# The International Law Commission's First Draft Convention on Crimes Against Humanity

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**Abstract**

*The UN General Assembly established the International Law Commission ("ILC") in 1947 to assist States with the promotion of 1) the progressive development of international law and 2) its codification. The ILC's first assignment from the General Assembly was to formulate the Nuremberg Principles, which affirmed the then radical idea that individuals can be held liable for certain international crimes at the international level. Since then, the ILC has played a seminal role in the development of modern international criminal law. In 2017, the ILC adopted on first reading a draft convention aimed at the prevention and punishment of crimes against humanity which it transmitted to States for comments. The draft treaty will help fill the present gap in the law of international crimes since States criminalized genocide in 1948 and war crimes in 1949, but missed the opportunity to do so for crimes against humanity. This Article examines the first reading text using the lens of the ILC's two-pronged mandate. Part II explains how the ILC can take up new topics and the main reasons why it decided to propose a new crimes against humanity convention. Part III discusses positive features of the draft convention, highlighting key aspects of each of the Draft Articles. Part IV critiques the ILC draft treaty focusing on inconsistencies in the use of the ICC definition of the crime, immunities, amnesties, and the lack of a proposal on a treaty monitoring mechanism. The final part draws tentative conclusions. The author argues that, notwithstanding the formal distinction drawn by the ILC Statute between progressive development, on the one hand, and codification, on the other hand, the ILC's approach to the crimes against humanity topic follows a well settled methodology of proposing draft treaties that are judged likely to be effective and broadly acceptable to States rather than focusing on which provisions reflect codification and which constitute progressive development of the law. It is submitted that, if the General Assembly takes forward the ILC's draft text to conclude a new crimes against humanity treaty after the second reading, this will make a significant contribution to the development of modern international criminal law.*

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## 1 Introduction

The International Law Commission ("ILC" or the "Commission") was established as a subsidiary body of the United Nations General Assembly in November 1947 to assist States with the promotion of the progressive development of international law and its codification.[1] This mandate is not only the statutory foundation on which the work of the ILC rests, but it is also at the heart of the discussions involving the ILC's past contributions, its present projects, and if the statute remains unamended, its future potential.

In the seven decades since it was established, the Commission has been widely praised, by States[2] and academics[3] alike, for its various contributions to the development of the field of international law. The Commission's inputs include areas as diverse as the law of treaties,[4] the law of diplomatic and consular relations,[5] the law of the sea,[6] international environmental law,[7] and of course, the law of State responsibility.[8] Much, if not all, of the Commission's work in

1 G.A. Res. 174 (II), Statute of the International Law Commission, art. 1 (1947).

2 Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, *Commemoration of the 70th Anniversary of the International Law Commission – 1st Meeting*, U.N. Web TV (May 21, 2018), http://webtv.un.org/search/commemoration-of-the-70th-anniversary-of-the-international-law-commission/5787804822001#t=22m35s; *see also, e.g.*, First Secretary of the Permanent Mission of the Gambia to the United Nations, Statement on Behalf of the African Group Before the Sixth Committee, 73rd Session of the United Nations General Assembly, Report of the International Law Commission on the Work of its Seventieth Session, at 2 (Oct. 22, 2018), https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/; Permanent Representative of the Commonwealth of the Bahamas to the United Nations, Statement on Behalf of the Caribbean Community (CARICOM), 73rd Session of the United Nations General Assembly, Report of the International Law Commission of the Work of its Seventieth Session, at 1 (Oct. 22, 2018), https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/; Statement of the Representative of China and Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China, 73rd Session of the United Nations General Assembly, Report of the International Law Commission of the Work of its Seventieth Session, at 2 (Oct. 22, 2018), https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/; Statement of the Head of Legal Service of the Ministry of Foreign Affairs and International Cooperation, 73rd Session of the United Nations General Assembly, Report of the International Law Commission of the Work of its Seventieth Session, at 1 (Oct. 22, 2018), https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/.

3 Jeffrey S. Morton, *The International Law Commission of the United Nations*, University of South Carolina Press, South Carolina, 2000; Sir Ian Sinclair, The *International Law Commission*, Cambridge University Press, Cambridge, 1987.

4 Int'l Law Comm'n, Rep. on the Work of the First Part of Its Seventeenth Session, U.N. Doc. A/CN.4/181, at 156-59 (1965); Int'l Law Comm'n, Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/CN.4/191, at 173-77 (1966).

5 Int'l Law Comm'n, Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/CN.4/191, at 177 (1966); *see also* G.A. Res. 3233 (XXIX) (Nov. 12, 1974).

6 *Id.*

7 *Id.*

8 *Id.*; James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002.


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those areas reflects the aspects of its mandate to assist States with both the codification and the progressive development of international law. But, arguably none of these areas, although foundational to the post World War II international legal order, have permeated the work of the Commission throughout the last seven decades as much as the field of international criminal law. Only two exceptions come to mind.

First, is the Law of Treaties. The Law of Treaties, which might be the Commission's most important contribution to date, formed the basis for what eventually became the 1969 Vienna Convention on the Law of Treaties ("VCLT").[9] Its significance is further exemplified by the many subsequent "spin-off" projects it has generated for the Commission since its entry into force. Those studies, largely aimed at accounting for lessons learned following decades of application of the VCLT to concrete situations as well as new developments, continue to dominate the Commission's program of work.[10] Indeed, entire studies have been conducted based on provisions, and in some cases, sections or paragraphs of articles from the VCLT. For instance, the Commission has completed additional work on reservations to treaties[11] (section 2 of the VCLT, comprised of Articles 19 to 24) and subsequent agreements and subsequent practice (Article 31(3)).[12] The Commission has ongoing work on provisional application of treaties (Article 25) and peremptory norms of general international law – *jus cogens* (Articles 53/64). Not to mention, at the request of the General Assembly, the application of the VCLT to unresolved questions concerning treaties concluded between States and international organizations or between international organizations.[13]

