

Why a Crimes Against Humanity Convention from a Perspective of Post-Soviet States?

Sergey Sayapin*

Abstract

Most post-Soviet States have introduced penal responsibility for crimes against humanity, either explicitly or under alternative headings. As a rule, their respective criminal laws are modelled after relevant provisions of the Draft Code of Crimes against the Peace and Security of Mankind or the Rome Statute of the International Criminal Court. The International Law Commission's adoption of the Draft Articles on Prevention and Punishment of Crimes Against Humanity represents an appropriate occasion for post-Soviet States that have not yet penalized crimes against humanity to bring their criminal laws into fuller conformity with customary international criminal law.

Keywords: crimes against humanity, criminal law, ICC Statute, implementation, post-Soviet States.

1 Introduction

In the post-Soviet space, attitudes towards the concept of crimes against humanity are quite sensitive. Reasons for this are both historical and more contemporary. On the one hand, the Soviet Union played an important role in the establishment of the Nuremberg Tribunal,¹ which, for the first time in history, held individuals accountable for crimes against humanity. However, the Soviet authorities themselves practised policies that amounted to crimes against humanity with impunity. These included persecutions of the 'bourgeoisie', religious believers and members of other 'hostile' classes after October 1917; Stalin's 'Great Terror'; man-made famines in Kazakhstan and Ukraine; the deportations of peoples; nuclear testing in Kazakhstan and the operation of forced labour camps. The enactment of legislation for the rehabilitation of the victims of Soviet repressions started materializing only as the dissolution of the Soviet Union became

* LLB, LLM, Dr. iur., PhD, Associate Professor of International and Criminal Law and Director of the LLB. in International Law Programme at the School of Law, KIMEP University (Almaty, Kazakhstan).

1 See S. Sayapin, "Russie" [Russia], in O. Beauvallet (Ed.), *Dictionnaire encyclopédique de la justice pénale internationale*, Paris, Berger Levrault, 2017, pp. 869-870.

Sergey Sayapin

imminent.² Other likely crimes against humanity of the Soviet regime were not as manifestly violent but nonetheless had large-scale repercussions. For example, the long-term and irreversible effects of some economic policies pursued by the Soviet leadership for the environment, lives and health of Central Asian peoples – such as the predatory use of water from the Syrdaryo and Amudaryo rivers for irrigation, since the 1960s, that resulted in the catastrophic desertification of the Aral Sea – could conceivably amount to crimes against humanity as well. More recently, lethal force was used excessively in some post-Soviet States, in contexts of organized violence.³

Given this painful legacy, it is comprehensible that nine out of fifteen post-Soviet States have already introduced penal responsibility for crimes against humanity at the domestic level, and at least two more States are contemplating the matter. In most cases, the respective States' legislative practices seem to result from their specific historical contexts and legal traditions, and to reflect their perceived roles as former 'authors' or 'victims' of crimes against humanity. The attitudes of individual States towards the Rome Statute of the International Criminal Court (ICC Statute), whose Article 7 contains a modern codification of crimes against humanity, per se represent an important factor in the implementation of crimes against humanity in the post-Soviet space. This article highlights the post-Soviet States' normative attitudes to the phenomenon of crimes against humanity, and makes policy recommendations relative to those States' approaches to the Draft Articles on Prevention and Punishment of Crimes Against Humanity. In particular, the Draft Articles – as well as the Convention on Crimes against Humanity, which is expected to result from them – could serve as a basis for future legislative reforms, and for facilitating mutual legal assistance in criminal matters.

2 Abstention: Kazakhstan, Russia, Tajikistan, Turkmenistan

Four post-Soviet States – Kazakhstan, Russia, Tajikistan, Turkmenistan – have not yet included the concept of crimes against humanity in their criminal laws as such. At least in the case of Kazakhstan, this policy is quite surprising, given the legacy of Soviet famines inflicted on the Kazakh people between 1919 and 1922 and between 1932 and 1933, and of nuclear testing near Semey in Eastern Kazakhstan from 1949 to 1989. This author observed elsewhere as follows:

- 2 Cf., for example, the Law of the Ukrainian Soviet Socialist Republic "On the rehabilitation of victims of political repressions in Ukraine" of 17 April 1991, the Law of the Russian Soviet Federative Socialist Republic "On the rehabilitation of victims of political repressions" of 18 October 1991, the Law of the Republic of Kazakhstan "On the rehabilitation of victims of mass political repressions" of 14 April 1993, and the Law of Latvia "On the determination of status of a politically repressed person for [victims of] the Communist and Nazi regimes" of 12 April 1995.
- 3 One may recall the use of force in Andijan (Uzbekistan) in May 2005, in Bishkek and Osh (Kyrgyzstan) in 2010, and in Kyiv (Ukraine) in February 2014.

