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Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

A Comprehensive History of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*

By Leila Nadya Sadat

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I. Introduction and Background

1. In Spring 2008, under the direction of Professor Leila Nadya Sadat, the Whitney R. Harris World Law Institute of Washington University School of Law embarked upon a project to study the need for a comprehensive convention on crimes against humanity, analyze the necessary elements of such a convention and draft a proposed treaty. Since that time, this Crimes Against Humanity Initiative has proceeded in four phases, over a period of three years, as follows:

- **Phase I**. Preparation of the project and methodological development, including the formation of the Initiative's Steering Committee;

- **Phase II**. Private study of the project through the commission of working papers by leading experts, the convening of expert meetings and collaborative discussion of draft treaty language at expert meetings held in St. Louis and The Hague;

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- **Phase III**. Public discussion of the project through written consultation with additional experts and at an international conference convened in Washington, D.C. from March 11-12, 2010; and

- **Phase IV**. Widening consultations with diplomats, academics and members of civil society, and organizing and participating in regional conferences as part of a global awareness campaign focusing on the prevention and punishment of crimes against humanity.

2. In addition to other public outreach efforts, the expert papers, the *Proposed Convention* resulting from the work completed in Phases I-III and this *Comprehensive History* have been published in this volume.

3. As the initial scholarly work was undertaken, a preliminary draft text of the convention, prepared by Professor M. Cherif Bassiouni, was circulated to participants of the Initiative's first meeting (the April Experts' Meeting) to begin the drafting process (*see* paras. 16-46 *infra*). As the Initiative progressed, 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 either in the United States or elsewhere. Between formal meetings, technical advisory sessions were held during which every comment received – whether in writing or communicated verbally – was discussed as the text was refined. The *Proposed Convention* went through seven major revisions (and innumerable minor ones) and was approved by the members of the Steering Committee in August 2010 as it now appears in Appendices I (in English) and II (in French) in this volume.[1]

4. The *Proposed Convention* builds upon and complements the ICC Statute by retaining the Rome Statute definition of crimes against humanity but adds robust interstate cooperation, extradition and mutual legal assistance provisions in Annexes 2-6. Universal jurisdiction was retained (but is not mandatory), and the Rome Statute served as the model for several additional provisions, including Articles 4-7 (Responsibility, Official Capacity, Non-Applicability of Statute of Limitations) and with respect to final clauses. Other provisions draw upon other international criminal law and human rights instruments, such as the recently negotiated Convention for the Protection of

[1] As used in this Comprehensive History, "draft convention" and "proposed convention" refer to interim versions of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*; "*Proposed Convention*" refers to the text approved by the Steering Committee in August 2010, which appears in this volume as Appendix I (in English) and Appendix II (in French).

All Persons from Enforced Disappearance, 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.

5. Although the Initiative benefited from the existence of current treaties, the creative work of the drafting process was to meld these and our own ideas into a single, coherent international convention that establishes the principle of State responsibility as well as individual criminal responsibility for the commission of crimes against humanity. The *Proposed Convention* innovates in many respects by attempting to bring 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 defenses of immunities and statutory limitations, by prohibiting reservations, and by establishing a unique institutional mechanism for supervision of the convention. Echoing its 1907 forbearer, it also contains its own Martens Clause in paragraph 13 of the Preamble. The twenty-seven Articles and six Annexes of the *Proposed Convention* represent a tremendous effort on the part of many individuals.

Why a specialized convention on crimes against humanity?

6. Since the indictment and judgment of the International Military Tribunal at Nuremberg, there has been no specialized convention on crimes against humanity. The objective of the Crimes Against Humanity Initiative is to fill this gap.

7. The Convention for the Prevention and Punishment of the Crime of Genocide was the first international treaty of general application to codify the repression of atrocity crimes. As such, it was a seminal development. Nevertheless, it left large gaps both in terms of the groups that it protected and the scope of its obligations. As a result, only a fraction of the millions of victims over the past six decades has benefited from the provisions of the Genocide Convention. Although other treaties, such as the Apartheid Convention and the new Convention on Enforced Disappearance, condemn particular manifestations of crimes against humanity, most crimes against humanity remain outside the ambit of a universal treaty unless they involve a situation within the jurisdiction of the International Criminal Court. These include extermination, imprisonment, persecution and widespread sexual violence including rape, sexual slavery, enforced prostitution and forced pregnancy.

8. Like the Geneva Conventions of 1949 and the Genocide Convention, a crimes against humanity treaty will complement and reinforce the mission of the International Criminal Court by building upon the negotiations that led to

the inclusion of crimes against humanity in the Rome Statute in 1998. At the same time, the Rome Statute provides a starting place, not a final destination, when it comes to the problem of mass atrocities. While the Rome Statute provides for the investigation and prosecution of individual offenders, not all States are parties, and the Court can only prosecute a very limited number of offenders given its size and statutory mandate. A comprehensive crimes against humanity convention could provide much-needed provisions on interstate cooperation in the investigation and punishment of perpetrators of crimes against humanity, filling a normative gap and providing critically important enforcement mechanisms.

9. The Initiative's goal of ending impunity for those who commit crimes against humanity is also linked to the further development of the Responsibility to Protect doctrine. Under international law, States must not commit certain of the most serious international crimes and may have a duty to prosecute those responsible for their commission. The emerging Responsibility to Protect principle may also require States to affirmatively intervene to protect vulnerable populations from nascent or continuing international crimes under certain circumstances. A necessary condition precedent to the invocation of the Responsibility to Protect is a clear definition of the event which triggers that responsibility. A comprehensive crimes against humanity convention could reinforce the normative obligation not to commit crimes against humanity, as well as emphasize the duty of States to prevent the commission of atrocity crimes.

Phases I and II of the Initiative

10. Phases I and II of the Crimes Against Humanity Initiative were concluded in September 2009, following two experts' meetings held in St. Louis, Missouri and in The Hague in April and June, respectively, of 2009. The discussion at these meetings highlighted the need for the convention to be an effective tool of prevention and interstate cooperation and to provide for universal jurisdiction and State responsibility. It was agreed that the convention should complement the Rome Statute for the International Criminal Court, contain compliance inducement mechanisms, and include provisions emphasizing capacity building. An initial outline of the draft convention was prepared and circulated in October 2008 by Professor M. Cherif Bassiouni and in April 2009 a proposed draft text was circulated by Professor Bassiouni prior to the April Experts' Meeting in St. Louis. This text was revised following the extensive discussions in St. Louis, and a new draft, the May draft convention, was circulated to participants in the Experts' Meeting convened from June 11-12, 2009 in The Hague. A summary of the major themes and discussions in April and June are found in paragraphs 16 to 46 and 47 to 78 below.

Phase III of the Initiative

11. Following the meeting in The Hague on June 11-12, 2009, a new draft of the convention (the July draft) was circulated to a small Technical Advisory Session of Experts, who met in St. Louis, Missouri, from August 21-23, 2009. The St. Louis August 2009 Technical Advisory Session recommended various changes to the draft convention's language, and a new version of the draft was circulated to the Steering Committee in September 2009. This text was revised further, and a new draft elaborated in November 2009 (the November draft convention).

12. Beginning in November 2009, more than 100 experts – some of whom had been present at earlier meetings, but most of whom had not been at either the April, June, or August meetings of the Initiative – were provided the November draft convention (in English) and invited to comment thereon. To provide relevant background on the progress of the Initiative, as well as the substantive discussions on previous iterations of the draft convention, these experts were also provided with an earlier version of this *Comprehensive History* that summarized Phases I and II (*Final Report on Phases I and II*).

13. A professional French translation of the November draft convention was circulated to French-speaking experts beginning in December 2009. Because the *Final Report on Phases I and II* was not translated, these experts were provided English-language versions of the report.

14. Through February 28, 2010, more than forty experts provided comments on either the English or French drafts of the *Proposed Convention*. Some comments were received orally in discussions with members of the Steering Committee or Harris Institute staff.[2] Many experts provided extremely detailed and helpful written comments. These included technical suggestions regarding terminology and consistency of word choice, and discussions of substantive issues. All comments received were circulated to and considered by the Steering Committee.

15. From March 11-12, 2010, a two-day international conference was held at the Brookings Institution in Washington, D.C. to discuss many of the major themes that had surfaced during earlier discussions of the project. A summary of the major themes and discussions at the March conference are found in paragraphs 85 to 165 below. At the conclusion of the meeting a Declaration was adopted by the Steering Committee calling upon States to adopt a comprehensive crimes against humanity convention. A copy of this document (*The Washington Declaration*) was circulated to participants at the meeting, and, as of this writing, has been signed by more than seventy-five

[2] A list of experts offering written comments is found in Annex 6.

distinguished experts and supporters of international criminal justice who participated in the work of the Initiative.[3]

II. April Experts' Meeting in St. Louis, Missouri

A. Plenary Sessions and Keynote Address

16. On April 13-15, 2009, forty-six experts gathered at Washington University School of Law for the first public meeting of the Crimes Against Humanity Initiative.[4] The program was opened by Whitney R. Harris, the last surviving "podium" prosecutor of the Nuremberg trials, who reminded the group of the historical importance of the Nuremberg trials and the link between the commission of crimes against humanity and the destruction of civilization itself. Whitney received a standing ovation as his legacy was recognized and those present were reminded of the work that remained to be done. Following Whitney Harris' remarks, Professor Leila Nadya Sadat, Chair of the Initiative's Steering Committee, opened the meeting and urged the participants to think creatively and imaginatively about the issues to be discussed. Professor Sadat then thanked the members of the Initiative's Steering Committee and Harris Institute and law school staff before turning to the meeting's substantive program.

17. The agenda featured fourteen commissioned papers,[5] each of which addressed a particular aspect of the law and practice relating to crimes against humanity. The first set of papers by Gregory Stanton and Roger Clark addressed the social and historical context within which crimes against humanity take place and early legal efforts to define and ultimately punish the crime. An additional paper by David Crane addressed the "peace and justice" issue often raised regarding attempts to prosecute perpetrators, particularly high-ranking political and military leaders, for crimes against humanity during peace negotiations.

18. The second set of papers took up legal issues regarding the definition of crimes against humanity and its application to particular contexts, focusing on the work of the ad hoc tribunals since 1993 (Göran Sluiter), the "policy element" and the scope of the crime (Guénaël Mettraux), gender crimes (Valerie Oosterveld), ethnic cleansing (John Hagan), immunities and amnesties (Diane Orentlicher), and modes of participation (Elies van Sliedregt).

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[3] *The Washington Declaration* appears in this volume and on the Harris Institute's website at http://law.wustl.edu/crimesagainsthumanity.
[4] A list of expert participants is found in Annex 1. The agenda is found in Annex 2.
[5] *See* Annex 2.

19. The third set of papers concerned the question of new conceptual paradigms – crimes against humanity and terrorism (Michael Scharf and Michael Newton) and a reconsideration of the "Nuremberg architecture" (M. Cherif Bassiouni).

20. The final set of issues involved enforcement, which became one of the most important foci of the St. Louis meeting. Three papers – on crimes against humanity and the International Criminal Court (Kai Ambos), crimes against humanity and the Responsibility to Protect (David Scheffer), and crimes against humanity and national jurisdictions (Payam Akhavan) – formed the basis of the discussion of international criminal law enforcement in various fora and reconnected the end of the conference with the beginning by emphasizing the existing lacuna in the enforcement of international criminal law.

21. On Monday evening, the group was addressed by John Clint Williamson, United States Ambassador-at-Large for War Crimes Issues. Ambassador Williamson spoke in support of the Initiative and highlighted the important work his office was doing to support international justice. He also commented briefly upon his efforts to achieve a limited *rapprochement* between the United States and the International Criminal Court. On Tuesday evening, the group visited Holmes Lounge in historic Ridgley Hall at Washington University, where the twelfth conference of the Inter-Parliamentary Union was held in 1904. It was there, on September 13, 1904, that the Inter-Parliamentary Union issued its appeal for peace and adopted a resolution calling for a second Hague Peace Conference, paving the way for the convening of the 1907 Hague Peace Conference.

22. On both days, a preliminary draft convention, prepared by Professor M. Cherif Bassiouni with comments from various participants (April draft convention), was presented and debated. A revised draft based upon those discussions was then presented to the June Intersessional Meeting of the Crimes Against Humanity Initiative in The Hague (May draft convention).

B. Major Themes Elucidated During the Discussions

1. The continuing problem of atrocity crimes

23. A compelling case was made that the commission of atrocity crimes, and particularly crimes against humanity, is a continuing and difficult international problem. In one study noted by Professor Bassiouni, of the 310 conflicts from 1948 to 2008, estimated casualties ranged from 92 to 101 million victims, most of whom were civilians. In more than 90 percent of

those cases, impunity was the rule.[6] While some participants voiced skepticism that "more law is good," arguing that atrocity trials do not necessarily deliver justice, others felt that punishment of individuals responsible for the commission of atrocity crimes (retributive justice) was a legitimate goal in and of itself. Most participants recognized that neither criminal trials nor alternative forms of justice, such as truth commissions, reparations, lustration, or indigenous models were sufficient in and of themselves to address the commission of mass atrocities. Rather, it was acknowledged that each of these mechanisms was useful and often several were needed during and following a given conflict to maximize peace and restore justice.

2. The obstacle of semantic indifference

24. Several experts underscored the difficulties of rallying international attention and support for preventing and punishing crimes against humanity. Many noted that unless a crime was described as "genocide," its commission somehow seemed less of a problem and required no international response. Many participants were frustrated by this "semantic indifference" to the commission of crimes against humanity, which has resulted in the victimization of millions of human beings. It was also noted that in the case of the position of the United Nations Special Advisor on the Prevention of Genocide, recommendations had been made to expand the title to "Prevention of Genocide and Mass Atrocities;" however, ultimately, the decision was taken not to include the words "Mass Atrocities." This was perhaps due to fears that, as one participant put it, States are conscious that crimes against humanity cut "close to the bone." One participant suggested shortening the definition of the crime, to make it more easily understandable to the general public, in the way that the Genocide Convention uses a short definition.

3. Capacity building as an important dimension of the issue

25. Several participants noted that one critical issue for societies addressing the problem of mass atrocities and post-conflict justice was the need for additional capacity building of local institutions. Many participants offered useful suggestions as to how a crimes against humanity convention might address this problem, and noted that the anti-trafficking convention seemed particularly helpful in the case of Vietnam, and the ILO convention on the worst forms of child labor seemed to stimulate State responses in many cases. Other experts suggested perhaps the establishment of a secretariat or a treaty body associated with the convention that could assist with State capacity building. Another alternative was the creation of a voluntary fund

[6] *See* THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (M. Cherif Bassiouni, ed. 2010).

for States like those found in many environmental treaties where reallocation of resources from wealthy to poorer nations has become important.

4. Relationship of a crimes against humanity convention to the International Criminal Court

a. Importance of the International Criminal Court

26. Much of the conference time was devoted to thinking about the relationship between the International Criminal Court and a new treaty condemning crimes against humanity. Virtually unanimous support was expressed for the idea that the treaty should in no way hamper, but should instead support the ICC and build upon the ICC Statute. Many experts referred to the long and arduous process of negotiating the Rome Statute, the fragile compromises achieved, and the current difficulties of the Court, particularly in regard to political support from African States, as reasons to rely heavily upon the ICC Statute for definitional purposes and to ensure that a new treaty with provisions on interstate enforcement and State responsibility would complement the ICC regime.

b. The normative relationship between Article 7 of the Rome Statute and the *Proposed Convention*

27. A fundamental question for the meeting was what to do with the definition in Article 7 of the Rome Statute. Several participants wrote superb papers proposing changes in the Article 7 definition. These proposals included dropping the "civilian population" requirement; deleting the "policy" element; expanding the list of gender crimes; including ethnic cleansing as a separate head of crime; and writing a new, shorter definition, harkening back to Article 6(c) of the Nuremberg Charter. Others noted that in spite of thoughtful arguments contending that the Rome Statute was not a codification of custom, but treaty law applicable only before the International Criminal Court, 108 States had already ratified the Rome Statute and were adopting domestic legislation tracking its provisions in order to fulfill their "complementarity" obligations.[7] Therefore, as a practical matter, changing the Rome Statute definition seemed impossible for those States and even implicated the law of treaties. Nonetheless, many experts continued to struggle with this question, as they believed that including the Rome Statute definition could be problematic in a multilateral interstate convention and were concerned that an international convention building upon it would not permit customary international law to evolve in a progressive manner. After much discussion, two possibilities emerged from the discussions that met with general approval.