The second exception of an area that continues to influence the work of the Commission are the Articles on Responsibility of States for Internationally Wrongful Acts. The State Responsibility Articles have not (yet) been transformed into a multilateral convention, like the VCLT. The study on State responsibility coincided with the bulk of the Commission's existence; an outcome of about 40 years of work over a seventy-year period. In fact, from the commencement of the study in 1956 and its completion upon second reading and eventual submission

9 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

10 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 138 (2015) (including the topic *Jus cogens* – a study of VCLT art. 53 – in the Commission's program of work) [hereinafter Rep. on Sixty-Seventh Session]; Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/67/10, at 105 (2011) (including the topic Provisional application of treaties – a study of VCLT art. 25 – to the Commission's program of work); *see also* Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 12 (2018) (completing the second reading of Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties – a study of VCLT art. 31(2)(a) – submitted to the General Assembly in 2018) [hereinafter Rep. on Seventieth Session].

11 Rep. on Seventieth Session, *supra* note 10, at 12 (draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties submitted to the General Assembly in 2018).

12 *Id.*; *see also* G.A. Res. 73/202, at 1-2 (Dec. 20, 2018).

13 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, U.N. Sales No. E.94. V.5 (1986) (not yet in force: 39 Signatories, 44 Parties).

with a final recommendation to the General Assembly in 2001, the topic was guided by no less than five ILC Special Rapporteurs. Questions of responsibility have also continued to generate further work for the ILC, in relation to, for example, the responsibility of international organizations[14] and issues of State succession.[15]

This article examines the role and contributions of the ILC in the promotion of the progressive development of international law and its codification from the perspective of the nascent field of International Criminal Law ("ICL"). Though not unique, if we account for the law of treaties – which, like a ghost, continues to hang around the corridors of the Commission – and the sheer scope and depth of State responsibility, the ICL field appears to have occupied a special place in the life of the ILC. This is because the Commission's first project, mandated to it by the General Assembly on November 27, 1947, was in fact the formulation of the principles of international law recognized in the Charter and in the Judgment of the Nürnberg International Military Tribunal ("IMT").[16] Recognizing the importance of this maiden ICL topic for the Commission appears important for both symbolic and substantive reasons.

Symbolically, the IMT was the first successful attempt to establish an ad hoc "international" penal tribunal to prosecute persons responsible for crimes under international law: namely, war crimes, crimes against humanity, and crimes against peace.[17] Thus, although the idea had been first planted just after World War I, it was World War II and the establishment of the IMT sitting at Nürnberg that cracked the door open to the hitherto unknown possibility of an international criminal tribunal that would address responsibility to individuals as part of the enforcement of certain fundamental values of the international community, Nürnberg became the "Grotian"[18] moment for ICL. The new Commission was thereafter tasked with reflecting upon the implications of that watershed for States and the international community.[19] This included the possibility of developing an international criminal code[20] and a corresponding international enforcement mechanism to give effect to its prohibitions.[21]

14 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 54-68 (2011).

15 Vienna Convention on Succession of States in Respect of Treaties, Nov. 6, 1996, 1946 U.N.T.S. 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, U.N. Sale No. E.94.V.6 (1983) (not yet in force); *see also* Pavel Šturma (Special Rapporteur on Succession of States in Respect of State Responsibility), *Second Rep. on Succession of States in Respect of State Responsibility,* U.N. Doc. A/CN.4/719, (Apr. 6, 2018).

16 *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN/SER.A/1950/Add. I.

17 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 280.

18 Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge University Press, Cambridge, 2013.

19 G.A. Res. 177 (II) (Nov. 21, 1947).

20 G.A. Res. 36/106 (Dec. 10, 1981).

21 G.A. Res. 260 B (111) (Dec. 9, 1948).


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Substantively, the principles formulated by the Commission for the General Assembly now form part of the starting point and thus the bedrock of modern ICL. This is largely due to the foundational nature and broad acceptance[22] of the Nürnberg Principles, which in seven broad strokes helped to cement a new global norm – that is, the notion that any person who commits an act constituting a crime under international law, such as a crime against peace, war crimes and crime against humanity, is responsible therefor and liable to punishment.[23] The Nürnberg Principles, by taking up key issues that continue to be the basis of international criminal prosecutions, have directly and indirectly played a role in influencing international law's attitude towards the rights and duties of individuals as well as the obligations of States under international criminal law.

Nonetheless, the Commission's contribution to ICL did not end with the Nürnberg Principles. In fact, it proved to be just the beginning. It has since covered a diverse set of ICL issues; most prominently, the question of international criminal jurisdiction, a draft code of crimes against the peace and security of humankind, and ultimately, work on a draft statute for a permanent international criminal court.[24] Since its early forays in the subject area, often at the request of the General Assembly, the Commission has, through its own initiative, taken up several related topics aimed at advancing the largely twentieth century notion of individual criminal responsibility for international crimes, alongside mechanisms for the enforcement of such prohibitions – whether at the national or international levels.

The ILC's work in this area, some of which is ongoing as of this writing, has touched on central and inter-related topics for this sub-field. These include the question concerning the definition of aggression, which for reasons largely relating to the Cold War bounced back and forth for several years between the Commission and the Sixth Committee like a ping-pong until the General Assembly itself completed the task with the adoption of a resolution on the topic by con-

22 Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Pursuant to Art. 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 (Dec. 13, 2011), https://www.icc-cpi.int/CourtRecords/CR2012_04203.PDF; Prosecutor v. Al Bashir, ICC-02/05-01/09, Corrigendum to the Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 43 (Dec. 13, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF; Prosecutor v Tadić , Case No. ICTY-94-1-I, Decision on Deference Motion for Interlocutory Appeal on Jurisdiction, 94 (Yugoslavia Oct. 2, 1995); Nahimana et al. v. Prosecutor, ICTR-99-52-A, Judgment, (Nov. 28, 2007); Prosecutor v. Taylor, Case No. SCSL-03-1-T, Judgement Summary (Apr. 26, 2012).

