der NATO in Libyen. Völkerrechtliche und rechtsphilosophische Anmerkungen zu einem weltpolitischen Trauerspiel’, in C. Krefß (ed.), *10 Jahre Arbeitskreis Völkerstrafrecht. Geburtstagsgaben aus Wissenschaft und Praxis* (Optimus Verlag, 2015) 153–184, at 168; C. Jalloh, ‘What Makes a Crime Against Humanity a Crime Against Humanity?’ 28 *American University International Law Review* (2013) 397; R. Vernon, ‘Crimes Against Humanity: A Defence of the Subsidiarity View’, 26 *Canadian Journal of Law and Jurisprudence* (2013) 229; D. Luban, ‘A Theory of Crimes Against Humanity’, 29 *Yale Journal of International Law* (2004) 85–167; M. Köhler, ‘Zum Begriff des Völkerstrafrechts’, 11 *Jahrbuch für Recht und Ethik* (2003) 435–467, at 458–463; E.-J. Lampe, ‘Verbrechen gegen die Menschlichkeit’, in H.-J. Hirsch, J. Wölter, and U. Brauns (eds), *Festschrift für Günter Kohlmann* (Verlag Dr. Otto Schmidt, 2003) 147–176; R. Vernon, ‘What is a Crime Against Humanity?’ 10 *The Journal of Political Philosophy* (2002) 231–249; for a few monographs on the subject, see J.A. Caro John, *El delito de lesa humanidad. Respuesta a algunos problemas interpretativos* (Ideas Solución Editorial, 2014); S. Kirsch, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (Peter Lang, 2009), in particular at 150; B. Kuschnik, *Der Gesamtatbestand des Verbrechens gegen die Menschlichkeit. Herleitungen, Ausprägungen Entwicklungen* (Duncker & Humblot, 2009), in particular at 217–281; K. Gierhake, *Begründung des Völkerstrafrechts auf der Grundlage der kantischen Rechtslehre* (Duncker & Humblot, 2006), in particular at 266–276; H. Vest, *Gerechtigkeit für Humanitätsverbrechen?* (Mohr Siebeck, 2006); L. May, *Crimes Against Humanity: A Normative Account* (CUP, 2005); G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit* (Duncker & Humblot, 2003), in particular at 360–364; M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn., Kluwer Law International, 1999), in particular at 246.

29 In general, this reflects the approach chosen by the Special Rapporteur. His reports usefully compile a lot of relevant material. But there is less ambition in analysing them.

This is true not only with respect to the underlying offences, but also regarding the contextual elements, the construction of which is determinative of the overall extent to which the law on crimes against humanity poses a limit to state sovereignty.

This again creates the impression that more clarity exists than is actually the case. It is true that the jurisprudence of the ICC has achieved a lot in clarifying the basic structure of the contextual elements of the crime.³⁰ But we have not yet reached a point where the outcome of the application of these contextual elements can be predicted with the desirable degree of certainty. To take just one example, in an insightful and illuminating contribution, Gilbert Bitti demonstrates how different the application of the chapeau elements by the Prosecutor appears to have been in the situation of the Ukraine (as between 21 November 2013 to 22 February 2014), on the one hand, and in the situation in Guinea-Conakry (September 2009), on the other hand.³¹ The Commentaries do not highlight such differences in the application of the definition.

It is difficult to overstate the practical importance of the controversy regarding the proper interpretation of the meaning of the words 'organizational policy' in Article 7(2)(a) of the ICC Statute. It is here that the choice is made as to whether and to what extent crimes against humanity cover conduct in furtherance of policies devised by non-state groups. It is at this point that the far-reaching decision is made as to whether the law on crimes against humanity moves to its 'third generation' which would include attacks by (national or transnational) non-state actors against civilian populations. Such a 'third generation' phase would entail that this body of law could also operate as antiterrorism law.³²

The commentaries restate the relevant decisions by ICC chambers³³, but do not take a position. True, no considered position can be taken on this issue without clarifying the essence of crimes against humanity³⁴ and, as stated before, doing the latter is not the Commission's ambition. Here again, however, it would have been preferable for the ILC to state more clearly what is at stake. While the Commission may be well advised to stay neutral, it would certainly be legitimate for states, being chiefly responsible for the direction

30 This jurisprudence now broadly follows the scheme as set out by Robinson, *supra* note 14, at 103–134. For a fairly recent useful account of the jurisprudence, see E. Chaitidou, 'The ICC Case Law on the Contextual Elements of Crimes Against Humanity', in Bergsmo and Song (eds), *supra* note 7, 47–102.

31 G. Bitti, 'La compatibilité des définitions du génocide et des crimes contre l'humanité en droit international et en droit interne', Cotte et al., *supra* note 9, 61–74, at 71–72.

32 Kreß, *supra* note 13, 91–92; for a detailed recent analysis in support of moving the concept of crimes against humanity to its third generation, see T. Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP, 2018), at 250–281.

33 2017 ILC Report, *supra* note 11, §§ 29–33, at 40–42; see also M.P. Scharf and M.A. Newton, 'Terrorism and Crimes Against Humanity', Sadat (ed.), *supra* note 7, 262–278, in particular at 275; S. Garibian, 'Hostes humani generis: les pirates vus par le droit', *Critique* (No 733-744/2008) 470–479.

34 Kreß, *supra* note 13, at 97–98; Kreß, *supra* note 25, at 863–866.

international (criminal) law is to take, to express their views as to whether the law against humanity should take another generational step, but in order to make their choice the question should be placed squarely before them.³⁵

Apart from the chapeau, it is the definition of persecution, contained in Draft Article 3(1)(h) in conjunction with Draft Article 3(2)(g), which raises questions. Draft Article 3(2)(g), reproducing Article 7(2)(g) of the ICC Statute, defines an act of persecution as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. Depending on the interpretation given to the concepts of ‘fundamental rights’ and ‘severe deprivation’, the inclusion of persecution as an underlying offence has the potential to make the law on crimes against humanity a sanction for violations of a wide array of human rights.³⁶ It is here that one can expect concerns by China and similarly-minded states to be at their strongest and, from the perspective of those states, these concerns will acquire only more importance the more generous the interpretation of the contextual requirement proves to become in the judicial practice.³⁷

If the above mentioned appeal to avert the danger of dividing the world over international criminal law is taken as seriously as it should be, and if it is recognized that a change of the text itself is no practical option, further thought should be given to ways to ensure that the definition is construed as narrowly as the prospect of a universal consensus can be maintained. States could make an attempt to give a more specific meaning to the open reference to ‘fundamental rights’. A second (not necessarily alternative) avenue to engage in a bridge-building exercise of authoritative interpretation could take the ‘connection requirement’ contained in the definition as a starting point. It is true that the ICTY has opined that the ‘connection requirement’ constitutes a regression from the existing customary law standard.³⁸ But while the underlying offence of persecution goes back to Nuremberg, it must be acknowledged that historic experience does not tell whether and to what an extent the autonomous application of this offence enjoys a widespread and robust support by states. Against this background, a few years ago, a thoughtful proposal was made³⁹ to explore whether a meaningful construction of the ‘connection requirement’ contained in the definition of persecution could have the potential to deepen the international consensus underlying the substantive law on

35 In the same vein, see Bassiouni, *supra* note 7, 56–58.

36 In that connection, it may be noted that in her recent monographic study of the problem, S. Erne, *Das Bestimmtheitsgebot im nationalen und internationalen Strafrecht am Beispiel des Tatbestands der Verfolgung* (Duncker & Humblot, 2016), at 374, concludes that the definition of persecution is void for vagueness under the legality standard applicable under German constitutional law.

37 It may also be worth seeing the concerns, which at least some of those states entertain regarding the unavailability of immunity *ratione materiae*, against the background of this unresolved question of interpretation.

38 Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, § 580. It bears recalling that the ICTY Trial Chamber reached its conclusion while recognizing that ‘the Statute of the ICC may be indicative of the *opinio juris* of many States’.

39 Luban, *supra* note 28, at 98ff.

crimes against humanity.⁴⁰ In view of the importance of these concerns, it is regrettable that the commentaries do not display sensitivity in this respect and do not even recall the opening passage of the Introduction to the Elements of Crimes of Crimes Against Humanity as defined in Article 7 of the ICC Statute, which reads as follows:

Since Article 7 pertains to international criminal law, its provisions, consistent with Article 22, must be strictly construed, taking into account that crimes against humanity as defined in Article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

It bears emphasising that the inclusion of this passage into the Elements of Crimes testifies of the fact that already in 1998 a significant number of states had voiced the concern that the definition of crimes against humanity could prove to be more intrusive than they were prepared to accept.⁴¹ This concern is likely to be stronger today. If the work on a future convention is understood as an opportunity to consolidate the substantive law on crimes against humanity rather than to expand it, a sense of realism appears to suggest at least reflecting on possibilities to constrain the application of the underlying offence of persecution.

E. The Neglected State Responsibility

At no point do the Draft Articles directly address a prohibition to commit conduct qualifying as a crime against humanity to states. While the third paragraph of the Draft Preamble refers to ‘the prohibition of crimes against humanity’ as *ius cogens*, it is not made explicit whether this prohibition is directly addressed to states. At the same time, the commentaries on Draft Article 4 make it clear that the ILC endorses the finding of the International Criminal of Justice (ICJ) in the *Bosnian Genocide* case⁴² that there indeed exists a prohibition addressed to states.

In his contribution to this special issue, William Schabas says that ‘the precedent established by the Court makes it unnecessary for the draft articles on crimes against humanity to include an explicit prohibition of the commission of

40 For a view going in the opposite direction, see Clark, *supra* note 12, at 23, who considers the connection requirement ‘a completely unnecessary’ limitation.

41 For a useful account of the negotiations leading to the formulation of the passage in question, see D. Robinson, ‘The Context of Crimes Against Humanity’, in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 61–80, at 65–69.

42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep (2007), 43 (hereinafter the *Bosnian Genocide* case), at 113, § 166.

crimes against humanity by states.⁴³ While it may be the case that no such necessity exists, one fails to understand why such a central point is not spelled out explicitly in the text. The fact that the Genocide Convention does not do so is no reason not to do better in the case of a future convention on crimes against humanity. In that same vein, Sadat, in her contribution takes the view that '(t)he Commission's work should be clear that state responsibility continues to attach to the commission of crimes against humanity in order to enhance the convention's preventive effect, as the case of *Bosnia v. Serbia* underscores'⁴⁴

Perhaps because of its failure squarely to address the prohibition to states in the text of the Draft Articles, the Commission does not reflect more closely on the precise content of this prohibition. Since states cannot themselves commit a crime in the technical sense, the prohibition addressed to states must relate to conduct underlying the definition of the crime. But to identify this conduct with precision is no straightforward matter and, unfortunately, the case law of the ICJ offers no real guidance on the matter.⁴⁵

One way to construe the prohibition is to assume that the conduct rules applying to the state are identical to those applying to the individual. Then the state violates the prohibition in question if only one single underlying offence is being committed, as part of a widespread or systematic attack against a civilian population, through one of its organs or any other individual whose conduct is attributable to that state. But there is reason to doubt whether the underlying offence constitutes the appropriate point of reference for the conduct rule addressed to the state. For the direct perpetrator of such an offence is typically not the ringleader, but an individual acting at the lower echelons of the hierarchy within the state hierarchy concerned. Assume that the commission of just one single underlying offence is attributable to a state and that this state is not the entity behind the (overall) attack against the civilian population. In such a case, the state concerned is likely to have committed a human rights violation, but it is open to doubt whether that state has also violated the prohibition related to the commission of crimes against humanity.

In order to avoid that problem, the latter prohibition could be directly linked to the (overall) attack against the civilian population. The state would then violate the prohibition in question if a(n at least emerging) widespread or systematic attack against a civilian population is attributable to it under the existing customary rules of attribution. To so attribute the attack will be challenging at least under the stringent *effective control* test. In order to avoid those

43 W.A. Schabas, 'Prevention of Crimes Against Humanity' in this Special Issue of the *Journal*.

44 Sadat, *supra* note 6. On that point, see also A. Zimmermann and F. Boos, 'Bringing States to Justice for Crimes Against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes Against Humanity', in this Special Issue of the *Journal*, and *infra* sub-section 4.A.5.

45 For a critical analysis, see C. Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide', 18 *The European Journal of International Law* (2007) 619–629, at 620–623.

difficulties, David Scheffer has made the suggestion directly to connect the prohibition in question with the policy behind the attack.⁴⁶

Interestingly, Scheffer has also put forward the idea to set out a prohibition for states to cooperate with a state that is devising or has devised a policy to attack a civilian population.⁴⁷ While the essence of this idea makes a lot of sense, it begs the question whether it is necessary to set out such a prohibition in view of the customary law rules reflected in Articles 16 and 41(2) of the ILC's Draft Articles on State Responsibility. Yet, it would have been worthwhile for the commentaries to engage with the question how the customary international law prohibition of aiding or assisting to the commission of an internationally wrongful act by another state applies in the case a state is pursuing the policy to attack a civilian population. In that connection, the ILC could have made its contribution to clarifying the law regarding important questions such as that of the legality *vel non* of an intervention on the invitation of a government which attacks a civilian population as part of its attempt to suppress a rebellion⁴⁸ or the related question of how to draw the fine line between intervention on invitation and collective self-defence in case of host state government responsible for an attack against part of its civilian population.⁴⁹ To sum up, all these questions would have benefitted from the Commission's closer attention.

3. Prevention

The ILC recognizes the existence of a duty of prevention under customary international law. The central passage on the identification of this customary rule includes a remarkably high degree of deductive reasoning:

Such treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity.⁵⁰

This obligation is spelled out in Draft Articles 2, 4 — not to forget (as Schabas rightly observes) in Draft Article 5 on *non-refoulement*.

To formulate an independent treaty obligation to prevent crimes against humanity is a welcome step, as it is hard to see any consideration that could justify treating crimes against humanity different from genocide with respect to prevention. The obligation requires states to establish a normative and administrative infrastructure against the occurrence of crimes against humanity.

46 D. Scheffer, 'Crimes Against Humanity and the Responsibility to Protect', in Sadat (ed.), *supra* note 7, 305–322, at 320–301.

47 *Ibid.*

48 C. Kreß, 'Major Post-Westphalian Shifts and some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', 1 *Journal on the International Law on the Use of Force* (2014) 11–54, at 29–30.