[7] As of this writing, 114 States are Parties to the Rome Statute.

28. First, the suggestion was made that the proposed convention essentially leave the definition open. A variation of this is found in Article 5 of the new Convention on Enforced Disappearance, which provides:

> The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law**.**

29. A similar proposal was included as option 2 in Article 2 of the May draft convention. This solution preserves flexibility – States Parties to the Rome Statute could incorporate the Rome Statute definition or, as some States have already done, modify it slightly. Concerns about the legality principle caused some discomfort with this proposal for some participants, who suggested instead incorporating Article 7 of the Rome Statute verbatim, but with some modifications given the definition's inclusion in a separate treaty. This is option 1 in Article 2 of the May draft convention.

c. The possibility of a protocol

30. One idea that emerged during the two days of meetings was the possibility of a protocol to the Rome Statute as an alternative to a separate multilateral convention. It was suggested that this could put the convention on a shorter track and would signify support for the Rome Statute. Other crimes within the Rome Statute might also be included in such a protocol, which would then require adoption by the ICC Assembly of States Parties. It was noted, however, that adoption by the Assembly of States Parties (which would require a supermajority vote) might bog the convention down in a long process and might not offer the shorter track envisaged. Moreover, although it would be possible for ICC non-States Parties to ratify such a protocol, ICC non-States Parties might not be able to participate fully in the initial discussions of the Protocol if the venue were the ICC Assembly of States Parties, as opposed to a United Nations conference open to all. Finally, such a Protocol could include no provisions on State Responsibility or prevention.

5. General theoretical and normative concerns

31. Many experts focused on the theory underlying crimes against humanity prosecutions, particularly as related to their definition and enforcement. As one participant remarked, perhaps the question was not whether the problem to be solved can be addressed in practice but whether it worked in theory. To put it another way, this expert observed that the question of what should be in a crimes against humanity convention depends upon which social interests one is trying to protect. Typically, crimes against humanity turn the normal state of affairs "on its head" because the State has

turned against its own citizens. In that sense, crimes against humanity has a "State policy" requirement because it is about State power. Other theories, however, ground crimes against humanity either in international humanitarian law, as an additional protection for civilians during war time, or in human rights law, which provides the broadest and most universal grounds for the protection of human dignity.

6. The question of universal jurisdiction

32. Many participants noted that crimes against humanity were traditionally considered "universal jurisdiction" crimes. Indeed, one paper suggested that a central feature of a crimes against humanity convention would be the inclusion of provisions on universal jurisdiction that would substantially strengthen the interstate enforcement regime applicable to the crimes. The biggest gap in international enforcement of crimes against humanity is that while complementarity focuses on national court jurisdiction, it only requires national courts to act in conjunction with a request from the International Criminal Court. If the Court's jurisdiction is not somehow engaged, there is no duty to try or extradite in the absence of legislation so providing. At the same time, substantial debate ensued as to the desirability of putting mandatory universal jurisdiction provisions in a treaty, as some States would be wary of ratifying a treaty instrument with provisions on universal jurisdiction, and the April draft convention included a clause suggesting that universal jurisdiction would be exercised only in limited circumstances. After substantial discussion, it was decided to put jurisdictional clauses in the crimes against humanity convention that tracked those already present in existing treaties, such as the Torture Convention, the Convention for the Suppression of Terrorist Bombings and the new Convention on Enforced Disappearance.

33. There was also considerable discussion of the failures of universal jurisdiction to materialize as a significant threat to "traveling tyrants," in part due to financial concerns. The example of Senegal was advanced, noting that it had argued it was unable to prosecute Hissène Habré due to the financial burden that such a trial would impose. The difficulty of convincing African States to ratify a new convention if there would be a duty (rather than an option) to exercise universal jurisdiction was also evoked.

7. The problem of selectivity in international criminal justice

34. The challenge posed by the objections of many African States to the issuance of the International Criminal Court's arrest warrant against Sudanese President al-Bashir was noted by several participants, who observed that it had been viewed in some quarters as an attack upon African dignity. The same issue was evoked with respect to the exercise of universal jurisdiction by

"northern courts," which may promote criminal justice, but may not be considered legitimate if they are perceived as selectively targeting only these crimes committed in the southern hemisphere. Others responded that crimes against humanity are not committed lawfully by any sovereign, and that all victims, whether African, Asian, European, or Latin American, are entitled to justice, both when they are victimized by their own States directly and when their States are unwilling or unable to protect them from being victimized by other actors. At the same time, it was acknowledged by the group that selectivity is a cause for concern and that consideration must be given as to how a crimes against humanity convention might address the issue.

8. Codification of crimes against humanity and its relationship to customary international law

a. Contributions of the case law of the ad hoc tribunals to the definition of the crime

35. This topic was the subject of a paper and a recurring theme throughout the discussions. The paper focused upon the ongoing difficulties in defining crimes against humanity and noted that even though the ICC Statute is an important codification, the legal team of the UN Secretary-General built upon, but modified, the ICC definition in developing the Statute for the Special Court of Sierra Leone. Thus, the paper concluded, there still appear to be uncertainties surrounding the crime and its definition. The paper also noted that in the summer of 1998, when the Rome Statute was adopted, only the *Tadić* jurisdictional decision (October 1995) and judgment (May 1997) had been handed down, meaning that case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) could not have had much influence on the ICC codification, although there was considerably more jurisprudence by the time the Elements of Crimes were adopted in 2002. As for the post-Rome experience, a vigorous discussion ensued as to whether the contributions of the ad hoc tribunals had developed the law on crimes against humanity in a positive manner. Questions as to methodology, particularly in the "discovery" of customary international law, were raised, with the larger question remaining as to the overall relationship between the law of the ICC and customary international law.

36. Many participants noted the tension between the universality of the ICC Statute – in aspirational terms because the Statute has not yet achieved universal acceptance, and in practical terms because of the possibility of Security Council referrals regarding situations in non-States Parties – and the idea that customary international law regarding crimes against humanity could continue to evolve outside the Statute, including in other international courts and tribunals. At the same time, it was noted that Article 10 of the ICC

Statute itself anticipates such a situation, and that "fragmentation" was perhaps not an undesirable structural consequence of the international legal order in all its diversity. The debates on these ideas resulted in the alternative formulations of Article 2 of the May draft convention.

b. Gender crimes

37. The paper on gender crimes argued that in order to be relevant to the nature of current and future armed conflicts, a treaty codifying crimes against humanity should reflect a range of gender-based prohibited acts. The paper also critiqued the definition of gender in the Rome Statute and suggested that perhaps the term, if included in a crimes against humanity convention, should not be defined. Both the paper author and the discussant argued for further specification of gender violence in a crimes against humanity convention, noting that using umbrella terms like "other inhumane acts" did not adequately capture the specific nature and horror of gender crimes. Others noted the difficulty of modifying the Rome Statute definition to provide for additional gender based crimes, for the reasons noted above (*see* paras. 27-29, *supra*).

9. State responsibility, the critical importance of prevention and the Responsibility to Protect

38. Although no paper was commissioned specifically on the issue of State responsibility, the issue arose throughout the two and one-half days of meetings. Participants were in widespread agreement that the principal goal of a crimes against humanity convention should be to end impunity for those who commit crimes against humanity, especially where those individuals use the apparatus of the State as an instrument of victimization. As one participant noted, the principal evil of a crime against humanity is the insidious way in which the territory of a State is transformed from a place of refuge into a trap. Recalling recent international criminal prosecutions of former heads of State, as well as former governmental and military leaders, participants agreed that the goal of ending impunity seems best served by focusing on the individual criminal responsibility of those actors instrumental to the commission of crimes against humanity.

39. Noting that criminal prosecutions are primarily reactive, several participants highlighted the problem of prevention and suggested useful additions to the draft convention along those lines. Obviously, it is hoped, but not empirically demonstrable, that the prosecution of atrocity crimes will deter future atrocity crimes; indeed, it was observed that given the paucity of enforcement of the norms against genocide, war crimes and crimes against humanity, impunity remained the rule rather than the exception. At the same time, the paper on the Responsibility to Protect suggested language that would

go further than requiring States to criminalize and prosecute individuals for committing crimes against humanity and would prohibit, and thus render illegal, the commission of crimes against humanity by any State Party, and require States Parties to the convention to act in accordance with the Responsibility to Protect principles set forth in the 2005 World Summit Outcome document. While some participants were supportive of including such provisions in a crimes against humanity convention, others hesitated, questioning whether the principles enunciated are clear enough or opining that inclusion of such principles could hinder the adoption of a convention.

10. The question of amnesties and immunities

40. Echoing the conclusions of the commissioned paper on the subject of amnesties and immunities, several participants argued that a crimes against humanity convention should include a specific prohibition on immunities but should not include a blanket prohibition of amnesties. For immunities, the question for the participants was not whether to include such a prohibition, but what form the prohibition should take. Much of the discussion centered on the state of the law following the *Arrest Warrant* case, with some suggesting that an immunity prohibition in a crimes against humanity convention should seek to progressively define the scope of immunity *ratione personae*. It was also suggested that a specific immunity prohibition should include a sentence excluding crimes against humanity from being characterized as official or public acts, which could serve to clarify what one participant described as the 'ambiguous' language of the *Arrest Warrant* case regarding private acts vis-à-vis immunity *ratione materiae*. Finally, it was suggested that any prohibition of immunities should not be limited to criminal prosecutions but extend to civil and administrative actions as well.

41. It was observed that recent attempts to codify a provision that would limit or prohibit the possibility of amnesty in the Rome Statute and the Convention on Enforced Disappearance had not borne fruit. It was noted that drafting an 'appropriate' amnesty provision might be particularly difficult in that a blanket prohibition could sweep too broadly, yet crafting appropriate exceptions could be problematic. The issue is already addressed to the extent that the *Proposed Convention* imposes a duty on States to prosecute those who commit crimes against humanity. In addition, the expert paper submitted by Professor Orentlicher noted that it could actually be counterproductive to include a prohibition on amnesties, as such could imply that no prohibition currently exists as a matter of customary international law in the absence of a treaty provision.

11. Crimes against humanity and terrorism

42. Following some discussion, there seemed to be widespread agreement among the participants that it was unnecessary and potentially problematic to include terrorism as a crime against humanity. Although some advantages could be envisioned, such as providing for universal jurisdiction over terrorist acts not currently covered by any of the existing terrorism conventions, it was felt that any attempt to include terrorism as a crime against humanity would suffer from the same definitional problem that has plagued States in this area—namely, the difficulty of States reaching a consensus on a general definition of terrorism. Moreover, the vast majority of those specific *acts* for which consensus could be achieved are already prohibited in one of the many existing terrorism conventions. Some of them are also already subsumed within the definition of crimes against humanity, such as mass murder under certain circumstances. Finally, it was observed that the Rome Statute does not include terrorism as a crime against humanity, and that the inclusion of terrorism in a crimes against humanity convention would therefore raise the concern repeatedly voiced that the convention should seek to complement the operation of the ICC rather than complicate its operations in any way.

12. Interstate cooperation and mutual assistance in penal matters

43. It was widely agreed among the participants that bridging the enforcement "gap" should be one of the primary functions of a crimes against humanity convention. This must include fostering the notion that States have an obligation to prosecute rather than merely a discretionary ability to prosecute. Such an obligation, however, must be coupled with providing the realistic capacity to prosecute which, for many States, will necessarily involve prosecutions requiring interstate cooperation in the form of mutual legal assistance.

13. Modes of participation

44. Much of the discussion of how a crimes against humanity convention should address modes of participation and individual criminal responsibility centered on two distinct issues: superior responsibility and joint criminal enterprise. There was widespread agreement that a distinct provision on superior responsibility should be included in the convention, and that this should incorporate the developments in the jurisprudence on this issue at the ad hoc international criminal tribunals. Most participants felt that the existing provision in the Rome Statute was the best option. Although it was pointed out that there are still some open questions regarding modes of participation and individual criminal responsibility arising from existing jurisprudence, and

that certain aspects of the jurisprudence have been controversial, it was generally considered that most of these are not questions to be directly addressed in the text of a convention.

45. It was widely acknowledged that although some form of extended liability is necessary to address the "system criminality" inherent in crimes against humanity, the development of joint criminal enterprise at the ad hoc international criminal tribunals has been problematic. The doctrine should not be stretched to the point that it becomes a threat to equitable application of the law. One suggestion made was that participants should consider whether conspiracy should be included as a mode of participation. Although there was no consensus reached on this question, it was pointed out that the concept of conspiracy has become more palatable to civil law countries with the spread of anti-terrorism legislation.

46. Finally, at the conclusion of the St. Louis meeting, the Steering Committee determined to commission an additional paper on interstate enforcement, given the central importance of that issue. Laura Olson was commissioned to produce that paper during Summer 2009.

III. The Hague Intersessional Experts' Meeting

A. Plenary Sessions and Keynote Address

47. On June 11-12, 2009, fifty-eight experts gathered at Leiden University's Campus Den Haag for the second public meeting of the Crimes Against Humanity Initiative.[8] The program was opened by the Honorable J.J. van Aartsen, Mayor of the City of The Hague, who welcomed the participants to the international city of peace and justice. Mayor van Aartsen stated that it was a great honor for the City of The Hague to host the meeting, noting in closing that "where lawlessness and absence of rights prevail, people cannot live in peace. Where injustice goes unpunished, old conflicts keep flaring up again."

48. The group was then addressed briefly by Judge Hans-Peter Kaul, Second Vice President of the International Criminal Court. Judge Kaul also welcomed the participants and expressed his own personal enthusiasm and support for the Crimes Against Humanity Initiative.

49. Steering Committee member Justice Richard Goldstone delivered an opening address in which he bridged the work of the April and June meetings, and drew upon the South African experience with apartheid and the current indictment of Sudanese President Omar al-Bashir by the International

[8] A list of expert participants is found in Annex 3. The Agenda is found in Annex 4.

Criminal Court to illustrate the central role of enforcement to the success of any treaty addressing international crimes. He reminded the participants that the multilateral convention condemning apartheid was never enforced and that South African diplomats were welcomed in capitals across the world during the apartheid era. This, he believed, may have prolonged the existence of South Africa's apartheid policies by as much as a decade. However, the situation in South Africa is now different. In that context, he noted that South Africa had announced it would arrest Sudanese President al-Bashir if he entered South Africa.

50. Justice Goldstone revisited several of the issues that had been discussed in St. Louis, including the relationship between the convention's definition of crimes against humanity and Article 7 of the Rome Statute, the need for more specific obligations of States, and the importance of workable enforcement mechanisms, including a treaty monitoring body. Justice Goldstone also reminded the participants of the need to remain ever-conscious of the victims of crimes against humanity, who are too often overlooked, and noted that to this end the convention should address State responsibility and might include non-State actors to facilitate the award of reparations to victims. Finally, he noted that the answer to those who might question the need for a crimes against humanity convention was two-fold: first, such a treaty would confer jurisdiction in the International Court of Justice over crimes against humanity committed by States, thus avoiding the result in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*; second, the treaty would oblige States to implement domestic legislation directed at crimes against humanity.

51. During the morning plenary session introducing the report of the St. Louis meeting, Steering Committee member M. Cherif Bassiouni drew upon his experience with the evolution of the Torture Convention from an academic idea to a political reality and described the need for a well-thought-out strategy possessing the greatest potential for the Initiative to lead to the adoption of an international instrument. He described the comparative benefits and disadvantages of the two options currently being considered, a comprehensive convention, and, as suggested in St. Louis, an additional protocol to the Rome Statute. Professor Bassiouni emphasized that the convention must seek to fill the enforcement gap that exists with regard to crimes against humanity, noting that effective extradition and mutual legal assistance provisions will be crucial to facilitating the bilateral cooperation necessary for the convention to be an effective tool in deterring crimes against humanity. He reminded the participants that the best is often the enemy of the good and urged all of them to focus on the end goal and be prepared, if necessary, to compromise on provisions of personal interest. He characterized the Initiative as an academic offering to the international community, one that seeks to accomplish a great objective.