23 *See, e.g., Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, supra* note 16 (irrelevance of official capacity (Principle III); general obligation to prevent and punish crimes against humanity (Principle VI)).

24 G.A. Res. 36/106 (Dec. 10, 1981); *Draft Statute for an International Criminal Court with Commentaries* [1994] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2); *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int'l L. Comm'n 17, U.N. Doc. A/CN.4/SER.A/1996/Add.1 Part Two.

sensus in 1974;[25] the obligation to prosecute or extradite (*aut dedere aut judicare*);[26] immunity of State officials from foreign criminal jurisdiction; and most recently, crimes against humanity. The Commission appears open to the prospect of continuing to work in the area of international criminal law with the addition to its long-term program of work in 2006 of the topic extraterritorial jurisdiction.[27] Even more recently, and based on a proposal of this writer approved in 2018 and included in its report to the General Assembly on the work of its Seventieth session, the ILC placed the topic universal criminal jurisdiction on its long-term program of work.[28]

This article will not examine all the ILC's rich contributions to the development of the ICL field. Rather, its aim is to examine a specific and contemporary ICL topic which some might consider the Commission's current flagship project because it is the only explicitly declared convention project: the Commission's first Draft Convention on Crimes Against Humanity, which first draft was completed during the sixty-ninth session in August 2017 and submitted to States for comments via the General Assembly in September 2017. As usual, the Commission has invited State comments on the first reading text. All States' comments are due at the beginning of December 2018.

The primary goal of the article, which focuses on the text as adopted on first reading, is to examine the positive, and less positive, aspects of the ILC's draft convention from the lens of codification and progressive development. The paper, in seeking to highlight key aspects of what will hopefully eventually form part of the ILC's latest contribution to the development of ICL, will suggest that even in highly technical areas, the theme of progressive development and codification, which is so central to the work and identity of the Commission, continues to remain important. The underlying feature of progressive development and codification, though it did not per se drive the debate on this topic as it has on other current topics, such as immunity of State officials from foreign criminal jurisdiction, seemed to lurk in the background. The background hum of the Commission's mandate may be among the best explanations for the more contentious parts of the crimes against humanity project, which generally aims to provide substantive clarity on the vital aspects of probably the most important of the four core international crimes: crimes against humanity.

Structurally, the article will proceed as follows. Part II seeks to provide some of the background context for the study. It explains the internal ILC process for the selection of new topics and considers why the crimes against humanity project seems important for both the ILC and the international community. Part III, which is the heart of the article, will examine each of the proposed articles and highlight some of the most prominent features of the draft convention as pro-

25 *See The Work of the International Law Commission*, 9th ed., United Nations Publications, 2017 pp. 124-25 (summarizing the completion of the topic of aggression in 2010).

26 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at Chapter VI (2014); G.A. Res. 69/118, at 3 (Dec. 10, 2014).

27 Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10 at 22, Annex E (2006).

28 Rep. on Seventieth Session, *supra* note 10, at 29, Annex A.


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posed by the Commission in its 2017 first reading text. Part IV then turns to the aspects of the text adopted by the ILC in relation to which I had some doubts. With respect to each of these parts, I will attempt to explain how the mandate of progressive development and codification could be relevant in appreciating the debate within the Commission and the compromise text that was adopted and submitted to States for their consideration. Part V draws tentative conclusions.

Readers must bear in mind that there remains a final second reading step for the crimes against humanity project, which is expected to be completed during the 71st session of the Commission in 2019. It is normal that, based on the comments of States and other observers, some of the text adopted on first reading will change. A final recommendation will thereafter be formulated by the Commission to accompany its final text to the General Assembly. At that stage, it will be up to the States to decide whether to take forward the item by convening a diplomatic conference or through direct negotiation of the treaty text by the General Assembly. It is hoped that, after many years of placing on the shelf the more recent outcomes of the Commission's outputs, that the General Assembly and States will see it fit to take forward the draft convention proposed by the ILC. In this way, they will not only better mind the present big gap in the prohibition of atrocity crimes, but also re-establish the relevance of the Commission's current work and its central role as the only general UN created body engaged in assisting them with the tasks of codification and progressive development of modern international law.

## 2 Background: The ILC's Process and the Decision to Study Crimes against Humanity

### *2.1 The General Assembly and Proprio Motu Action as Two Potential Sources of New ILC Topics*

By way of background, there are two principal methods by which the ILC can carry out its statutory responsibilities to study pressing international law questions for States and the international community. First, under the Statute, adopted by States in 1947, the General Assembly, other principal UN organs or specialized agencies may refer topics to the ILC for study in accordance with the provisions of the Statute of the Commission.[29] While this occurred relatively frequently in the past in relation to the General Assembly, including in respect of several ICL topics including the draft statute for a permanent International Criminal Court ("ICC") which was requested in 1994, such referrals have been infrequent more recently. The latter was noticed, so much so that in 1996, the ILC review of its working procedures at the request of the General Assembly itself emphasized to the parent body that States and other relevant UN organs be encouraged to submit proposals for new topics involving codification and progressive development of international law.

29 G.A. Res. 174 (II), Statute of the Int'l Law Comm'n, arts. 16 and 17 (Nov. 21, 1947).

Second, the ILC is statutorily entrusted with surveying the whole field of international law with the view to selecting topics for codification and to recommending them to the General Assembly. In its practice, dating back to 1949, the Commission concluded that it possessed the competence to work on proposed studies notified to States through the General Assembly for their feedback without necessarily first securing a formal green light to proceed. This aspect apparently recognizes the independent role of the ILC as an expert body.