49 C. Kreß, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force Against "IS" in Syria', *Just Security*, 17 February 2015, available online at <https://www.justsecurity.org/20118/clus-kreb-force-isil-syria/> (visited 3 December 2018).

50 2017 ILC Report, *supra* note 11, § 6, at 48.

Furthermore, the obligation to prevent becomes relevant in case of a concrete threat that crimes against humanity might be committed. In light of ICJ jurisprudence,⁵¹ this aspect of the obligation to prevent carries with it a territorial and an extraterritorial dimension and its fulfilment may take the form of collective as well as unilateral action.

The Commission's attempt to spell all this out in greater detail than it has been done in the Genocide Convention is to be commended. The manner it proposes to do so, however, leaves room for improvement.⁵² Most importantly, the draft articles miss the opportunity to articulate clearly the possibility that the obligation to prevent may require a state to take unilateral action extraterritorially.⁵³ In his contribution to this symposium, Schabas rightly makes the point in the following terms:

It is regrettable that the draft articles do not confirm more precisely the principle of an obligation of prevention extending beyond the jurisdiction of a state, one that exists regardless of whether 'other States, relevant intergovernmental organisations, and, as appropriate, other organisations' are active

If an attempt to improve the formulation of Draft Articles 2 and 4 is made, thought should be given to distinguishing between the abstract and the concrete dimension of the obligation to prevent. Furthermore, it would be good if the commentaries could clarify if, and up to what point, the obligation to prevent is relevant with respect to legislation on matters of criminal law and criminal jurisdiction, because these are issues taken up separately in subsequent draft articles. Finally, the commentaries could very usefully elaborate on the question to what extent states should be required, for the sake of preventing the commission of crimes against humanity on their territory, to accept the assistance by other states and/or other entities.

Draft Article 4 incorporates the ICJ's determination that states must act 'in conformity with international law' when they take action to prevent the commission of crimes against humanity. In doing so, the ILC excludes the possibility of its draft articles being invoked in support of the legality of use of force without relevant state consent or authorization by the Security Council. Although there is a connection between the debate about humanitarian intervention and the concept of crimes against humanity,⁵⁴ the Commission is well

51 The leading case is the *Bosnian genocide* case, *supra* note 42, cited extensively in the Commission's Commentary on Draft Article 4, 2017 ILC Report, *supra* note 11, at 45.

52 For a useful analysis pointing in the same direction as the present text, see Commissie van Advies Inzake Volkenrechtelijke Vraagstukken, *De ontwerpverdragen van der ILC over misdrijven tegen menselijkheid*, CAVV Advies Nr. 32, August 2018, sub 4 (hereinafter 'Dutch Advisory Committee on Issues of Public International Law'; also see online at [https://cms.webbeat.net/ContentSuite/upload/cav/doc/De.ontwerpverdragen.van.de.ILC.over.misdrijven.tegen.de.menselijkheid\(1\).pdf](https://cms.webbeat.net/ContentSuite/upload/cav/doc/De.ontwerpverdragen.van.de.ILC.over.misdrijven.tegen.de.menselijkheid(1).pdf) (visited 3 December 2018)).

53 For two helpful scholarly contributions on that question, see M.L. Piqué, 'Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity', in Bergsmo and Song (eds), *supra* note 7, 135–172, at 161–170; T. Weber, 'The Obligation to Prevent in the Proposed Convention Examined in Light of the Obligation to Prevent in the Genocide Convention', in Bergsmo and Song (eds), *ibid.*, 173–200, at 180–192.

54 For a detailed exposition of that connection, see Garibian, *supra* note 12, at 35–59.

advised not to touch on the highly sensitive question of humanitarian intervention in its draft. But, as Schabas highlights, the commentaries could (and perhaps should) have addressed the relevance of the obligation to prevent for the decision-making within the Security Council and, in particular, for the exercise, by the permanent members of the Council, of their 'veto power'.

4. Punishment

A. Criminalization

1. *Defining the Crime: The Mirror-Approach*

Draft Article 6(1) stipulates that states have to incorporate the definition of crimes against humanity, as contained in Draft Article 3, in their domestic laws. Such an obligation goes beyond what states have to do under the ICC Statute's principle of complementarity. The commentaries usefully note that states retain a certain 'liberty of translation' in implementing the obligation to criminalize. They are accordingly at liberty not to reproduce the exact legal language used in Draft Article 3 as long as this does not result in a significant departure from that draft article.⁵⁵ For example, Section 7(1) No 8 of the German Code of Crimes under International Law, for reasons of legal certainty, avoids the use of the words 'other inhuman acts of a similar character', as contained in Draft Article 3(1)(k), but still captures the essence of the underlying offence as described in the latter definition.

The obligation to criminalize crimes against humanity in a way that mirrors the international definition appears appropriate within the context of the proposed convention. As the commentaries note,⁵⁶ it would require legislative action in those many states that either do not have any criminal law on crimes against humanity or use a definition that significantly deviates from that contained in Draft Article 3. Such legislation action would be a welcome development. The question remains whether it is conceivable to relax the obligation proposed in Draft Article 3 with respect to certain underlying offences in order to genuinely engage with the 'reservations, views and proposals of States such as China, India, Indonesia, Israel and Russia',⁵⁷ but also the United States of America,⁵⁸ or whether any such relaxation would result in an unacceptable fragmentation. While preserving the integrity of the definition weighs heavily in general, the underlying offence of persecution again⁵⁹ warrants a special reflection in view of the particular challenge to legal certainty

⁵⁵ 2017 ILC Report, *supra* note 11, § 6, at 61.

⁵⁶ *Ibid.*

⁵⁷ See *supra* sub-section 2.A., text accompanying note 16.

⁵⁸ For the lack of specific US legislation against crimes against humanity, see M.K. Whalen, 'U.S. Role in the Prevention and Prosecution of and Response to Crimes Against Humanity', in Bergsmo and Song (eds), *supra* note 7, 303–328.

⁵⁹ See *supra* sub-section 2.D.

it raises and due to its potentially far reaching scope of application. One wonders whether it would be absolutely out of the question to soften the first paragraph of Draft Article 6 so as to allow states to incorporate the definition of crimes against humanity as contained in Draft Article 3 with the exception of the underlying offence of persecution. If states make it clear that such an amendment could make it possible for them to join the proposed convention, the issue should receive a serious discussion, though the preferable way forward would no doubt be to meet any such concern by providing an authoritative signal that and in what manner the underlying offence of persecution is to be strictly construed.

2. *The Missing Inchoate Crimes: Incitement and Conspiracy*

Draft Article 6(2) appropriately captures attempt, but it does not cover incitement and conspiracy. While the Commission appears to assume that incitement to crimes against humanity is included in the list of modes of participation proposed in Draft Article 6(2)(c), Elies van Sliedregt rightly points out that the relevant passage of the commentaries⁶⁰ ‘blurs the line between modes of participation in crime and inchoate offences’.

This raises the question whether Draft Article 6 should be amended so as to include the inchoate crimes of incitement and conspiracy to commit crimes against humanity. The fact that neither Article 7 nor Article 25(3) of the ICC Statute provide for such crimes indicates that is open to doubt whether the latter can, as of yet, be considered as crimes under (customary) international law. But acknowledging uncertainty need not be the final word on the matter. Indeed, a future convention on crimes against humanity could crystallize or help in crystallizing such international criminalization.

The central question therefore is whether incitement and conspiracy to commit crimes against humanity, as a matter of legal policy, should be covered. In his contribution to this symposium, Schabas supports that idea by reference to the need for prevention. Incitement and conspiracy certainly bear the risk that crimes against humanity may be committed. Yet, to avert such a danger may rather be a matter for police action than for punishment. But, as Sliedregt observes, the idea to criminalize dangerous conduct at a fairly early stage (*Vorfeldkriminalisierung*) has already gained international currency with respect to conduct that endangers lesser values than crimes against humanity. If seen in this light, it would appear consistent to take the same step with respect to crimes against humanity. Indeed, at least in the case of incitement, it can be argued that this conduct by itself not only threatens, but also disturbs the secure existence of the threatened civilian population in a way that warrants punishment, albeit one of a lesser degree than in case of the (attempted) commission of crimes against humanity or any mode of participation in the crime.

60 2017 ILC Report, *supra* note 11, § 13, at 64. See E. van Sliedregt, ‘Criminalization of Crimes Against Humanity under National Law’ in this Special Issue of the *Journal*.

3. *The Problem with Superior Responsibility*

In her contribution to this symposium, Slidregt makes a persuasive case in support of the flexible approach proposed in Draft Article 6(2)(b), (c) with respect to the definition of attempt and forms of participation.⁶¹ Slidregt advances an equally powerful argument against the proposition contained in Draft Article 6(3) not to offer the same degree of flexibility with respect to the individual criminal responsibility of superiors, but to take the formulation of superior responsibility in Article 28 of the ICC Statute as the text to be mirrored in domestic law. Slidregt does not dispute that the principle of command responsibility possesses what she usefully calls ‘international pedigree’. But she carefully summarizes the well-known unfortunate flaws from which the articulation of that principle in Article 28 of the Statute suffers. One cannot help being astonished that the Commission does not allude to those flaws.⁶²

4. *The Omission of Engaging with Omission*

Draft Article 6 is silent regarding individual criminal responsibility by omission apart from command responsibility. This is understandable in view of the failure to agree on a provision to that effect when the ICC Statute was drafted.⁶³ It is less understandable, though, that the Commentary does not take stock of the judicial evolution and the scholarly debate so far.⁶⁴

5. *The Principle of Culpability: The Special Challenge Posed by System Criminality*

Draft Article 6(4) proposes not to treat a superior order as a ground precluding criminal responsibility and Draft Article 6(7) requires states to enable their criminal courts to impose penalties that reflect the ‘grave nature’ of crimes against humanity. Both propositions are likely to meet with widespread agreement as they accord with a powerful intuition. On a closer inspection, however, things turn out to be more difficult.

Crimes against humanity are certainly attacks on important values. Yet, an individual located at the lower echelons of the organization behind the overall

61 While this flexibility concerns the formulation, the flexibility provided in Draft Article 6(8) with respect to the responsibility of legal persons, extends to the question of criminality as such. In view of both the state of customary international law (see C. Kreß, ‘Joachim Vogels Regelmodelle der Beteiligung und das Völkerstrafrecht’, in Tiedemann et al. (eds), *Die Verfassung moderner Strafrechtspflege. Erinnerung an Joachim Vogel* (Nomos Verlagsgesellschaft, 2016), 259–273, at 261) and the continuing theoretical debate, also this latter approach is to be commended.

62 Once more, the Commentary compiles the relevant materials, but does not analyse them; cf. 2017 ILC Report, *supra* note 11, §§ 16–22, at 65–67.

63 For references, see Slidregt’s contribution to this symposium (*supra* note 60).

64 For a useful recent study with comprehensive references, see I. Petersen, ‘Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence’, 18 *International Criminal Law Review* (2018) 749–787.

campaign may well be in an extremely challenging situation when called upon by international law to step outside ‘his or her’ criminal system. This should be reflected at the sentencing stage despite the grave nature of the act. The formulation of Draft Article 6(7) probably leaves room for that consideration, but the commentaries should highlight the point.

In the same vein, and following Slidregt’s view, a question mark must be placed behind Draft Article 6(4) on superior orders. It is not incorrect to state, as the Draft Article does, that a superior order, by and of itself, does not provide a ground for excluding individual criminal responsibility. But this does not exhaust the matter. If, for example, a young, low-ranking individual concerned fails, also due to systematic indoctrination, to question the lawfulness of an order to commit a crime against humanity, it is not completely inconceivable, depending on the underlying offence in question and the circumstances prevailing at the time of action, that his or her mistake of law is preferably to be qualified as unavoidable. It is true that Article 33 of the ICC Statute foresees such a possibility only in the case of war crimes. But, as Slidregt perceptively observes, this is an unduly rigid distinction, which the Commission should better have questioned than simply have recorded. A slight addition to Draft Article 6(4) would suffice to reflect this consideration. Following the formulation used in Article 6 of the Charter of the Tokyo Tribunal, the words ‘of itself’ could be inserted between the words ‘is not’ and the words ‘a ground’.

6. *The Case Against a Statute of Limitation*

Draft Article 6(6) proposes to prohibit statutes of limitation. This suggestion is to be commended as a matter of legal policy while its customary law basis, as of yet, remains shaky.⁶⁵ The main policy consideration against statutes of limitation relates to the unfortunate fact that genuine criminal proceedings on crimes against humanity will, not infrequently, become possible only a long time after the commission of the crime. Indeed, the continuous existence of the criminal system as part of which the crime was committed may stand in the way of such proceedings.

B. *Jurisdiction, Duties to Investigate, Aut Dedere Aut Iudicare, Fair Treatment, Ne Bis In Idem*

1. A Welcome Step Forward: The Proposed Legal Regime in Outline

Draft Article 7 stipulates the duty to establish criminal jurisdiction based on the principles of territoriality (paragraph 1, *lit. a*), active (paragraph 1, *lit. b*) and passive (paragraph 1, *lit. c*) nationality as well as that of the *forum deprehensionis* (paragraph 2). This jurisdictional regime constitutes the prerequisite for the obligation *aut dedere aut iudicare* of the state of the *iudex deprehensionis*

⁶⁵ John, *supra* note 28, at 65–72.

proposed in Draft Article 10. The *dedere* limb of this obligation includes, as an alternative to the extradition to another state, the suspect's surrender to an international criminal court. In order for the obligation *aut dedere aut iudicare* to become meaningful, the state of the *iudex deprehensionis* must be required to conduct a preliminary inquiry into the relevant facts. This obligation is set out in Draft Article 9(2) and it is complemented by the provisions proposed in Draft Article 9(1), (3) regarding custody in and information sharing by the state of the *iudex deprehensionis*. To all this, Draft Article 8 adds the obligation of the territorial state of alleged crimes against humanity to investigate and Draft Article 11 adds the obligation to accord the person concerned fair treatment at all stages of the proceedings. As Antonio Coco explains, this set of proposals is, in essence, well conceived and its adoption as part of a convention on crimes against humanity would be a welcome development.⁶⁶ In that respect, the formulation of the obligation *aut dedere aut iudicare* in the form of a triangular relationship⁶⁷ and the emphasis on fair treatment deserve particular praise.