So far, the concept of crimes against humanity is alien to the penal legislation of the Republic of Kazakhstan. It may seem, at first sight, that the Criminal Code of Kazakhstan already contains the elements of many crimes [...] listed in Article 7(1) of the ICC Statute, and thus establishes criminal responsibility for their commission, with due regard to the provisions on the multiplicity of offences in the Code's General Part [...] This is partly correct: the penal legislation of Kazakhstan does, indeed, contain the equivalents of most crimes against humanity in the sense of Article 7(1) of the ICC Statute. In particular, some of the so-called extremist crimes are reminiscent of some crimes against humanity [...] However, under Kazakhstan's penal law, these do not fall (except Article 174) within the ambit of crimes against the peace and security of mankind (of which crimes against humanity are a part), and hence are not subject to the provisions of international and domestic penal law regarding the non-applicability of statutes of limitations. Such common crimes are also exempted from ICL rules on universal jurisdiction [...] If crimes against humanity were integrated into Kazakhstan's penal legislation in the future, these aspects of the General Part of ICL should be taken into account.⁴

Otherwise, Kazakhstan did quite a good job of implementing the General⁵ and Special Parts of international criminal law in the revised edition of its Criminal Code (2014). Similarly, Russia, Tajikistan (the only State Party to the ICC Statute in Central Asia) and Turkmenistan have introduced responsibility for quite a few crimes under international law but not yet for crimes against humanity. In Russia, a team of international and criminal law experts suggested integrating the elements of crimes against humanity in the Criminal Code,⁶ with due regard to customary international law,⁷ but this initiative has unfortunately not been successful so far. It may be noted, though, that the Criminal Code of Tajikistan contains Article 399 ("Biocide"), which criminalizes "the use of nuclear, neutron, chemical, biological (bacteriological), climatic or other weapons of mass destruction *in order to destroy people and the environment*" (emphasis added). Although this provision technically relates to the use of prohibited means of warfare, it may be argued that Tajikistan employs the notion of biocide to penalize crimes against

4 See S. Sayapin, 'The Implementation of Crimes against the Peace and Security of Mankind in the Penal Legislation of the Republic of Kazakhstan', *Asian Journal of International Law*, Vol. 10, 2020, pp. 1-11, at 4-5, footnotes in the quoted text omitted.

5 See also S. Sayapin, 'The General Principles of International Criminal Law in the Criminal Code of the Republic of Kazakhstan', *Asian Journal of International Law*, Vol. 9, No. 1, 2019, pp. 1-9.

6 See G.I. Bogush, G.A. Esakov, & V.N. Rusinova, *Mezhdunarodnyye prestupleniya: Model implementatsii v rossiyskoye ugovnoye zakonodatelstvo* [International Crimes: An Implementation Model for the Russian Penal Legislation], Moscow, Prospect, 2017, pp. 154-167.

7 Since Russia 'unsigned' the ICC Statute in November 2016, customary international law now represents a more appropriate basis for the penalization of crimes against humanity. See S. Sayapin, 'Russia's Withdrawal of Signature from the Rome Statute Would Not Shield its Nationals from Potential Prosecution at the ICC', *EJIL: Talk!*, 21 November 2016, available at: www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/#more-14774.

Sergey Sayapin

humanity, at least in armed conflicts. The Criminal Codes of Kazakhstan, Russia and Turkmenistan contain similar provisions⁸ but do not explicitly mention the purpose of the crimes or civilian victims.

3 Contemplation: Ukraine, Uzbekistan

Ukraine and Uzbekistan are known to be considering integrating crimes against humanity into their respective Criminal Codes, on quite different circumstantial grounds. The following is reported on the ICC website:

Ukraine is not a party to the Rome Statute. However, on 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Rome Statute accepting the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. Further, on 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date [...]