In reality, however, topics must receive feedback from States after their addition to the long-term program of work. This preserves the central role of States in the process and underscores the role of the technical experts is merely to assist the General Assembly in its primary responsibility to promote international cooperation in the political field and the promotion of the progressive development of international law and its codification. This means that ILC proposed topics usually receive feedback and are formally taken note of in a General Assembly resolution. It is only after such a step that, based on several additional considerations like the nature of the feedback received, that the ILC will take a separate and subsequent decision on whether to study the proposed topic further by moving it into its active program of work. A topic that does not generate any interest amongst States is unlikely to make it into the current program of work. Topics that only generate lukewarm interest or that are perceived as political or policy oriented may also meet the same fate. That said, while there is a rigorous process for inclusion of topics into the *long-term* program of work, the assessment of the potential suitability of topics for the *active* work program turns on various other considerations and becomes a matter of collective judgment.

### *2.2 The Addition of Crimes against Humanity to the Long-Term Program of Work*

Perhaps unsurprisingly, and due also to the increased development of other fora and sites of law making for States, the second path discussed above has formed the basis for most of the ILC's work and outputs in the past seventy years. Of late, for various complex reasons, it has been the only path. This means that, like all the Commission's current projects, the topic crimes against humanity began with a proposal presented by a member. The proposal in this case was presented by Sean Murphy (USA). All proposals are considered by the Working Group on the long-term program of Work, which is a subsidiary body of the Planning Group. The latter is established by the Commission to which it reports and retains the same membership each year. A topic proposal must fulfill certain criteria agreed by the Commission in 1996 and reiterated in 1998 before it can secure approval.

As part of a multi-stage internal review process, in the more recent practice, the long-term program of work working group operating on the basis of consensus decides whether the formal topic selection criteria have been fulfilled. In this regard, it carefully assesses (1) whether a given topic proposal appears to meet the needs of States in respect of the progressive development and codification of international law; (2) if the topic is sufficiently advanced in stage in terms of State practice; and (3) if the topic is concrete and feasible, provided that (4) the Commission shall not restrict itself to traditional topics but could also reflect those newer and pressing concerns of the international community as a whole. In


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this case, as regards crimes against humanity, the working group concluded that all these criteria had been fulfilled.

The principal argument in favor of the crimes against humanity topic was that there exists, in the present international legal framework, a big gap in the field of ICL. In particular, as it relates to the law of "core international crimes," that is, genocide, war crimes, crimes against humanity, and although the last was not mentioned in the proposal, the crime of aggression.[30] Whereas genocide and war crimes have been codified in standalone global treaties requiring States to investigate and prosecute those who commit them within their national courts, there is no equivalent global convention concerning crimes against humanity.[31] Considering that the latter crime is the broadest crime available, vis-à-vis the other core crimes, the need to codify it in its own separate instrument and thereby provide greater legal certainty in its use becomes very important.

As a second main justification, there is at present no regime of inter-State cooperation providing for mutual legal assistance and extradition for crimes against humanity at the horizontal level. Yet, perhaps partly because of how suppression or transnational crimes conventions have evolved on a separate track vis-à-vis atrocity crimes, the international community has developed such cooperation regimes for numerous transnational crimes conventions, such as corruption. The latter may be considered less heinous crimes than crimes against humanity. By providing for a treaty that would address crimes against humanity specifically, it was felt that this could enhance the investigation and prosecution of these crimes at the national level. Empowering domestic courts to prosecute crimes against humanity is distinct from the jurisdiction of international criminal tribunals such as the ICC, which operates at the vertical/international level. Thus, especially given that the Rome Statute does not as such include an explicit duty for States to prosecute crimes against humanity but requires States to act as the first line of defense against impunity, a special convention on crimes against humanity was found as a potential useful complement of that system. This will enhance the complementarity regime under the ICC system. In the end, based on the syllabus proposal, it was decided that it was about time that the ILC considered taking up this important topic with the view of potentially assisting States to codify this important international crime in a separate treaty aimed at both prevention and punishment of those who perpetrate it.

30 Rome Statute of the International Criminal Court art. 5, July 1, 2002, 2187 U.N.T.S. 3.

31 See, in this regard, the examples of the treaties regarding genocide and an example of one of the four addressing grave breaches amounting to war crimes in terms of the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, June 8, 1977, 1125 U.N.T.S. 3.

As usual with the Commission topic selection process, the decision of the working group on the work program is reported to the parent Planning Group chaired by the first vice chair of the Commission for that session. The Planning Group, in turn, reports to the plenary of the ILC as a whole. The Commission, after consideration of the report, endorsed the working group's decision at the level of the plenary of the Commission, which then subsequently decided to recommend the inclusion of the topic crimes against humanity to the long-term program of work during the Sixty-Fifth Session in 2013.[32] The crimes against humanity topic, the syllabus for which was annexed to the 2013 report, was thereafter notified to the General Assembly with a request for the feedback from States on the proposed topic. There, States proved to be generally favorable towards the topic, though there was some concern that whatever the Commission does in the topic, should be careful to complement rather than undermine the legal regime centered around the ICC. The General Assembly took note of the topic in its resolution that year.[33]

### *2.3 The Addition of Crimes against Humanity to the Current Program of Work*

Upon resumption of its work in the summer 2014, the ILC analyzed the feedback of States on the crimes against humanity proposal in the General Assembly. Given the generally favorable State reactions towards the topic, and the availability of space on its program of work, the Commission decided to move crimes against humanity on to the Commission's current program of work.[34] Consistent with the ILC practice, Mr. Murphy, the proponent of the topic was appointed as Special Rapporteur.[35] Special rapporteurs play an important role for the Commission in a volunteer capacity, helping to guide the formulation of a plan and leading the effort on the topic. The special rapporteurs typically prepare reports each year to further the work plan on the topic, explaining the state of the law and making proposals for Draft Articles.