2. *The Open Question of Customary Law*

The adoption of this set of proposals in the form of an international treaty would at the same time strengthen the case for maintaining that the obligation of the state of the *iudex deprehensionis* to exercise universal jurisdiction over a crime against humanity (in the form of *aut dedere aut iudicare*) reflects customary international law.⁶⁸ As Coco demonstrates, it is certainly possible to make that case,⁶⁹ but the ILC, perhaps understandably, avoids a statement to that effect. The Commission also does not touch upon the conceptual question of

66 See A. Coco, 'The Universal Duty to Establish Jurisdiction Over, and Investigate, Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9 and 11 by the International Law Commission', in this Special Issue of the *Journal*. See also Akhavan, *supra* note 7, at 40; L.M. Olson, 'Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity. Inter-State Cooperation, Mutual Legal Assistance, and the *Aut Dedere Aut Iudicare* Obligation', in Sadat (ed.), *supra* note 7, 323–344, at 328; R. Maxwell, 'The Responsibility to Protect and to Prosecute: Reflections on the Canadian Experience and Recommendations for the Proposed Crimes Against Humanity Convention', in Sadat (ed.), *ibid.*, 275–302, at 295–298; for an instructive analysis from a Chinese perspective, see Shang and Zhang, *supra* note 18.

67 Shang and Zhang, *supra* note 18, observe that the inclusion of the international criminal court limb may confront a state not party to the ICC with the risk of having to implicitly recognize that Court's jurisdiction. The commentary could clarify that this risk does not exist in view of the alternative formulation and the fact that a state can always avoid the surrender of the suspect to an international criminal court.

68 Akhavan, *supra* note 7, at 40; J. Pasch, 'State Obligation to Punish Core International Crimes and the Proposed Crimes Against Humanity Convention', in Bergsmo and Song (eds), *supra* note 7, 201–219, at 217.

69 Concurring, for example, Olson, *supra* note 66, at 325; for the contrary view, see D. Tladi, 'Complementarity and cooperation in international criminal justice. Assessing initiatives to fill the immunity gap', Institute for Security Studies Paper 277, November 2014, at 4; I. Kennedy, 'The Proposed Convention on Crimes Against Humanity and *Aut Dedere Aut Iudicare*', in Bergsmo and Song (eds), *supra* note 7, 329–344, at 330–333. This author suggests ways in

whether the exercise of criminal jurisdiction by the state of the *iudex deprehensionis*, in the absence of any other jurisdictional link, constitutes a form of universal jurisdiction.⁷⁰ As Coco observes, such a qualification is warranted. If the state of the *iudex deprehensionis* exercises criminal jurisdiction without any further jurisdictional link, its activity is indeed understood best as that of a fiduciary of the international community's *ius puniendi* over crimes against humanity. This is confirmed by the welcome fact that Draft Article 10 does not make the duty to prosecute of the alleged offender by the state of the *iudex deprehensionis* dependent on the prior non-compliance of that state with an extradition request.⁷¹

3. 'Territory under Jurisdiction' and the Proper Reach of the Jurisdiction of the 'iudex deprehensionis': Improving Draft Article 7

Coco suggests an addition to the provision on territorial jurisdiction in Draft Article 7(1)(a) in order to cover those cases where a state takes intrusive action extraterritorially through persons who do not possess the nationality of that state. In such a case, this state should indeed be in a position to exercise its jurisdiction and Coco is right that it could be doubted whether the conduct concerned took place on territory under the jurisdiction of the state in question. Coco suggests adding the words 'or whenever a person is under the physical control of that state' to Draft Article 7(1)(a). In order to avoid arguments about the proper interpretation of the words 'physical control' one could also consider an addition to Draft Article 7(1)(b) so that individuals acting under the control of a state are assimilated to that state's nationals for the purposes of that provision. But perhaps the best way to solve the problem would be to add interpretative language in the commentaries to Draft Article 7(1)(a), to the effect that a broad understanding of the words 'territory under its jurisdiction' is ensured.

Coco furthermore suggests deleting the words 'and it does not extradite or surrender the person in accordance with the present draft articles' from the end of Draft Article 7(2). This consideration is persuasive: under the legal regime proposed in Draft Articles 7, 9 and 10, the state of the *iudex deprehensionis* must possess criminal jurisdiction in order to take the preliminary measures envisaged in Draft Article 9 even in case these measures are taken with a view subsequently to extradite or surrender the suspect. The words 'and it

which the application of the proposed Convention could contribute to crystallize what he would consider a new customary international law rule; *ibid.*, at 340–343.

70 For a detailed analysis of this and a number of other conceptual questions regarding 'universal jurisdiction', see C. Kreß, 'Universal Jurisdiction Over International Crimes and the *Institut de Droit International*', 4 *Journal of International Criminal Justice (JICJ)* (2006) 561–585.

71 Understandably, the Commission abstains from clarifying the customary law status of a power to exercise universal jurisdiction over crimes against humanity more broadly, including in the absence of the suspect on the territory of the state concerned; for the view of one of the two present authors, see Kreß, *ibid.*

does not extradite or surrender the person in accordance with the present draft articles' cast doubt in that important respect and should therefore be taken out of the provision.

4. *The Missing Principle of Subsidiarity Regarding the Exercise of Universal Jurisdiction by a State: Improving the Interplay of Draft Articles 10 and 7 through an Element of Jurisdictional Priorities*

Coco's most far-reaching proposal for improvement concerns the interplay between Draft Article 7 on the establishment of the various titles of criminal jurisdiction and Draft Article 10 on *aut dedere aut iudicare*. The suggestion is to introduce an element of jurisdictional hierarchy into the scheme in order to help in solving positive conflicts of jurisdiction. This is an important and helpful consideration.

While Coco remains open as regards the content of the priority rule, it is suggested to embrace the principle that the exercise of universal jurisdiction by a state is subsidiary both to the exercise of jurisdiction by another state based on territoriality or personality and to the exercise of jurisdiction by a competent international criminal court.⁷² For in the first alternative there is a state with a closer jurisdiction title, and in the second there is an organ directly entrusted with the enforcement of the international *ius puniendi*.⁷³

The application of this principle must be nuanced in both directions. The state of universal jurisdiction must not extradite the suspect to a state with a closer jurisdictional title where it must be feared that this state is either not able or not willing genuinely to proceed with criminal proceedings. The same should apply where it must be feared that the state with a closer jurisdiction title would not accord the suspect a fair treatment during the proceedings. Perhaps it is not necessary to make the last of the two *caveats* in the relationship with an international criminal court. Regarding the first *caveat*, it must be considered that the capacity restraints under which international criminal courts have been working to date are such that those courts tend to confine their exercise of jurisdiction to those persons who are allegedly most responsible for crimes under international law. It is therefore only in that respect that the principle of subsidiarity of universal jurisdiction can reasonably be expected to apply in practice.

72 One of the authors has argued that the principle of subsidiarity of universal jurisdiction applies as a matter of customary international law; Kreß, *ibid.*, at 579–581.

73 It is of course true that the admissibility of proceedings before the ICC is governed by the principle of complementarity. While the application of this principle is justifiable with respect to states with close jurisdiction links, as a matter of principles, it cannot be convincingly explained *vis-à-vis* a state of universal jurisdiction. Yet, for pragmatic reasons, the principle of subsidiarity should apply only to the extent that the state of universal jurisdiction is under an obligation to cooperate with the international criminal court in question. Otherwise, the principle of subsidiarity might require a state not party to the ICC Statute to cooperate with it in a given case and this could make such states reluctant to embrace the proposed convention; for a Chinese perspective, see Shang and Zhang, *supra* note 18, at 360.

5. Nuancing the Early Sharing of Information: Improving Draft Article 9

In light of their importance in practice, it is to be welcomed that Draft Article 9 deals with the provisional measures taken by the state of the *iudex deprehensionis* in some detail. As Coco rightly observes, the duty to conduct a preliminary inquiry into the facts, as proposed in the second paragraph of that provision, is central, and it may be added that it would therefore be preferable to place it upfront in the first paragraph. The provision regarding possible pre-trial or pre-extradition/surrender detention should be the second paragraph. The proposed obligation of the state of the *iudex deprehensionis* to share information with states in possession of close jurisdictional titles, while well-conceived as a matter of principle, must be nuanced in light of the possibility that the state receiving the information might wish to obstruct the proceedings because of its own involvement in the alleged criminal conduct or might not wish to accord the suspect a fair treatment.

6. Clarifying its Distinct Scope of Application: Improving Draft Article 8

The commentaries to Draft Article 8 emphasize that the duty proposed therein, that the territorial state of alleged crimes against humanity investigates those crimes promptly and impartially, is distinct from that in Draft Article 9(2) of the state of the *iudex deprehensionis* to conduct a preliminary inquiry into the facts of the given case.⁷⁴ To the extent that such an investigation is required, as the commentaries observe,⁷⁵ in order to prevent the commission of further crimes against humanity, Draft Article 8 can be seen as the articulation of one specific dimension of the duty to prevent under Draft Article 4.

Yet, already by locating the duty in question after Draft Article 7, the drafters make clear their intention that the duty to investigate, as proposed in Draft Article 8, is also designed to support subsequent criminal proceedings. The commentaries confirm that intention.⁷⁶ But this gives rise to the question of how properly to delineate the duty in question from that proposed in Draft Article 9(2). As Coco suggests, the duty to investigate proposed in Draft Article 8 would most usefully add to the former provision, if it were to be applied to the contextual elements of a crime against humanity or, to borrow a key procedural concept of the ICC Statute, to the relevant situation. The results of the investigation carried out pursuant to Draft Article 8 could then be of assistance in subsequent criminal proceedings with respect to individual cases relating to the same situation.

It is therefore suggested that Draft Article 8 is amended so that its distinct scope of application will be articulated more clearly. The use of the words ‘contextual elements’ or ‘situation’ might help in achieving that goal. It might also be worth clarifying in the commentaries whether the duty to investigate

⁷⁴ 2017 ILC Report, *supra* note 11, § 1, at 80.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

pursuant to Draft Article 8 might also be fulfilled through the establishment of a special commission of inquiry rather than the organs of the state's criminal justice system.

Whatever the competent organ, the investigation proposed in Draft Article 8 should not only be 'prompt' and 'impartial', but also 'effective' and, as Coco as well as Carla Ferstmann and Merryl Lawry-White suggest in their contributions, this attribute should be added to the text of the Draft Article.⁷⁷

In practice, the activation of Draft Article 8's potential will, however, often be hindered by the fact that the addressee of the duty, that is the territorial state, will be the entity behind the policy to attack the civilian population concerned. Compliance by such a state with the duty in question is not to be expected. The prospects that the state behind a policy to attack a civilian population will promptly conduct an impartial investigation on this very attack are equally slim where the attack is carried out extraterritorially. Therefore, while Coco's suggestion to include the latter scenario in Draft Article 8 makes sense as a matter of principle, its practical gains are doubtful.

In such a cross-border situation the picture changes where the other state concerned is taken into consideration. Where a state becomes the 'theatre' of an attack against a civilian population devised by another state, hope for a meaningful overall investigation can be vested in that state. The same applies where underlying offences, such as deportation, produce significant results in the territory of another state. Also this state would then come under the duty to investigate as proposed in Draft Article 8. Yet, it happens not infrequently that an independent international commission of inquiry is established to conduct investigations of the type envisaged in Draft Article 8. The ILC might therefore wish to consider how Draft Article 8 could be amended to ensure synergies rather than to risk the duplication of investigative work.

7. Setting the Appropriate Standard: Fair Treatment under Draft Article 11

Coco refers to criticisms that Draft Article 11 might give undue prominence to the relevant national law and suggests amending the provision so as to 'dispel doubts about the primacy of international human rights law'. Yet, it is not easy to see how anything in Draft Article 11 could be properly construed so as to mean that a state could deviate from binding international human rights standards by reference to its more lenient national law. If an attempt was nevertheless to be made in the direction of Coco's suggestion, unduly ambitious not to mention ambiguous language such as that of 'highest' international standards should be avoided — in view of the well-known dilemma that occurs whenever suspects of crimes under international law are entitled to a more benign treatment than other suspects.

⁷⁷ C. Ferstmann and M. Lawry-White, 'Participation, Reparation, and Redress: Draft Article 12 of the ILC's Draft Articles on Crimes Against Humanity at the Intersection of International Criminal Law and Human Rights Law' in this Special Issue of the *Journal*.

8. *Ne Bis In Idem?* – *A Call for Consideration*

The draft articles do not provide for a right not to be prosecuted or punished twice for the same offence (*Ne Bis In Idem*). This is in line with the fact that no such right currently exists under (general) customary international law. Furthermore, to date, the problem in cases of crimes against humanity has been the absence of jurisdictions genuinely willing to conduct criminal proceedings, rather than a multiplicity of them.

Yet, neither of these considerations conclusively answers the question whether the proposed Convention should provide for a right to *ne bis in idem*. On the contrary, such a right, even if only infrequently relevant, would seem to constitute an appropriate corollary to the multiplication of *fora* to which the suspect of a crime against humanity could be exposed as a consequence of the proposed Convention.⁷⁸

Obviously, the right under discussion would have to be nuanced in view of the possibility that criminal proceedings may have been carried out for the purpose to shield a suspect from genuine prosecution in a different *forum*. A possible provision on *ne bis in idem* in the Convention should, therefore, be drafted following the example of Article 20(3) of the ICC Statute. Controversies about the application of such a provision could no doubt arise. But this could happen with any other guarantee of fair treatment as well and, in all those cases, dispute settlement in accordance with Draft Article 10(2) would be the desirable option to solve the controversy.

The inclusion of a right to *ne bis in idem* should therefore be considered by the Commission.

C. *Victims*

1. *Finding the Right Balance Rather than a 'Victim-Centred' Approach*

In their insightful and rich contribution to this symposium, Carla Ferstmann and Merryl Lawry White report Poland's call for a victim-centred approach to the drafting of the proposed convention. In light of the terrible plight that victims of crimes against humanity suffer, such a demand certainly appeals to an important intuition. Yet, a word of caution is warranted. There can be no denying that the position of victims in criminal proceedings has undergone much strengthening in recent decades, not least under the influence of international human rights bodies.⁷⁹ But this development should not be misunderstood. The acknowledgment of a legitimate interest of the victim in the conduct of subsequent criminal proceedings against the offender does not mean that there is (now) agreement that (international) punishment is

⁷⁸ One of the present authors had suggested to apply the prohibition *ne bis in idem* wherever universal jurisdiction is exercised over a crime under international law; Kreß, *supra* note 70, at 583.