The preliminary examination initially focussed on alleged crimes against humanity committed in the context of the "Maidan" protests which took place in Kyiv and other regions of Ukraine between 21 November 2013 and 22 February 2014, including murder; torture and/or other inhumane acts. Following the lodging of a new article 12(3) declaration by Ukraine on 8 September 2015, the Office [of the Prosecutor] decided to extend the temporal scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.⁹

These developments prompted Ukraine to draft domestic legislation to penalize crimes against humanity.¹⁰ The proposed Article 437-1 of the Criminal Code ("Crimes against humanity") by and large conforms to Article 7 of the ICC

8 Cf. Art. 163(2) of the Criminal Code of Kazakhstan, Art. 356(2) of the Criminal Code of Russia, and Art. 167.4(2) of the Criminal Code of Turkmenistan.

9 See ICC, 'Ukraine', available at: www.icc-cpi.int/ukraine (last accessed 10 June 2020).

10 For the full text of the bill (in Ukrainian), see <https://minjust.gov.ua/m/pro-vnesennya-zmin-dodaykih-zakonodavchih-aktiv-schodo-zabezpechennya-garmonizatsii-kriminalnogo-zakonodavstva-z-polojennymi-mijnarodnogo-prava> (last accessed 10 June 2020).

Statute, and implements, in two paragraphs, its substantive provisions.¹¹ The bill is currently under consideration by the Parliament, along with formal ratification of the ICC Statute.

In Uzbekistan, a cardinal revision of penal legislation was ordered by President's Regulation No. PP-3723 of 14 May 2018. The purposes of the revision included bringing the Criminal Code into fuller conformity with international law. Since the concept of crimes against humanity was not present in the first edition of Uzbekistan's Criminal Code (1994), it was proposed, in 2019, to include it in the revised edition as follows:

Deliberate encroachment on the civil, political, economic, social or cultural rights of a person on the basis of her affiliation with any social group shall be punished [...]

The same acts committed repeatedly or by prior agreement by a group of persons shall be punished [...]

The acts envisaged in the first or second paragraphs of this Article [and] resulting in causing death to another person or [in] other grave consequences, shall be punished.¹²

11 The proposed provision reads as follows:

- 1 The commission of one or more of the acts provided for in this part of the article with the knowledge that such act or acts are part of a widespread or systematic attack against civilians:
 - 1 conversion to slavery or human trafficking;
 - 2 illegal deportation or forcible transfer of population;
 - 3 any severe deprivation of physical liberty in violation of fundamental rules of international law;
 - 4 torture;
 - 5 rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other similar forms of sexual violence;
 - 6 persecution of any identified group or community on political, racial, national, ethnic, cultural, religious, gender or other grounds that are generally considered inadmissible under international law;
 - 7 enforced disappearance of people;
 - 8 apartheid;
 - 9 other intentional inhuman acts of a similar nature, which are accompanied by causing great suffering or serious bodily injury or serious harm to mental or physical health,
 - shall be punishable by imprisonment for a term of seven to fifteen years.
 - 2 The commission of one or more of the acts set forth in this part of the article in the context of a large-scale or systematic attack on any civilian with the knowledge that the act or acts in question form part of such an attack:
 - 1 murder;
 - 2 extermination,
 - shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.
- 12 See S. Sayapin, 'Crimes against the Peace and Security of Mankind in the Revised Edition of the Criminal Code of the Republic of Uzbekistan', *Review of Central and East European Law*, Vol. 45, No. 1, 2020, pp. 36-58, at 51.

Sergey Sayapin

The aforementioned proposal was made under the heading of “criminal discrimination”, in order to avoid ambiguity inherent in the notion of ‘humanity’,¹³ with the following understanding:

The first paragraph criminalizes deliberate encroachments on an individual’s fundamental rights on the ground of their affiliation with any social group [...] even if these are committed sporadically. The second paragraph introduces the elements of organization and multiplicity, which correspond to the requirement of a “widespread or systematic attack”, and thus elevate the offences to the level of crimes against humanity, as these are understood in international law. Finally, the third paragraph criminalizes particularly serious discriminatory acts, which result in the death of a person or other grave consequences, and therefore should be penalized more severely.¹⁴

As of this writing, it remains to be seen whether this proposal will be adopted. If Uzbekistan introduces penal responsibility for crimes against humanity, it will become the second State in Central Asia (after Kyrgyzstan) to do so.