Consistent with that role, in this topic as well, the Special Rapporteur prepared three reports for each of 2015, 2016 and 2017. The reports would be circulated to the members just before arrival in the Swiss city of Geneva each summer, and following their introduction by the Rapporteur, they would be debated by the members of the Commission in the plenary.[36] After the debate closes, signified by the summing up by the Special Rapporteur, the proposed Draft Articles contained in each report were transmitted to the Drafting Committee. In the drafting pro-

32 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, U.N. Doc. A/68/10, at 170 (2013).

33 G.A. Res. 69/118, at 7 (Dec. 10, 2014).

34 Int'l Law Comm'n, Provisional summary record of the 3227th meeting of the Sixty-Sixth Session, U.N. Doc. A/CN.4/SR.3227 (2014), at 3.

35 Int'l Law Comm'n, Provisional summary record of the 3227th meeting of the Sixty-Sixth Session, U.N. Doc. A/CN.4/SR.3227 (2014), at 3.

36 Sean D. Murphy (Special Rapporteur on Crimes against Humanity), *First Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/680 (Feb. 17, 2015); Sean D. Murphy (Special Rapporteur on Crimes against Humanity), *Second Rep. on Crimes Against Humanity,* U.N. Doc. A/CN.4/690 (Jan. 21, 2016); Sean D. Murphy (Special Rapporteur on Crimes against Humanity), *Third Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/704 (Jan. 21, 2016) [hereinafter Murphy, *Third Rep.*].


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cess, the members of the Commission that volunteered to serve on the drafting team for the topic would engage in a detailed and substantive process of review of every single paragraph, sentence, and comma. Issues of substance are also discussed, with the chair of the Drafting Committee and Special Rapporteur playing important roles, in plenty of informal discussions and negotiations to find a consensus. Once the articles are completed, they are reported back to the Plenary of the Commission, where they are adopted. The Commission would approve and subsequently include them in its annual report for onward transmission to the General Assembly where States get the opportunity to comment on them in the Sixth (Legal) Committee.

At the Sixty-Ninth Session in 2017, that is, just four years after the project began, the Commission successfully adopted a complete set of Draft Articles on crimes against humanity.[37] The first reading package contained a preamble, 15 Draft Articles, and a draft annex, all of which were accompanied by draft commentary.[38] These were transmitted to States, through the Secretary-General, with a request inviting written comments from States by December 1, 2018.

## 3 Positive Aspects to the ILC's First Draft Convention on the Prevention and Punishment of Crimes Against Humanity

### *3.1 An Opportunity to Prepare a Draft Convention for the General Assembly*

Before I highlight the substance of the Draft Articles, as adopted by the Commission upon first reading in August 2017, it seems noteworthy that the crimes against humanity project is important both for the ILC and the international community. First, and though perhaps the least important reason is that for the ILC, which has in the past been criticized for its deliberative – or should I say *too deliberative* – pace of work, the completion of the first reading of the Draft Articles on crimes against humanity stands as a major accomplishment. All the more so given the relatively short period between the addition of the topic to its program of work in the summer of 2014, the appointment of a Special Rapporteur the same year, and the completion of the first reading with a full set of Draft Articles with commentary in the summer of 2017. The credit for this lightning speed, in ILC terms, must go to the Commission as a whole. But it would not have been possible without a dedicated Special Rapporteur, as well as an engaged and cooperative Drafting Committee and Commission. The significance of this point should not be underestimated as it in some respects confirms that the ILC is capable of taking up a new topic and turning around a rigorous first draft instrument within a relatively short time frame.

Second, the crimes against humanity project can also be seen as important to the ILC; for it is, at present, the only topic whereby the Commission has explicitly declared, from day one in the Syllabus for the topic, that it will be working in the

37 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10, at 10-21 (2017).

38 *Id.* at 9-10.

most traditional or classical part of its mandate,[39] that being to prepare legal texts, for the General Assembly, which have the potential, or capacity, to become treaties.[40] This too is important because many of the ILC's more recent projects have softer forms such as draft conclusions and draft guidelines. The seeming shift towards the preparation of other types of instruments does not mean that the Commission will neglect its primary function to assist also with the codification of international law through the proposal of instruments capable of creating binding legal obligations for States. In this regard, the Crimes against Humanity draft will soon join the 2016 protection of persons in the event of disasters text which was adopted on second reading during the ILC's Sixth-Eighth session and recommended to the General Assembly for the elaboration as a convention.

### *3.2 The ILC's Composite Approach to Its Mandate and Application to Crimes against Humanity*

In accordance with Article 1 of its Statute, the Commission has as its object the "promotion of the progressive development of international law" and its "codification." The terms "codification" and "progressive development" are defined, albeit merely for convenience, in Article 15 of the Statute of the Commission. Article 15 states that "progressive development of international law" is a reference to the "preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." In contrast, "codification of international law" is said to mean "the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine."

As a matter of principle, as regard this distinction in its founding instrument, the ILC has adopted a "composite" approach to its mandate.[41] Thus, though seemingly formally bound to some type of distinction between progressive development and codification under Article 15 of its statute, the Commission has preferred to present legal texts that may reflect a mix of both. For that reason, as a *general* rule, the ILC has not flagged which of its provisions contained in texts forwarded to the General Assembly constitute one or the other. It has done so in a relatively small group of instances over a seventy-year period. It would, when it speaks to the point, often be content to state, at the outset, that the text in the package sent to States should be presumed to include a mixture of both codifica-

39 Int'l Law Comm'n, Syllabus on the Topic of Crimes Against Humanity, U.N. Doc. A/68/10 at Annex II: Crimes Against Humanity.