⁷⁹ The Commentary compiles much of the relevant materials in 2017 ILC Report, *supra* note 11, §§ 2–3, at 92–94.

(primarily) about securing a right of the victim. Such a view would lose sight of the fundamentally important (international) community's interest in the enforcement of (international) criminal law. Such a view also tends to ignore the possibility that, grave as crimes under international law are, there may also be community interests pointing in the direction of the avoidance of a criminal justice response. Victims are of course central when it comes to reparation. In that respect, it may therefore be justified to speak of a victim-centred approach. Yet, a sense of realism would suggest that in the all too often-prevailing challenging circumstances after violent conflict, 'victim-centred' should not be taken to mean 'victim-absolutist'.

It should rather be openly acknowledged that, in cases of crimes under international law, the formulation of the rights of victims and the relevant duties of states present a distinct challenge both in the area of participation in criminal proceedings and in that of reparation. This challenge results from the fact that such crimes are typically systematic in nature and therefore result in a high number of victims. The suffering of each individual victim is no less painful because of the existence of many others who find themselves in a similar situation and the interest of each individual victim in participating in criminal proceedings and in receiving reparation is therefore as intensive in case of a systemic crime as it is in the case of isolated criminality. Yet, experience shows that it may simply be impossible for states to adhere to the highest desirable standards in the aftermath of the commission of crimes under international law. In the most recent development of international criminal justice, starting with the establishment of the ICC,⁸⁰ the rights of victims have received a more prominent place than ever before. This, however, has also led to an unprecedented measure of unfulfilled expectations, which have been adversely affecting the entire enterprise ever since. This major challenge requires drafters of the new convention to navigate with circumspection and, at the same time, it calls for moderation in the evaluation of any propositions made.

2. *Single Article versus 'Holistic Approach'*

The Commission proposes comprehensively to deal with the issues concerning victims in one single article.⁸¹ Ferstmann and Lawry-White thoughtfully question this approach and emphasize the cross-cutting nature of those issues. This is a valid point to which it may be added that the questions of participation in criminal proceedings and reparation are quite distinct and that the ICC Statute, for example, unsurprisingly deals with them in different provisions and legal contexts.⁸² Thus, there is good reason to reconsider the 'single article approach' proposed by the ILC.

80 Cf. only Arts 68(3) and 75 ICCSt. and the respective Rules of Procedure and Evidence.

81 For a welcome exception, see Draft Art. 14(3)(a).

82 *Ibid.*

3. *The Case for More Protective Detail: Reconsidering Draft Article 12(1) in Particular*

Draft Article 12 proposes taking a fairly general approach to the formulation of the rights of victims and the duties of states. Ferstmann and Lawry-White disagree and explain why details matter, for example, in the area of witness protection. The thoughtful and well-informed suggestions could give the Commission reason to carefully reconsider whether more protective detail could be given to both the draft text (in particular of its paragraph 1) and the commentaries thereto.

4. *Reflecting the Complexity of Victim Participation in Criminal Proceedings for Crimes under International Law: Improving Draft Article 12(2) and/or Its Commentary*

Ferstmann and Lawry-White fear that the words ‘in accordance with national law’ in the second paragraph of Draft Article 12 would provide states with legal cover ‘to compromise the intended objective of this provision altogether’. It may be doubted, though, whether this fear is justified in light of the wording itself (which says ‘in accordance’ instead of ‘subject to’) and even more in view of the commentaries, which refer to a ‘firm obligation’.⁸³

Regarding the absence of detail in the draft, one wonders whether there should not have been some reflection on the challenges the ICC has been experiencing in its early practice with the participation of large groups of victims. The mere mention of a ‘representative’ of the victims in the commentaries⁸⁴ is too cursory to be instructive.

5. *A Host of Unresolved Questions Regarding Reparation in Favour of Victims: Improving Draft Article 12(3)*

Draft Article 12 qualifies the enumeration of the different dimensions of a right to reparation by the words ‘as appropriate’. The commentaries give the following explanation:

Such wording acknowledges that States must have some flexibility and discretion to determine the appropriate form of reparation, recognizing that, in the aftermath of crimes against humanity, various scenarios may arise, including those of transitional justice, and reparations must be tailored to the specific context. For example, in some situations, a State may be responsible for crimes against humanity while, in other situations, non-State actors may be responsible. The crimes may have involved mass atrocities in circumstances where, in their wake, a State may be struggling to rebuild itself, leaving it with limited resources or any capacity to provide material redress to victims. The ability of any given

83 2017 ILC Report, *supra* note 11, § 12, at 96.

84 *Ibid.*

perpetrator to make reparation will also vary. Paragraph 3 is without prejudice to other obligations of States that exist under international law.⁸⁵

Ferstmann and Lawry-White disagree and instead say: 'However, while recognizing that every scenario is different, such argument should not be used to compromise the standard required by international law — but rather, a reason to reemphasize it.'⁸⁶

Whether this counterargument is persuasive with respect to all scenarios in question is open to doubt. The fact that a state 'may be struggling to rebuild itself, leaving it with limited resources', implies the possibility that there may be a conflict of legitimate (private and public) interests, for example, in a situation of transitional justice which requires striking a balance. To respond that 'the standard required by international law' must be 'reemphasized' in such a situation does not seem to answer the dilemma and whether international law indeed demands 'full reparation' under such circumstances would remain to be shown.

At the same time, the explanation provided in the commentaries makes it clear that it is not possible to deal with the reparation issue by means of one single generally worded paragraph. The relevant scenarios are just too different and the legal questions too manifold. Most importantly, a distinction must be drawn between the duty by a state to provide reparation and the offender's duty to do so. As presently worded, it is unclear which duty to provide reparation paragraph 3 is meant to cover. Only if the two dimensions of the question of separation are clearly demarcated, can the legal questions be identified and properly addressed. The problem of limited resources, for example, may arise both at the state level and at that of the individual offender. This does not mean, though, that it should be solved in the same way at both levels.

The Commission does little to identify which state under an obligation to provide reparation for crimes against humanity. This is a consequence of the ILC's failure, as mentioned above,⁸⁷ to address the question of state responsibility in connection with crimes against humanity. Furthermore, Draft Article 12(3) is too indeterminate with respect to identifying states that are obliged to take action in order to ensure that the offender provides the victim with reparation. Let us consider a state exercising universal jurisdiction over a crime against humanity pursuant to Draft Article 10 in connection with Draft Article 7(2). It is not obvious that such a state, which takes it upon itself to act as the fiduciary of the international community, should also be under an obligation to ensure that the offender provides reparation. But if this is what the Commission has in mind, it should say it clearly, so that states can properly understand the reach of their obligations under the proposed convention.

Finally, while the state's duty to provide reparation and the offender's duty to provide reparation are situated at distinct levels and raise distinct legal questions, they are united by the same goal. It would, therefore, be helpful to

⁸⁵ *Ibid.*, § 19, at 98.

⁸⁶ Ferstmann and Lawry-White, *supra* note 77.

⁸⁷ *Supra* sub-section 2.E.

think about ways in which reparation at both levels can best be coordinated in furtherance of a victim-centric approach to justice. To take up this task is no doubt an ambitious exercise, but one wonders whether this drafting process should not be the moment to confront it.⁸⁸

D. Extradition and Mutual Legal Assistance

1. A Welcome Step in Advance: The Legal Regime in Outline

The Commission deals with extradition and mutual legal assistance in Draft Articles 13 and 14. A separate annex to the draft articles deals a number of primarily procedural issues related to mutual legal assistance. As Harmen van der Wilt observes in his contribution, the ILC has not steered in new directions in formulating these texts:

Article 44 of the 2003 United Nations Convention against Corruption and Article 16 of the 2000 United Nations Convention against Transnational Organized Crime (hereafter: UNCTOC) have served as a blueprint for Article 13 on extradition, whereas Article 14 on mutual legal assistance *largo sensu* copies Article 46 of the Corruption Convention and Article 18 of the UNCTOC.⁸⁹

Draft Article 13 complements the obligation *aut dedere aut iudicare* proposed in Draft Article 10. This explains why Draft Article 13 does not provide for the obligation to extradite. Under the proposed Convention, each custodial state would retain the right to prosecute domestically. Only if the state chooses not to do so, will the obligation to extradite arise, but this obligation will then stem from Draft Article 10 rather than from Draft Article 13. It is therefore understandable that Draft Article 13(6) does not touch upon those grounds upon which a requested state may refuse extradition under its national law,⁹⁰ including the prohibition to extradite nationals.⁹¹ The main purpose of Draft Article 13 then is to require states to comply with any possible technical legal hurdles to extradition, such as the requirement of an extradition treaty, so that they will be in a position to fulfil their obligation to extradition under Draft Article 10 in those cases where they do not wish to bring the matter to trial before their own courts.⁹² The situation is different in the case of legal assistance other than extradition and Draft Article 14(1) accordingly obliges states to ‘afford one another the widest measure of legal assistance in

88 States may also wish to consider the establishment of a (voluntary) Trust Fund system building on the experience being gained through practice under the ICC Statute.

89 H.G. van der Wilt, ‘Extradition and Mutual Legal Assistance in the Draft Convention on Crimes Against Humanity’ in this Special Issue of the *Journal*.

90 Except for the ‘political offence’ exception, which the second paragraph of Draft Art. 13 proposes to exclude. But this does not change the fact that the State concerned will remain free to prosecute at home.

91 For a thoughtful proposal for improvement in that regard, see van der Wilt’s contribution, *supra* note 89.

92 2017 ILC Report, *supra* note 11, § 4, at 100.

investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article'. This general obligation is elaborated upon in Draft Article 14(3) and this, as van der Wilt explains, is done with an appropriate view to the specific procedural needs in case of proceedings for crimes against humanity.

Taken together, Draft Articles 13 and 14, as well as the annex to the latter provision, do not contain any major innovative features. But, as van der Wilt concludes, they would nonetheless prove to constitute a welcome advance for the interstate cooperation in dealing with crimes against humanity.

2. *Enhancing Mutual Legal Assistance: Two Proposals*

Under paragraph 8(b) of the Draft Annex, a request for mutual legal assistance may be refused 'if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests'. This would enable a recalcitrant state with very considerable leeway to avoid cooperation. One would therefore hope that the Commission reconsider the matter and follow van der Wilt's advice to use the more circumscribed language in Article 93(3) of the ICC Statute.

Paragraph 16 of the same Annex does not appear to require a requested state to allow a requesting state to conduct the interview of a witness, who is on the territory on the requested state and does not desire to travel to the requesting state, by video conference. In view of both the practical importance of taking witness testimony, and the fact that an interview will often be of far greater practical use if conducted by the state in charge of the (main) criminal proceedings, one would have hoped — here again — for a proposal stimulating a more effective cooperation. Such a proposal could have drawn inspiration from the interpretation the ICC has given to Article 93(1)(b) of the ICC Statute.⁹³

Should these two proposals not be taken up, it would be very helpful to include them within the framework of the initiative taken by a number of states to adopt an international treaty on extradition and mutual legal assistance for all crimes under international law.⁹⁴ Also for this reason, it must be welcomed that Draft Article 14(5) allows for enhanced mutual legal assistance through agreement outside the framework of the proposed convention.

93 Judgement on the Appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, *Ruto and Sang* (ICC-01/09.01/11 OA 7 OA 8), Appeals Chamber, 9 October 2014, § 130.

94 Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia. See Parliamentarians for Global Action, *Background Information: Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*, 2017, available online at www.pgaction.org/pdf/Background-Information-MLA-Initiative.pdf (visited 19 November 2018).

3. *Surrender and Other Forms of Vertical Co-operation: A Loophole?*

Neither Draft Article 13 nor Draft Article 14 deals with the relationship between states and a competent international criminal court. This omission is probably based on the assumption that such relationship is sufficiently covered by the legal basis on which the competent international criminal court rests. Yet, this is not the case. For example, the cooperation duties under Part 9 of the ICC Statute, which is likely to be the most relevant one in practice, only apply to States party to the Statute. But it would seem consistent with the spirit of the proposed Convention — including, in particular, its triangular obligation *aut dedere aut iudicare* — to require states that are not party to the ICC Statute also to enable themselves of surrendering a suspect to the ICC or of rendering this Court another form of assistance. Thought should therefore be given as to whether the two draft articles in question could be given such an additional dimension. This could be coupled with an opt-out clause, should certain states not party to the ICC Statute signal that they would find it difficult to join the proposed Convention if it was otherwise.⁹⁵

E. *The Unresolved Question of Immunity Ratione Materiae*

1. *The Paramount Importance of the Question*

There is reason to believe, as Payam Akhavan does,⁹⁶ that the provision for a (conditional) duty to exercise universal jurisdiction over crimes against humanity, as it would result from a reading of (Draft) Article 10 in connection with Article 7(2), would constitute the most important advance in the enhancement of the effectiveness of the national criminal justice response to crimes against humanity. The reason is as follows: crimes against humanity are often committed pursuant to the policy of the government of a state to attack part of its own civilian population. In this paradigm scenario of crimes against humanity, the territorial state, which will then typically also be the state of active and passive personality, will not be willing genuinely to conduct criminal proceedings because such proceedings would have to be directed against its own organs. As long as the government responsible for the commission of crimes against humanity remains in power, and in the absence of a competent international criminal jurisdiction, only the existence of the extra-territorial jurisdiction of another state offer real prospects for the occurrence of criminal proceedings. As the evolution of international criminal law shows,⁹⁷ even after a change of the regime, the territorial state may well be

⁹⁵ For a Chinese perspective, see Shang and Zhang, *supra* note 18, at 360.

⁹⁶ Akhavan, *supra* note 7, at 40–41.