4 Acceptance: Armenia, Belarus, Azerbaijan, Lithuania, Estonia, Georgia, Kyrgyzstan, Latvia, Moldova

The other nine post-Soviet States have introduced penal responsibility for crimes against humanity, either explicitly or under alternative headings. It appears that such alternatives originate in the Draft Code of Crimes against the Peace and Security of Mankind. Armenia, whose people were victimized en masse during the First World War, penalizes a few selected “crimes against the security of mankind”.¹⁵ The Criminal Code of Belarus employs the same terminology.¹⁶ The Criminal Code of Azerbaijan, in Articles 105 to 113, penalizes acts that essentially

13 The author would personally prefer the term “crimes against the civilian population” to “crimes against humanity” but accepts that “the issue [...] is not about replacing [this term] with a new term but about interpreting the concept of humanity adequately, for the purposes of international and domestic criminal law”. *Ibid.*, at 48-50.

14 *Ibid.*, at 51, footnotes in the quoted text omitted.

15 Cf. Art. 392 of the Criminal Code of Armenia (“Crimes against the security of mankind”): “Expulsion, unlawful detention, enslavement, mass and systematic executions without trial, abduction of people followed by their disappearance, torture or cruel acts committed on the grounds of racial, national, ethnic origin, political views and religion of the civilian population – shall be punishable by deprivation of liberty for a term of seven to fifteen years or life imprisonment”.

16 Cf. Art. 128 of the Criminal Code of Belarus (“Crimes against the security of mankind”): “Deportation, unlawful detention, enslavement, mass or systematic execution of executions without trial, kidnapping followed by their disappearance, torture or acts of cruelty committed in connection with racial, national, ethnic origin, political convictions and religion of the civilian population – shall be punishable by deprivation of liberty for a term of seven to twenty five years, or life imprisonment, or the death penalty”.

constitute crimes against humanity – such as extermination,¹⁷ slavery,¹⁸ deportation or forced resettlement,¹⁹ sexual violence,²⁰ forced pregnancy,²¹ persecution,²² forcible detention,²³ racial discrimination,²⁴ deprivation of liberty in violation of international law²⁵ and torture²⁶ – but names them “crimes against the security of humanity”.²⁷ Finally, Lithuania criminalizes the “treatment of per-

- 17 Cf. Art. 105 of the Criminal Code of Azerbaijan (“Extermination of population”): “Full or partial extermination of the population in the absence of elements of genocide shall be punishable by deprivation of liberty for a term of fourteen to twenty years or life imprisonment”.
- 18 Cf. Art. 106 of the Criminal Code of Azerbaijan (“Slavery”): “106.1. Slavery, that is, the full or partial exercise in respect of a person of the powers inherent in the right of ownership – shall be punishable by deprivation of liberty for a term of five to ten years”.
- 19 Cf. Art. 107 of the Criminal Code of Azerbaijan (“Deportation or forced resettlement of a population”): “Expulsion of the population from the lawful places of settlement to another state or exile by other compulsory actions, without grounds established by international law and the laws of the Azerbaijani Republic – shall be punishable by deprivation of liberty for a term of ten to fifteen years”. Notably, the terms used in the provision (expulsion or exile) do not correspond to those used in its title (deportation or forced resettlement).
- 20 Cf. Art. 108 of the Criminal Code of Azerbaijan (“Sexual violence”): “Rape, forced prostitution, forced sterilization or other acts related to sexual violence – shall be punishable by deprivation of liberty for a term of twelve to twenty years or life imprisonment”.
- 21 Cf. Art. 108-1 of the Criminal Code of Azerbaijan (“Forced pregnancy”): “Illegal deprivation of liberty of a woman forced into pregnancy in order to change the ethnic composition of a particular people or with other serious violations of international law – shall be punishable by deprivation of liberty from twelve to twenty years or life imprisonment”.
- 22 Cf. Art. 109 of the Criminal Code of Azerbaijan (“Persecution”): “Persecution of any group or organization for political, racial, national, ethnic, cultural, religious motives, motives of gender or other motives prohibited by international law, that is, a gross violation of the fundamental rights of people because of their belonging to these groups or organizations, if this act is related to other crimes against the security of humanity, shall be punishable by deprivation of liberty for a term of five to ten years”.
- 23 Cf. Art. 110 of the Criminal Code of Azerbaijan (“Forcible detention of a person”): “Detention, arrest or abduction of a person with the aim of depriving of legal protection for a long period of time on the instructions, support or with the consent of the state or political organization and subsequent denial of the fact of deprivation of liberty of the person or refusal to report information about his fate or whereabouts – shall be punishable by deprivation of liberty for a term of ten to twenty years or life imprisonment”.
- 24 Cf. Art. 111 of the Criminal Code of Azerbaijan (“Racial discrimination (apartheid)”): “Acts committed with the aim of organizing and securing the superiority of one racial group to oppress another racial group [...] shall be punishable by deprivation of liberty for a term of twelve to twenty years or life imprisonment”.
- 25 Cf. Art. 112 of the Criminal Code of Azerbaijan (“Deprivation of liberty in violation of norms of international law”): “Arrest or other deprivation of liberty of persons, in violation of international law – shall be punishable by deprivation of liberty for a term of five to eight years”.
- 26 Cf. Art. 113 of the Criminal Code of Azerbaijan (“Use of torture”): “Causing physical pain or mental suffering to persons who have been detained or [whose] freedom [has] otherwise [been] restricted – shall be punishable by deprivation of liberty for a term of seven to ten years”.
- 27 See note to Art. 105 of the Criminal Code of Azerbaijan: “Crimes against the security of humanity [are] intentional acts provided for in Articles 105 113 of this chapter, which are an integral part of widespread or systematic attacks [directed] against a civilian population in peacetime or war-time alike”.