40 *Id.* at 14-16.

41 See Charles C. Jalloh, 'The Role and Contributions of the International Law Commission to the Development of International Law', *Florida International University Law Review*, Vol. 13, 2019, p. 975; Dire Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?', *Leiden Journal of International Law,* Vol. 32, 2019, pp. 169-87.


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tion and progressive development.[42] This approach seemed to generally work well. It also seems protective of States lawmaking role since they would in any event go on to negotiate a treaty text based on the Commission's work. The question that might now arise is whether this established practice should continue given the increasing tendency of the ILC's current projects to be of a softer or even soft law nature in the form of principles, guidelines or conclusions rather than Draft Articles designed for possible transformation into multilateral conventions negotiated by States.

Some aspects of the ILC's first reading draft crimes against humanity treaty appear to go beyond codification of the existing customary law of crimes against humanity and may reflect its progressive development. Indeed, the fact that the Commission embarked upon the path of preparing Draft Articles for the crimes against humanity topic does not mean that the work on this or any of its other projects could be regarded as limited to codification of the existing law. That task will, in methodological terms, involve an in-depth assessment of the customary law status of each given rule. That will in turn call for a detailed examination of the existence of a general practice among States that is accepted as law in relation to a given rule. A second step would then determine whether the rule needs to be improved even as it is reduced into writing as part of the exercise of codification. Even in the task of codification, it can be presumed to include minor changes or additions to clarify issues or fix gaps. As Brierly explained well in the early days of the ILC in relevant part:

> …codification cannot be absolutely limited to declaring existing law. As soon as you set out to do this, you discover that the existing law is uncertain, that for one reason or another there are gaps in it which are not covered. If you were to disregard these uncertainties and these gaps and simply include in your code, rules of existing law which are absolutely clear and certain, the work would have little value. Hence, the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest which is the better view; where a gap exists, he will suggest how it can best be filled. If he makes it clear what he is doing, tabulates the existing authorities, fairly examines the arguments pro and con, he will be doing his work properly.[43]

There are, of course, other aspects of the draft convention that constitute "progressive development," as the phrase is understood in Article 15 of the Statute of the Commission. The latter provides for the preparation of draft conventions on subjects that have either not yet been regulated or encompasses situations where the law itself has not been sufficiently developed in State practice. The descrip-

42 *See,* for instance, Draft Articles on the Effects of Armed Conflicts on Treaties, *in* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third session, U.N. Doc. A/66/10 (2011); Draft Articles on the Law of Transboundary Aquifers, *in* Int'l Law Comm'n, Rep. on the Work of Its Sixtieth Session, U.N. Doc. A/63/10 (2008).

43 As quoted in Herbert Briggs, *The International Law Commission*, Cornell University Press, New York, 1969, pp. 134-135.

tion of some provisions contained in the first reading text of crimes against humanity might fit the progressive development category. The extension of rules on extradition and mutual legal assistance specifically to crimes against humanity could be illustrations of this.

Yet, there is extensive practice of States in that regard in relation to several other (transnational) crimes. In fact, this example suggests that the distinction between codification and progressive development is to some extent facile, in the sense that both concepts mandated in Article 15 of the Commission's statute admit of a measure of change to a given rule whether framed as codification or progressive development. In the present example, all that takes place is that the existing rule which is known in the transnational crimes context is extended to cover a new situation addressing atrocity crimes. If that contention is true, the question might arise whether this approach was sound for this specific topic. I would argue that it is for several reasons. First, given the nature of the subject matter, especially the gravity of the crimes under consideration. A related point is the virtually inseparable nature of the task of codification from the task of progressive development.

Second, although there is some practice to prosecute these crimes within international tribunals such as the ICTY, the ICTR, the SCSL and the ICC, there is relatively limited State practice concerning the investigation and prosecution of such crimes within *national* courts. Yet, at least indirectly, the practice of international courts set up to prosecute crimes against humanity would be relevant,[44] more so whereby the law in this area has been developed by the judges of those courts without objection from States.

Third, and relatedly, since the ILC project was partly justified as a gap filling convention, there is, ultimately, a need for an effective regime at the national level for the prevention and punishment of crimes against humanity. This apparently requires a study of treaties which are highly developed in respect of transnational crimes. Those treaties may offer useful models for crimes against humanity. In such circumstances, rather than emphasize which aspect of its Draft Articles constitute progressive development and which reflect codification of existing law, the Commission necessarily blends the two to advance Draft Articles deemed to be useful, effective, and likely to find acceptance among a broad range of States. This would include parties or non-parties to the ICC Statute.

In a nutshell, both for principled and practical reasons, the draft crimes against humanity articles adopted on first reading in 2017 conform to the long-standing practice of the Commission. As the study itself aims at producing a draft convention, which contains elements of existing law and elements of proposals for progressive development of the law, the Commission enjoys some freedom to suggest provisions based primarily on whether they are expected to be useful and effective in the prohibition and punishment of crimes against humanity. Thus, it is plausible that some of the provisions will go beyond existing law, that is to say, beyond codification as defined under the Statute. The safeguard for States is that, if they take forward the draft convention, they would negotiate the text and make

44 Rep. on Seventieth Session, *supra* note 10, at Ch. V (conclusion 4) (2018).


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it their own. Once satisfied, they can through signature, ratification and accession express their consent to be bound by the obligations contained within it. In such circumstances, it seems not as material for each specific Draft Article to reflect the *lex lata*.

