



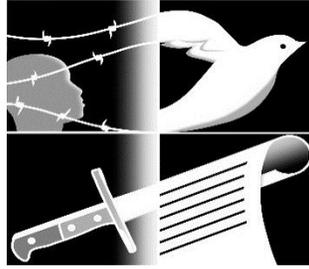
**Comments and Observations
on the 2017 Draft Articles on Crimes against Humanity
as Adopted on First Reading at the Sixty-ninth Session of
the International Law Commission**

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In Memoriam **Professor M.
Cherif Bassiouni (1937-2017)**

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COMMENTS AND OBSERVATIONS ON THE 2017 DRAFT ARTICLES ON CRIMES AGAINST HUMANITY AS ADOPTED ON FIRST READING AT THE SIXTY-NINTH SESSION OF THE INTERNATIONAL LAW COMMISSION

Introduction

The International Law Commission's 2017 Draft Articles provide an excellent point of departure for the negotiation of a new global treaty on crimes against humanity.¹ The Draft Articles touch upon most of the essential points a new convention will require, and appear to be generally acceptable to States, as evidenced by the increasing numbers of States approving of or neutral towards the Commission's work.² This is no small achievement. When the *Crimes Against Humanity Initiative* was launched in 2008, there was skepticism about the need for a new treaty and the utility of the exercise, even amongst those who recognized its potential value. It took years of writing, speaking, and conversations, both public and private, before the idea caught on. It helped that the *Initiative* consulted individuals from all over the world in elaborating its draft; and the fact that there was an actual text that could be examined proved useful as well, particularly after the publication of the *Initiative's 'Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity'*.³ What has really made the difference in international enthusiasm for the project has been the work of the Commission, however, which is thus to be commended.

The Commission's draft is significantly shorter than the *Proposed Convention*, but incorporates many of the same elements: it complements and reinforces the International Criminal Court (ICC) Statute by retaining in Draft Article 3 the text of Article 7 of the Rome Statute; it has a separate focus on prevention as well as punishment; it incorporates a strong procedural regime for extradition and mutual legal assistance based upon modern U.N. conventions on corruption and transnational organized crime; it has robust jurisdictional and *aut dedere aut judicare* provisions, including a fine rendition of the so-called 'triple alternative' in

¹ Int'l Law Comm'n, *Report on the Work of Its Sixty-ninth Session*, U.N. Doc. A/72/10 (2017), at p. 10 [hereafter 'ILC 2017 Draft Articles'].

² 'Compilation of Government Reactions to the UN International Law Commission's Project on Crimes Against Humanity', The Whitney R. Harris World Law Institute (November 2017), available at <http://law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2017/12/6th-Committee-Governmental-Responses-Dec.-2017.pdf>.

³ 'Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity', in L.N. Sadat (ed.) *Forging a Convention for Crimes Against Humanity* (2nd edn., Cambridge University Press, 2013), 323-344 [hereafter '*Proposed Convention*']. The *Proposed Convention* can also be found on page 403 in French and on page 503 in Spanish. These texts, as well as Arabic, Chinese, German, Portuguese, and Russian translations, are available online at <http://law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/>. For the genesis of the project, see M.C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law* (1994) 457-494.

Draft Article 10; and it has a dispute resolution clause (Draft Article 15) which could be invoked before the International Court of Justice (or elsewhere) to resolve disputes regarding the treaty's interpretation and application. We also commend the 2017 Draft Articles' inclusion of liability for legal persons in Draft Article 6(8); its focus on victims (Draft Article 12); and provisions on the fair treatment of the alleged offender (Draft Article 11).

Nonetheless, as the Commission continues its work, we wish to offer some thoughts about the 2017 Draft Articles and suggestions that the Commission could consider. We remain concerned that, in spite of the reference to *jus cogens* now found in the Draft Preamble, the Commission's text does not acknowledge the important residual role of customary international law and *jus cogens* norms in interpreting a new convention on crimes against humanity. Although many core obligations of States are codified in the Draft Articles, it is important to underscore that they have not been *created* by the treaty but are already present in customary international law. After all, the origins of crimes against humanity are found in the Preamble of the 1899 and 1907 Hague Conventions, the Charter of the International Military Tribunal at Nuremberg, and the Statutes of the *ad hoc* international criminal tribunals. The proposed new treaty builds upon this deep reservoir of customary international law.

As a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found in *Furundžija*, a norm's *jus cogens* status results in a series of consequences, including its non-derogable nature, even in times of emergency,⁴ the non-applicability of statutes of limitations,⁵ that it 'must not be excluded from extradition under any political offence exemption',⁶ and the prohibition against 'expelling, returning or extraditing a person to another State where there are substantial grounds for believing' that person would be subjected to a violation of the norm.⁷ The Tribunal noted:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [...] In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. [...]