Sergey Sayapin

sons prohibited under international law”,²⁸ enforced disappearances²⁹ and separation of children from their parents.³⁰ Reasons for avoiding the use of the term ‘crime against humanity’ could be of a political or legal nature.

In turn, the Criminal Codes of Estonia, Georgia, Kyrgyzstan, Latvia and Moldova refer to crimes against humanity explicitly, and define them quite in line with Article 7(1) of the ICC Statute and Article 2(1) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity. Notably, Estonia criminalizes crimes against humanity committed by individuals or legal entities.³¹ The Criminal Code of Georgia nearly verbatim replicates the definition of crimes against humanity under present-day international criminal law (ICL).³² Kyrgyz-

- 28 Cf. Art. 100 of the Criminal Code of Lithuania (“Treatment of persons prohibited under international law”): “A person who intentionally, by carrying out or supporting the policy of the State or an organisation to attack civilians on a large scale or in a systematic way, conducts their killing or causes serious impairment to their health; inflicts on them such conditions of life as bring about their death; enslaves persons; commits deportation or forced transfer of the population; unlawfully imprisons or otherwise restricts the physical freedom of persons in violation of the norms of international law; tortures persons; rapes or sexually coerces persons, involves them in sexual slavery or forces them to engage in prostitution; unlawfully deprives a forcibly inseminated woman of liberty with a view to altering the ethnic composition of the population or in committing another violation of the norms of international law; forcibly sterilises persons or carries out other sexual coercion actions of a similar character; persecutes any group or community of persons for political, racial, national, ethnic, cultural, religious, sexual or other reasons prohibited under international law; detains, arrests, abducts or otherwise deprives them of liberty, where such a deprivation of liberty is not recognised, or fails to report the fate or whereabouts of the persons; carries out the policy of apartheid shall be punishable by a custodial sentence for a term of five up to twenty years or by a life custodial sentence”.
- 29 Cf. Art. 100 of the Criminal Code of Lithuania (“Enforced disappearance”): “A person who, while acting as an agent of the State or as a person or a group of persons acting with the authorisation, support or acquiescence of the State, detains, abducts a person or otherwise deprives him of liberty, followed by a refusal to acknowledge such a detention, abduction or deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, shall be punishable by a custodial sentence for a term of three up to fifteen years”.
- 30 Cf. Art. 100 of the Criminal Code of Lithuania (“Separation of children”): “A person who unlawfully separates children while being aware that these children, parents or guardians thereof are victims of the criminal acts provided for in Art. 1001 of this Code – shall be punishable by a custodial sentence for a term of up to eight years”.
- 31 Cf. Para. 89 of the Criminal Code of Estonia (“Crimes against humanity”): “(1) Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, shall be punishable by eight to twenty years’ imprisonment or life imprisonment. (2) The same act, if committed by a legal person, is punishable by a pecuniary punishment”.
- 32 Cf. Art. 408 of the Criminal Code of Georgia (“Crimes against humanity”): “A crime against humanity, that is, any act committed in the framework of a widespread or systematic attack against a civilian population or civilians, expressed in murder, mass extermination, causing grievous bodily harm, deportation, illegal restriction of liberty, torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization of people, persecution of a group of persons on political, racial, national, ethnic, cultural, religious, gender or other grounds, apartheid and other inhuman acts that cause serious harm to a person’s physical and (or) mental state – shall be punishable by deprivation of liberty for a term of twelve to twenty years or indefinite deprivation of liberty”.