With the above context in mind, let us now proceed to assess the *form* and *substance* of the ILC's draft crimes against humanity articles adopted by the Commission on first reading in 2017. Two brief observations seem warranted. First, though perhaps an unfair comparison, the first draft crimes against humanity convention consists of a preamble, 15 Draft Articles, and a draft annex, all of which are accompanied by commentary. This is a much shorter and more compact instrument, compared to the 19 clauses of the 1948 Genocide Convention and between the 63 and 163 clauses and several annexes of the four Geneva Conventions.

Second, and focusing on substance, even a cursory review would show that the draft crimes against humanity articles reflect many benefits of having a standalone treaty. It compares favorably, and in nearly all respects, improves upon the Geneva and Genocide Convention frameworks. The duty to prevent and the duty to punish are both given great weight. The draft convention also contemplates strong mini-extradition and mutual legal assistance regimes that are missing from the war crimes and genocide conventions. For the latter reason, it would have been beneficial for the Commission to broaden the crimes against humanity project to also include war crimes and genocide in its study.

### *3.3 Draft Article 1 – Scope of the Draft Articles*

Besides the preambular paragraphs, which among other things recognize that the prohibition of crimes against humanity is a peremptory norm of general international law and that it is the duty of States to exercise their criminal jurisdiction over the crime, this opening provision, which is standard in ILC draft texts, sets the stage for the whole project. It provides that the Draft Articles apply to or concern the prevention and punishment of crimes against humanity. It looks both to the future and the past. Future in the sense that, by criminalizing crimes against humanity, it seeks to prevent them from being committed. In terms of addressing the past, when crimes are committed, it seeks to create a mechanism that would require States to take measures to prevent others who would otherwise carry them out.

Regrettably, although crimes against humanity, genocide and war crimes are typically committed together, the draft instrument does not encompass those other crimes. To have covered war crimes and genocide would have broadened the scope of the ILC's project. Nonetheless, it would have better addressed the realities of international crimes by providing a regime for horizontal cooperation on extradition and mutual legal assistance than solely addressing the single crime. Incidentally, several States have initiated a treaty-making project that would address the crimes.

### *3.4 Draft Article 2 – General Obligation*

Article 2 essentially provides that States undertake both to prevent and to punish crimes against humanity, which are crimes under international law, whether committed in peace time or during wartime. The first part of the provision can be said to constitute codification. The ILC had, in some of its prior work, concluded that crimes against humanity were clearly prohibited as a crime under international law. The latter obligation, which entails the element of prevention, may constitute progressive development.[45]

In advancing this provision, the Special Rapporteur provided multiple treaty references including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, 1954 Draft Code of Offences Against the Peace and Security of Mankind, 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, and others.[46] Although, none of those instruments included the exact language of Article 2, the Special Rapporteur emphasized that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, with 150 State signatories, as a similar convention which represents that States bear an obligation to prosecute and prevent these crimes of atrocity which are punishable during times of armed conflict, and times of peace. The Genocide Convention, which contains the duty of prevention in relation to that crime, is usually considered to be part of customary international law. As a crime analogous to a crime against humanity, and considering the subsequent developments in international criminal law since 1948, an extension of this obligation to cover this crime is warranted.

The text of the provision seems well anchored by its alignment with the analogous obligation set forth in Article 1[47] of the 1948 Genocide Convention via use of the words "undertake to" rather than "shall," and identifies crimes against humanity as "crimes under international law," an expression previously used by the ILC, for example in Article 1, paragraph 2 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind.[48] The assertion in this Draft Article that crimes against humanity are crimes under international law "whether or not committed in time of armed conflict"[49] is also important due to the long debate among international criminal lawyers about the so-called conflict nexus. As explained by the Chairperson of the Drafting Committee,

45 Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee on Crimes against Humanity, at 3-5 (June 2, 2015), http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_crimes_against_humanity.pdf&lang=EF.

46 Int'l Law Comm'n, *supra* note 32, at Chapter IV, Article 2 commentary 6.

47 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

48 Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/CN.4/L.532 at 50.

49 Int'l Law Comm'n, *supra* note 32, at Chapter IV, Article 2; Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee on Crimes Against Humanity, *supra* note 45, at 5.


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> The Drafting Committee considered it important to maintain this element from the original proposal by the Special Rapporteur in view of the historic evolution of the definition of crimes against humanity. As explained in the First Report, these crimes were originally linked to the existence of an armed conflict in the context of the Nürnberg Tribunal. Customary international law has developed since then, and it is now firmly established that no such connection is required.[50]

The duty to prevent crimes against humanity is further explained in the Commission's commentary, and was also addressed in later substantive provisions of the Draft Articles. Unresolved issues concerning this provision will include the *scope* and *depth* of the duty, in particular, whether it applies only internally in the concerned State or also externally in relation to other States. Consideration of this will presumably account for the developments concerning humanitarian intervention and the responsibility to protect which was endorsed in relation to crimes against humanity by the UN General Assembly in 2005. The duty to prevent, as important as it is, would seem to be progressive development.

### *3.5 Draft Article 3 – Definition of Crimes against Humanity*

The first reading crimes against humanity text also provides, in four paragraphs, a single definition of crimes against humanity. This should help develop the type of definitional coherence we see for the crime of genocide and war crimes but that has been abjectly missing for crimes against humanity. In terms of origin, the first three paragraphs of this article essentially reproduced Article 7 of the Rome Statute, which incidentally, did not purport to be adopting the customary international law definition of crimes against humanity when the treaty was negotiated in 1998. The preference for the ICC definition stems from the view within the Commission, both in Plenary and Drafting Committee, that the definition contained in the Rome Statute should not be altered for the purposes of the Draft Articles.[51] This approach, which also apparently reflected the preference of some States Parties to the Rome Statute, seemed uncontroversial within the Commission.