52. Steering Committee member William Schabas also addressed the morning plenary session, warning the participants that a crimes against humanity convention must be drafted so as to achieve a delicate balance between codification and aspiration. He referenced the European Court of Human Rights' decision in the *Soering* case as an example of treaty drafting which foreclosed progressive development by judicial interpretation. He also noted that the experience of the ad hoc international criminal tribunals demonstrates the benefit of permitting judges to progressively interpret the contours of customary international law. With regard to the interim draft treaty's definition of crimes against humanity, Professor Schabas noted that it had become clear during the St. Louis meeting that nothing about the draft treaty should have the potential for undermining the Rome Statute. He outlined the comparative benefits and disadvantages of having either a verbatim copy of the definition from Article 7 of the Rome Statute in the crimes against humanity convention, or no definition at all.

53. Three panel discussions were conducted during the remainder of the day. The first, chaired by Steering Committee member Juan Mendez, addressed the need for a crimes against humanity convention as a natural completion of the work begun with the Rome Statute, discussing the timing, feasibility, and scope of a convention. The second panel, chaired by Steering Committee member Ambassador Hans Corell, addressed enforcement issues, including extradition, mutual legal assistance, immunities and State responsibility. The third panel, chaired by Steering Committee Chair Leila Sadat, discussed ways in which the convention would complement the work of the International Criminal Court.

54. On Thursday evening, the group was addressed by Gareth Evans, former Foreign Minister of Australia and then President and CEO of the International Crisis Group. He recalled his travels through Asia as a young man and the friendships he developed with students from all over the region, including young Cambodians, all of whom later died in the mass atrocities committed by Pol Pot's regime. Evans noted that the knowledge and memory of what must have happened to those young men and women haunts him to this day. It was this memory, he said, that made him intensely committed to the Initiative and the ultimate adoption of a convention to fill the gap "which has all too obviously become apparent in the array of legal instruments available to deal with atrocity crimes, notwithstanding the emergence of the International Criminal Court." Finally, Evans said that he had every confidence that the Initiative "will bear real fruit."[9]

55. On Friday, a technical advisory session was held to discuss the May draft convention. Many technical and substantive suggestions were received

[9] The text of Mr. Evans's remarks is found in this volume.

as the participants discussed and debated the draft treaty language. It was noted that over the summer, Harris Institute staff under the direction of Professor Bassiouni and Professor Sadat would work to research and implement the suggestions made at the technical session. It was also decided that a drafting meeting would be convened in St. Louis in August, during which a limited number of participants from the two experts' meetings would work to refine the draft text.

B. Major Themes Elucidated During the Discussions

1. The importance of prevention

56. Many participants acknowledged that it will be vitally important for the convention to be an instrument for the fair and effective prosecution and punishment of those who commit crimes against humanity, but also felt that prevention should be the primary focus of the convention. Parallels were drawn to the Genocide Convention, with some participants noting that it is particularly weak vis-à-vis prevention and often used as a fig leaf behind which States hide to avoid their obligations. This experience should inform the Initiative. One participant spoke of the NATO bombing campaign in Kosovo as an example of the preventive potential of the convention. He noted that NATO commanders went to extraordinary lengths to avoid civilian casualties, due in no small part to their knowledge of the existence of the ICTY and its mandate.

57. It was then suggested that prevention must focus on education and capacity building among States. In this regard, several participants also noted the importance of "operationalizing" the emerging norm of the Responsibility to Protect and thought that the convention would benefit from explicitly recognizing the norm as a State obligation.

2. Enforcement

a. The need to bring States within the jurisdiction of the International Court of Justice

58. Echoing the discussion at the April Experts' Meeting in St. Louis, many participants and panelists spoke to the need for the convention to specifically address the question of State responsibility. Many participants voiced strong support for the inclusion in the treaty of a dispute settlement mechanism vesting jurisdiction for inter-State disputes in the International Court of Justice (ICJ). As became painfully apparent with the ICJ's decision in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, there is currently no mechanism for holding States responsible when they commit or are complicit in crimes against humanity. As such, there is currently no

mechanism by which either aggrieved States or the victims of such crimes may seek reparations, leaving the vast majority of victims with no remedy. Moreover, at least one member of the International Court of Justice continues to believe that the Genocide Convention does not provide a basis for the invocation of State responsibility, making it necessary to explicitly address this issue in the draft convention.

59. It was suggested that in addition to States, thought should be given to including non-State actors, including corporations, within the provisions of the treaty. If feasible, this would ensure that organizations which commit or are complicit in crimes against humanity may be held accountable for reparations to aggrieved States and victims.

b. Filling the current gaps in domestic legislation

60. It was generally agreed among participants that there is currently a vacuum in domestic legislation regarding international crimes in general, including crimes against humanity, and that one of the primary goals of effective enforcement under the convention should be to fill this gap. For example, it was noted that only two of the thirty African States Parties to the Rome Statute have implemented domestic legislation, and only five of thirty-one Commonwealth States have done so. This is also a problem among States not parties to the Rome Statute. Indeed, one participant pointed out that crimes against humanity are completely missing from U.S. law. Universal domestication of the obligations under the convention will be important to ensuring that there is no safe haven for those who commit crimes against humanity.

61. The suggestion was also made that alternatives to traditional domestic prosecutions should be considered. Specifically, with regard to the domestication of the convention's obligations to extradite or prosecute, the question was raised whether it would be sufficient for States to prosecute offenders domestically for "ordinary" crimes (*i.e.*, multiple counts of murder), as opposed to murder as a crime against humanity. It was also suggested that States might employ a strategy of deportation of suspected offenders rather than prosecution.

c. The possibility of regional courts

62. One participant noted that the experience of both international criminal tribunals and domestic courts demonstrates that prosecuting crimes against humanity is logistically and technically difficult, and that States will need to have specialized units dedicated to atrocity crimes. Given these difficulties, and the lack of capacity apparent in many domestic criminal

justice systems, it was suggested that thought should be given to the creation of regional courts that might more effectively prosecute offenders.

d. Impact of the disappearance of the ad hoc tribunals

63. Relevant to the discussion about the need for capacity building, several participants noted that with the impending closure of the various ad hoc international criminal tribunals, there will be a significant number of professionals with expertise in the adjudication of crimes against humanity. Thought should be given to how this wealth of experience might be put to use in furtherance of the convention and its goals.

e. The importance of effective mutual legal assistance

64. There was widespread agreement among the participants that effective mutual legal assistance among States is a necessary pre-requisite if the convention is to have any hope of fulfilling its potential. It was noted that concrete and enforceable mutual legal assistance obligations would "tighten the net," making it easier for States to prosecute those individuals responsible for crimes against humanity.

65. It was suggested that the convention would benefit by looking to the detailed mutual legal assistance provisions in other conventions, including specifically the UN Convention Against Corruption and the UN Convention Against Transnational Crime. It was also noted that the convention could include provisions on witness protection, modeled upon the UN Convention Against Corruption, and a provision on international subpoenas. A provision on subpoenas could benefit the prosecution of these crimes, which often cross State borders, and would constitute a much-needed progressive development in the field of mutual legal assistance.

66. Given the fundamental importance of mutual legal assistance in combating international crime, it was also suggested that perhaps there should be a convention aimed specifically at mutual legal assistance for international crimes. This suggestion met with widespread approval, in particular by some at the meeting representing NGOs, who noted that they have been supportive of such a convention for many years.

f. The need for compliance inducement mechanisms such as a treaty monitoring body

67. Many of the participants said that the convention would benefit greatly by the inclusion of a treaty monitoring body. Such a body should have the capacity to receive and review compliance reports submitted by States and should be prepared to publicize any State Party's failure to abide by its

obligations under the convention. Such a mechanism was thought by some to be an effective tool, with the capacity to raise the alarm when any situation threatened to deteriorate to the point where crimes against humanity might be committed.

68. Other participants felt that a treaty monitoring body should exist more in the form of a technical secretariat without any specific duty to "name and shame" non-compliant States. This body would exist to facilitate training and capacity building where it is needed. The participants were in widespread agreement that many States lack the resources and/or the political will to prevent, investigate, or punish crimes against humanity. A treaty monitoring body equipped to provide support and training directly to such States would therefore benefit both the prevention and punishment dimensions of the convention. It was felt that training for domestic law enforcement would be particularly useful. One participant familiar with the domestic investigation of crimes against humanity in West Africa noted that he had been extremely impressed with the professionalism of the investigations. Others noted that the training of local law enforcement provided the best option for ensuring successful investigation and domestic prosecution.

3. Public relations and the need for civil society involvement

69. The participants agreed that it would be crucial for the success of the Initiative to have the support of civil society. It will be important for the general population of the world to see the need for a convention, and for the plight of those affected by crimes against humanity to be made more relevant and highly visible. To this end, the Initiative will need high profile people and organizations to publicize and promote the need for a convention. Some participants noted that crimes against humanity suffer from a "perception" problem, in that crimes against humanity are viewed as less egregious violations than genocide. Accordingly, one of the great benefits of a convention would be its potential for addressing and correcting this perception. This was also discussed at the St. Louis Experts' Meeting, where the problem of semantic indifference was evoked (*see* para. 24, *supra*).

70. With regard to the importance of public opinion, it was noted that NGOs played an important role at the Rome Conference and were instrumental in marshalling public opinion in favor of ICC ratification in many States. Organizations such as the Coalition for the International Criminal Court, Amnesty International and Africa Legal Aid – all represented at the meeting – could play an important public relations role in promoting awareness of the convention among both States and the general public, as well as helping to galvanize public and political support for the convention. It was suggested that a special meeting for NGOs be convened, and that the Initiative involve them more deeply in formulating a political strategy.

4. The Responsibility to Protect

71. As in St. Louis, the participants held mixed views on whether, or to what degree, the convention should incorporate the developing norm recognizing the Responsibility to Protect. While some felt that the General Assembly's resolution on the norm provides a sufficient basis for including it as an affirmative State obligation, others were less confident.

72. Some who supported "operationalizing" the Responsibility to Protect doctrine in the convention noted that the apparent intention of the current Secretary General to aggressively promote the norm provided an opportunity. Some suggested that including the norm as an affirmative State obligation represented a significant comparative added value of a comprehensive convention over an additional protocol to the Rome Statute. Finally, it was suggested that the principle of Responsibility to Protect could be recognized and affirmed in the Preamble.

5. The possibility of an additional protocol to the Rome Statute

73. Many participants addressed the question posed by the morning speakers with regard to an optional protocol to the Rome Statute, voicing various degrees of support and concern. Some were concerned that many States which have ratified the Rome Statute have failed to domesticate its provisions. This caused some to question the need for any additional law, noting that attention should be paid to enforcing existing law.

74. Other participants pointed out that tying the Initiative to the Rome Statute in the form of an additional protocol raises particular problems for States that are not parties to the ICC. Thus, an additional protocol is bound to face political difficulties that a comprehensive convention would not raise. While it is certainly not the only State in such a position, the United States was mentioned as a specific example of one non-party State which would face particular political difficulties.

75. Ultimately, there was agreement with the Steering Committee's decision to proceed with the preparation of a convention and, at a later time, an additional protocol. It was noted that the additional protocol could be modeled upon the provisions of the convention.

6. The definitional question

76. As in the St. Louis meeting, there was a clear consensus among the experts in The Hague that the convention must complement the Rome Statute and do no harm to the ICC. On the question whether the convention should

track Article 7 of the Rome Statute or have no definition of crimes against humanity, most participants felt that the lack of a definition would present problems for States in being able to domestically prosecute crimes against humanity. This could be a particular problem for States which are not parties to the Rome Statute, as they will have to decide how to define the crime domestically to give effect to the principle of legality. It was also suggested that members of the public reading the convention should be able to understand directly from the convention what is prohibited, as is now the case with the Genocide Convention.

77. Ultimately, there was little support for the option of not including any definition in the convention. Although it was acknowledged that copying Article 7 raises technical issues, such as potential amendments to Article 7, it was generally agreed that these issues did not pose insurmountable difficulties. Some participants also noted that copying Article 7 will not foreclose States from progressively developing their own domestic statutes on crimes against humanity. Canada was raised as an example of one domestic jurisdiction which has implemented broader prohibitions on crimes against humanity than it was required to do by the Rome Statute.

78. Some participants advocated expanding the list of crimes in Article 7 to include issues of immediate concern to developing States, especially in the global "South." These would include economic and environmental crimes. The same question had also come up in the April Experts' Meeting in St. Louis. However thoughtful these and other suggestions were, the consensus remained that Article 7 should not be modified by the convention.

IV. The Technical Advisory Session in St. Louis and Circulation of the November Draft Convention for Comment

79. Following the Hague Intersessional Experts' Meeting in June, the draft treaty was revised in accordance with the input received during the June meeting. This work produced an amended treaty draft (July draft convention), which was circulated to the Steering Committee for review and comment.

80. On August 21-23, 2009, seven experts gathered at Washington University School of Law for a technical advisory session on the July draft convention.[10] During two full days of meetings, the participants reviewed and discussed each article of the text. At the successful conclusion of the meetings, the participants were able to reach a consensus on refinement of the July draft convention, which was then sent to the Steering Committee for comment in September (the September draft convention).

[10] A list of expert participants is found in Annex 5.

81. Following Steering Committee input and revision, the draft text was again refined, and an interim November draft convention was produced and circulated to more than 100 experts for comment. The convention was also translated into French and sent to Francophone experts who commented on the French text.

82. Each of the experts who provided written comments on both the English and French draft conventions expressed broad support for the goals of the Initiative. Several experts whose schedules did not permit detailed review and comment nevertheless expressed their admiration for the work of the Initiative and their hopes for its success. A few experts expressed doubts as to whether States would take up the draft convention at this time but nonetheless applauded the Initiative's goals and progress. One expert noted that although skeptical at first, he was persuaded of the need for a convention following his review of the most recent draft. Echoing the problem of semantic indifference discussed during previous meetings (*see* paras. 24 and 69, *supra*), this expert noted that a convention focused on crimes against humanity might prod States which currently seem to be excessively focused on the label of "genocide" as a precondition to concern and action.

83. The only hesitations expressed went to the timing of the Initiative. While broad agreement was expressed as to its normative goals, it was underscored by some that the project should support rather than detract from the important work of the International Criminal Court. Additionally, some experts expressed their hope that the project would engage in "progressive" development of the law. That is, the concern was raised that it was likely that States might use the opportunity for a new convention to retreat from the application of the doctrine of universal jurisdiction or immunities, for example, and the Initiative was urged to elaborate a convention that would take a strong "anti-impunity" stand, given that States would likely water down the provisions later on during further study and negotiations.

84. It was impossible for the Steering Committee to adopt all comments received, particularly as many experts disagreed with each other. Each comment, however, was carefully considered during the final revisions of the draft text, and particularly where a clear consensus emerged, the text was modified accordingly.[11]

V. The Washington, D.C. Meeting, March 11-12, 2010

85. From March 11-12, 2010, nearly 100 experts gathered at the Brookings Institution, in Washington, D.C., for the final "capstone"

[11] The list of experts providing written comments is found in Annex 6.

conference of the Initiative's first three phases.[12] Like the April Experts' Meeting in St. Louis, the program opened with a presentation from Whitney R. Harris who reminded the group of the historical importance of the Nuremberg trials and the link between the commission of crimes against humanity and the destruction of civilization itself. Whitney urged the group to finish the Nuremberg legacy by adopting a convention to prevent and punish crimes against humanity. These were Whitney Harris's final public remarks, for he passed away on April 22, 2010.[13]

86. The agenda featured an opening and a closing plenary session, six panels addressing issues that had surfaced during the Initiative's work, and keynote addresses by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues and Christian Wenaweser, Permanent Representative of Lichtenstein to the United Nations and President of the Assembly of States Parties to the Rome Statute of the International Criminal Court. The program was opened by Strobe Talbott, President of the Brookings Institution, who welcomed the participants and underscored the important role of Brookings Institution projects and scholars in shaping and informing U.S. foreign policy. Mark Wrighton, Chancellor of Washington University in St. Louis, then presented the University's "Global Philanthropy Award" to Steven Cash Nickerson for his leadership gifts to the Whitney R. Harris World Law Institute in support of the Crimes Against Humanity Initiative.