stan penalizes, along with crimes against humanity,³³ enforced disappearances³⁴ and apartheid.³⁵ The latter two *corpus delicti* must have been singled out from crimes against humanity owing to their complexity. Quite conservatively, the Criminal Code of Latvia makes a link between crimes against humanity and other crimes under international law.³⁶ This link is evocative of Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter, where crimes against humanity were defined as inhumane acts committed against any civilian population “in execution of or in connection with any crime within the jurisdiction of the Tribunal”. It should be noted, though, that this link was omitted as early as in Article II(1)(c) of the Control Council Law No. 10,³⁷ and is not part of customary international law now.³⁸ Finally, the Criminal Code of Moldova con-

- 33 Cf. Art. 381 of the Criminal Code of Kyrgyzstan (“Crimes against humanity”): “Illegal deportation, illegal detention, enslavement, mass or systematic execution of executions without trial, deliberate systematic widespread attack on any civilians, forced displacement, kidnapping, torture or acts of persecution committed with the aim of discrimination based on gender, race, language, disability, ethnicity, religion, age, political and other beliefs, education, origin, property and other status of the civilian population – shall be punishable by imprisonment of category VI or life imprisonment with a fine of VI category or without one”.
- 34 Cf. Art. 382 of the Criminal Code of Kyrgyzstan (“Enforced disappearance”): “Enforced disappearance, that is, the arrest, detention or kidnapping of people by the state, political organization or with their permission, with their support or with their consent, with a subsequent refusal to recognize such deprivation of liberty or to report on the fate or whereabouts of these people with the aim of depriving them of protection by the law for a protracted period of time – shall be punishable by imprisonment of category VI”.
- 35 Cf. Art. 386 of the Criminal Code of Kyrgyzstan (“Apartheid”): “Acts committed as part of a widespread or systematic persecution of a racial, religious, national, ethnic, political and other social group for the purpose of establishing and maintaining dominance over such a group and its members [...] shall be punishable by deprivation of liberty of category VI or life imprisonment”.
- 36 Cf. Section 71 of the Criminal Code of Latvia (“Crimes against humanity”): “For a person who commits a crime against humanity, that is, for an activity which is performed as a part of widespread or systematic attack against civilians and which has been expressed in murder, extermination, enslavement, deportation or forced movement, unlawful deprivation or limitation of liberty, torture, rape, involvement of a person into sexual slavery, compelling to engage in prostitution, forced fertilisation or sterilisation, or sexual violence of similar degree of severity, apartheid, persecution of any group of people or union on the basis of political, racial, national, ethnical, cultural, religious or gender affiliation or other reasons which have been recognised as inadmissible in the international law, *in relation to any activity indicated in this Section or genocide, or war crime or another activity provided for in the international law binding upon the Republic of Latvia*, which causes serious physical or mental suffering, the applicable punishment is life imprisonment or deprivation of liberty for a period of three and up to twenty years” (emphasis added).
- 37 Cf. Art. II(1)(c) of the Control Council Law No. 10: “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”.
- 38 See G. Werle & F. Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford, Oxford University Press, 2014, pp. 329-332.

Sergey Sayapin

tains a comprehensive provision on crimes against humanity,³⁹ which may have served as a source of inspiration for the authors of the draft crimes against humanity provision proposed in Ukraine (see *supra* note 11). Both provisions are modelled after Article 7 of the ICC Statute not only in terms of content but also in form, with variations prescribed by the legislative technique.