⁴ Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1-T, 10 December 1998, Trial Chamber II, International Criminal Tribunal for the former Yugoslavia, para. 144 (citations omitted). See generally W.A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2nd edn., Cambridge University Press, 2008), at pp. 101-102.

⁵ *Furundžija* Judgment, *supra* note 4, para. 157

⁶ *Ibid.*

⁷ *Ibid.* para. 144.

Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.⁸

1. Draft Preamble

The preamble is a critical element of any treaty as it guides courts, tribunals, academics, and even government officials as to the understanding of the instrument's 'object and purpose', which will be the basis of interpreting any ambiguous language.⁹ Thus, it is important that the preamble not only set forth the reasons for the convention's adoption, but situate it as part of a system of international criminal justice. The preamble also ties into the expressive function of international criminal law, allowing the reader to understand the important social values the treaty enshrines and protects.¹⁰

The 2017 Draft Preamble emerging from the Commission took into account the comments of Members and now contains an explicit reference to the Rome Statute and to the *jus cogens* nature of crimes against humanity. This signals the intended complementarity of the ILC's Draft Articles with the Rome Statute, which has been a major preoccupation of States and civil society as the new contemplated treaty has taken shape. It also emphasizes the peremptory and non-derogable character of the prohibition, and offers at least a nod to the idea that they cannot be lawfully amnestied.¹¹

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

*Declaring that in cases not covered by the present Convention or by other international agreements, the human person remains under the protection and authority of the principles of international law derived from established customs, from the laws of humanity, and from the dictates of the public conscience, and continues to enjoy the fundamental rights that are recognized by international law.*¹²

⁸ *Ibid.* paras. 155-156. See also M.C. Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', 59 *Law and Contemporary Problems* (1996) 63-74; A. Cassese, 'The Hierarchy of Rules in International Law: The Role of Jus Cogens', in *International Law* (2nd edn., Oxford University Press, 2004), pp. 198-212.

⁹ Art. 31(1), (2) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

¹⁰ See D. M. Amann, 'Group Mentality, Expressivism, and Genocide', 2 *International Criminal Law Review* (2002) 92-143.

¹¹ Conversely, it is not clear why the phrase 'prevented in conformity with international law' was added, as it seems to state the obvious.

¹² *Proposed Convention*, *supra* note 3, Preamble.

Given that most commentators tie the emergence of crimes against humanity at Nuremberg to the Martens clause, it seems odd not to include a provision like this in the preamble of a new treaty on crimes against humanity. Professor Theodor Meron has observed the ‘enduring legacy’ and ‘continuing currency’ of the provision, which has been included not only in the two Hague Conventions but restated in modern humanitarian law treaties and by conferences and military manuals.¹³ Many experts consulted by the *Initiative* warned of the need not to prejudice the continuing development of customary international law. Including a Martens clause in the preamble could respond to this concern and reinforce Draft Article 3(4).

In addition, from a drafting perspective, some of the language seems awkward. In particular, clause 2 could be modified to refer to the ‘wellbeing of the peoples of the world’.

2. Definition of the Crime

The Commission took the position that it would adopt Article 7 of the Rome Statute as the definition of crimes against humanity in the new convention.¹⁴ There are many reasons to take this approach even though several participants in our project, in the seminars held after the Commission’s meetings in Geneva during the past two years, and even Members of the Commission themselves, have expressed varying levels of frustration with the text of Article 7.¹⁵ After extensive discussion, we concluded that a new model convention would either have to leave the definition open, along the lines of Article 5 of the Convention on Enforced Disappearance (‘crimes against humanity as defined in applicable international law’) or essentially track the Rome Statute definition, which was negotiated by 165 States and has now been adopted by 123. Those ultimately negotiating the new treaty may take a different view; but it seemed most sensible to build upon the Rome Statute for this and many other elements of a new inter-State convention in order to solidify and build upon the ‘Rome consensus’.

In implementing the new treaty, however, States may vary the terms of the text, which can be seen as a ‘floor’ rather than a ‘ceiling.’ Thus, they need not ‘supercopy’ Draft Article 3 verbatim in order to benefit from and participate in the treaty regime. States have often done this with other international criminal law conventions, including the Rome Statute.¹⁶ The

¹³ T. Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *American Journal of International Law* (2000) 78-89, at pp. 78-79.

¹⁴ The Commentary to Draft Article 3(4) notes the wide acceptance of the Rome Statute definition. See ILC 2017 *Draft Articles*, *supra* note 1, at p. 31, para. 8. This was also the basis for the *Proposed Convention’s* definition.