A. Opening Plenary Session and Keynote Address

87. Mary Werntz, Head of Regional Delegation for the United States and Canada for the International Committee of the Red Cross, delivered the opening address of the Conference. She spoke of the important work of the ICRC in the enforcement, application and development of international humanitarian law. She underscored the central importance of the four Geneva Conventions, the two Additional Protocols of 1977 and other instruments setting forth standards for the conduct of war. In response to questions, she noted that the ICRC believes that the current instruments are effective, and that efforts to reopen them in light of current criticisms might lead to a lowering of standards. During the question and answer period, she suggested that the ICRC was very much in favor of continuing to develop the law, and that the Crimes Against Humanity Initiative was very much consistent with the ICRC's thinking on these issues. Her advice was that, in terms of the

[12] A list of expert participants is found in Annex 7. The agenda is found in Annex 8. The discussion at the Washington meeting focused on the November 2009 draft of the *Proposed Convention*; therefore, all references to draft provisions in this section refer to the November draft convention.

[13] Whitney Harris' remarks were communicated by videotape, and can be found on the Harris Institute website at http://law.wustl.edu/news/pages.aspx?id=7913.

political viability of the Initiative, it would be best to take a long-term view of State support and ratification.

88. During the opening plenary session, Professor Sadat presented the work of the Initiative to date, and outlined the reasons for the Initiative's work. Subsequently, Professor Bassiouni took the floor and underscored the need for the convention. He pointed to the obstacle of *realpolitik* that accompanies the Initiative, which may require State actors to open themselves to responsibility that the convention can bring about. He again noted the conclusions of a recent study (*see* para. 23, *supra*) that between 1948 and 2008 an estimated 92 to 101 million people, mostly civilians, died in 310 conflicts, with only about 866 persons having been prosecuted out of an estimated one million perpetrators. He observed that victims had received practically nothing.

89. Professor Bassiouni also evoked the high cost of international criminal justice and noted that the international community is presently facing dozens of failed States which will create a tremendous need for justice that may overwhelm the system. Hence, the need for more enforcement mechanisms. He observed that the Rome Statute system established a vertical relationship between the ICC and States Parties, but that no horizontal system exists between States, and that, for complementarity to engage, mechanisms of interstate cooperation based on the principle of extradite or prosecute must be established. The normative gap needed to be filled, and universal application expanded to cover not only States Parties to the ICC but non-States Parties as well.

90. As to the definition of crimes against humanity in the convention, the decision had been taken by the Steering Committee to use Article 7 of the Rome Statute verbatim to enhance acceptance of the convention and support for its adoption. In this way, the convention will directly expand the ICC's reach, scope and breadth. This meant that some weaknesses in Article 7 needed to be accepted.

91. Professor Bassiouni noted that non-State actors, in particular, posed challenges to current international law which contains no incentives for their compliance. In Professor Bassiouni's view, Article 7(2) of the Rome Statute was meant to refer to State policy, not to non-State actors, which creates a gap as well as a question of tactics: Maybe one option, he noted, would be to "pretend" that Article 7(2) does apply to non-State actors and hope that the ICC sees it that way.

92. Professor Bassiouni observed that the draft convention rested upon four pillars: the normative foundation composed of human rights law, international criminal law and international humanitarian law; prevention; the

expansion of the principle of *aut dedere aut judicare*; and, finally, sanctions. The text, he noted, is well drafted and solid, resting on existing international criminal law treaties and principles, but with imaginative linkages.

93. In terms of political strategy, Professor Bassiouni noted that the draft convention began with a group of qualified experts, then expanded to consultations, resulting in many refinements to the text. The political process, he noted, would be challenging, but suggested that the audience could be encouraged by the process that accompanied the elaboration and adoption of the Torture Convention. Professor Bassiouni explained how the Torture Convention also emerged from a combination of expert groups and governments and suggested that a six- to eight-year timeline would not be unreasonable; yet it would require a great deal of work and in the end, the text might be quite different than what we started with.

B. Major Themes Elucidated During the Discussions

1. Crimes against humanity and gender justice

94. This panel, chaired by The Honorable Christine Van den Wyngaert, was the first of six sessions convened by the Initiative for the two-day conference. The speakers were Elizabeth Abi-Mershed, Assistant Executive Secretary of the Inter-American Commission on Human Rights; David M. Crane, former Chief Prosecutor for the Special Court for Sierra Leone; Patricia Viseur Sellers, former legal advisor for Gender-Related Crimes at the International Criminal Tribunal for the former Yugoslavia; and Judge Inez Monica Weinberg de Roca, President of the United Nations Appeals Tribunal.

95. Judge Van den Wyngaert began by noting that because gender crimes became an explicit subcategory of offenses within the definition of crimes against humanity in Article 7 for the first time, gender justice was a novelty in the ICC Statute. This was a great achievement. Yet, there had been criticism of the definition of gender in Article 7(3) of the ICC Statute, in particular during the presentations on this issue at the April Experts' meeting in St. Louis. Nonetheless, for reasons already articulated (*see* paras. 27 and 37 *supra*) the Steering Committee chose to leave intact the fragile framework of the ICC definition of gender, even though the French translation of the ICC Statute translates "gender" as "sexe."

96. The panelists were asked to address three questions: (1) Whether we need a subcategory of gender crimes as crimes against humanity; (2) What to do about the potentially stigmatizing nature of gender crimes whose victims may not wish to come forward or be labeled as victims, for example, of "enforced prostitution"; and (3) Whether the phenomenon of gender crimes is a symptom of creeping penalization in international criminal law.

97. The panelists extensively discussed these issues in their own presentations and answered questions from the experts in the audience. The point was made that the Inter-American Commission has been able to advance the normative work of identifying and remedying gender-related human rights violations because the legal instruments in the Inter-American system permit individual petitions and the case law of the Inter-American Court of Human Rights have emphasized the positive obligations of State and non-State actors. The work of the Special Court for Sierra Leone and the ICTY and ICTR has also contributed to an understanding of the gendered nature of atrocity crimes in certain contexts. Specifying what these violations entail in treaty instruments is important, particularly in the international criminal law context, for otherwise reliance on the category of "other inhumane acts" can give rise to problems of legality.

98. It was also noted that if specific normative content was missing, the question becomes "is prosecution of gender crimes permissive or required?" If it is permissive, then it becomes personnel-dependent and requires that someone like Patricia Viseur Sellers be present to raise the issue. The presence of women personnel is important, in any event, because of the stigmatization problem referred to by Judge Van den Wyngaert in her opening remarks. On the question whether victims should be able to raise new crimes before the ICC, for example, the panelists noted that in many cases even though those claims might be valid, raising them could fetter the Prosecutor's discretion and potentially impair the rights of the defense.

2. Peace and justice dilemmas

99. This panel was chaired by Justice Richard J. Goldstone. Other speakers included Richard Dicker, Director, International Justice Program of Human Rights Watch; Elizabeth Ferris, Senior Fellow at the Brookings Institution; Jerry Fowler, former President of The Save Darfur Coalition; and Max du Plessis, Professor at the University of KwaZulu-Natal in South Africa.

100. The discussions centered upon the balance between peace and justice. One panelist noted that justice was different from the political process because it is an end in itself and is essential to honoring victims and strengthening the rule of law. Negotiators need to strengthen their management of peace and justice, which is difficult to do as there is no universal blueprint. At the same time, one can draw lessons from experiences where these objectives have been managed well, in particular during the Dayton negotiations in 1995 and the Goma Peace negotiations in eastern Congo in 2008. It was suggested that diplomats, mediators, and others tend to have an overly negative reaction when justice enters the picture during a

period of peace negotiations or when the deployment of peacekeepers is an issue. This causes pushback against justice initiatives, but is not warranted by the experience of the international community.

101. There was much discussion on the role of the Security Council in bringing about peace. It was observed by one expert that the Permanent Members of the Council had undermined the Council's authority and the work of the International Criminal Court. It was also noted that Articles 13 and 16 of the ICC Statute functioned as a compromise but could also create a situation that was politicized or hypocritical.

a. The difficulties facing humanitarian workers

102. For humanitarians working in conflict situations, it was observed that the factual context is quite different than before. The number of actors has increased and diversified, with more than 250,000 humanitarian actors around the world. Although most humanitarians on the ground hope for justice, during a peace process, they may sometimes find themselves helping the perpetrators. It was suggested that humanitarian organizations should not be pressed to open their files to investigators.

b. Sudan and the African situation more generally

103. It was noted that the ICC Prosecutor's issuance of an arrest warrant for Sudanese President Omar al-Bashir had been criticized as disruptive of the peace process in Sudan. Yet, there was no ongoing peace process in Sudan at the time for the warrant to disrupt but instead it was *after* the ICC warrant request that a new peace process was initiated in Doha that led to some progress. The ICC moved forward with its process in a deliberate manner; however, one expert observed that the Security Council and governments did not pursue the peace process with the same sustained seriousness of purpose. Because of this disconnect, the reconciliation of justice and peace has not been achieved.

104. Others noted that the concern in Africa about the activities of the ICC emanates from an African perspective that sees the ICC as a threat to State sovereignty. The al-Bashir arrest warrant creates issues because Sudan is not a party to the ICC, and the Security Council's referral is seen as a cynical exercise of power involving a double standard. This is a serious concern. At the same time, it was noted that the African Union must be reminded that the Security Council's role in ICC prosecutions was foreseen and agreed to by the thirty African States Parties to the ICC.[14]

[14] This issue was also raised at the April Experts' Meeting. *See* para. 34 *supra*.

c. The role of prosecutors

105. It was argued that international prosecutors should ground themselves in non-partial adherence to the law and be free from corruption because of the highly political atmosphere in which they work. They must be independent, but not indifferent to the political landscape, which may affect the exercise of their discretion, such as the timing of an indictment or an arrest warrant. The audience was reminded that this is true of domestic prosecutors, as well.

d. Amnesties and truth commissions

106. The questions of amnesties and a truth and reconciliation commission for Sudan were raised during the discussion. It was observed that blanket amnesties would probably not be accepted, but that there might be some possibility for amnesties under the Rome Statute. It was also stressed that amnesties would not be effective outside of the country where granted, and that the ICC would ultimately have to address the question under its Statute.

107. The panel also discussed whether the proposed crimes against humanity convention should contain a provision on amnesties, an issue that had been raised at earlier meetings and by experts during the consultation process (*see* paras. 40-41 *supra*). It was observed that efforts had been made during the ICC Preparatory Committee discussions to offer an amnesty provision, but that had not been productive. Similarly, there was a proposed amnesty provision (prohibiting amnesties) in the Convention on Enforced Disappearance, but it did not receive consensus.

3. Facilitating effective interstate cooperation in the prevention and punishment of crimes against humanity

108. This panel, chaired by Ambassador Hans Corell, focused on effective interstate cooperation, a core issue in the proposed crimes against humanity convention. Panelists included Serge Brammertz, Chief Prosecutor, the International Criminal Tribunal for the former Yugoslavia; Professor Robert Cryer, Birmingham Law School; Professor Yoram Dinstein, Tel Aviv University; Laura Olson, The Constitution Project; and Professor Darryl Robinson, Queen's University.

a. Cooperation with international tribunals

109. It was noted that there is virtually universal agreement that international cooperation is central to the work of international tribunals and international justice. Cooperation was central to the ICTY's early days and remains a key concern. Access to archives and documentation in countries where investigations are conducted is essential; so is access to witnesses in national

and international prosecutions. At the ICTY, cooperation of third parties has been an issue, especially with respect to the acquisition and use of classified material in investigations and in tribunal proceedings.

110. It was also observed that cooperation between international and national institutions goes both ways. The ICTY, for instance, has been receiving and responding to requests for assistance coming from States in the region; at the moment, incoming requests are greater than outgoing requests. Cooperation also means not only fulfilling all technical requests for information, but also helping the Tribunal to succeed. In the case of the ICTY, while the governments of Serbia and Croatia have provided technical assistance to the Tribunal, there is poor political support for its work in those countries and actions taken by the Tribunal are often criticized. In Serbia at the moment, 65 percent of the population opposes the arrest of General Mladic, which indicates that the Tribunal has failed to explain the importance of its work. This is an important problem for the international community.

111. A second factor influencing cooperation is the pressure which the international community places on individual States. The success of the ICTY is at least partly attributable to the decision of the United States to condition financial aid to Serbia upon the arrest of remaining fugitives as well as the commitment of the European Union to link accession prospects to the level of cooperation the former Yugoslav States provide to the Tribunal. The only chance that the ICTY has to fulfill its mandate is to ensure that incentives to require cooperation from the countries in the region remain in place.

112. Finally, the importance of capacity building was underscored. The ICTY Prosecutor noted a number of internal mechanisms at the ICTY that exist to facilitate cooperation, including a dedicated tracking unit, ICTY police who work with local police, a functioning assistance unit for public inquiries, and a special section to work with war crimes prosecutors from the region. One of the ICTY's top priorities at the moment is to organize the transfer of cases from the Tribunal to local institutions, because the ICTY's success will depend on how this transfer takes place.

113. Other experts also underscored the need for capacity building. It was noted that the ICC, although a permanent court, has the same problem as the tribunals – namely, it will need a completion strategy for each situation, as it cannot stay in situation countries forever. A major difference between the ICC and the ad hoc tribunals is that the latter built partners on the ground during their lifetime.

b. Cooperation provisions of the draft convention

114. It was observed that the draft convention aimed at improving the horizontal enforcement of international criminal law, rather than its vertical application by the ICC, the ICTY, or other international tribunals. Robust enforcement is the key to fighting impunity, and stronger enforcement mechanisms than those currently available are needed. The greatest gaps exist at the horizontal level of interstate prosecutions and mutual legal assistance. For instance, where there is no extradition treaty between individual States, most States cannot extradite. The *Proposed Convention* establishes the legal basis for extradition for crimes against humanity and removes the political offense exception as a ground for refusal to extradite. This is important because crimes against humanity are often the result of State policy. The draft text also addresses issues of mutual legal assistance, enforcement of another State's penal judgments and transfer of persons for execution of sentences.

115. One expert noted that often common and civil law countries have different standards of proof for extradition, which raises problems in interstate cooperation. Common law countries want to see evidence before extradition. Civil law countries merely require a description of the facts prior to extradition. Thus, it might be helpful to require States Parties to recognize that in ratifying the convention, they are setting aside national preferences on evidentiary standards.

116. Article 7 of the draft text[15] requires States to investigate if they received information that crimes against humanity have been or are being committed. Article 6(9) provides further that a State must prosecute those responsible for crimes against humanity.[16] States might worry about this, especially about the prospect of vexatious prosecutions. However, vexatious prosecutions are usually a concern in private suits, and although the above cited articles impose strong obligations on States, that should not be an insurmountable problem.

117. The draft of the *Proposed Convention* innovates as regards evidence. Article 9(2) permits a receiving State to recognize evidence from the sending State, even when this evidence, although credible and obtained fairly and effectively, does not conform to the rules of evidence in the receiving State.[17] The panel expressed support for this provision, but queried whether States would find it acceptable. It was recognized that after all the goal of the *Proposed Convention* is to the start the process of discussion and negotiation,

[15] Now Article 9 of the *Proposed Convention*.
[16] Now Article 8(9) of the *Proposed Convention*.
[17] Now Article 11(2) of the *Proposed Convention*.

not to end it. Thus, the above provision gives States something to discuss and take out if they need to compromise on other provisions.

118. The draft also provides that no statute of limitations shall apply to crimes against humanity,[18] which is a common impediment to extradition of offenders. At the same time, the convention includes provisions[19] for denial of extradition when substantial grounds exist to believe that a person might be sought for extradition for discriminatory reasons, that his or her trial rights may be denied, or that the possible penalty for the offense is not provided for in the law of the requested State.