⁹⁷ May it suffice to recall the rather painful experience of the attempts to conduct criminal proceedings for ‘massacres’, as crimes against humanity were then called, after the Great War in the case of what is today widely called the Armenian genocide committed by organs of the Ottoman Empire; for a summary, see Garibian, *supra* note 12, at 91–100; see also S. Garibian, ‘From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International

confronted with political and other obstacles to the conduct of criminal proceedings. But in the scenario under consideration, the existence of extraterritorial jurisdiction, as proposed in Draft Article 7(2), and the duty to exercise it, as proposed in Draft Article 10, will not be worth too much in practice if the suspects enjoy immunity from foreign criminal jurisdiction. This question of immunity is of the greatest practical relevance because the most important suspects are state organs where the crimes are orchestrated by a government. One may reply that the picture has changed since it has become increasingly accepted over time that crimes against humanity can be committed pursuant to the policy of a non-State organization. Questions of immunity, so the argument could go on, do therefore not arise in one scenario of crimes against humanity of significant contemporaneous importance. The significance of this scenario is not to be doubted. But it should not detract from the fact that it will be the answer given to the question of immunity, which will be highly determinative of the degree of progress in the enforcement of international criminal law, the proposed Convention will make possible. The fairly simple explanation for this fact is that, for obvious political reasons, the exercise of extraterritorial jurisdiction will be needed most in practice, where crimes against humanity have been committed pursuant to the policy of the government of a State and such crimes against humanity continue to be committed in our days. One should therefore be under no illusion: The real practical impact of the future Convention is intimately connected with the immunity question.

2. *The Commission's Proposal for the Way Forward: Avoiding the Issue*

Draft Article 6(5) proposes that states exclude reliance on the holding of an official position as a ground for excluding criminal responsibility. The commentaries explain that this provision is designed to codify the customary law rule that the holding of an official position cannot be raised as a 'substantive defence' in proceedings for crimes against humanity. In the same paragraph, the commentaries add that the provision 'has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction'.⁹⁸

Under this legal regime, the immunities *ratione personae* enjoyed under customary international law by incumbent heads of state, of government and foreign ministers, and perhaps by other incumbent high-ranking officials⁹⁹ would remain in place also within the new treaty relationship between the state parties to the convention. Whatever one thinks of that state of

Criminal Law in Progress', 1-2 *Armenian Review* (2010), 87–102. Also see, A. Demirdjian, 'A Moving Defence: The Turkish State and the Armenian Genocide', 16 *JICJ* (2018) 501–526.

98 2017 ILC Report, *supra* note 11, § 30, at 69.

99 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, ICJ Reports (2002), 3, at § 55.

law,¹⁰⁰ for the Commission to propose a treaty-based waiver of these immunities, would simply not be realistic under the prevailing political circumstances.¹⁰¹

The legal picture is far less clear with respect to the question of immunity *ratione materiae*. In her contribution Micaela Frulli sets out the case for the view that the irrelevance of the official position and the absence of immunity *ratione materiae* are two sides of the same substantive coin so that there can be no procedural immunity *ratione materiae* ('substantive law theory'). The essence of Frulli's (and others')¹⁰² interpretation of the evolution is that it has been a key idea behind directing the international legal prohibition against crimes against humanity to the individual and coupling this international conduct rule with a criminal sanction to preclude the individual state organ, who violates that prohibition, from relying on his or her official position in order to avoid the imposition of the criminal sanction by an international or by a foreign criminal court.

Compare this interpretation with the following well-known passage in the Nuremberg judgment:

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official positions in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: 'The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.' On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state authorizing action moves outside its competence under international law.¹⁰³

And compare the same interpretation with another passage, this time taken from the judgment of the District Court of Jerusalem in the case against Eichmann. Here the Court, placing reliance on the Nuremberg judgment *inter alia*, cites with approval the following statement by an author:

Immunity for acts of state constitutes the negation of international criminal law which indeed derives the necessity of its existence exactly from the very fact that acts of state often have a criminal character for which the morally responsible officer of state should be made penally liable.¹⁰⁴

100 For an analysis, see M. Frulli, 'The Draft Articles on Crimes Against Humanity and Immunity of Officials: Unfinished Business?' in this Special Issue of the *Journal*.

101 For a similar view, see D. Orentlicher, 'Immunities and Amnesties', in Sadat (ed.), *supra* note 7, 202–222, at 202 and 216–217.

102 For references, see Frulli, *supra* note 100.

103 International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, 41 *The American Journal of International Law* (1947), at 221.

104 Judgment of the District Court, 12 December 1961, 36 *International Law Reports* (1968) 18, at 47; the Supreme Court referred with approval to this part of the judgment and used similar language to confirm the result; *Ibid.*, 277, at 308–312.

It is reasonable to interpret these important judicial findings in the way Frulli suggests. This is reflected in the following particularly insightful passage of the fifth report submitted by Special Rapporteur Escobar Hernández on the ILC's parallel project '*Immunity of State Officials from Foreign Criminal Jurisdiction*' ('Draft Articles on Immunities'):

Nevertheless, this description of immunity as a mere procedural bar and the fundamental distinction between immunity and responsibility are difficult to support in absolute terms, especially in the field of criminal law. The analysis of practice and the necessary teleological interpretation of immunity lead to more nuanced conclusions. One example that comes to mind is the fine line that separates the invocation of official position as a substantive defence to avoid responsibility from its invocation as a procedural defence to avoid the exercise of jurisdiction. It suffices to recall how the Nürnberg Tribunal used the term in both senses and how the polysemic use of the irrelevance of official position has found its way into both case law and quite a few of the international instruments analysed in the present report.¹⁰⁵

On the basis of the substantive law theory, the commentaries' *caveat* regarding possible '*procedural* immunities (emphasis added by the authors)' in the Commentary on Draft Article 6(5) would be of no relevance with respect to the question of immunity *ratione materiae*. Such immunity would then, in accordance with and by virtue of the customary international law rule on official capacity codified in Draft Article 6(5), simply not exist in cases of crimes against humanity.

Yet, the Commission has not endorsed the substantive law theory. This is evident from the ILC's work on the separate topic '*Immunity of State Officials from Foreign Criminal Jurisdiction*' (Immunity Rules). The question of immunity *ratione materiae* in foreign criminal proceedings for crimes under international law is perhaps the most important aspect of this ILC project — and its most controversial one. In 2017, the Commission took the unusual step to record a vote precisely on the question of immunity *ratione materiae*.¹⁰⁶ This vote resulted in the adoption by majority of Draft Article 7(1)(b) within the ILC's project on immunities, pursuant to which '(i)mmunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: ... crimes against humanity'.¹⁰⁷ However, a number of ILC members remain opposed to this rule. If those members have nevertheless agreed with Draft Article 6(5), their position must be that state officials enjoy procedural immunity *ratione materiae* in foreign proceedings for crimes against humanity. It follows from this that the *caveat* on 'procedural immunities' in the commentaries to Draft Article 6(5) is meant also to reflect the controversy within the Commission about the question of immunity *ratione materiae*. The following sentence in the commentaries provides additional evidence for this intention: '[f]urther, paragraph 5 is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign

105 UN Doc. A/CN.4/701, 14 June 2016, § 150, at 64–65.

106 2017 ILC Report, *supra* note 11, § 74, at 164.

107 *Ibid.*, at 177.

criminal jurisdiction”.¹⁰⁸ Thus, the approach suggested by the Commission so far is to avoid clarifying the question of immunity *ratione materiae* in the Draft Articles on crimes against humanity or in the commentaries thereto.

3. *The Unavailability of Immunity Ratione Materiae in Cases of Crimes under International Law under Current International Law*

Sadat and Frulli criticise the ‘proposal to avoid the issue’ in their contributions to this special issue. They both demand that the Commission conclusively states that there can be no immunity *ratione materiae* in proceedings for crimes against humanity.¹⁰⁹ Contrary to what a minority of ILC members believe, this appeal is in conformity with existing customary international law. This essay is not the place to comprehensively set this position out. For more detailed analyses, reference is made, apart from the pertinent passages of the fifth report submitted by Special Rapporteur Escobar Hernández,¹¹⁰ to the studies by Helmut Kreicker¹¹¹ and by Ramona Pedretti,¹¹² which are the two most detailed studies of the question the present authors are aware of. Both studies have correctly concluded that immunity *ratione materiae* is unavailable in cases of crimes against humanity — not just as a matter of ‘progressive legal development’, but as a matter of existing customary international law. But in addition to this reference, a couple of observations are called for in view of the Commission’s work on the Immunity Rules.

These observations exclusively apply to crimes under (general) customary international law — that is to war crimes, the crime of aggression, crimes against humanity and genocide. For two reasons, it is of great importance to specify that point. First, Draft Article 7 of the Immunity Rules proposes the inapplicability of immunity *ratione materiae* with respect to a number of other serious crimes. The following observations are not meant to support that broader proposition. Second, those who criticise the position that immunity *ratione materiae* is unavailable in cases of crimes under (general) customary international law often fail to distinguish between this limited category of crimes and human rights violations more broadly. They make the case that there is no what they sometimes call a ‘human rights exception’ to immunity *ratione materiae* and from having made that broad case they conclude that immunity *ratione materiae* continues to apply in cases of crimes under (general) customary international law as well. The article ‘Pinochet’s Legacy Reassessed’ published by Ingrid Wuerth in 2012 is perhaps the most influential example

108 *Ibid.*, § 31, at 69.

109 Orentlicher, *supra* note 101, at 202 and 208–211, takes the same position.

110 UN Doc. A/CN.4/701, 14 June 2016, §§ 22–140, at 17–61.

111 H. Kreicker, *Völkerrechtliche Exemtionen. Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihre Wirkungen im Strafrecht*, Vol. 2 (Duncker & Humblot, 2007), 175–219.

112 R. Pedretti, *Immunity of Heads of States and State Officials for International Crimes* (Nijhoff, 2015), 156–192.

for such an approach.¹¹³ But for the reasons that follow, to prove that no 'human rights exception' exists, is not conclusive for the far narrower point under consideration that immunity *ratione materiae* is unavailable in cases of crimes under (general) international Law. Terminological clarity is crucial in the present legal context.

The debate within the Commission focuses on the evaluation of the practice of states and their *opinio iuris* since the 1990s or even more recently. Those members, who argue in support of the availability of immunity *ratione materiae* in cases of crimes under (general) customary international law, refer to inconsistencies in this body of state practice and *opinio iuris*. Some among those members include the practice of states in non criminal law cases to make their point.¹¹⁴ In a forthcoming essay, Commission member Dire Tladi thoughtfully sets out the counter-arguments against this position.¹¹⁵ He correctly maintains that reliance on non-criminal law cases is inapposite for the present purposes¹¹⁶ and he carefully demonstrates that the more recent body of state practice is far less inconsistent than the other side suggests it is. Tladi's argument is a helpful one, but, as is the case with the Commission's debate in general, his analysis sets it far too late in time.¹¹⁷ In fact, immunity *ratione materiae* was unavailable in cases of crimes under (general) customary international long before the 1990s. In a brilliant forthcoming essay, Hervé Ascensio and Béatrice Bonafé make that point in far greater detail than it is possible to do in this article.¹¹⁸ What follows is the core of the argument.

The starting point for the relevant legal evolution is the recognition in classic international law of the extraterritorial jurisdiction of the belligerent state over war crimes committed by enemy prisoners of war before capture.¹¹⁹ This extraterritorial jurisdiction, which applied to state soldiers, thus

113 I. Wuerth, 'Pinchet's Legacy Reassessed', 106 *The American Journal of International Law (AJIL)* (2012) 731–768, see particular at 731–732.

114 See, in particular, S.D. Murphy, UN Doc. A/CN.4/SR.3362, 19 June 2017, at 4–7.

115 D. Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?' 31 *Leiden International Law Journal* (2018), forthcoming.

116 In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports (2012), 99, at § 91, the ICJ has correctly pointed out that the question of jurisdictional immunity of a state is to be distinguished from the question of immunity *ratione materiae* of state officials in criminal proceedings.

117 The same applies to the vigorous criticism against Draft Article 7 of the Immunity Rules put forward by Q. Shen, 'Methodological Flaws in the ILC's Study on Exceptions to Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction', 112 *AJIL Unbound* (2018), 9–15; <https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/the-present-and-future-of-foreign-officials-immunity/61A21A81622B7725F78F5685EA9588A7> (visited 22 November 2018).

118 H. Ascensio and B. Bonafé, 'L'absence d'immunité des agents de l'État en cas de crime international: pourquoi en débattre encore?' 4 *Revue générale de droit international public* (2018), forthcoming.

119 C. Kreß, 'Crimes de guerre', in O. Beauvallet (ed.), *Dictionnaire encyclopédique de la justice pénale internationale* (Berger-Levrault, 2017) 288–296, at 288.

state officials,¹²⁰ implied the unavailability of immunity *ratione materiae*. This power constituted the key point of reference for the debates about the prosecution of war crimes after the First World War. It is within this context that discussion about extending the legal regime for war crimes to the nascent concepts of crimes against humanity and crimes of aggression (waging a war of aggression) began.¹²¹

Whatever the legal situation before, Nuremberg constituted the recognition of the existence of international legal prohibitions of aggression, war crimes and crimes against humanity, coupled with a criminal sanction, directed towards the individual state official. The underlying purposes were twofold and intimately connected: First, it was now out of question to attribute the conduct of a state official violating those prohibitions only to the state of the official concerned. This conduct was rather to be attributed also to the official him or herself. Second, the internationalization of the conduct rule, coupled with the provision of a criminal sanction, opened the door, beyond the already existing bilateral extraterritorial jurisdiction over war crimes, for the exercise of the jurisdiction by competent international criminal courts and for the exercise of universal jurisdiction by states over the state officials concerned for the commission of what was now clearly established as a body of crimes under international law. In the passage cited above,¹²² the Nuremberg Tribunal famously

120 The point that provision for extraterritorial criminal jurisdiction, which is by definition or at least primarily designed to cover state officials, implies the recognition of the unavailability of immunity *ratione materiae*, has been made by D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 21 *European Journal of International Law* (2010) 815–852, at 840–846. The argument may usefully be illustrated by reference to the grave breaches regime, enshrined under the Geneva body of international treaty law, and reflective of general customary international law. It is impossible to maintain that the grave breaches regime can effectively operate if those individuals that this regime is designed to cover enjoy immunity *ratione materiae*. It may be noted in passing that the argument based on the provision of extraterritorial jurisdiction over crimes, which are either by definition or typically committed by state organs, also applies to torture and enforced disappearance. For those international treaties that govern the prosecution of these crimes, also provide for extraterritorial jurisdiction (Akande/Shah, *ibid.*, at 841–843). But here, an additional argument is required to show that the inapplicability of immunity *ratione materiae* extends to the realm of (general) customary international law, which is the point at issue with respect to the debate about Draft Article 7 of the Immunity Rules.