¹⁵ They criticized the ‘civilian population’ requirement (as has this author), the policy element, and the definitions of gender crimes, and particularly the odd phrasing of Article 7(3). L.N. Sadat, ‘A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity’, in L.N. Sadat (ed.) *Forging a Convention for Crimes Against Humanity* (2nd edn., Cambridge University Press, 2013) 323-344, para. 27.

¹⁶ See, e.g., French Penal Code, C. PÉN. Art. 212-1 (Fr.) (requires ‘a concerted plan’ to prove criminal responsibility for crimes against humanity, as opposed to a ‘State or organizational policy’); French Penal Code, C. PÉN. Art. 211-1 (Fr.) (includes political groups in the definition of genocide); Canadian Criminal Code, Canada: Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24), 2000 (includes multiple textual variations, such as excluding the requirement that persecution be committed ‘in connection with’ another crime under the statute); Spain: Penal Code arts. 607-616 bis, B.O.E., 24. November 1995, revised 24 April 2015 (Sp.) (includes political groups in the definition of genocide). See also sources cited *infra* note 23 (varying the definition of persecution. See also A.J.

Commentary suggestion that '[a]ny elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance' therefore seems at odd with State practice.¹⁷

Yet there are certain aspects of Article 7 that are not found in customary international law and seem particularly tied to the Rome Statute's negotiation.¹⁸ These could perhaps be deleted from Article 3. The first is Rome Statute Article 7(3)'s definition of 'gender' which was inserted purely as part of a negotiating compromise and appears to have little or no substantive meaning.¹⁹

The second is language in Draft Article 3(1)(h) (persecution) which now speaks of persecutory acts 'in connection with [crimes against humanity] ... genocide or war crimes'. This only partially tracks Article 7(1)(h) which refers to 'any crimes with the jurisdiction of the Court', which now includes aggression. As such, the ILC's codification provides for narrower jurisdiction than the Rome Statute. Most major precedents²⁰ omit the requirement that persecution must be linked or connected to another international crime, as do subsequent iterations of it.²¹ It is also inconsistent with the case law of the international tribunals²² and the

Carrillo & A.K. Nelson, 'Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction', 46 *George Washington International Law Review* (2014) 481-530 (showing differences between national laws on crimes against humanity).

¹⁷ See ILC 2017 *Draft Articles*, *supra* note 1, at p. 45, para. 41.

¹⁸ During our meetings and subsequent seminars and conferences on the Commission's work many proposals were advanced to remove aspects of the Rome Statute definition that seem tied to Article 7's status as a crime defined, by its own terms, '[f]or the purpose of this Statute'.

¹⁹ See, e.g., V. Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court', 16 *International Feminist Journal of Politics* (2014) 563-580.

²⁰ See, e.g. Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, done at Berlin, 20 December 1945, Art. II(1)(c) ('(a) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated'.); Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 5(h) ('Persecutions on political, racial and religious grounds'.); Statute of the International Criminal Tribunal for Rwanda, Art. 3(h) ('Persecutions on political, racial and religious grounds'.).

²¹ See, e.g., Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, Art. 2(h) ('Persecution on political, racial, ethnic or religious grounds;'); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 5 ('persecutions on political, racial, and religious grounds'); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII) (27 June 2014), available online at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> [hereafter 'Malabo Protocol'], Art. 28C(1)(h) ('Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law').

²² See, e.g., Prosecutor v. Kupreškić, Judgment, Case No. IT-95-16, 14 January 2000, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, paras. 580-581, 615 ('[Rome Statute] Article 7(1)(h) is not consonant

national legislation of many States.²³ It is largely understood that the ‘in connection with’ requirement was included in the Rome Statute as a jurisdictional threshold.²⁴ We recommend the deletion of this language and the codification of the crime of persecution as an independent crime, following customary international law.

3. Immunities

As now noted in the 2017 Draft Preamble, crimes against humanity are *jus cogens* offenses under international law. It is clear under both treaty and customary international law that there is no immunity *ratione materiae* for crimes against humanity.²⁵ This covers immunities in national law as well as before foreign criminal jurisdictions. It would thus seem uncontroversial to include a provision tracking Article 27(1) of the Rome Statute in the new treaty. If it is left out, there will inevitably be States that argue that immunity is permissible, as a minority of Law Lords did in the *Pinochet* case, and which seems also to be the controversial new position of the African Union in the Malabo Protocol,²⁶ which would upend more than 70 years of customary international law. It is thus a positive development that Draft Article 6(5) addresses the question explicitly.