119. The draft text is silent on the issue of the death penalty. However, it should be recalled that extradition must adhere to the principle of *non-refoulement*. The draft requires States to consider not only gross violations of human rights but also humanitarian law violations. If a State is to prosecute effectively, it requires judicial assistance (*i.e.*, witness protection, freezing of assets), so a specialized convention requires special provisions regarding the movement of persons from one country to another. A new convention should establish the basis for such required cooperation.

120. The draft text also provides that legal assistance between States Parties can be predicated upon the convention itself, without the need for an additional mutual legal assistance treaty.[20] At the same time, the legal assistance provisions of the convention are meant to apply only if no other treaty governs the relevant obligations of States. To maximize prospects for accountability, the *Proposed Convention* allows a State to transfer detainees or criminal proceedings to another country.[21] It also gives States Parties the option to give effect to the penal judgments of other States.[22] The provisions governing the transfer of convicted persons are essential – the possibility that a defendant could be transferred back to serve his sentence in the requested country may facilitate extradition and counter impunity.[23] To ensure that no convicted individual receives pardon or commutation of sentence by his or her home State, the convention does not permit grants of clemency without the assent of the transferring State.[24]

121. Additionally, it was noted that Annex 2 on extradition does not explicitly address the issue of dual criminality. It was suggested that

[18] Now Article 7 of the *Proposed Convention*.
[19] Now Annex 2(D) of the *Proposed Convention*.
[20] *See* Article 13 and Annex 3 of the *Proposed Convention*.
[21] *See* Article 14 and Annex 4 of the *Proposed Convention*.
[22] *See* Article 16 and Annex 6 of the *Proposed Convention*.
[23] *See* Article 15 and Annex 5 of the *Proposed Convention*.
[24] *See* Annex 5(3) of the *Proposed Convention*.

excluding the dual criminality requirement could be useful. It was also observed that even if it is theoretically possible to extradite without legislation, it can be difficult to convince a judge to apply the treaty in the absence of legislation.

c. The normative contribution of the draft convention revisited

122. The point was made that some may doubt the utility of treaties such as the *Proposed Convention*. Treaties, however, help guide and construct our thinking and create normative constraints that shape human behavior. At the same time, on the issue of the normative contribution of the convention, objections were raised to a commentary note in the draft of the convention, suggesting that the policy element in Article 7 of the Rome Statute applies only to State actors. It was contended that this interpretation is problematic because it risks ruling out crimes against humanity committed by non-State actors and creates other issues under dual criminality. One participant, who had been a coordinator of Articles 7 and 7(2)(a) of the Rome Statute, noted that he did not feel that Article 7 contains such a limitation. Moreover, he argued that such an interpretation would contravene the law that, following the *Tadić* case, State and non-State actors are covered by the definition of crimes against humanity. A suggestion was made to delete the limiting language in the commentary, which was later accepted by the Steering Committee.

d. The relationship between enforcement and prevention

123. An interesting point was raised regarding the pace of international justice. It was suggested that proceedings are slow and expensive – for example, by the time the ICTY wraps up its work (projected date 2013), it will have taken almost two decades and cost $2 billion to complete its work. By comparison, the Nuremberg Tribunal took 11 months. One expert suggested that a fact-finding procedure, created by the UN Security Council, like the equivalent of the international fact-finding committee established by Additional Protocol I, could be useful. Such a procedure could be activated between speculation about atrocities to come and future punishment therefore, before the acts become widespread and systematic. No mechanisms would be required, other than fact-finding, to discover what is happening. This would make a record and help to pressure States and the international community before a situation spirals completely out of control.

124. If there is to be a fact-finding commission, the question is who appoints it and who stands behind it. If the Security Council lends its

imprimatur to a fact-finding commission, it will be possible for it to adopt binding and influential decisions.

125. It was suggested that the high cost of the international criminal justice system might be a result of its relative infancy. It is a long-term investment requiring large amounts of initial capital. In time, hopefully the International Criminal Court and internationalized courts will demonstrate their utility and competence and prove a less costly alternative to war.

4. Crimes against humanity and U.S. policy

126. This panel was chaired by Andrew Solomon, Deputy Director for the Brookings Institution. The other panelists included John Clint Williamson, former U.S. Ambassador-at-Large for War Crimes Issues; Joseph Zogby, Staff Director of the U.S. Senate Subcommittee on Human Rights and the Law; Michael P. Scharf, Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law; Elizabeth Andersen, Executive Director of the American Society of International Law; and Larry Johnson, former UN Assistant-Secretary-General for Legal Affairs.

127. At the outset, it was emphasized that while the present commitment of the United States to international criminal law and justice is often questioned, historically the United States has contributed a great deal to the development of international criminal law (*i.e.*, the Nuremberg trials, the ICTY and the ICTR) and to its enforcement (*i.e.*, the prosecution of Charles Taylor at the SCSL). It was further noted that there has been a dramatic evolution of U.S. foreign policy towards the ICC under the Obama Administration. The attendance of Stephen Rapp, the U.S. Ambassador-at-Large for War Crimes Issues, at the Assembly of States Parties of the International Criminal Court was a positive step forward. Yet, despite the Obama administration's willingness to participate in and support the work of international bodies, it was observed that it is unlikely that the United States will become an ICC State Party any time soon.

a. U.S. role in international humanitarian law

128. One expert made the point that the U.S. role in the establishment and administration of the International Criminal Tribunal for the former Yugoslavia was largely one of support and contribution. It was observed that the United States often took more progressive positions on matters of international humanitarian law than the UN Secretariat, the body in charge of drafting the ICTY Statute and related resolutions. For instance, when the Secretariat excluded the Additional Protocols to the Geneva Conventions and Common Article 3 from the ICTY Statute, then U.S. Ambassador to the United Nations, Madeleine Albright, made it clear that the United States did

not agree. Furthermore, the United States generously contributed FBI and Department of Justice resources to the work of the ICTY. It also shared sensitive information with ICTY prosecutors (under Rule 70 of the ICTY Statute), which was used to obtain non-classified evidence for trial. Recently, the United States has remained a main supporter of the ICTY amidst pressure by other governments for the Tribunal to close down soon.

129. The same panelist also asserted that the United States led the effort to establish the International Criminal Tribunal for Rwanda and had taken, along with New Zealand, the initiative in drafting the Statute and empowering the Tribunal. Common Article 3 and the Geneva Protocols were explicitly included in the ICTR Statute. Furthermore, the United States was a major leader in establishing and securing General Assembly approval for the Special Court for Sierra Leone. The U.S. government has also consistently funded the Khmer Rouge Tribunal, even under former President George W. Bush.

130. It was also noted that although the United States is a major donor of development assistance for capacity-building and strengthening the rule of law in national jurisdictions, this assistance has two drawbacks. First, it is too little – tens of millions of dollars, instead of hundreds of millions – especially compared to European contributions. Second, this assistance has not properly aimed at fostering complementarity between the ICC and national jurisdictions (possibly because of wishful thinking that the ICC would fail).

b. Existing U.S. legislation on atrocity crimes and its shortcomings

131. The panel observed that it was only in 2007 that the Unites States Senate created a standing Subcommittee on Human Rights and the Law. The subcommittee held the first hearing on the issue of genocide law in U.S. history. The hearing highlighted a gap in U.S. law (the Proxmire Act which implemented the Genocide Convention domestically) – namely, that the Act did not cover non-U.S. nationals who committed genocide abroad. In response, Senators Durbin and Coburn introduced the Genocide Accountability Act, which was adopted unanimously by both Houses of Congress and signed into law by President George W. Bush in 2007.

132. Similarly, the Subcommittee on Human Rights and the Law held a hearing on the issue of child soldiers. At the time, U.S. law did not provide for the prosecution or even deportation of persons responsible for the recruitment of child soldiers who resided in the United States. In 2008 the Child Soldiers Accountability Act was passed by Congress and signed into law by President George W. Bush.

133. The Human Rights Subcommittee has also received evidence which underscores shortcomings in domestic prosecutions of human rights violations. For example, Dr. Juan Roma-Goza gave testimony about his efforts, which went largely unheeded, to compel the U.S. government to prosecute his former torturers who were living in the United States. Similarly, an alleged perpetrator of the Srebrenica massacre known to reside in the state of Massachusetts was tried for visa fraud even though accused of crimes against humanity. It is believed that more than 1,000 individuals responsible for war crimes and crimes against humanity have found safe haven within the United States. Senators Durbin and Coburn have introduced a new Crimes Against Humanity bill to enable the prosecution of such individuals. The eventual adoption of this legislation promises to be an uphill battle, as would be the ratification of any future crimes against humanity convention. On a more positive note, Senator Durbin was instrumental in the passage of the Human Rights Enforcement Act, which creates a section within the U.S. Department of Justice with the mandate to prosecute human rights violators. The bill passed both Houses and was signed into law by President Obama in early 2010.

134. One panelist commented on the limitations of existing U.S. legislation on the issue of atrocity crimes. The Genocide Accountability Act (*see* para. 131 *supra*) is limited to the scope and requirements of the Genocide Convention, and neither contains an obligation to prosecute or extradite individuals responsible for genocide taking place outside U.S. borders. Similarly, the War Crimes Act (18 U.S.C. § 2441) does not provide for universal jurisdiction and permits amnesty deals with non-citizens responsible for war crimes against other non-citizens before coming to the United States. Even the proposed crimes against humanity legislation by Senators Durbin and Coburn does not go far enough in requiring mandatory prosecutions and closing the door on amnesties for perpetrators of crimes against humanity.

135. Against this backdrop, it was observed that there were four ways in which a crimes against humanity convention could affect U.S. policy: (1) it could help end amnesty deals; (2) it could close gaps in existing domestic legislation; (3) it could facilitate cooperation with the ICC and other prosecution efforts around the world; and (4) it could add a new tool in the arsenal of atrocity prosecutions – indictments. To illustrate this last point, one panelist invoked the Pan Am 103 bombing prosecutions. Instead of using force against Libya after the bombing, the United States, relying on existing counter-terrorism conventions, went to the United Nations with indictments and secured Libya's agreement to a trial at a specially convened court in The Netherlands. There is no similar convention on crimes against humanity at the moment. A new crimes against humanity convention could provide the necessary basis for the issuance of indictments against perpetrators of crimes against humanity, outside the ICC framework.

c. Possible U.S. role in a crimes against humanity convention

136. Currently, the U.S. government has no position on a crimes against humanity treaty. In fact, at the moment, except for a small group of government international criminal law experts, the U.S. government is largely unaware of the work of the Initiative and the call for the conclusion and adoption of a new international treaty to prevent and punish the commission of crimes against humanity. Even when the work of the Initiative becomes better known, U.S. officials from different departments and agencies, such as the Defense and Justice Departments, will have to study the *Proposed Convention* and weigh in on its consequences. U.S. policy is rarely imposed from above by top political appointees and is instead the product of the "least common denominator" of the interests of different government representatives.

137. In view of the above, U.S. participation in a new crimes against humanity convention is not just a question of securing Senate ratification. Instead, it will require concerted lobbying efforts of different agencies and offices within the Executive Branch as well. It was suggested that such efforts be directed first and foremost at the Democracy, Human Rights and Labor Bureau in the Department of State; the Office of the Legal Advisor and the War Crimes Office at the Department of State; a newly created section within the U.S. Department of Justice to prosecute serious human rights violations; and the JAG Offices in the Department of Defense.

138. In the process, it is also important for the Crimes Against Humanity Initiative to think about how to avoid getting caught up in a potential U.S. backlash against the ICC. The challenge is to make the *Proposed Convention* part of a continued U.S. engagement with issues of international justice, no matter what happens to U.S. policy towards the ICC in particular. To that end, the Initiative should endeavor to educate U.S. government stakeholders about what the *Proposed Convention* does or does not do, especially as regards its implications for potential liability of U.S. soldiers.

d. A crimes against humanity convention and amnesties

139. It was repeatedly emphasized that a crimes against humanity convention should take a hard stance on amnesties for alleged perpetrators. Rights violators cannot be trusted, and amnesties erode the rule of law and add to cynicism. Furthermore, amnesties prevent the development of a historical record. Examples were given of ignominious amnesty offers: there is strong evidence that U.S. envoy Richard Holbrooke offered Radovan Karadzic immunity from prosecution in peace talks in the mid-1990s; in 2003

Charles Taylor, the former President of Liberia, was given a deal to seek exile in Nigeria and avoid international prosecution for his role in the Sierra Leone conflict; prior to the invasion of Iraq, Bahrain offered Saddam Hussein asylum should he want to leave the country, despite his long record of crimes against humanity; and even today many States are calling on the UN Security Council to quash the ICC indictment of President al-Bashir of Sudan.

e. Alternatives to ratification

140. One possible route for the eventual *Proposed Convention* to become binding international law immediately, without lengthy negotiations and the need for country ratifications, was suggested – namely through its adoption, in whole or in part, by the UN Security Council in a Chapter VII resolution. This is what happened in the aftermath of September 11 when the Security Council drew upon an existing proposed treaty on terrorist financing in issuing a number of Chapter VII resolutions (*i.e.*, UN S.C. Res. 1368, 1373, and 1377). One panelist speculated that another Darfur could be the catalyst for adopting the *Proposed Convention* in a future Chapter VII resolution, much as the September 11 attacks were for the proposed terrorist financing treaty.

141. Another panelist commented on the alternatives to U.S. ratification of a crimes against humanity convention. She noted that while ratification is a long, difficult and uncertain process, other steps could be taken in the short to medium term, such as clarifying domestic law, filling in existing gaps, adopting best practices, and providing a common framework.

f. The UN Security Council and crimes against humanity

142. The history of the establishment of the Special Tribunal for Lebanon offers an interesting glimpse into the positions of UN Security Council members on crimes against humanity. The Lebanon Tribunal is tasked to investigate and prosecute those responsible for the assassination of former Lebanese Prime Minister Rafiq al-Hariri. The Tribunal applies Lebanese law and has no jurisdiction to try any other crime under international humanitarian law. When the UN Secretariat attempted to include crimes against humanity in the Statute of the Tribunal, the Permanent Members of the Security Council objected. Some objections dealt with the threshold number of victims for crimes against humanity to exist (*i.e.*, is 60 victims enough?); other objections concerned the credibility of the Security Council if it recognized crimes against humanity as triable offenses in al-Hariri's assassination but not in the case of the 2006 Israel-Hezbollah war.

5. Crimes against humanity and state responsibility to protect

143. This panel was chaired by Professor William A. Schabas, Director of the Irish Centre for Human Rights, National University of Ireland, Galway. The other panelists included Professor Payam Akhavan, McGill University; Professor Edward C. Luck, International Peace Institute; The Honorable Daniel David Ntanda Nsereko, Judge at the International Criminal Court; Professor Dinah L. Shelton, George Washington University Law School; and Professor David J. Scheffer, Northwestern University Law School and former U.S. Ambassador-at-Large for War Crimes Issues.

144. Professor Schabas opened the discussion by observing that the panel topic of State Responsibility to Protect breaks down into two issues: State responsibility and responsibility to protect/prevent. He highlighted two relevant provisions in the draft convention. Article 2(2)(a) on the object and purposes of the convention imposes obligations on States to "prevent" crimes against humanity, and Article 6(1) requires States Parties to implement the convention by adopting legislation in accordance with the convention.[25] Professor Schabas also suggested that the scope of obligations imposed by any future treaty on atrocity crimes will be interpreted in light of the ICJ decision in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, which addressed issues of prevention under the Genocide Convention.

a. The responsibility to protect principle

145. It was suggested that of the four crimes which the principle of the Responsibility to Protect (R2P) addresses, crimes against humanity have particular importance. Generally, genocide becomes known after the fact, war crimes involve individual acts, and ethnic cleansing does not have the same legal status as the other atrocity crimes. Thus, crimes against humanity are vital for the implementation of R2P in practice.