5 Conclusion

Since the majority of post-Soviet States have already enacted penal legislation on crimes against humanity, it will be a matter of time for others to make (probably uneasy) political decisions about including crimes against humanity in their respective Criminal Codes. The development of the Draft Articles on Prevention and Punishment of Crimes against Humanity by the International Law Commission is a good occasion for States that have not yet penalized crimes against humanity to reconsider their positions, and to bring their criminal laws into bet-

39 Cf. Art. 135-1 of the Criminal Code of Moldova ("Crimes against humanity"):

- 1 The commission, in the framework of a widespread or systematic attack against any civilians, if such an attack is committed knowingly, of one of the following acts:
 - a enslavement, trafficking in adults or children;
 - b deportation or forced displacement, in violation of the general rules of international law, of persons lawfully residing in the territory of the attack;
 - c detention or other deprivation of physical freedom in violation of general rules of international law;
 - d torture of a person in custody or otherwise in the hands of a tormentor, causing grievous bodily harm or grievous harm to health or causing physical or mental suffering that exceed the consequences of applying sanctions permitted by international law;
 - e rape, sexual slavery, forced prostitution, unlawful deprivation of liberty of a pregnant woman who has become pregnant by force to change the ethnic composition of a population, forced sterilization, or any other type of sexual violence;
 - f persecution of any identifiable group or community through deprivation or restriction of fundamental human rights for political, racial, national, ethnic, cultural, religious, gender or other reasons recognized as inadmissible by international law;
 - g carrying out actions entailing the enforced disappearance of a person with the aim of depriving him of protection by the law through abduction, arrest or detention on the orders of a state or political organization or with their permission, with their support or with their consent, with the subsequent refusal to recognize such deprivation of liberty of this person or provide upon request real information about his further fate or his whereabouts;
 - h the application of apartheid practices;
 - i the commission of other inhuman acts of a similar nature, consisting in the intentional infliction of grievous physical or mental suffering or grievous bodily harm or grievous harm to health, shall be punishable by deprivation of liberty for a term of 10 to 20 years.
- 2 The commission under the conditions provided for in paragraph (1) of one of the following acts:
 - a the killing of one or more persons;
 - b the exposure of the population or part thereof with a view to its complete or partial destruction to living conditions designed for its physical destruction,
 - shall be punishable by deprivation of liberty for a term of 15 to 20 years or life imprisonment.

ter conformity with customary international criminal law, of which crimes against humanity are a constituent part.

Importantly, such reconsideration would not be related to the ICC Statute, which raises concerns among most post-Soviet States.⁴⁰ The Convention on Crimes against Humanity, which is expected to result from the Draft Articles, would constitute a legal instrument of its own, and its enforcement and implementation would not depend on the ICC. This factor may be insignificant for the Baltic States as well as Georgia and Tajikistan, which participate in the ICC Statute, but it certainly is of significance in the other ten post-Soviet States.

Further, the Convention on Crimes against Humanity will be a multilateral instrument to facilitate cooperation among States in the prevention, investigation, prosecution and punishment of crimes against humanity, reflective of substantive and procedural rules of customary ICL, which already are present in their respective Criminal and Criminal Procedure Codes,⁴¹ as well as in bilateral and multilateral treaties on mutual legal assistance in criminal matters. Such treaties include, for example, the 1993 Minsk Convention and the 2002 Kishinev Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.⁴² In other words, States, including post-Soviet States, should not perceive the prospective Convention on Crimes against Humanity as a normative novelty. It represents a codification of customary ICL on a specific subject in much the same way as the Genocide Convention or the UN Convention against Corruption deal with their subjects. The Convention would enable States to exercise jurisdiction with respect to crimes against humanity on the basis of recognized principles of criminal jurisdiction (Art. 7) and with due regard to the principle *aut dedere aut judicare* (Art. 10), and would not in any way impair their sovereignty. The supportive statements on behalf of Armenia, Belarus, Estonia, Ukraine and Uzbekistan, which were made during the 74th session of the UN General Assembly Sixth Committee in response to the Draft Articles, seem to suggest that quite a few post-Soviet States recognize that the new Convention would contribute to the maintenance of peace, security and well-being of the world (*cf.* the second preambular paragraph of the Draft Articles), and might support its adoption at a forthcoming diplomatic conference. The conference would also represent an occasion to address the substantive and formal concerns raised in the Sixth Committee, for example, by the Russian Federation, in order to make the Convention acceptable to a maximum number of States.

40 Ten out of fifteen post-Soviet States do not participate in the ICC Statute. See https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last accessed 10 June 2020).

41 *Cf.*, for example, Section 12 of the Criminal Procedure Code of the Republic of Kazakhstan ("International Cooperation in the Field of Criminal Proceedings").

42 The 2002 Kishinev Convention was intended to replace the 1993 Minsk Convention but some post-Soviet States failed to ratify the former, and the Minsk Convention continues to apply in relations with such States. Notably, the Baltic States are not Parties to either treaty.