At the same time, the language of Draft Article 6(5) refers only to a ‘person holding an official position’, and does not track either Article IV of the Genocide Convention, the 1950 Nuremberg Principles, or Article 27(1) of the Rome Statute. For the same reasons that the *Initiative* – and the Commission – used Article 7 of the Rome Statute to define crimes against humanity, it may be preferable to use the already negotiated and widely accepted language of Article 27(1) in lieu of the text currently proposed. Paragraph 31 of the Commentary to Draft Article 6(5) takes the view that this provision only prevents an offender from raising ‘the fact of his or her official position as a substantive defence so as to negate any criminal responsibility’²⁷ and contains a cryptic reference that this provision ‘is without prejudice to the Commission’s work on the topic “Immunity of State officials from foreign criminal jurisdiction”’.²⁸ It would be

with customary international law. ... The Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. ... A narrow definition of persecution is not supported in customary international law’); Prosecutor v. Nuon Chea & Khieu Samphan, Case No. 002/19-09-2007/ECCC/TC, 7 August 2014, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, paras. 431-432 (rejecting the argument that a link must exist between the acts of persecution and another underlying offence within the jurisdiction of the ECCC).

²³ See, e.g., Canada, Crimes Against Humanity and War Crimes Act, 2000, S.4(3) and 6(3); Republic of Congo, Loi N°8-98 du 31 Octobre 1998, Article 6(h); French Penal Code, C. PÉN., Art. 212-1(8); Germany, Code of Crimes against International Law, 2002, Section 7(10); Spain, Código Penal, Artículo 607 bis (1)(1°).

²⁴ See, e.g., K. Kittichaisaree, *International Criminal Law* (Oxford University Press, 2002), at p. 121; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2016), at pp. 194-202.

²⁵ L.N. Sadat, ‘Exile, Amnesty and International Law’, 81 *Notre Dame Law Review* (2006) 955-1036.

²⁶ Malabo Protocol, *supra* note 21, Art. 46A *bis*.

²⁷ See ILC 2017 *Draft Articles*, *supra* note 1, at p. 69, para. 31.

²⁸ *Ibid.*

unfortunate if a consequence of the Commission's work on a new treaty for crimes against humanity was to roll back understandings about the irrelevance of official capacity as a defense to a prosecution for crimes against humanity.

The *Initiative* took the position that procedural immunities should be addressed by the new treaty, following Article 27(2) of the Rome Statute. The Commission in the current Draft Articles seems to have taken a more conservative position. Yet its 1996 Draft Code of Crimes took a different view. Article 7 of the Commission's prior draft provided:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.²⁹

The Commentary adds:

Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its Judgment, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. *The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.*³⁰

4. Amnesties

The paragraphs of the Third Report³¹ that addressed amnesties (paras. 285-297) suggested the lawfulness of amnesties granted to persons accused of committing crimes against humanity. This was a surprising development. The Third Report notes that 'no international treaty explicitly prohibits amnesties',³² observing, in contrast, that Article 6(5) of Additional

²⁹ *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, in Report of the International Law Commission on the Work of its Forty-Eighth Session (A/51/10) (1996), at p. 26.

³⁰ *Ibid.* pp. 26-27, para. 6 (emphasis added).

³¹ Sean Murphy (Special Rapporteur on Crimes Against Humanity), *Third Report on Crimes Against Humanity*, U.N. Doc.A/CN.4/704, 23 January 2017, paras. 285-297 [hereafter '*Third Report*'].

³² *Ibid.* para. 286.

Protocol II suggests they are lawful. Yet APII has little to do with crimes against humanity,³³ and does not in any event support the grant of amnesty for the commission of *international crimes*, as the ICRC,³⁴ and others have noted.³⁵ In 2009 the High Commissioner for Human Rights concluded:

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

An amnesty that exempted crimes against humanity from punishment and/or civil remedies would also be inconsistent with States parties’ obligations under several comprehensive human rights treaties that do not explicitly mention this international crime, including the International Covenant on Civil and Political Rights and the American Convention on Human Rights, but which have been interpreted to require punishment of crimes against humanity.³⁶

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

It is widely agreed . . . that international treaties that require States Parties to prosecute a defined offense, such as genocide or torture, would be breached by an amnesty exempting perpetrators of these offenses from criminal prosecution. Similarly, . . . treaties that explicitly require States Parties to provide a remedy for

³³ L.N. Sadat, ‘Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement’, 31 *Emory International Law Review* (2016) 197-270, at pp. 199-213.

³⁴ ‘Customary IHL: Rule 159. Amnesty’, International Committee of the Red Cross, available online at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159.

³⁵ L.N. Sadat, ‘Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable’, in S. Macedo, *Universal Jurisdiction* (2004), 193-213, at pp. 202-203; *see also* W. Burke-White, ‘Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation’, 42 *Harvard International Law Review* (2001) 467-533, at pp. 530-531; N. Roht-Arriaza, ‘After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity’, 37 *Human Rights Quarterly*, UC Hastings College of the Law Faculty Scholarship (2015) 341-382.