146. One panelist compared the draft text of the proposed convention and the 2005 World Summit Outcome on the Responsibility to Protect adopted by the UN General Assembly. There is significant overlap between the two documents – for instance, between Articles 2 and 6(12)[26] of the convention and paragraphs 138 and 139 of the World Summit Outcome. Yet, there are important distinctions. Paragraph 139 of the World Summit Outcome commits UN Member States to protect vulnerable populations both inside and outside their borders in accordance with Chapter VII of the UN Charter. In contrast, the draft crimes against humanity convention does not contain an

[25] Now Article 8(1) of the *Proposed Convention*.
[26] Now Article 8(13) of the *Proposed Convention*.

explicit obligation for States to protect civilian populations, and it does not give civilians a right to protection as the Outcome provisions do. (One panelist took issue with this interpretation of paragraph 139, contending that it contains no obligation to respond, and that the United States would not have signed onto it if it did.) Furthermore, the draft language of the convention contains the words "prevent and suppress." While "protection" signifies proactive action, "suppression" usually refers to action after the fact. These are important differences that future policy makers and lawyers will have to parse out and make sense of.

147. One panelist expressed the view that the Security Council should not be front and center in R2P initiatives. He argued that States should not condition the discharge of their obligation to protect on Security Council authorization. Regional and sub-regional action can be more effective in responding to emerging conflicts. In addition, peace-keeping missions can be authorized by the UN General Assembly without the consent of the Security Council. Another panelist cautioned that R2P should be carefully distinguished from humanitarian intervention.

148. One panelist applauded the proposed convention as a real improvement over the Genocide Convention on the issue of prevention. The Genocide Convention emphasized punishment after the fact. The proposed convention, by contrast, has progressive provisions on prevention. It promotes multilateralism over unilateralism by encouraging States Parties to call upon the UN to take action, if needed. Unlike the Rome Statute, the convention does not contain language forbidding interference with internal political affairs and territorial integrity. The convention also requires States to develop educational and informational programs.[27] Such programs should aim to eradicate social ills and prevent the dissemination of hatred, which usually underlie and facilitate the commission of crimes against humanity. It was further suggested that besides education, the convention should also discuss and encourage constitutional reforms on self-determination, political and economic equality for all groups, and the principle of humanity.

b. State responsibility

149. The panel urged the Steering Committee to include a strong State responsibility principle in the proposed convention. While a watered-down version of the principle exists in Articles 1 and 6(12)-(13)[28] of the convention, one expert felt that was not sufficient. Unless the obligation of State responsibility is made more explicit, it would be impossible to bring an action at the ICJ for the failure of a government to stop crimes against humanity

[27] S*ee* Article 8(15) of the *Proposed Convention*.
[28] *See* Articles 8(1) & 8(13)-(15) of the *Proposed Convention*.

under this convention. At the same time, it was recognized that selling a strong State responsibility provision to future States Parties of the convention could be difficult.

150. One panelist suggested that the obligation to protect should not only be stronger than what the convention envisages but also more expansive to include collective responsibility to intervene and prevent crimes. The questions of where, when, and how to intervene are difficult, but not impossible, to answer. The ICJ decision in *Bosnia and Herzegovina v. Serbia and Montenegro* established that the responsibility of States to prevent genocide extends to territories over which they have not only jurisdiction and effective control, but also influence. (Another panelist wondered what France's responsibility to intervene in Rwanda would have been under the rationale of this decision.) In addition, while imminence is required, States should not wait until the eleventh hour to intervene. Instead, the international community should create early warning systems to detect signs of mass incitement and radicalization. Atrocity crimes are not natural disasters, but manmade catastrophes, which makes them foreseeable and preventable. Finally, there is a misunderstanding about what counts as prevention. In the case of the Rwandan genocide, for instance, events might have unfolded differently had RTLM radio been shut down, instead of waiting for the Security Council to act.[29]

151. One panelist also argued for a broader view of how governments commit crimes. He rejected the narrow focus of the ICJ and the ICTY on specific intent, especially in genocide prosecutions. He urged that the draft convention should clarify that specific intent to commit crimes against humanity is not required to prove liability under its provisions. Another panelist explained that under Articles 138-139 of the World Summit Outcome document, an intent to commit crimes is not required for an R2P intervention. An intervention could be justified even in the absence of intent, if a State (especially a failed State) cannot exercise effective control over its territory and populations.

152. It was also suggested that the principle of the Responsibility to Protect should run to non-State actors and armed groups. Quite often States are not in control of their own territories. In such situations, the responsibility to protect the civilian population and prevent the commission of mass atrocities should bind non-State actors as well.

153. The question of what specific obligations should inform State responsibility under R2P and the proposed convention elicited thoughtful discussion. It was suggested that criminal sanctions for incitement and hate

[29] Ambassador Stephen Rapp made a similar point during his address at the Conference.

speech are a concern particular to genocide prevention, but could become problematic in the context of crimes against humanity. First, such penalties bump into freedom of expression issues; and second, it is unclear how to prosecute incitement when hate speech does not lead to violence in its aftermath. It was further pointed out that States refused to include incitement to commit crimes against humanity in the Rome Statute. At the same time, criminal sanctions for incitement and hate speech may be important tools to prevent the commission of atrocities.

154. One commentator identified specific duties which could inform State responsibility obligations – refraining from participation in the planning of crimes against humanity, engaging in and cooperating with ongoing investigations, and committing to R2P in binding treaty form. Another expert wondered how the latter obligation squared with domestic constitutional bans on military intervention in countries like Japan. The argument was advanced that the two may be compatible since there is a clear distinction between military intervention and prevention, especially if prevention takes the form of economic or political measures.

155. The panel also addressed the interesting question whether State responsibility should attach to diplomatic decisions that have impact on atrocity crimes. For instance, can Security Council Member States be held responsible for how they vote in the Security Council? One panelist related that the United States was attacked for its votes in 1993 and 1994 in connection with the situations in the former Yugoslavia and Rwanda. Another panelist added that in 1993 Bosnia and Herzegovina considered bringing the United Kingdom before the ICJ on the theory that its actions in the Security Council violated the Genocide Convention and the Convention on the Elimination of All Forms of Racial Discrimination. The same panelist argued that the ICJ has recognized an obligation on behalf of States to exercise pressure in conflict situations. Another panelist took the position that international law has not yet settled this issue.

c. Lessons from the Inter-American Court of Human Rights

156. One panelist reviewed the record of the Inter-American Court of Human Rights (IACtHR) on the issue of a State's responsibility to protect and prevent. The IACtHR has recognized a legal duty to prevent and investigate human rights violations, but it has not distinguished between investigating past crimes and preventing future violations. The Court has also detailed specific measures to be taken to protect human rights. It has held that truth commissions are not a substitute for judicial processes and that amnesties cannot be used to limit responsibility. It has also ordered educational measures and training programs for individuals most at risk of violating

human rights. Finally, in the *Miguel Castro* case, the Court referred to a duty of international cooperation and extradition.

6. Universal jurisdiction, complementarity and capacity building

157. This panel was chaired by Juan E. Méndez, Visiting Professor, Washington College of Law, American University. The other panelists included Gilbert Bitti, International Criminal Court; Francesca Varda, Coalition for the International Criminal Court; and Mohamed El-Zeidy, International Criminal Court.

158. At the outset, Professor Méndez reminded the audience of the importance of the three issues that the panel was designed to discuss. He noted that universal jurisdiction is a necessary weapon in the fight to end impunity, and the Initiative's Steering Committee carefully considered the concept in drafting the proposed convention. Complementarity, too, is key to the prevention of crimes against humanity, while capacity building has turned into one of the three main pillars of the proposed convention, alongside prevention and punishment.

a. Complementarity at the ICC

159. It was observed that as the cornerstone of the Rome Statute, the principle of complementarity protects State sovereignty. The International Criminal Court has addressed issues of complementarity mainly in cases involving its *proprio motu* and State referral jurisdiction. Some of the most important findings of the ICC on this issue, which could have implications for crimes against humanity prosecutions, include the following: (1) That national proceedings should encompass both the person and the conduct in question to foreclose ICC involvement; (2) That States should incorporate and national courts should apply the modes of liability recognized in the ICC Statute; (3) That although the meanings of "unwilling" and "unable" remain unclear, the Court has held, in the *Katanga* case (September 2009), that if a State has been inactive in investigating or prosecuting a particular accused, then the Court need not reach the question of unwillingness and inability in asserting jurisdiction.

160. One panelist distinguished between classical complementarity, which concerns the basis for the exercise of jurisdiction by the International Criminal Court, and positive complementarity, which deals with capacity building and mutual assistance between national and international tribunals. He pointed out that while the origins of positive complementarity are sometimes traced to Nuremberg, that Tribunal was created not to enhance the capacity of domestic courts, but to establish jurisdiction over Nazi crimes committed against a stateless population. Similarly, the notion of positive

complementarity is improperly attributed to the ICC. Instead, it originated with the ICTY, where the Office of the Prosecutor began sending so-called "category two" cases back to domestic courts while at the same time offering these courts assistance. He noted that the ICC probably will not engage in the kind of positive complementarity/capacity building witnessed at the ICTY and the ICTR – while it will encourage domestic prosecutions, it will not get involved in technical or financial support. However, he suggested that the ICC should consider cooperating with States by sharing databases of non-confidential information, involving local lawyers in OTP activities, assisting countries in meeting their international law obligations and strengthening their witness protection capabilities.

b. The work of NGOs in facilitating complementarity

161. The panelists drew attention to the work of the Coalition for the International Criminal Court (CICC) at the national level. The CICC has helped identify local experts to advocate for the Rome Statute on the ground. In addition, the CICC has worked closely with national judiciaries to encourage and facilitate capacity building. The CICC has also provided support for and monitored the process of implementation of the ICC Statute by individual States. The implementation process has been slow and accompanied by many challenges, but has had the positive impact of modernizing State criminal codes and expanding State jurisdiction over international crimes. Jordan and Morocco were singled out for their specific advances towards implementation; Latin America and Africa were also noted as making good progress. It was also stated that 25 States have criminalized crimes against humanity as of early 2010. The example of the *Fujimori* case was advanced to illustrate how crimes against humanity jurisprudence at the international level is influencing national courts. In *Fujimori*, the Supreme Court of Peru relied upon precedent from the Inter-American Court of Human Rights to find that the national amnesty law was no longer applicable.

c. Reparations for victims

162. The issue of victim compensation arose during the Question and Answer session. An expert from the audience observed that Article 6 of the November draft of the convention[30] leaves matters of reparations almost entirely to the discretion of individual States. He argued that instead, the international community should agree on an international mechanism for reparations. One panelist suggested that a trust fund for victims could be helpful.

[30] Now Article 8 of the *Proposed Convention*.

C. Closing Plenary Session, Issuance of Resolutions and the Signing of the Washington Declaration

163. At the outset of the final plenary session, the Steering Committee requested the participants to observe a moment of silence in honor of the victims of crimes against humanity.

164. Professor Sadat then read aloud three resolutions in which the Steering Committee: (1) Expressed gratitude to Steven Cash Nickerson for his financial generosity and ongoing support, which enabled the Initiative to bring together the many minds who contributed to the development of the proposed convention; (2) Recognized Whitney R. Harris for his tireless dedication to the cause of international criminal justice and for his enthusiastic support of the work of the Initiative; and (3) Thanked the individuals and organizations who had taken part in the Initiative by reviewing and commenting on both the form and substance of the proposed convention. The Resolution noted that these contributions, stemming from many different legal systems, were invaluable in refining and finalizing the convention.

165. Finally, the Steering Committee concluded the meeting by adopting the *Washington Declaration* included in this volume. The *Declaration* recognizes the plight of the millions of victims of crimes against humanity and calls upon States to adopt a comprehensive crimes against humanity convention incorporating certain fundamental principles.[31] A copy of the *Declaration* was circulated to participants at the meeting, and, as of this writing, has been signed by more than seventy-five distinguished experts and supporters of international criminal justice.

VI. May Technical Advisory Session

166. Following the conclusion of the Washington Conference, the draft convention was refined once more at another technical advisory session held in Chicago, Illinois, at DePaul University School of Law, from May 10-11, 2010.[32] The session considered the input received from experts in Fall and Winter of 2009-2010 and the comments from the Washington Conference. Portions of the text were redrafted and refined. The resulting draft was then sent to the Steering Committee for deliberation. After lengthy discussions, additional changes were incorporated and the text finalized. The result is the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, found in Appendix I of this volume, which was

[31] *The Washington Declaration* appears in this volume and on the Harris Institute's website at http://law.wustl.edu/crimesagainsthumanity.
[32] A list of participants is found in Annex 9.

adopted by the Steering Committee in August 2010 (in English), and subsequently translated into French (Appendix II).

VII. Conclusion

167. During Phase IV of the Initiative's work, the *Proposed Convention* will be circulated to governments, United Nations decision makers, academics and NGOs to promote the work of the Initiative and create support for the adoption of a comprehensive international instrument on crimes against humanity. It is intended that States, NGOs and prominent personalities, including former Heads of State, will take part in this effort. The Initiative plans to convene and participate in regional meetings in, *inter alia*, Africa, the Americas, Asia, Europe and the Middle East to further these objectives.

168. It is hoped that by the end of Phase IV of the Initiative, the international community will have acquired the strong conviction that the adoption of a comprehensive international instrument on crimes against humanity is both urgently required and eminently feasible.

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

St. Louis Experts' Meeting
April 13-15, 2009
Annex #1: List of Participants

Steering Committee Members

Chair: Professor Leila Nadya Sadat, Washington University in St. Louis School of Law; Director of the Whitney R. Harris World Law Institute

Professor M. Cherif Bassiouni, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute

Ambassador Hans Corell, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations

Justice Richard Goldstone, Fordham University School of Law; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda

Mr. Juan Méndez, President, International Center for Transitional Justice

Professor William Schabas, Director, the Irish Centre for Human Rights, National University of Ireland, Galway

Judge Christine Van den Wyngaert, International Criminal Tribunal for the former Yugoslavia; International Criminal Court

Expert Participants

Professor David Akerson, Sturm College of Law, University of Denver

Professor Payam Akhavan, McGill University Faculty of Law

Professor Diane Marie Amann, University of California Davis School of Law

Professor Dr. Kai Ambos, Georg-August-Universität, Göttingen, Germany

Ms. Elizabeth Andersen, Executive Director, American Society of International Law

Ms. Evelyn Ankumah, Executive Director, Africa Legal Aid

Dr. Kelly Dawn Askin, Open Society Justice Initiative

Professor Elizabeth Borgwardt, Washington University in St. Louis

Dr. Frank Chalk, Concordia University

Professor Roger S. Clark, Rutgers University School of Law-Camden

Professor David Crane, Syracuse University College of Law

Ms. Margaret deGuzman, the Irish Centre for Human Rights, National University of Ireland, Galway

Professor Mark Drumbl, Washington & Lee University School of Law

Mr. Mark Ellis, International Bar Association

Dr. John Hagan, Northwestern University

Professor Hurst Hannum, Tufts University, The Fletcher School

Mr. Whitney R. Harris, former prosecutor for the International Military Tribunal at Nuremberg

Ambassador Feisal Amin Rasoul al-Istrabadi, Indiana University School of Law

Mr. Larry Johnson, former UN Assistant-Secretary-General for Legal Affairs

Professor David Luban, Georgetown University Law Center

Professor Larry May, Washington University in St. Louis

Mr. Guénaël Mettraux, former Associate Legal Officer and former defense counsel, International Criminal Tribunal for the former Yugoslavia

Professor Michael A. Newton, Vanderbilt University Law School

Ms. Laura M. Olson, American Society of International Law

Professor Valerie Oosterveld, University of Western Ontario Faculty of Law

Professor Diane Orentlicher, American University Washington College of Law

Professor Mark Osiel, T.M.C. Asser Institute, University of Amsterdam

Professor Naomi Roht-Arriaza, University of California, Hastings College of the Law