121 Ascensio and Bonafé, *supra* note 118. It is true that the third chapter of the 1919 Report of the Commission on Responsibilities refers to the consent to be given, through the signature to the Peace Treaty, by the state of the officials to the prosecution. But it is apparent from the way the relevant passage of the report is drafted that the authors are of the view that the application of immunity *ratione materiae* is inapposite in the case of the crimes in question. The conclusion reads as follows: 'All persons belonging to enemies countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecutions'; for easy access to the Report, see <https://www.legal-tools.org/doc/63159c/pdf/> (visited 26 November 2018).

122 *Supra* sub-section 4.E.2., text accompanying footnote 103.

concluded that this implied the unavailability of immunity *ratione materiae*. To reply that the Tribunal did not speak of the ‘procedural immunity *ratione materiae*’ misses the substance of the Tribunal’s conclusion. And to argue that the Nuremberg judgment is relevant only in the context of international criminal proceedings ignores the fact that the passage in question was not worded that way and that its underlying logic is not so confined. It follows that the Nuremberg judgment, developing the preexisting customary international law on war crimes and building on the legal debate between states after the First World War, led to the breakthrough of an international criminal law *stricto sensu* which implied the unavailability of immunity *ratione materiae*.

It might of course be doubted whether the Nuremberg judgment, even if considered against its historic background, could by itself give birth to such a body of crimes under (general) international law. But Nuremberg has not remained an isolated event. The Tokyo judgment followed suit and explicitly confirmed the legal analysis set out in the Nuremberg judgment.¹²³ States then unanimously confirmed the Nuremberg principles, including the principle about the unavailability of immunity *ratione materiae*, in General Assembly resolution 95(1)¹²⁴ and the ILC recognized the Nuremberg principles, including (and citing the language used by the Nuremberg Tribunal) the unavailability of immunity *ratione materiae*.¹²⁵ Subsequently, many domestic judiciaries would act on the basis of the Nuremberg and Tokyo judgments and conduct criminal proceedings against former German and Japanese State organs.¹²⁶ It has been questioned whether these national judgments should ‘count’. Germany might not have invoked any immunity and Japan had consented to it, so the argument runs. Leaving aside further inquiries into Germany’s legal position and irrespective of the question of how far Japan’s consent to national criminal proceedings after World War II can be carried, this argument appears to assume that those states that exercised jurisdiction over former German or Japanese state officials for crimes under international law explained the legality of their proceedings under international law on the basis of the attitude taken by Germany and Japan. But take another look at the above-cited¹²⁷ passage from the judgment rendered in the *Eichmann* case, which is directly relevant for crimes against humanity. Clearly, the Courts of the State of Israel did not make their course of action dependent on Germany’s attitude. They felt

123 R.J. Pritchard and S.M. Zaide (eds), *The Tokyo War Crimes Trials: The Complete Transcripts of the International Military Tribunal for the Far East in Twenty-two Volumes*, Vol. 20 (Garland, 1981), at 48437–48439.

124 GA Res. 95(1), 11 December 1946, § 1.

125 *Yearbook of the International Law Commission*, 1950, Vol. II, §§ 95–127, at 374–378, in particular Principle III §§ 103–104, at 375.

126 An exception must be made for the crime of aggression. In that respect, the judicial practice of states subsequent to Nuremberg and Tokyo is sparse. For the purposes of the present study, we need not decide whether this means that immunity *ratione materiae* applies (as a procedural bar) to this single crime under international law.

127 *Supra* sub-section 4.E.2. text accompanying footnote 104. Here again it would be an unacceptable formalism to dismiss the relevance of the judgments because they framed the legal issue as one pertaining to ‘act of State’ rather than to ‘immunity *ratione materiae*’.

entitled to proceed as they did by virtue of the implications of the very concept of ‘crime under international law’. In making their legal argument, they did not consider that the Nuremberg judgment on immunity *ratione materiae* was relevant only for international criminal proceedings, but they recognized its significance for the enforcement of international criminal law *stricto sensu* in general. Whatever the precedential value of the Nuremberg and Tokyo judgments, if only taken as such, together with the just-mentioned subsequent practice of states and *opinio iuris* there can be no doubt that a narrowly defined body of international criminal law *stricto sensu* had come into existence long before the 1990s, one characteristic of which was the unavailability of immunity *ratione materiae*.

The preceding analysis is not to deny that more recently, and particularly in the course of the Commission’s work on the Immunity Rules, a number of states have articulated the view that immunity *ratione materiae* operates as a procedural bar to the exercise of foreign criminal jurisdiction over crimes under international law.¹²⁸ Yet, the preceding clarification of the evolution of (general) customary international law enables one to determine the legal relevance of those statements. The states in question present their views as the expression of their position regarding the current state of customary international law. While this is entirely understandable, it is incorrect. In fact, by expressing such views, those states have produced new practice and *opinio iuris*, which is directed to (and, of course, capable of) bringing about a change of customary international law.

4. Reflections on Possible Solutions: Complementing the Absence of Immunity *Ratione Materiae* with the Recognition of Jurisdictional Priorities and/or Procedural Safeguards

Irrespective of the state of customary international law, the present lack of consensus among states makes it highly unlikely that a draft convention on crimes against humanity could codify the unavailability of immunity *ratione materiae* and yet constitute a basis for anything close to universal acceptance. This leads to the question whether the Commission, for this reason, is well advised to avoid the issue — or whether anything more helpful can be done than that.

128 For an helpful attempt to summarize the different views, see J. Barkholdt and J. Kulaga, ‘Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, United Nations General Assembly, Sixth Committee, 2017’, KFG Working Paper Series No 14, Posted 16 May 2018, Last Revised 29 June 2018, available online at <https://papers.ssrn.com/sol3/papers.cfm?abstractid=3172104> (visited 23 November 2018); for a far less detailed overview, see S.D. Murphy, ‘Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?’ 112 *AJIL Unbound* (2018), 4–8, at 7, available online at <https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/the-present-and-future-of-foreign-officials-immunity/61A21A81622B7725F78F5685EA9588A7> (visited 23 November 2018).

To eliminate the possibility of exercising jurisdiction over foreign state officials would constitute a heavy blow to the effective enforcement of the international *ius puniendi* over crimes against humanity. Therefore, simply to accept the demand now put forward by some states to introduce immunity *ratione materiae* as a procedural bar to the exercise of foreign criminal jurisdiction over crimes under international law (including crimes against humanity) would clearly be a price too high to pay in order to eliminate the divide among states on the immunity issue.

The real question is therefore whether the gap between the two camps could be bridged. Building such a bridge does not seem out of reach. It must be recognized that those who call for immunity *ratione materiae* as a procedural bar, do not necessarily do this out of hostility *vis-à-vis* the effective enforcement of international criminal law. Instead, they do have a point to the extent that they express the fear of politically motivated and thus abusive domestic criminal proceedings. For it is difficult to ignore, first, that crimes under international law are usually situated in a context of high politics and that, second, the judiciary in too many national criminal justice systems all over the world does not appear to be reliably shielded against political interference.

With this in mind, Commission member Nolte articulated the idea to bridge the gap on the basis of what he has called the principle of 'waive or prosecute'.¹²⁹ This proposal starts from the idea that immunity *ratione materiae* applies, but requires a state, which is unwilling to prosecute his or her official at home, to waive its right to invoke this immunity right *vis-à-vis* a foreign state of the *iudex deprehensionis*. The latter state would then be entitled to exercise its jurisdiction. With only a slight adjustment, this proposal could also be put to work without questioning that, under applicable customary international law, immunity *ratione materiae* is unavailable in cases of crimes under (general) customary international law. The adjustment of Nolte's proposal would consist of giving priority, in the exercise of criminal jurisdiction, to the official's state. If this priority right was properly — and genuinely — invoked *vis-à-vis* a state of the *iudex deprehensionis* through an extradition request, this latter state would have to defer to the prosecution by the requesting state.

This model is partly in line with the position set forth above¹³⁰ that the Draft Articles' *aut dedere aut iudicare* regime should be refined through the introduction of an element of jurisdictional priority. If the exercise of universal jurisdiction is governed by the principle of subsidiarity, as the present authors suggest above, the official's state will be given priority *vis-à-vis* a state of the *iudex deprehensionis* with no close jurisdictional link with the crime under international law. Nolte's idea, however, goes one step further. It would provide the official's state with jurisdictional priority also *vis-à-vis* the territorial state and the state of passive nationality (which will more often than not be the

129 G. Nolte, UN Doc. A/CN.4/SR.3365, 13 July 2017, at 6, available online at http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a.cn4.sr.3365.pdf&lang=EF (visited 23 November 2018).

130 *Supra* sub-section 4.B.4.

same state). Whether this is satisfactory is a policy question worth debating in view of the fact that the territorial state and the state of passive nationality usually have a particularly strong and legitimate interest in exercising their jurisdiction. Another question, which deserves closer scrutiny in connection with the idea of a(n absolute) jurisdictional priority of the official's state, is whether the state of the *iudex deprehensionis* should be entitled to reject the extradition request in presence of reasons to believe that the official's state is ultimately unwilling to proceed genuinely with the case. Alternatively, the state of the *iudex deprehensionis* could be provided with a right to observe the proceedings in the official's state in order to be able, if it sees the need to do so, to challenge the genuineness of these proceedings in inter-State dispute settlement proceedings.

There is a second path to bridge the gap.¹³¹ This second model would give teeth to the obligation of the State of the *iudex deprehensionis* to adhere to the fair treatment standards referred to in Draft Article 11 in cases of proceedings against foreign state officials. In that respect, *ex post*- and *ex ante*-models of judicial control are conceivable: provision could be made to ensure that the state of the official (ideally after having been in a position to follow the proceedings as an observer) can bring a judicial challenge for lack of fairness *ex post*, if need be. The perhaps most ambitious solution would consist of introducing a system of accreditation. Here, the power to exercise jurisdiction over an official of another state for a(n alleged) crime under international law irrespective of the consent of the state of the official would be granted only if an independent treaty body had before confirmed that the state concerned is equipped with an independent judiciary (both on the books and in practice).

This article is not the place to decide which of these conceivable bridges is the preferable one and then to build this bridge with all its necessary procedural details. The more modest aim of the foregoing considerations was to show that both the importance of the question of immunity *ratione materiae* and the conflicting principles at stake make it worth investing one's intellectual energy in such a bridge-building effort.

It is finally submitted that, while the Commission plans to debate the matter solely in the context of its study on immunities of state officials, the proposed convention on crimes against humanity would be an ideal place for the first time to give life to a successful bridge-building effort. This would constitute a genuine attempt to avoid dividing the world over international criminal justice,¹³² and it would set a standard that could evolve into customary international law applicable to all crimes under international law.

131 This has been partly alluded to by M. Forteau, 'Immunities and International Crimes before the ILC: Looking for Innovative Solutions', 112 *AJIL Unbound* (2018) 22–26, at 25–26, available online at <https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/the-present-and-future-of-foreign-officials-immunity/61A21A81622B7725F78F5685EA9588A7> (visited 23 November 2018).

132 China's concern regarding the immunity issue is reported in clear terms by Shang and Zhang, *supra* note 18, at 362–364.

F. *The Unresolved Question of Amnesty*

In recent years, there has been a robust debate about whether evolving international principles opposing amnesty for serious crimes under international law may be too inflexible. In particular, many have urged that amnesties can play an important role in ending violent conflict or in clearing the way for traditional processes of reconciliation to operate effectively in the aftermath of mass atrocity.

It is difficult to disagree with the accuracy of this overall assessment of the state of affairs made by Diane Orentlicher, a leading authority on the matter.¹³³ In view of the importance of the question of amnesties, this symposium includes two contributions, those by Sarah Nouwen and Hugo Relva, which address the topic in greater detail.¹³⁴ The fact that they reach very different conclusions confirms the impression that the legal and the legal policy issue before us is a particularly thorny one.

1. *The Commission's Proposal for the Way Forward: 'An Emphasis on Punishment Coupled with a Small Backdoor to Muddle Through'*

The Draft Articles do not address the question of amnesty explicitly. On the basis of a meticulous analysis of Draft Articles 8–10 in light of the amnesty question, Nouwen concludes that, while the first sentence of Draft Article 10 leaves the door a little open for a national prosecutor to comply with an amnesty decision taken by the legislator, the duty to make a preliminary inquiry (Draft Article 9(2)) and the second sentence of Draft Article 10, depending on the relevant national law, would make it extremely difficult for a national prosecutor (and a judge) to accept a negotiated settlement of a violent conflict which provides for an amnesty for crimes under international law committed in the course of that conflict. The comparatively cursory sections of the commentaries to Draft Article 10 do not do much to clarify the picture. They acknowledge that 'the obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty'.¹³⁵ To this they add 'that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence'.¹³⁶ They end on the sibylline note: Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize

133 Orentlicher, *supra* note 101, at 221–222.

134 See S.M.H. Nouwen, 'Is There Something Missing in the Proposed Convention on Crimes Against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission', and H.A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity: The Prohibition on Amnesties, Military Courts, and Reservations' both in this Special Issue of the *Journal*.

135 2017 ILC Report, *supra* note 11, § 8, at 86.

136 *Ibid.*, § 11, at 88.

crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others.¹³⁷

The emphasis on punishment is clear, but the reader gets the sentiment that the Commission is struggling with the question of whether it is advisable to insist on the criminal justice avenue under all circumstances. Hence, a small and unspecified backdoor appears to be left open to ‘muddle through’ in case the dire need for an alternative solution arises.