³⁶ U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, U.N. Doc. HR/PUB/09/1, U.N. Sales No. E.09.XIV.1 (2009), available online at http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf (citations omitted).

violations of rights enumerated therein have been interpreted implicitly to proscribe amnesties that prevent victims from accessing an effective remedy.³⁷

It is true that this does not address the question of the illegality of amnesties for crimes against humanity under customary international law; yet, the Third Report did not cite any cases in which an amnesty for crimes against humanity has been sustained by any national or international court, and recent decisions point in the opposite direction,³⁸ with some limited exceptions.³⁹ Although there are doctrinal writings suggesting that amnesties might be lawful, even for crimes against humanity,⁴⁰ the only exception generally admitted has been where a State (such as South Africa) has engaged in a comprehensive and democratic process that resulted in the possibility of domestically issued conditional amnesties.

Article 53 of the Rome Statute is thought to be a grudging admission that the ‘interests of justice’ may require the international community to respect a carefully negotiated solution that includes conditional amnesties, such as those negotiated during South Africa’s transition from apartheid.⁴¹ Yet increasing dissatisfaction with the South African transition from apartheid has been voiced in South Africa,⁴² and the ICC Prosecutor has been clear that such a situation would

³⁷ D. Orentlicher, ‘Immunities and Amnesties’, in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2nd edn., Cambridge University Press, 2013) 202-222, at p. 217.

³⁸ See, e.g., Prosecutor v. Kallon & Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, Appeals Chamber, Special Court for Sierra Leone, paras. 67-74, 87-89; D. De Vos, ‘Corporate Accountability: Dutch Court Convicts Former “Timber Baron” of War Crimes in Liberia’, Blog of the European University Institute, 24 April 2017, available online at <https://me.eui.eu/dieneke-de-vos/blog/corporate-accountability-dutch-court-convicts-former-timber-baron-of-war-crimes-in-liberia/> (‘finding that a national amnesty that precludes prosecutions of war crimes and crimes against humanity would be ‘incompatible with the international obligation to prosecute such crimes’’). An official English translation of the case is available online at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:2650>. Although States still suggest or adopt amnesty measures, courts often strike them down, especially if they apply to crimes against humanity or the most serious war crimes. See, e.g., P. Bradfield, ‘Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo’, 15 *Journal of International Criminal Justice* (2017) 827-855.

³⁹ See, e.g., N. Roht-Arriaza, ‘After Amnesties are Gone’, *supra* note 35, at pp. 354-355 (noting amnesties sustained only due to the operation of the legality principle); see also Prosecutor v. Fofana, Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, (SCSL-2004-14-AR72(E)), 25 May 2004, para. 3 (noting States’ duty to prosecute crimes whose prohibition has the status of *jus cogens*).

⁴⁰ See, e.g., M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (2009), at pp. 206-208; M. Pensky, ‘Amnesty on Trial: Impunity, Accountability, and the Norms of International Law’, 1 *Ethics and Global Politics* (2008) 1-40.

⁴¹ See M. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 32 *Cornell International Law Journal* (1999) 507-527; Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Oxford: Hart Publishing, 2008).

⁴² See, e.g., M. Mamdani, ‘Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)’, 32 *Diacritics* (2002) 32-59; Eugene Baron, ‘Remorse and Repentance Stripped of its Validity. Amnesty Granted by the Truth and Reconciliation Commission of South Africa’, 41 *Studia Historiae Ecclesiasticae* (2015) 169-184; C. Corliss, ‘Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa’s Cradock Four Case’, 21 *Michigan State International Law Review* (2013) 273-299.

be ‘exceptional’. No such exceptional case has been recognized to date. Thus, to the extent the law has evolved since 1998, it seems to have crystallised the prohibition *against* amnesties for crimes against humanity, not supported their legality.⁴³

The ILC did not need to address the question of amnesties under customary international law because the 2017 Draft Articles only speak to the obligations that the convention itself will impose, not all theoretical possibilities related to the question of amnesty for international crimes. In the two scenarios most relevant to the Draft Articles, the legality of an amnesty for crimes against humanity granted by a State Party to the convention, and the legality of an amnesty before a foreign criminal jurisdiction that is a Party to the convention, the amnesty would presumably be invalid.⁴⁴ The Commentary to Draft Article 10 states that ‘the obligation upon a State to [investigate and prosecute] may conflict with the ability of the State to implement an amnesty . . .’.⁴⁵ This language seems problematic in light of current State and international practice and the *jus cogens* nature of crimes against humanity.⁴⁶ It implies the lawfulness of amnesties for crimes against humanity, a proposition unsupported by customary international law and State practice.