Dr. Leonard Rubenstein, Physicians for Human Rights

Professor Michael P. Scharf, Case Western Reserve University School of Law

Professor David Scheffer, Northwestern University School of Law

Ambassador Thomas A. Schweich, Washington University in St. Louis School of Law

Professor Elies van Sliedregt, Vrije Universiteit Amsterdam

Professor Göran Sluiter, University of Amsterdam

Dr. Gregory H. Stanton, Genocide Watch

Professor Jane Stromseth, Georgetown University Law Center

Mr. B. Don Taylor III, International Criminal Tribunal for the former Yugoslavia

Professor Melissa Waters, Washington University in St. Louis School of Law

Ambassador John Clint Williamson, U.S. Ambassador-at-Large for War Crimes Issues

Washington University and Harris Institute Personnel

Chancellor Mark S. Wrighton, Washington University in St. Louis

Dean Kent Syverud, Dean and Ethan A.H. Shepley University Professor, Washington University School of Law

Ms. Amitis Khojasteh, Cash Nickerson Fellow, Whitney R. Harris World Law Institute

Ms. Linda McClain, Assistant Director, Whitney R. Harris World Law Institute

Mr. Michael Peil, Associate Dean for International Programs, Washington University School of Law

Rapporteurs

Ms. Kate Allen, Harvard Law School

Mr. Joseph Vincent Barrett, Harvard Law School

Ms. McCall Carter, Washington University in St. Louis School of Law

Ms. Miriam Gouvea Cohen, Harvard Law School

Ms. Margaret Wichmann, Washington University in St. Louis School of Law

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

St. Louis Experts' Meeting
April 13-15, 2009
Annex #2: Agenda

MONDAY, APRIL 13, 2009

8:30 a.m. **Welcome and Opening Remarks**

- **Leila Nadya Sadat**, Washington University School of Law; Director, Harris World Law Institute
- **Whitney R. Harris**, Nuremberg Prosecutor

Section I: Legal, Social and Historical Context

9:00-9:45 **History of Efforts to Codify Crimes Against Humanity**

- **Roger S. Clark**, Rutgers University School of Law, Camden (Author)
- **Frank Chalk**, Concordia University (Discussant)

9:45-10:30 **Why A Crimes Against Humanity Convention?**

- **Gregory H. Stanton**, Genocide Watch (Author)
- **Mark Drumbl**, Washington & Lee University School of Law (Discussant)

10:45-11:30 **Peace and Justice**

- **David Crane**, Syracuse University College of Law (Author)
- **Richard Goldstone**, Harvard Law School (Discussant)

Section II: Legal Issues

11:30-12:15 **The Jurisprudence of the Ad Hoc Tribunals Since 1993 and Their Contribution to the Legal Definition of Crimes Against Humanity**

- **Göran Sluiter**, University of Amsterdam (Author)
- **William Schabas**, National University of Ireland, Galway (Discussant)

12:15 **Conclusion of Morning Session**

- **Kent Syverud**, Washington University School of Law; Dean and Ethan A.H. Shepley University Professor

1:45-2:30 **Continuing Definitional Issues Regarding Crimes Against Humanity, Including the Policy Element and the Scope of the Crime**

- **Guénaël Mettraux**, formerly International Criminal Tribunal for the former Yugoslavia (Author)
- **Mark Osiel**, T.M.C. Asser Institute, University of Amsterdam (Discussant)

2:30-3:15 **Gender Crimes**

- **Valerie Oosterveld**, University of Western Ontario Faculty of Law (Author)
- **Kelly Dawn Askin**, Open Society Justice Initiative (Discussant)

3:15-4:00 **Ethnic Cleansing**

- **John Hagan**, Northwestern University (Author)
- **Larry Johnson**, former UN Assistant-Secretary-General for Legal Affairs (Discussant)

4:15-5:30 **Plenary Session – Introduction of Draft Convention**

6:30 **Evening Gala**

- **Remarks - Chancellor Mark S. Wrighton**, Washington University in St. Louis
- **Keynote Address – John Clint Williamson**, U.S. Ambassador-at-Large for War Crimes Issues

TUESDAY, APRIL 14, 2009

Section II: Legal Issues (continued)

8:30-9:15 **Immunities and Amnesties**

- **Diane Orentlicher**, American University, Washington College of Law (Author)
- **Naomi Roht-Arriaza**, University of California, Hastings College of the Law (Discussant)

9:15-10:00 **Modes of Participation**

- **Elies van Sliedregt**, Vrije Universiteit Amsterdam (Author)
- **Laura M. Olson**, American Society of International Law (Discussant)

Section III: New Conceptual Paradigms

10:15-11:00 **Crimes Against Humanity and Terrorism**

- **Michael P. Scharf**, Case Western Reserve University School of Law (Author)
- **Michael A. Newton**, Vanderbilt University Law School (Author)
- **Melissa Waters**, Washington University School of Law (Discussant)

11:00-11:45 **Revisiting the Architecture of Nuremberg? Crimes Against Humanity and International Criminal Law**

- **M. Cherif Bassiouni**, DePaul University College of Law (Author)
- **David Luban**, Georgetown University Law Center (Discussant)

Section IV: Enforcement Issues

1:15-2:00 **Crimes Against Humanity and the International Criminal Court**

- **Kai Ambos**, Georg-August-Universität, Göttingen (Author)
- **Betsy Andersen**, American Society of International Law (Discussant)

2:00-2:45 **Crimes Against Humanity and the Responsibility to Protect**

- **David Scheffer**, Northwestern University School of Law (Author)
- **Diane Marie Amann**, University of California Davis School of Law (Discussant)

2:45-3:30 **Crimes Against Humanity and National Jurisdictions**

- **Payam Akhavan**, McGill University Faculty of Law (Author)
- **Evelyn Ankumah**, Africa Legal Aid (Discussant)

3:45-5:45 **Plenary Session – Resumed Discussion of Draft Convention**

WEDNESDAY, APRIL 15, 2009

8:30-10:00 **Executive Session** (Steering Committee Members only)

10:00-12:00 **Technical Advisory Session – Resumed Discussion of Draft Convention**

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

The Hague Intersessional Experts' Meeting
June 11-12, 2009
Annex #3: List of Participants

Steering Committee Members

Chair: Professor Leila Nadya Sadat, Washington University in St. Louis School of Law; Director of the Whitney R. Harris World Law Institute

Professor M. Cherif Bassiouni, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute

Ambassador Hans Corell, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations

Justice Richard Goldstone, Fordham University School of Law; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda

Mr. Juan Méndez, Scholar-in-Residence, the Ford Foundation

Professor William Schabas, Director, the Irish Centre for Human Rights, National University of Ireland, Galway

Judge Christine Van den Wyngaert, International Criminal Tribunal for the former Yugoslavia; International Criminal Court

Expert Participants

Judge Carmel A. Agius, International Criminal Tribunal for the former Yugoslavia

Judge Joyce Aluoch, International Criminal Court

Ms. Evelyn Ankumah, Executive Director, Africa Legal Aid

Ms. Silvana Arbia, Registrar of the International Criminal Court

Ms. Elizabeth Stubbins Bates, David Davies of Llandinam Research Fellow, London School of Economics and Political Science

Mr. Morten Bergsmo, Senior Researcher, International Peace Research Institute, Oslo, Norway

Professor Wim Blockmans, Rector, Netherlands Institute for Advanced Study in the Humanities and Social Sciences

Mr. Rob Bokhoven, Ministry of Justice, The Netherlands

Ms. Helen Brady, Special Tribunal for Lebanon, former Senior Appeals Counsel in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia

Ms. Cynthia Chamberlain, Legal Officer, International Criminal Court

Sara Criscitelli, Prosecutions Coordinator, Office of the Prosecutor, International Criminal Court

Professor Robert Cryer, Birmingham Law School

Judge Pedro R. David, International Criminal Tribunal for the former Yugoslavia

Judge Fatoumata Diarra, First Vice-President of the International Criminal Court

Dr. David Donat-Cattin, Director, International Law and Human Rights Programme, Parliamentarians for Global Action

Mr. Gareth Evans, President and Chief Executive Officer, International Crisis Group

Ms. Claire Fourçans, Office of Public Counsel for the Defense, International Criminal Court

Dr. Fabricio Guariglia, Senior Appeals Counsel, Office of the Prosecutor, International Criminal Court

Mr. Christopher Hall, Amnesty International

Dr. Larissa van den Herik, Leiden University Faculty of Law

Mr. Omer Ismail, Advisor, ENOUGH! Project

Professor Mark W. Janis, University of Oxford and University of Connecticut School of Law

Dr. Chantal Joubert, The Netherlands Ministry of Justice

Judge Hans-Peter Kaul, Second Vice-President, International Criminal Court

Mr. Steven Kay, defense counsel before the International Criminal Tribunal for the former Yugoslavia

Mr. Xavier-Jean Keïta, Principal Counsel of the Office of Public Counsel for the Defence, International Criminal Court

Ms. Cecilia Kleffuer, Coalition for the International Criminal Court

Professor Dr. Geert-Jan Alexander Knoops, University of Utrecht

Judge Akua Kuenyehia, former First Vice-President, International Criminal Court

Judge O-Gon Kwon, Vice-President, International Criminal Tribunal for the former Yugoslavia

Ms. Catherine Marchi-Uhel, Head of Chambers, International Criminal Tribunal for the former Yugoslavia

Judge Theodor Meron, International Criminal Tribunal for the former Yugoslavia

Dr. Guénaël Mettraux, former Associate Legal Officer and former defense counsel, International Criminal Tribunal for the former Yugoslavia

Mr. George Mugwanya, Senior Appeals Counsel, International Criminal Tribunal for Rwanda

Mr. Steven Cash Nickerson, Executive Vice President, CFO and General Counsel, PDS Technical Services

Judge Daniel David Ntanda Nsereko, International Criminal Court

Ms. Laura M. Olson, President, Blackletter Consulting, LLC

Dr. Eugene O'Sullivan, Member of the Rules Committee and former defense counsel, International Criminal Tribunal for the former Yugoslavia

Mr. William Pace, Convener, Coalition for the International Criminal Court

Mr. Robert Petit, Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia

Thomas Wayde Pittman, Senior Legal Officer, International Criminal Tribunal for the former Yugoslavia

Judge Kimberly Prost, International Criminal Tribunal for the former Yugoslavia

Mr. Stephen Rapp, Chief Prosecutor of the Special Court for Sierra Leone

Professor Elies van Sliedregt, Vrije Universiteit Amsterdam

Dr. Göran Sluiter, University of Amsterdam

Dr. Carsten Stahn, Programme Director, Grotius Centre for International Legal Studies, Leiden University-Campus Den Haag

Professor Albert Swart, University of Amsterdam

Mr. Krister Thelin, Member of the United Nations Human Rights Committee

Ms. Lorena Toyos-Flores, Legal Intern, International Criminal Court

Mr. Michaïl Wladimiroff, Wladimiroff & Waling

Washington University and Harris Institute Personnel

Ms. Amitis (Amy) Khojasteh, Cash Nickerson Fellow, Whitney R. Harris World Law Institute

Ms. Linda McClain, Assistant Director of the Whitney R. Harris World Law Institute

Mr. Michael Peil, Associate Dean for International Programs, Washington University School of Law

Mr. B. Don Taylor III, Executive Director of the Whitney R. Harris World Law Institute and Cash Nickerson Fellow

Rapporteurs

Ms. Brianne McGonigle, University of Utrecht

Ms. Rumiana Yotova, Leiden University

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

The Hague Intersessional Experts' Meeting
June 11-12, 2009
Annex #4: Agenda

Thursday, June 11, 2009

8:30-8:45 **Welcome and Opening Remarks**

- **Leila Nadya Sadat**, Washington University School of Law; Director, Harris World Law Institute
- **Carsten Stahn**, Grotius Centre for International Legal Studies, Leiden University-Campus Den Haag

8:45-9:00 **Welcome Address**

- **Mr. J.J. van Aartsen**, Mayor of the City of The Hague

9:15-10:00 **Opening Address: Crimes Against Humanity and International Criminal Law**

- **Justice Richard Goldstone**, Fordham University School of Law; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda

10:15-11:15 **Plenary Session: Report from April Experts' Meeting**

- **M. Cherif Bassiouni**, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute
- **William Schabas**, Director, the Irish Centre for Human Rights, National University of Ireland, Galway
- **Overview of Project; Presentation of April Report, Leila Sadat**, Washington University School of Law

11:15-12:45 **Panel 1: Completing the Work of Rome: The Need for a Crimes Against Humanity Convention**

- **Chair: Juan Méndez**, Scholar-in-Residence, the Ford Foundation
- **M. Cherif Bassiouni**, DePaul University College of Law

- **Mark Janis,** University of Oxford and University of Connecticut School of Law
- **Leila Nadya Sadat**, Washington University School of Law
- **Richard Goldstone**, Fordham University School of Law

14:15-15:45 **Panel 2: Enforcement Issues**

- **Chair: Hans Corell**, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations
- **Sara Criscitelli**, Prosecutions Coordinator, Office of the Prosecutor, International Criminal Court
- **Morten Bergsmo**, Senior Researcher, International Peace Research Institute, Oslo, Norway
- **Robert Cryer**, University of Birmingham
- **Elies van Sliedregt**, Vrije Universiteit Amsterdam

16:00-17:30 **Panel 3: Crimes Against Humanity and the International Criminal Court**

- **Chair: Judge Christine Van den Wyngaert**, International Criminal Tribunal for the former Yugoslavia; International Criminal Court
- **Thomas Wayde Pittman**, Senior Legal Officer, International Criminal Tribunal for the former Yugoslavia
- **Carsten Stahn**, Grotius Centre for International Legal Studies
- **Judge Kimberly Prost**, International Criminal Tribunal for the former Yugoslavia
- **Fabricio Guariglia**, Senior Appeals Counsel, Office of the Prosecutor, International Criminal Court
- **Evelyn Ankumah,** Executive Director, Africa Legal Aid

19:00 **Dinner at Pulchri Studio**

- **Keynote Address: Gareth Evans,** President & CEO of the International Crisis Group

Friday, June 12, 2009

8:30-10:00 **Steering Committee Meeting**

10:00-12:00 **Technical Advisory Session: Discussion of Draft Convention**

- **Chair: Leila Nadya Sadat**, Washington University in St. Louis School of Law
- **Presentation: M. Cherif Bassiouni,** DePaul University College of Law

14:00-16:30 **Technical Advisory Session (Resumed)**

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

Technical Advisory Session in St. Louis
August 21-23, 2009
Annex #5: List of Participants

Steering Committee Members

Chair: Professor Leila Nadya Sadat, Washington University in St. Louis School of Law; Director of the Whitney R. Harris World Law Institute

Professor M. Cherif Bassiouni, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute.