2. *The Preferable Approach: Acknowledging and Dealing with a Genuine Dilemma*

Relva criticises the existence of this backdoor for states to ‘to get away’ with an amnesty decision and he demands that a ‘general prohibition of amnesties’ be included in the Draft Articles.¹³⁸ It may safely be assumed that many human rights activists are in agreement with this call. Yet, it is open to serious doubt whether the legal policy stand in support of a rigorous prohibition of amnesties would be best served by the attempt to include explicit language to that effect in the proposed convention. In that context, Orentlicher’s word of caution bears recalling:

With vigorous debate on these issues still very much on their way, they are unlikely to be resolved during negotiations for a convention on crimes against humanity. In all likelihood, States and human rights organizations that support a ‘no amnesty’ provision would, in the face of proposals that dilute the strength of such a provision, conclude that it is best to exclude such language altogether.¹³⁹

Indeed, one need not even go back to the widespread support that, at the time, was expressed at the international level with respect to South Africa’s negotiated transition in order to wonder how likely it is that states would agree on a general prohibition of amnesties. It would suffice to take a closer look at the recent peace agreement reached in Colombia between the government and the FARC.¹⁴⁰ While it would appear that this agreement has been widely welcomed by other States, and while this agreement does not provide an amnesty *stricto sensu* for war crimes and crimes against humanity, it is also true, as Nouwen correctly observes,¹⁴¹ that it is an entirely open question whether the implementation of the alternative-sanctions regime can be considered as constituting a(n albeit attenuated) criminal justice response.¹⁴²

137 *Ibid.*

138 Relva, *supra* note 134. In her contribution to the symposium, Sadat takes the same view.

139 Orentlicher, *supra* note 101, at 222.

140 H. Olasolo and J.M.F. Ramirez Mendoza, ‘The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition’, 15 *JICJ* (2017) 1011–1047.

141 For references on the Colombian peace agreement, see Nouwen’s contribution, *supra* note 134.

142 For the statements made by the ICC Prosecutor on the situation of Colombia including the envisaged transitional justice regime, available online at <https://www.icc-cpi.int/colombia?In=fr> (visited 23 November 2018); for a brief overview of the legal questions arising under the ICC Statute, see conversation with C. Kreß, ‘La CPI querrá ver castigados a todos

This could mean that the position taken by the Commission is the best solution for the supporters of the ‘no amnesty’-approach, under the prevailing circumstances. This position may also seem politically attractive for states, as it allows the continuance of a strongly punitive rhetoric, while leaving it to the judiciaries to deal with the hard cases. States took precisely that approach in their negotiation of the ICC Statute — and this is what probably inspired the Commission.

However convenient this solution appears at first sight, Nouwen’s contribution to this special issue places a powerful question mark behind its ultimate wisdom. The fact that the international community is prepared to accept negotiated settlements such as the South African or the Colombian ones suggests that the slogan ‘no peace without justice’ is too simplistic — particularly if that slogan is understood to mean ‘no peace without *criminal* justice.’¹⁴³ While many states continue to prefer punitive rhetoric in the abstract, their practice in hard cases reveals that they do recognize that a peaceful transition may involve the need to strike a balance between conflicting principles that all have their place within the international legal order. The opinion appended by President Garcia-Sayán to the Inter-American Court of Human Rights’ Judgment in the *El Mozote* case¹⁴⁴ (opinion that appears to have inspired the drafters of the Colombian peace agreement) suggests that this recognition might be gaining ground even within that judicial institution, which has long been the strongest driving force behind the ‘no amnesty’ approach. For the sake of clarity, it would be beneficial for states to avail themselves of the precious opportunity of the proposal of a convention on crimes against humanity and undertake the first genuine attempt to explicitly articulate a policy choice on how best to go about the question of amnesty.

The fact that Nouwen submits a concrete text proposal indicates that it is not beyond reach to come up with a well-balanced solution. A greater degree of specificity than Nouwen suggests is desirable and may also be achievable. Such greater specificity would allow identifying the principles at stake more precisely. It could furthermore highlight that the principle of an equal enforcement of international law weighs most heavily in case of those (allegedly) most responsible for the commission of crimes under international law. Not least, it could be pointed out that any amnesty extending to the latter category of persons should be conditioned to the establishment of a credible alternative mechanism to search for the truth, and by the undertaking of a genuine attempt to provide reparation to victims and assurances of non-repetition. This text is not the place for a full discussion about the best possible way forward.

los máximos responsables’, *Semana*, 3 September 2016, available online at <https://www.semana.com/Imprimir/492401> (visited 23 November 2018).

143 In support of ‘*Laveu du pluriel*’ regarding the concept of ‘justice’ particularly in a period of transition, see S. Garibian, ‘*Laveu du pluriel*. Les commissions de vérité et de réconciliation et la recherche de la vérité’, in J.P. Massias (ed.), *Les commissions vérité et réconciliation en Amérique latine* (Institut Universitaire Varenne, LGDJ), forthcoming.

144 *The Massacres of El Mozote and Nearby Places v. El Salvador*, IACtHR Judgment of 25 October 2012, Concurring Opinion of Judge D. Garcia-Sayán, at § 37.

But it is the place to voice support for Nouwen's call that states should no longer ignore that there is a genuine dilemma about amnesties, and should assume their responsibility to deal with it.

5. Dispute Settlement

Draft Article 15 provides for the settlement of disputes concerning the interpretation and application of the proposed convention. At the same time, the draft articles leave the question of the establishment of a treaty body to resolve such disputes to a future decision by states.

A. *An Unduly Timid Proposal: Draft Article 15*

It is surprising to note — as Zimmermann and Boos in fact do in their contribution — to what extent Draft Article 15 deviates from Article IX of the Genocide Convention. It is even more astonishing to note how prominently the UN Convention Against Corruption, dealing with a crime of a very different nature, figures in the commentaries to the Draft Article.¹⁴⁵ The resulting proposal appears unduly timid in three important respects.¹⁴⁶

First, Draft Article 15(2) makes the seizure of the ICJ dependent on the failure to settle the dispute through negotiations, even if, under Draft Article 15(3), every state is allowed to opt out of the jurisdiction of the Court. This proposal deviates from Article IX of the Genocide Convention and, as Zimmermann and Boos explain, it reduces the efficiency of the proposed compromissory clause. Second, these authors also persuasively point out that the requirement of prior negotiations may prevent a state from seeking timely provisional measures, as the text does not provide for the possibility to request provisional measures without the need for prior negotiations. Third, Draft Article 15(2) deviates from Article IX of the Genocide Convention by omitting the words 'including those relating to the responsibility of a State for crimes against humanity'. Zimmermann and Boos rightly make the point that this omission is particularly unfortunate in light of the fact that the Draft Articles fail to clarify that the state itself is under an obligation not to commit a widespread or systematic attack against a civilian population.¹⁴⁷ Both omissions taken together may well be used as an argument that no such obligation exists.

The possibility to opt out, as proposed in Draft Article 15(3), is to be regretted as well. Clearly, a system of mandatory ICJ jurisdiction would make the proposed Convention a more robust legal regime of protection. Yet, the drafters

145 See, for example, 2017 ILC Report, *supra* note 11, § 2, at 116. As Zimmermann and Boos show in their contribution (*supra* note 44), the Special Rapporteur had suggested placing an even greater reliance on this convention.

146 The proposal also raises difficult questions regarding the scope *ratione temporis* of the compromissory clause, for a detailed analysis, see Zimmermann and Boos, *supra* note 44.

147 On this failure, see *supra* sub-section 2.E.

have probably rightly assumed that a provision for general mandatory ICJ jurisdiction would be too ambitious under the prevailing political circumstances. This being said, the Draft Article 15 should also be seen in connection with the possibility that states might agree about special procedural safeguards for cases of the exercise of criminal jurisdiction over crimes against humanity allegedly committed by the official of another state.¹⁴⁸ Should the official's state be given the right of challenging *ex post* its official's fair treatment in criminal proceedings before a foreign court, it would be advisable to entrust the ICJ with compulsory jurisdiction, at least where the individual in question does not have recourse to an international human rights court.

B. The Case for a Treaty Body with a Limited Mandate

A convention without a monitoring mechanism is likely to be an "orphan".¹⁴⁹ By these words, Sadat calls for inclusion in the proposed Convention of such a treaty body. While states will quite understandably wish to be convinced of the need for investing in such a body, Sadat's proposal deserves close consideration.

The mandate of such a body should reflect the fact that the proposed convention differs from human rights instruments. There is therefore no need to provide for a mechanism competent to receive individual complaints. It is also not desirable to follow the model of the Convention on the Elimination of Racial Discrimination and to entrust a treaty body with the settlement of disputes among states pursuant to a complicated set of procedures.¹⁵⁰

The mandate should rather be confined to monitoring states' legislative, administrative and judicial activity in establishing the domestic infrastructure required to prevent and punish crimes against humanity and in actually employing it when appropriate. Moreover, the treaty body could create a useful 'discursive space'.¹⁵¹

6. The Question of Reservations

In accordance with the Commission's practice, the Draft Articles do not contain a proposal regarding reservations. Admitting reservations might be another way to deal with the attempt to prevent the proposed Convention from increasing divisions among States about international criminal justice. However, the law on crimes against humanity forms part of the fundamentals of the current international legal order and this seriously cautions against allowing for fragmentation.

148 See discussion *supra* sub-section 4.E.4.

149 See Sadat, *supra* note 6.

150 For the implications of such a model for Draft Art. 15, see Zimmermann and Boos, *supra* note 44.

151 As observed by the Dutch Advisory Committee on Issues of Public International Law, *supra* note 56, *sub* 5.

In this text, it has been suggested to make use of this opportunity to send out the signal that international as well as national courts should strictly construe the definition of crimes against humanity so that it can be stated with confidence that the law on crimes against humanity is based not on lofty aspirations, but on a rock solid global consensus.¹⁵² It has furthermore been noted that the provisions on extradition and mutual legal assistance provide ample space for States to have their legitimate concerns be accommodated by a refusal to grant a request for cooperation and it has been considered to provide for an opt-out clause should those provisions be given a desirable vertical dimension.¹⁵³ It has also been observed with regret, but understanding, that the proposed compromissory clause is coupled with the possibility to opt out. Finally, it has been suggested to take up the as of yet unresolved questions of immunity *ratione materiae* with a view genuinely to balance the ideal of an equal enforcement of international criminal law against competing considerations.

Beyond all this, however, it is difficult to see how reservations could not defeat the purpose of the proposed convention at its core and endanger the integrity of a core element of the current international legal order.

7. A Specialized Convention on Crimes Against Humanity versus a (More) Comprehensive Convention for Crimes under (General) International Law

In the very first paragraph of the commentaries, the Commission asks the question whether it is the right approach to confine the proposed convention to one single crime under (general) international law. But the ILC does not really discuss this question. It rather leaves the matter to states for consideration in the future.¹⁵⁴ What follows are no more than a few tentative observations to stimulate this debate.

The proposal for the adoption of an international treaty, which forms the subject matter of this special issue, is confined to crimes against humanity. Any consideration whether it is desirable to take a more comprehensive approach must begin with identifying those crimes which could be candidates for such a more general international treaty regulation. In that respect, the very first sentence of the commentaries states: ‘Three crimes typically have featured in the jurisdiction of international criminal tribunals: genocide, crimes against humanity and war crimes.’¹⁵⁵ One hopes that the wording of this

152 *Supra* sub-section 2.D.

153 *Supra* sub-section 4.D.1. and 3.

154 2017 ILC Report, *supra* note 11, § 1, at 21; see also *ibid.*, § 2, at 24–25; for a thoughtful discussion, see Tladi, *supra* note 69.

155 2017 ILC Report, *supra* note 11, § 1, at 21.

sentence will be adjusted in the course of the second reading so that it includes the crime of aggression, over which the ICC has active jurisdiction as from 17 July 2018.¹⁵⁶ With this addition, the inaugural sentence of the commentaries would comprehensively list the existing crimes under (general) international law. Those could form the object of a comprehensive international treaty regime regarding prevention and national prosecution.

In order to assess the need for such a comprehensive approach, it is useful to consider what the overall picture would be if the proposed convention remained confined to crimes against humanity. War crimes form the object of, in particular, the Geneva Conventions and the two Additional Protocols. Those conventions contain a range of different provisions, which can be related to the purpose of prevention. Regarding domestic prosecution, war crimes committed in international armed conflict are essentially covered by the grave breaches regime of the Geneva Conventions and their First Additional Protocol, a regime that is far more cursory than that of the proposed convention. The domestic prosecution of war crimes committed in non-international armed conflict is not covered by any international treaty regime. The United Nations Charter, and in particular its collective security system, relates to the prevention of crimes of aggression. Yet, no existing international treaty covers their domestic prosecution. The Genocide Convention covers prevention and punishment of genocide. In a number of respects, this Convention's regulation is less detailed than that proposed for the convention on the prevention and punishment of crimes against humanity. In other parts, the Genocide Convention's legal regime could do with an update. At first sight, this diversity regarding the international treaty coverage of crimes under (general) international law appears to call for harmonization through one comprehensive international treaty. On a little closer inspection, however, things, unsurprisingly, turn out to be far more complex.

The UN Charter regime regarding the prevention of the use of force is not lightly to be touched at and the question of domestic prosecution of crimes of aggression may not call for the same answers as crimes against humanity in view of, for example, the absolute leadership character of this crime and a widespread perception that an international criminal court is the most appropriate forum to deal with leaders who may be responsible for aggression. This may suggest that the crime of aggression be better left out the international treaty regime under consideration.

Regarding war crimes, the Geneva Conventions already deal with prevention under certain angles and if improvements were to commend themselves, they should probably be made within the framework of the Geneva body of international treaty law. This is not to say that the initiative for a 'Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes' is ill conceived. Quite to the contrary, the idea to adopt such a treaty is welcome in view of the relatively cursory

156 C. Kreß, 'On the Activation of the ICC's Jurisdiction over the Crime of Aggression', 16 *JICJ* (2018) 1–18.

international treaty regulation of the domestic prosecution of war crimes committed in international armed conflict and the absence of such regulation in the case of war crimes committed in non-international armed conflict. Whether or not such a new treaty could add anything of real significance to the proposed convention's regulation on crimes against humanity remains to be seen. If yes, this added value should indeed go into a freestanding international treaty for extradition and mutual legal assistance rather than it being included in the proposed convention on crimes against humanity. If no added value regarding the prosecution of crimes against humanity was to be achieved, it should be considered whether the proposed 'Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes' would better be confined to war crimes in which form it could become a new Additional Protocol to the Geneva Conventions.¹⁵⁷

This leaves one with genocide and the perhaps surprising suggestion to consider whether in that respect a more comprehensive approach appears feasible and desirable. While it is true that the prohibitions of genocide and crimes against humanity do not protect precisely the same values,¹⁵⁸ the intimate historic and systematic connection between these crimes cannot be denied. What is more, in practice, the distinction between those two crimes often means drawing an extremely fine line. Last but not least, the Genocide Convention, with its two essential pillars of prevention and punishment, has rightly served as the model for the proposed convention from the outset of the discussion about this project.