As the Commission has itself noted, the International Court of Justice held in *Belgium v. Senegal* that ‘prosecution is an international obligation... the violation of which is a wrongful act engaging the responsibility of the State’.⁴⁷ It may thus be useful for the Commission to include a carefully drafted provision prohibiting States Parties to the convention from granting amnesties for crimes against humanity in the Draft Articles. Such a provision could assist States in periods of transition by reinforcing the need for accountability for the most serious crimes under international law. There were proposals for such a provision during the negotiation of the Convention on Enforced Disappearance, but agreement could not be reached.⁴⁸ This may indicate the presence of *practical* obstacles to achieving consensus on this point; but a survey of the case law and State practice does not suggest *legal* obstacles to doing so.

⁴³ See, e.g., Amnesty International, *International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity* (2015), available online at <https://www.amnesty.org/en/documents/ior40/1227/2015/en/>, at pp. 15-23. The Colombian peace process is often invoked as State practice supporting the grant of amnesties, but it involves a complex process (akin to South Africa) which eschewed both uniform prosecutions and blanket amnesties in favor of a variety of accountability mechanisms which are contingent upon the seriousness of the offense. In particular, the most serious crimes under international law are to be prosecuted and punished, including crimes against humanity. See, e.g., N.C. Sanchez, ‘Post-conflict in Colombia (18): Amnesty and pardon in the peace process, democraciaAbierta’, 22 Sept. 2016, available at www.opendemocracy.net/democraciaabierta/nelson-camilo-s-nchez/post-conflict-in-colombia-18-amnesty-and-pardon-in-peace-pro.

⁴⁴ Sadat, ‘Exile, Amnesty and International Law’, *supra* note 25.

⁴⁵ ILC 2017 *Draft Articles*, *supra* note 1, at p. 86, para. 8; see also *Ibid.* pp. 86-88, paras. 8-11. Twenty Members of the Commission participated in the Drafting Committee. *Ibid.* para. 6(b).

⁴⁶ *Furundžija* Judgment, *supra* note 4, at para. 155.

⁴⁷ ILC 2017 *Draft Articles*, *supra* note 1, at p. 85, para. 95.

⁴⁸ D. Orentlicher, ‘Immunities and Amnesties’, in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2nd edn., Cambridge University Press, 2013) 202-222, at pp. 220-221.

5. Prevention

The Commission has placed appropriate emphasis not only on punishment but on the prevention of crimes against humanity in Article 2 (general obligation) and Article 4 (obligation of prevention). A core pillar of the *Initiative's* work on crimes against humanity concerned the potential preventive dimension of a new treaty. The *Proposed Convention* included the obligation of prevention in Article 2(1), as well as in Article 8(12)-(16) (obligation of States to prevent) and throughout other provisions of the *Proposed Convention*. The inclusion of Draft Article 4 is thus welcome, but we believe that prevention could be strengthened by the inclusion or modification of other provisions, as follows.

a. Reservations

The *Proposed Convention* prohibited reservations⁴⁹ to prevent States from undermining the treaty's effectiveness and to enhance its preventive dimension. A surprising number of recent and older international agreements also prohibit reservations, including the Paris Agreement on Climate Change and the Rome Statute. It seems preferable for a core human rights treaty to take a similar approach. If reservations are prohibited, recent empirical studies⁵⁰ suggest that opt-out clauses in particular areas may be useful to present States with choices.⁵¹ There are many points in the current Draft Articles giving States the right to refuse mutual legal assistance, for example, or to opt-out of dispute settlement.

If the Commission decides to permit reservations, it should specify which articles may be subject to them, as Members noted during the Sixty-ninth Session. Additionally, if reservations are permitted, opt-outs from various provisions are redundant and should be eliminated. No doubt the Draft Articles, when finalized on second reading, will form a carefully calibrated 'package' taken together.

b. Monitoring Mechanisms

A convention without a monitoring mechanism is likely to be an 'orphan'. Although there is some fatigue regarding monitoring mechanisms internationally, and questions of resources are clearly implicated by the creation of a new treaty body, the Commission's Commentary to the 2017 Draft Articles is replete with decisions and comments from treaty bodies such as the Human Rights Committee and the Torture Committee, demonstrating just how important the interpretive work of these institutions is.⁵² Although some Members expressed the view that this was a policy question best left to States, the Commission could usefully advance the work of

⁴⁹ *Proposed Convention*, *supra* note 3, Art. 23.

⁵⁰ See, e.g., J. Galbraith, 'Treaty Options: Towards a Behavioral Understanding of Treaty Design', 53 *Virginia Journal of International Law* (2013) 309-364.