Expert Participants

Mr. Morten Bergsmo, Senior Researcher, International Peace Research Institute, Oslo, Norway

Professor Robert Cryer, Birmingham Law School

Mr. Larry Johnson, former UN Assistant-Secretary-General for Legal Affairs

Dr. Guénaël Mettraux, former Associate Legal Officer and former defense counsel, International Criminal Tribunal for the former Yugoslavia

Dr. Göran Sluiter, University of Amsterdam, Faculty of Law

Washington University and Harris Institute Personnel

Ms. Linda McClain, Assistant Director of the Whitney R. Harris World Law Institute

Mr. Michael Peil, Associate Dean for International Programs, Washington University School of Law

Mr. B. Don Taylor III, Executive Director of the Whitney R. Harris World Law Institute and Cash Nickerson Fellow

Rapporteurs

Ms. McCall Carter, Washington University in St. Louis School of Law

Ms. Margaret Wichmann, Washington University in St. Louis School of Law

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

Annex #6: List of Experts Submitting Comments on the November 2009 Draft Convention

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Mr. Hirad Abtahi, International Criminal Court

Senator Robert Badinter, Hauts-de-Seine Department, French Senate

Mr. Antoine Bernard, International Federation of Human Rights, International Secretariat Division

Judge Gilbert Bitti, International Criminal Court

Professor Gideon Boas, Monash University Law

Professor Neil Boister, University of Canterbury

Professor John Cerone, New England School of Law

Professor Hilary Charlesworth, Australian National University

Mr. Hicham Cherkaoui, Coalition Marocaine pour la Cour Pénale Internationale

Professor Christine Chinkin, The London School of Economics & Political Science

Dr. Philippe Currat, Dr en droit, Avocat au Barreau de Genève

Judge Liu Daqun, International Criminal Tribunal for the former Yugoslavia

Judge Sylvia Fernandez de Gurmendi, International Criminal Court

Professor Yoram Dinstein, Tel Aviv University

Mr. Nick Donovan, Aegis Trust

Professor John Dugard, Centre for Human Rights, University of Pretoria

Mr. Norman Farrell, International Criminal Tribunal for the former Yugoslavia

Mr. Benjamin Ferencz, former Nuremberg Prosecutor

Dr. Susan Harris-Rimmer, Australian National University

Dr. Chantal Joubert, The Netherlands Ministry of Justice

Professor Michael Kelly, Creighton University School of Law

Professor Dorean Koenig, The Thomas M. Cooley Law School

Professor Claus Kress, University of Cologne

Professor Suzannah Linton, The University of Hong Kong

Ms. Renifa Madenga, International Criminal Tribunal for Rwanda

Judge Sanji Mmasenono Monageng, International Criminal Court

Mr. Daryl Mundis, Special Tribunal for Lebanon

Professor Jordan Paust, University of Houston Law Center

Ms. Jelena Pejic, International Committee of the Red Cross

Mr. Robert Petit, Justice Canada, Crimes Against Humanity/War Crimes

Mr. Hugo Relva, Amnesty International

Professor Darryl Robinson, Queen's University

Mr. Eli Rosenbaum, U.S. Department of Justice, Criminal Division

Professor Marco Sassòli, Université de Genève

Professor Susana SáCouto, American University, Washington College of Law

Professor Wolfgang Schomburg, Durham Law School

Professor Albert Swart, University of Amsterdam

Judge Stefan Trechsel, International Criminal Tribunal for the former Yugoslavia

Judge Helmut Tuerk, Vice President, International Tribunal for the Law of the Sea

Professor H. G. van der Wilt, University of Amsterdam

Professor Beth Van Schaack, Santa Clara University School of Law

Ms. Patricia Viseur Sellers, International Criminal Law/Humanitarian Law Consultant

Judge Patricia Wald, U.S. Court Appeals, D.C. Circuit, and International Criminal Tribunal for the former Yugoslavia

Professor Andrew Williams, University of Warwick

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

Washington Conference
March 11-12, 2010
Annex #7: List of Participants

Steering Committee Members

Chair: Professor Leila Nadya Sadat, Washington University in St. Louis School of Law; Director of the Whitney R. Harris World Law Institute

Professor M. Cherif Bassiouni, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute

Ambassador Hans Corell, former UN Under-Secretary-General for Legal Affairs

Justice Richard Goldstone, Georgetown University Law Center; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda

Mr. Juan Méndez, Visiting Professor, Washington College of Law, American University, Washington D.C.

Professor William Schabas, Director, the Irish Centre for Human Rights, National University of Ireland, Galway

Judge Christine Van den Wyngaert, International Criminal Court

Expert Participants

Ms. Elizabeth Abi-Mershed, Assistant Executive Secretary, Inter-American Commission on Human Rights

Mr. Mike Abramowitz, United States Holocaust Memorial Museum

Mr. Anees Ahmed, Extraordinary Chambers in the Courts of Cambodia

Professor Payam Akhavan, McGill University

Ms. Elizabeth Andersen, Executive Director, American Society of International Law

Ms. Evelyn Ankumah, Executive Director, Africa Legal Aid

Mr. James Apple, President, International Judicial Academy

Ms. Cecile Aptel, International Justice Expert

Judge Micki I. Aronson, Administrative Appeals Judge, U.S. Social Security Administration

Professor John Barrett, St. John's University School of Law

Ms. Fatou Bensouda, Deputy Prosecutor, International Criminal Court

Mr. John Berger, Cambridge University Press

Mr. Gilbert Bitti, International Criminal Court

Dr. Michael Bohlander, Durham University Law School

Ms. Andrea Bosshard, First Secretary, Legal and Political Section, Embassy of Switzerland

Mr. Serge Brammertz, Prosecutor, International Criminal Tribunal for the former Yugoslavia

Mr. William Burke-White, U.S. Department of State

Mr. Scott Carlson, U.S. Department of State

Professor David Crane, former Chief Prosecutor, Special Court for Sierra Leone, Syracuse University College of Law

Professor Robert Cryer, Birmingham Law School

Judge Pedro David, International Criminal Tribunal for the former Yugoslavia

Ms. Mélanie Deshaies, University of Montreal

Mr. Richard Dicker, Human Rights Watch

Professor Yoram Dinstein, Tel Aviv University

Mr. Nick Donovan, Aegis Trust

Professor Max du Plessis, University of KwaZulu-Natal; Institute for Security Studies

Mr. Mohamed El Zeidy, International Criminal Court

Mr. Jerry Fowler, Save Darfur Coalition

Ms. Julia Fromholz, Human Rights First

Ms. Heloisa Griggs, Counsel, U.S. Senate Committee on the Judiciary, Subcommittee on Human Rights and the Law

Mr. Morton Halperin, Senior Advisor, Open Society Institute

Mr. Aung Htoo, General Secretary, Burma Lawyers Council

Mr. Larry Johnson, former UN Assistant-Secretary-General for Legal Affairs

Mr. Joseph Kamara, Acting Prosecutor, Special Court for Sierra Leone

Professor Michael Kelly, Creighton University School of Law

Mr. Michael Kleinman, Humanity United

Mr. Neil Kritz, United States Institute of Peace

Mr. Magnus Lennartsson, The Dag Hammarskjöld Foundation

Mr. Edward Luck, International Peace Institute

Mr. Henk Marquart Sholtz, Secretary-General, International Association of Prosecutors

Dr. Guénaël Mettraux, Defence Counsel, International Criminal Tribunal for the former Yugoslavia

Professor Sean Murphy, George Washington University Law School

Ms. Catherine Newcombe, U.S. Department of Justice

Mr. Steven Cash Nickerson, Executive Vice President, CFO and General Counsel, PDS Technical Services

Judge Daniel David Ntanda Nsereko, International Criminal Court

Professor Hèctor Alonso-Olàsolo, Utrecht University

Ms. Laura Olson, Senior Counsel, The Constitution Project

Mr. William Pace, Coalition for the International Criminal Court

Mr. Gregory Peterson, The Robert H. Jackson Center

Ambassador Constancio Pinto, Ambassador of the Democratic Republic of Timor-Leste to the United States

Judge Árpád Prandler, International Criminal Tribunal for the former Yugoslavia

Ambassador Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues

Mr. Steve Riskin, United States Institute of Peace

Professor Darryl Robinson, Queen's University

Mr. Eli Rosenbaum, U.S. Department of Justice

Professor Michael Scharf, Case Western Reserve University School of Law

Professor David Scheffer, Northwestern University

Professor Dinah Shelton, George Washington University Law School

Professor Jane Stromseth, Georgetown University Law Center

Mr. Frederick Swinnen, International Criminal Tribunal for the former Yugoslavia

Mr. Colin Thomas-Jensen, The ENOUGH! Project

Mr. Igor Timofeyev, Paul, Hastings, Janofsky & Walker LLP

Judge Bakhtiyar Tuzmukhamedov, International Criminal Tribunal for Rwanda

Mr. Rob van Bokhoven, The Netherlands Ministry of Justice

Professor Elies van Sliedregt, Vrije Universiteit Amsterdam

Ms. Francesca Varda, Coalition for the International Criminal Court

Ms. Patricia Viseur Sellers, former Legal Advisor for Gender-Related Crimes, International Criminal Tribunal for the former Yugoslavia

Mr. John Washburn, Convener, American Non-Governmental Organizations Coalition for the International Criminal Court

Judge Inéz Mónica Weinberg de Roca, President, UN Appeals Tribunal

Ambassador Christian Wenaweser, Permanent Representative of Liechtenstein to the UN; President, Assembly of States Parties to the Rome Statute of the International Criminal Court

Ms. Mary Werntz, International Committee of the Red Cross

Ambassador John Clint Williamson, former U.S. Ambassador-at-Large for War Crimes Issues

Mr. Lawrence Woocher, United States Institute for Peace

HRH Prince Zeid Ra'ad Zeid Al-Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States

Mr. Mohamed El Zeidy, International Criminal Court

Ambassador Urs Ziswiler, Ambassador of Switzerland to the United States

Mr. Joseph Zogby, Chief Counsel to U.S. Senator Richard Durbin

Washington University and Harris Institute Personnel

Chancellor Mark S. Wrighton, Washington University in St. Louis

Dean Kent Syverud, Washington University School of Law

Mr. B. Don Taylor III, Executive Director of the Whitney R. Harris World Law Institute and Cash Nickerson Fellow

Ms. Erika Detjen, Cash Nickerson Fellow, Whitney R. Harris World Law Institute

Mr. Jason Meyer, Cash Nickerson Fellow, Whitney R. Harris World Law Institute

Ms. Margaret Wichmann, Cash Nickerson Fellow, Whitney R. Harris World Law Institute

Brookings Institution Personnel

Mr. Strobe Talbott, President

Mr. Martin Indyk, Vice President for Foreign Policy

Ms. Erin Bourgois, Project Administrator

Ms. Elizabeth Ferris, Senior Fellow

Ms. Jacqueline Geis, Associate Director of Development, Foreign Policy

Ms. Natalie Lempert, Intern

Mr. Theodore Piccone, Senior Fellow

Mr. Andrew Solomon, Deputy Director

Ms. Chareen Stark, Senior Research Assistant

Ms. Erin Williams, Rapporteur

Rapporteurs

Ms. Rebecca Abou-Chedid, Georgetown University

Mr. Tajesh Adhihetty, Georgetown University

Mr. Justin Fraterman, Georgetown University

Mr. Yeghishe Kirakosyan, Georgetown University

Mr. Tom Odell, Georgetown University

Ms. Sarah Rivard, Georgetown University

Mr. Paul Schmitt, Georgetown University

Mr. Marc Sorel, Georgetown University

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

Washington Conference
March 11-12, 2010
Annex #8: Agenda

Thursday, March 11, 2010

9:00-9:30 **Welcome and Opening Remarks**

- **Strobe Talbott**, President, The Brookings Institution
- **Mark S. Wrighton**, Chancellor, Washington University in Saint Louis
- **Presentation of the Global Philanthropy Award to Steven Cash Nickerson**

9:30-10:00 **Opening Address**

- **Introduction: William A. Schabas**, Director, the Irish Centre for Human Rights, National University of Ireland, Galway
- **Speaker: Mary Werntz**, Head of Delegation, Regional Delegation for the United States and Canada, International Committee of the Red Cross

10:00-11:00 **Plenary Session**

- **Introduction to the Crimes Against Humanity Initiative and Presentation of the Draft Convention**
- **Leila Nadya Sadat**, Washington University School of Law, Henry H. Oberschelp Professor of Law; Director, Harris World Law Institute
- **Remarks of Whitney R. Harris**
- **M. Cherif Bassiouni**, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute

11:15-12:45 **Panel 1: Crimes Against Humanity and Gender Justice**

- **Chair: Judge Christine Van den Wyngaert**, International Criminal Court
- **Elizabeth Abi-Mershed**, Inter-American Commission on Human Rights
- **Evelyn A. Ankumah,** Africa Legal Aid
- **David M. Crane**, Syracuse University; former Chief Prosecutor, Special Court for Sierra Leone

- **Patricia Viseur Sellers**, former Legal Advisor for Gender-Related Crimes, International Criminal Tribunal for the former Yugoslavia
- **Judge Inéz Mónica Weinberg de Roca**, UN Appeal Tribunal

12:45-2:00 **Lunch: Carnegie Endowment for International Peace**

- **Introduction: Leila Nadya Sadat**, Washington University School of Law, Henry H. Oberschelp Professor of Law; Director, Harris World Law Institute
- **Speaker: Ambassador Stephen J. Rapp**, U.S. Ambassador-at-Large for War Crimes Issues

2:00-3:30 **Panel 2: Peace and Justice Dilemmas**

- **Chair: Justice Richard J. Goldstone**, Georgetown University Law Center; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda
- **Richard Dicker**, Human Rights Watch
- **Elizabeth Ferris**, The Brookings Institution
- **Jerry Fowler**, The Save Darfur Coalition
- **Max du Plessis**, University of KwaZulu-Natal

3:45-5:15 **Panel 3: Filling the Gaps: Facilitating Effective Interstate Cooperation in the Prevention and Punishment of Crimes Against Humanity**

- **Chair: Hans Corell**, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations
- **Serge Brammertz**, Chief Prosecutor, International Criminal Tribunal for the former Yugoslavia
- **Yoram Dinstein**, Tel Aviv University
- **Robert Cryer**, Birmingham Law School
- **Laura Olson**, The Constitution Project
- **Darryl Robinson**, Queen's University

7:00 **Dinner** The Dupont Hotel

- **Introduction**: **Kent D. Syverud**, Washington University School of Law, Dean and Ethan A.H. Shepley University Professor
- Award Ceremony honoring the Crimes Against Humanity Initiative Steering Committee
- Presentation of the Whitney R. Harris World Law Institute World Peace Through Law Award to M. Cherif Bassiouni

Friday, March 12, 2010

10:00-11:30 **Panel 4: Crimes Against Humanity and U.S. Policy**

- **Chair: Andrew Solomon**, The Brookings Institution
- **Elizabeth Andersen**, American Society of International Law
- **Larry D. Johnson**, Columbia Law School, former UN Assistant-Secretary-General for Legal Affairs
- **Michael P. Scharf**, Case Western Reserve University School of Law
- **John Clint Williamson**, former U.S. Ambassador-at-Large for War Crimes Issues
- **Joseph R. Zogby**, Chief Counsel to U.S. Senator Richard Durbin

11:30-12:45 **Lunch** Carnegie Endowment for International Peace

- **Introduction: Justice Richard J. Goldstone**, Georgetown University Law Center; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda
- **Speaker: Ambassador Christian Wenaweser**, Permanent Representative of Liechtenstein to the UN; President, Assembly of States Parties to the Rome Statute of the International Criminal Court

12:45-2:15 **Panel 5: Crimes Against Humanity and State Responsibility to Prevent**

- **Chair: William A. Schabas**, Director, the Irish Centre for Human Rights, National University of Ireland, Galway
- **Payam Akhavan**, McGill University
- **Edward C. Luck**, International Peace Institute
- **Judge Daniel David Ntanda Nsereko**, International Criminal Court
- **Dinah L. Shelton**, George Washington University Law School
- **David J. Scheffer**, Northwestern University; former U.S. Ambassador-at-Large for War Crimes Issues

2:30-4:00 **Panel 6: Universal Jurisdiction, Complementarity and State Capacity Building**

- **Chair: Juan E. Méndez**, Visiting Professor, Washington College of Law, American University
- **Gilbert Bitti**, International Criminal Court
- **Francesca Varda**, Coalition for the International Criminal Court
- **Mohamed El Zeidy**, International Criminal Court

4:00-5:30 **Plenary Session: Closing Ceremony and Presentation of the Conference Outcome Document**

- **Chair: Leila Nadya Sadat**, Washington University School of Law Henry H. Oberschelp Professor of Law; Director, Harris World Law Institute
- **M. Cherif Bassiouni**, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute
- **Hans Corell**, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations
- **Justice Richard J. Goldstone**, Georgetown University Law Center; former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda
- **Juan E. Méndez**, Visiting Professor, Washington College of Law, American University, Washington D.C.
- **William A. Schabas**, Director, the Irish Centre for Human Rights, National University of Ireland, Galway
- **Judge Christine Van den Wyngaert**, International Criminal Court

Washington University School of Law
Whitney R. Harris World Law Institute
Crimes Against Humanity Initiative

Technical Advisory Session in Chicago
May 10-11, 2010
Annex #9: List of Participants

Participants

Professor M. Cherif Bassiouni, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute

Mr. Larry Johnson, former UN Assistant-Secretary-General for Legal Affairs

Professor Leila Nadya Sadat, Washington University in St. Louis School of Law; Director of the Whitney R. Harris World Law Institute

Mr. Neill Townsend, Staff Attorney, Circuit Court of Cook County - Office of the Chief Judge, Cash Nickerson Fellow