Therefore, the question most worthy of consideration by states is whether the insights gained in the course of the work conducted both by the Crimes Against Humanity Initiative and the ILC should not be used also to update the Genocide Convention. Just consider the benefit in formulating an identical regime on prevention for both crimes, in replacing Article VI of the Genocide Convention by the legal regime proposed by Draft Articles 7–10, together with the improvements suggested in this symposium, in extending the provisions on extradition and mutual legal assistance as well as on victims and fair treatment, and, not least, in making any carefully devised solution that may be found with respect to the unresolved questions of immunity and amnesty equally applicable to genocide. There would then be one single convention on genocide and crimes against humanity providing for a coherent legal regime. For those states that are currently parties to the Genocide Convention and would then ratify the new more comprehensive convention, the latter would take the place of the former.¹⁵⁹

157 For an argument in support of one comprehensive convention on crimes against humanity, genocide and war crimes, see Tladi, *supra* note 69, 9–11.

158 The historic explanation for this has recently been elucidated in P. Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (Alfred A. Knopf, 2016).

159 For an observation on this point in historical perspective, see Garibian, *supra* note 9, at 52–53.

8. A Final Word on the Way Ahead

One cannot be but impressed how far the efforts laying the foundations of a new convention on crimes against humanity have taken us in a relatively short time. While it is certainly desirable to maintain the momentum, a 'rush to conclusion' should be avoided. Solid groundwork has been laid, but there is room for refinement in quite a number of respects in order to strengthen the proposed Convention. A workable treaty regime of interstate cooperation regarding the prosecution of crimes against humanity that does not deepen the divide among states about the international criminal justice system, must confront rather than avoid the questions of immunity *ratione materiae* and amnesty. What can be done by the ILC during its second reading and what will be better left for a diplomatic conference remains to be seen. The same is true for the question of whether a *momentum* can be created to extend the proposed convention to genocide. At this juncture, no safe prediction is possible whether a draft convention will be presented which, to borrow the words of the Special Rapporteur, is 'really needed' and at the same time 'politically feasible'.¹⁶⁰ But it can safely be stated that every additional investment in intellectual energy and time to arrive at the formulation of such a draft is worthy of the effort. For the adoption of a Convention on Crimes against Humanity and preferably one that also updates the Genocide Convention fulfilling these two criteria would mark yet another milestone in the evolution of the international criminal justice system.

160 Murphy, *supra* note 4.

BOOK REVIEW

Philippe Sands, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'* (Alfred A. Knopf, 2016) 448 pp. (Hardcover) £20 ISBN 9780385350716

How much do we know about the origins of the crimes about which we write frequently? How much do we know about the people whose lives became immortalized through these concepts? How do their lives intersect with our own? These are but some of the questions raised by Philippe Sands' multiple biography and memoir *East West Street*. This book addresses the biographies of Hersch Lauterpacht and Raphael Lemkin, whose work was foundational to the discipline of international criminal law and masterfully interweaves their histories with Sands' own family history. The result is an intricate masterpiece.

At the heart of the book is the question whether we fundamentally consider ourselves as individuals or as members of groups. This question has important implications for how culpability and responsibility is attributed. The question is deeply psychological and philosophical.

East West Street refers to the street in the Ukrainian city of Lviv on which Sands' maternal grandparents lived. The street name alludes to the shifting fates and identities of the town, Poland and Europe. It represents a microcosm of Europe's turbulent 20th century. *East West Street* is also where the lives of the central characters intersect. Lemkin — a Polish Jew, was the lawyer who coined the term 'genocide' and fought to have the concept included in the Charter of the International Military Tribunal in Nuremberg and recognized by the United Nations. He studied law in Lvov. Lauterpacht was born and lived in Zolkiew, a small town close to Lvov.

In setting up the individual versus the group, Sands compares Lemkin to Lauterpacht. Lauterpacht, the Polish Jewish refugee, eventually took a post at the University of Cambridge, where his son, Elihu Lauterpacht, would one day teach Sands. It would take 30 years for Sands to discover that his father and Hersh Lauterpacht hail from Zolkiew, at opposite ends of the town, on *East West Street*.

Sands' personal connection to, and professional admiration for, Lauterpacht is clear from the outset. He acknowledges Lauterpacht's flaws — most notably, he refers to Lauterpacht's almost cold ability to separate the fate of his family — persecution by the Nazis — from his intellectual views on international crimes. Lemkin, on the other hand, was more demonstrably driven by previous traumatic experience. Lemkin is portrayed as socially awkward. It is not merely his temperament that is criticized. Lemkin's work is repeatedly described as being unimaginative and lacking in rigor. According to Elihu Lauterpacht, his father 'thought [Lemkin] to be a compiler, not a thinker'.¹

Lemkin is by far the most interesting character portrayed in the book. I first read about Lemkin in Samantha Power's brilliant Pulitzer prize-winning book, *A Problem from Hell: America and the Age of Genocide*.² Power described Lemkin as being a neglected figure in the history of international justice, an unsung hero. Lemkin was nothing if not determined, burning bridges in his single-minded advocacy for the adoption of a convention concerning genocide. He innovatively sought to uncouple genocide from war. His efforts were ultimately realized through the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

The juxtaposition of genocide and crimes against humanity and the associated tension between the protection of the group and the individual is both the most interesting and most troublesome mechanism in the book. Possibly inspired by Lauterpacht's idea that recognizing genocide as a crime would undermine the protection of the individual, the book exaggerates the significance of the contrast between the two forms of protection. I hold the view that much gets lost in the suggestion that genocide and crimes against humanity are somehow mutually exclusive or incompatible. Crimes against humanity, for example, includes many group-

1 P. Sands, *East West Street* (Alfred A. Knopf, 2016), at 107.

2 See S. Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002).

based crimes, such as persecution and extermination.

The emphasis placed within the book on personality is interesting. The interest shown by Sands in the force of personality and personal connections, more than any other feature of the book, distinguishes it from a purely academic or legal text. It also raises the question of the impact of prominent personalities in the formation of international criminal law. For instance, could the International Criminal Tribunal for the former Yugoslavia have been impacted by the personality and personal history of Antonio Cassese? Was there anything in the personal history of those early giants in international criminal law that prompted them to pursue international justice in such a dogged and determined manner? Cassese's stamp on *Tadić* can be discerned. Cassese's activist inclination to judicial lawmaking shines through the pages of the judgment. Which other stamps have been imprinted into judgments? And what is the backstory?

Sands has the rare ability to not only tell an intriguing story but to evoke an entire age and lost world. The story is amplified and deepened by evocative photographs and atmospheric illustrations. The characters in these pictures stare at us with melancholy and war-weary eyes. The last biography I read of such skill, breadth and personal insight was Gitta Sereny's biography entitled, *Albert Speer: His Battle with Truth*.³ Albert Speer, Hitler's Minister of Armaments, also became his close companion. Sereny's controversial and provocative book, centres on her series of interviews with Speer at his home in Heidelberg, Germany.⁴ Sereny's research on Speer ultimately spanned 11 years. Sereny argued that Speer's unhappy and emotionally arid childhood made him vulnerable to Hitler's 'paternal' influence. Bravely, certainly for her time, she admitted liking Speer as a person and believed that he had found moral redemption. In an obituary, *The Guardian*, described Sereny's 'relentless psychological

exploration of her subject'.⁵ Like Hannah Arendt, Sereny essentially wrestled with the question of how to explain evil. Like Arendt, she was fascinated by the ordinary nature of evil. Their work was informed by a psycho-analytical way of thinking. Written at a time when it was not acceptable to humanize Nazis, Sereny was accused of showing too much understanding of, and towards, her subject.

Whereas Sereny's book falls squarely in the category of biography, Sands' book is more than a biography and defies literary categorization. It straddles genres and teases us into thinking the book is about a specific topic only to surprise us at every turn. Sands describes not only the historical, political and legal context in which his characters lived and worked but also their idiosyncrasies and that which made them human. In this regard, as in the case of authors such as Sereny and Arendt, it is clear that Sands writes to understand his subjects. Sands seeks to understand not only the nature of evil, but also the family on his mother's side he never knew and ultimately himself. In addition, he strives to understand the dichotomy between Lauterpacht and Lemkin, which raises the question of individual- and group-based protection, as discussed above. At the end of the book, Sands describes that, upon visiting a mass grave on the outskirts of Zolkiew, he 'understood'. In doing so, Sands shows his awareness of the complexity of the question of the group versus individual dichotomy. Indeed, groups *are* persecuted as groups. Whereas Sands does not attempt to examine 'evil' as closely as Sereny, he does form a friendship with Nazi commander Hans Frank's son, Niklas Frank. Frank, who became a distinguished journalist, became Sands' friend during the research. Sands appreciates Frank's honesty and clear perspective of his Nazi father. Emotionless, Frank conveys to Sands: 'I am opposed to the death penalty. Except for my father'.⁶

Sands' prodigiously researched story does not confine us to one street but leads us down winding roads and forest paths. It leads us down the corridors of the United Nations and

3 G. Sereny, *Albert Speer: His Battle with Truth* (Pan Macmillan, 1995).

4 Sereny previously published a book on her interviews with Treblinka commandant Stangl. See, G. Sereny, *Into that Darkness: An Examination of Conscience* (Penguin, 1983).

5 'Isabel Hilton: Obituary', *The Guardian*, 19 June 2012, available online at <https://www.theguardian.com/books/2012/jun/19/gitta-sereny> (visited 5 April 2018).

6 Sands, *supra* note 1, at 374.

down dark, dusty archives. On the way, we discover Miss Tilney, the brave woman who helped Sands' maternal grandmother Rita avoid deportation by the Nazis. We meet Clara Kramer who hid under the floorboards of a cellar in Zolkiew. On the most significant tangent, Sands questions whether his grandfather was in fact his mother's father and goes so far as to have a DNA test carried out. The result of the test did not support his theory.

Upon hearing the Nuremberg verdict, Lemkin was devastated not only by the silence on genocide by the International Military Tribunal (IMT) but also by the fact that the Tribunal entirely ignored crimes committed before the war. This jurisdictional gap was the dramatic result of a last-minute change in the drafting of Article 6 of the IMT Charter. A single comma inserted in the wording of Article 6(c) restricted the crimes that would fall under the Tribunal's jurisdiction.

Fundamentally it meant that crimes against humanity had to be connected to war, which is a requirement that has subsequently fallen away. Sands explains the consequence of the comma:

For an act to be a crime, it had to be connected to the war ... the consequence [was] the carving-out from the trial of all the acts that occurred in Germany and Austria before September 1939. The acts of impoverishment and banishment taken against individuals like Leon, in November 1938, and against millions of others — of confiscation, expulsion, detention, killing — would be outside the jurisdiction of the tribunal.⁷

Much hinges on a comma. Much turns on coincidence. The book highlights the power of coincidence and serendipitous connection.

Besides the central coincidence of the close association with Lviv by the protagonists, the book is riddled with further incidences of coincidence: among the Jews hiding with Kramer were relatives of Lauterpacht.

East West Street starts with the quote by Nicolas Abraham: 'What haunts are not the dead but the gaps left within us by the secrets of others.' The book prompts us to probe the secret histories of our intellectual heroes and ourselves and the ways in which they shape us. The book encourages us to question how our own experiences, heritage and family experience can inform our understanding of our discipline. Many international criminal lawyers have their own compelling and personal reasons for being drawn to the study and practice of international criminal law. Sands' book urges us to celebrate that personal connection, to delve deeper, to excavate and to understand. It asks us to turn to sources and instincts more personal and intimate than law although ordinarily considered 'extraneous to law'. It further urges us to reconstruct the worlds and places destroyed by international crimes. Sands reveals the history that hides under the floorboards of international law. The final passages of the book, describing an imagined, dreamlike journey through Lviv, is written with such haunting lyricism, it reads like music. *East West Street* is a love song to lost ones, a requiem for another age.

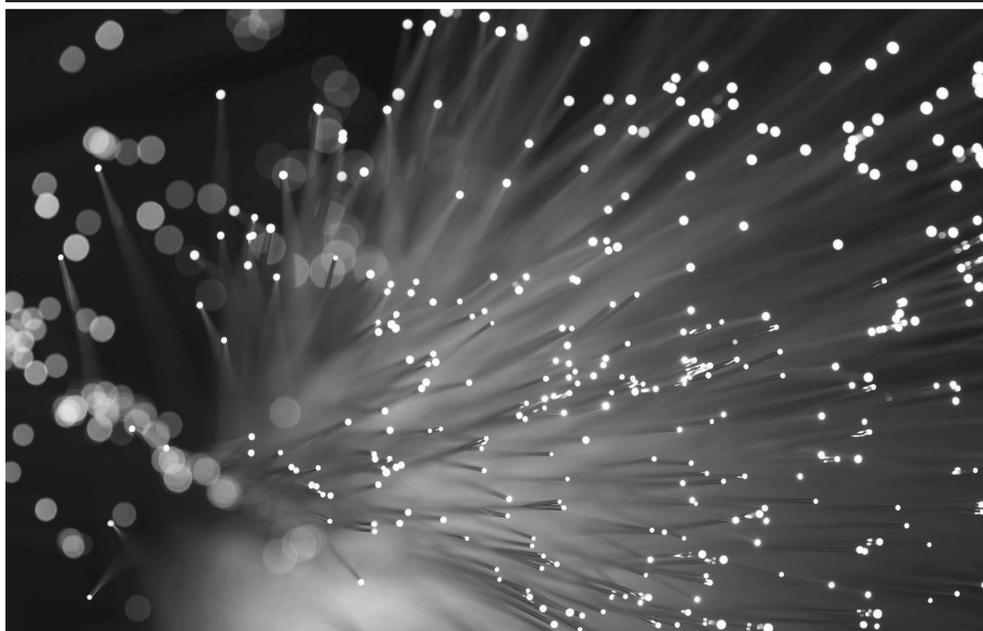
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⁷ *Ibid.*, at 348.

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