⁵¹ This would also be consistent with the ILC's past work. See International Law Commission, 'Reservations to treaties', available at http://legal.un.org/ilc/guide/1_8.shtml and the practice of human rights bodies.

⁵² See, e.g., Commentary to Draft Article 5 (*non-refoulement*), which makes extensive reference to the work of the Committee Against Torture and the Human Rights Committee. ILC 2017 *Draft Articles*, *supra* note 1, at pp. 57-58, paras. 7 & 10. See also Commentary to Draft Article 8 (investigation), *ibid.* pp. 80-81, paras. 2-5.

States by presenting options in terms of institutional design. The problem the Commission's work is addressing is not an excess of institutional capacity, but an excess of crimes. Having a monitoring mechanism of some kind therefore seems important to the future treaty's ultimate success.

c. Incitement

During the Commission's 2016 plenary discussion of the Second Report, several Members discussed the need to include 'incitement' as a mode of liability in the Commission's Draft along the lines of Article III(c) of the Genocide Convention. This issue was raised at the Geneva Academy Seminar held on 6 May 2017 in discussing the first 10 articles as well.⁵³ The *Proposed Convention* included 'incitement' in Article 4(2)(e) (tracking the language of the Genocide Convention), to enhance the treaty's preventive dimension and based upon existing jurisprudence, including the successful prosecution of Julius Streicher by the International Military Tribunal at Nuremberg for crimes against humanity based upon his writings advocating the annihilation of the 'Jewish race'.⁵⁴ As former U.S. Ambassador Stephen Rapp has noted, incitement is often a key precursor to the commission of crimes against humanity and genocide.⁵⁵ For this reason, it seems useful to require States to prohibit, consistent with their obligations under international human rights law, 'advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence'.⁵⁶ This could be placed either in the Commission's draft article on prevention, or incitement could be added as a mode of liability to Draft Article 6. Although the Second Report suggested that 'inducement' covers 'incitement',⁵⁷ that is not entirely clear.⁵⁸ Including 'incitement to crimes against humanity' in

⁵³ The Geneva Academy convened two seminars at the Villa Moynier in May 2016 and 2017 following the Commission's sessions on the ILC draft text.

⁵⁴ He was convicted of crimes against humanity based upon his 'incitement to murder and extermination', Judgment of October 1, 1946, International Military Tribunal Judgement and Sentence, 41 *American Journal of International Law* (1947) 172, 296. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No 18), at p. 40, U.N. Doc. A/7218 (1968), *entered into force* 11 November 1970, includes incitement to crimes against humanity in Article 2 as does the Apartheid Convention in Article III(a). International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII) (30 November 1973), *entered into force* 18 July 1976.

⁵⁵ S.J. Rapp, former U.S. Ambassador-at-Large for Global Criminal Justice, *Keynote Address*, Brookings Institute (March 2010).

⁵⁶ *Proposed Convention*, *supra* note 3, Art. 8(1)(C) (12).

⁵⁷ Sean Murphy (Special Rapporteur on Crimes Against Humanity), *Second Report on Crimes Against Humanity*, para. 33, U.N. Doc. A/CN.4/690, Annex II, 21 January 2016; *See also* Int'l Law Comm'n, *Report on the Work of Its Sixty-Eighth Session*, U.N. Doc. A/71/10 (2016), at p. 253, paras. 12-13.

⁵⁸ To induce an action commonly means to allure or attract an individual to engage in conduct. Black's Law Dictionary defines inducement as 'the act or process of inciting or persuading another person to take a certain course of conduct'. *Black's Law Dictionary* (10th edn., Thomson West, 2014), at p. 894. To incite, however, is 'to provoke or stir up (someone to commit a criminal act)'. *Ibid.* p. 880. An inducement is an *incentive* that brings about a result; an incitement is a (direct and public) *call to action*.

this new convention could have real juridical import and is consistent with the views of scholars, as well as customary international law.⁵⁹

d. State Responsibility

Article 2 (general obligation) of the 2017 Draft Articles omits a phrase from the *Initiative's* proposed Article 1 (nature of the crime) that provided 'States may be held responsible for crimes against humanity pursuant to principles of State responsibility for internationally wrongful acts'. The First Report observed that this was not intended to suggest that States do not incur responsibility for crimes against humanity, but that such responsibility is implied and therefore need not be explicitly mentioned.⁶⁰ Yet all references to State Responsibility have now been eliminated from the text of the Draft Articles.⁶¹ The Commission's work should be clear that State Responsibility continues to attach to the commission of crimes against humanity in order to enhance the future convention's preventive effect, as the case of *Bosnia vs. Serbia* underscores.⁶²

6. Dispute Settlement

The general tenor of Draft Article 17 on inter-State dispute settlement is acceptable, but the drafting could perhaps be improved along the lines many Members suggested during their interventions in May 2017. First, to the extent that the Draft Articles do not expressly refer to State Responsibility, we agree with Members who noted that the language 'including those relating to the responsibility of a State for [crimes against humanity]' based upon Art. IX of the Genocide Convention is critically important. As noted above, the *Initiative* took the position that it was important to make State Responsibility explicit due, in part, to the dissenting judge's opinion in *Bosnia v. Serbia*. Because the Draft Articles assume that State Responsibility is

⁵⁹ See, e.g., G.S. Gordon, *Atrocity Speech Law* (Oxford University Press, 2017); J. Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); R.A. Wilson, *Incitement on Trial* (Cambridge University Press, 2017); R.A. Wilson & M. Gillett, *The Hartford Guidelines on Speech Crimes in International Criminal Law* (Peace and Justice Initiative, 2018).

⁶⁰ Sean Murphy (Special Rapporteur on Crimes Against Humanity), *First Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/680, 17 February 2015, para. 81.

⁶¹ Draft Article 15 seems problematic in several respects. It does not track either Article IX of the Genocide Convention or any other text, and provides no time limit before which referral to the ICJ will be possible if negotiations fail. The Commission may wish to revisit this during its next reading.

⁶² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Merits, Judgment, 2007 I.C.J. Rep. 43 (26 February 2007).

The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. [...]

The unusual feature of Article IX is the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III".

Ibid. paras. 167-169.

implicit, it is important to retain the critical language from Art. IX upon which the majority relied in that case.

In addition, dispute settlement is vitally important to the success of the convention. An opt-out is acceptable (but not ideal), only if reservations are otherwise prohibited. Otherwise the opt-out should be deleted as redundant. Additionally, the comments of Members suggesting either that arbitration should not be required prior to submission of the dispute to the International Court of Justice, and/or that a time limit for negotiations (6 months) should be imposed may be useful points to consider during the second reading of this provision.

7. Federal States and Territoriality

The 2017 Draft Articles have no provision on federal States. The Third Report proposed Draft Article 16 which read: ‘The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions’.⁶³ Our *Proposed Convention* had a nearly identical provision⁶⁴, which drew upon Article 41 of the International Convention for the Protection of All Persons from Enforced Disappearance. Similar provisions are found in Article 50 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the Second Optional Protocol to the ICCPR. Such provisions grew out of growing dissatisfaction with federal State clauses or ‘territorial clauses’ limiting the scope of a treaty’s obligations to those that a federal government has the authority to assume. Article 50 of the ICCPR was inserted during the Covenant’s negotiation after a number of countries objected to the insertion of a federal clause ‘on the grounds that it gave the federal authority a wide discretion to avoid responsibility and left non-federal States in doubt as to the legal obligations of federal states under the treaty’.⁶⁵

In summer 2017, the Drafting Committee of the International Law Commission deleted Draft Article 16 from the First Reading of the Draft Articles. However, many Members felt that this was an important provision to include, as it would make it clear that treaty obligations cannot be differentiated within a State but must be applied to the whole of its territory.⁶⁶ As such, the Commission may wish to reconsider its inclusion.

Conclusion

More than seventy years have passed since the Nuremberg Tribunal convicted individuals, for the first time in history, of ‘crimes against humanity’. It is thrilling to witness, at

⁶³ *Third Report*, *supra* note 31, para. 211.

⁶⁴ *Proposed Convention*, *supra* note 3, Art. 20.

⁶⁵ G. Triggs, ‘Australia’s Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?’, 31 *International and Comparative Law Quarterly* 286 (1982).

⁶⁶ See, e.g., D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press, 2012), p. 316 (‘In recent years, there seems to be less enthusiasm for federal clauses, especially regarding treaties on human rights. The objections centre on allowing federal States to assume different (and fewer) obligations than non-federal States, especially where human rights treaties are designed to establish universal minimum standards’); see also ‘*Third Report*’, *supra* note 31, paras. 208-211.

long last, the birth of a new global treaty on crimes against humanity and participate in its evolution. A new treaty enhancing the ability of national systems to prevent and punish crimes against humanity and reinforcing the Rome Statute could greatly assist with the maintenance of international peace and security, and provide solace to the victims of these crimes.

The Commission's work on the topic of crimes against humanity is thus timely and important. As the Commission continues to refine its project, we hope that it will cleave to the international criminal law norms established at Nuremberg – and reinforced by the Rome Statute and its own work on the *Draft Code of Crimes* – to consolidate the *acquis de droit pénal international* by crafting text that builds upon and enhances the effectiveness of international criminal law. In this way, the Commission's work will represent not only the codification of international law, but also its progressive development, consistent with its mandate under the U.N. Charter.