At the same time, it should have provoked a more robust discussion of whether the provision constituted codification or progressive development of international criminal law. This is because there are seemingly diverging views among jurists on the customary law status of the Rome Statute definition, with most authorities and ad hoc courts concluding that the ICC Statute is much narrower than customary international law. The difficulty was implicitly recognized. Thus, although only directed at definitions found in national legislation and in other international instruments, the Commission added a savings clause in paragraph 4 to the borrowed definition from Article 7 of the ICC Statute. That fourth paragraph clarifies that the Draft Article is without prejudice to any broader defi-

50 Int'l Law Comm'n, *supra* note 45, at 5.
51 *Id.* at 6.

nition of crimes against humanity provided in any international instrument or national law.

This without prejudice clause also allowed the ILC to ignore potentially positive developments in the definition of crimes against humanity since the Rome Statute was adopted in July 1998, in relation to for example, the crime of enforced disappearance that now has a standalone treaty concluded in 2006. The issue was explained as follows:

> [T]he definition adopted for these Draft Articles has no effect upon broader definitions that may exist currently in other instruments, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, or in national laws … [and which] also makes clear that the present Draft Articles have no effect on the adoption, in the future, of a broader definition of crimes against humanity in an international instrument or a national law.[52]

Interestingly, although there were references to definitions of crimes against humanity under *national law* or *other international instruments,* the without prejudice clause was virtually silent regarding *customary* international law. That omission was surprising considering that custom is one of the most important sources of law with serious implications for national jurisdictions and their prohibition of crimes against humanity. It is even more surprising since the Commission was simultaneously also undertaking a separate study on identification of customary international law. In States that would have incorporated the crime, through national legislation, the prosecution of the crime would be possible as paragraph 4 captured their scenario. For those States that have the possibility of doing so under customary law, without first having passed legislation, the omission in the without prejudice clause of customary law would pose some legal difficulties. The ILC will presumably revisit this aspect during the second reading on the topic.

There is a further concern about the ILC definition that is more forward-looking than backward-looking. What the Commission does should not in any way inhibit the growth of the customary law of crimes against humanity. Ironically, even the ICC Statute, from which the ILC crimes against humanity definition is borrowed, two points make the intention of States not to disturb customary law crystal clear. First, the opening formulation of Article 7 of the Rome Statute, uses the language of "for the purpose of this Statute". This phrase was included to avoid any doubts about the specific purpose of the definition in the context of the establishment of a permanent ICC.

Second, in Article 10 of the ICC Statute, States were unequivocal that their preference for a particular definition of crimes against humanity for the specific purposes of the Rome Statute was not to be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes outside the ICC context. The ILC could also have taken on board developments in international law since the Rome Statute was negotiated in July 1998. Elements of the

52 *Id.*


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definition of the crime, for example in relation to enforced disappearances as a crime against humanity, has since been phrased in a way that is much broader than the definition actually included in Article 7, paragraph 2(i), of the Rome Statute.

We shall return to these and related concerns about the use of the ICC definition in Part IV of the present article. For now, it can be concluded that the definition of crimes against humanity contained in the first reading text is closer to an exercise in codification rather than progressive development – to the extent that most (though not all) of the elements contained in the Rome Statute definition would appear to be part of customary international law.

### *3.6 Draft Article 4 – Obligation of Prevention*

One of the most important features of the first reading text is the obligation of prevention. Draft Article 4, composed of two paragraphs, provides one of the most important provisions when it requires that each State undertakes to prevent crimes against humanity, in conformity with international law. It would establish an independent duty, from that of the duty to punish, to prevent crimes against humanity through the adoption of various and effective measures. This obligation mandates States to affirmatively "effect legislative, administrative, judicial or other preventative measure in any territory under its jurisdiction" and "cooperate with other States, relevant intergovernmental organizations and, as appropriate, other organizations" to prevent crimes against humanity.

Draft Article 4 complements Article 2 and makes the case why certain acts, which qualify as crimes against humanity, already require States to engage in proactive measures of prevention. The comparison was made to certain other widely condemned crimes such as genocide, apartheid, enforced disappearances, and torture. The prohibition of those crimes requires States to take preventive measures. By parity of reasoning, even if the obligation did not exist in relation to all the acts that comprise crimes against humanity, it was felt necessary to extend it to also cover such crimes since all of those crimes are themselves crimes against humanity when committed in the context of a widespread or systematic attack against any civilian population. Here, a strict line dividing *codification* from *progressive development* would have required separating the three underlying acts for which there are independent treaties *to the extent* that those could be said to constitute customary law (i.e. torture, enforced disappearances and apartheid) from the rest of the eight others that constitute crimes against humanity (i.e. murder, extermination, enslavement, deportation, imprisonment, rape, persecution, and other inhumane acts).

Most of the rest of these crimes, for instance, murder, enslavement, imprisonment, rape and persecution are so prevalent in virtually all States that it will be hard for them not to constitute forms of codification even if one might have to fill a gap to derive the duty to prevent them in addition to the duty to punish. The autonomous duty to prevent crimes against humanity is also consistent with the practice of States in concluding numerous largely suppression treaties that feature a duty to take steps to prevent particular crimes such as terrorism and hostage taking.

To justify the argument for prevention, reliance was also placed on multilateral human rights treaties establishing obligations to prevent human rights violations. Reference was also made to the jurisprudence of international courts, most notably, the International Court of Justice. All indicated the commonsense position that, like the case for genocide, States could be asked to undertake the duty to prevent crimes against humanity. In the commentary, the Commission went on to explain what exactly prevention would entail. Here, it relied on a four-prong duty for States based on the ICJ judgment in relation to Genocide, which was viewed as naturally extending to crimes against humanity. The ICJ has reasoned that the duty to prevent genocide is not necessarily territorially limited, meaning that the similar duty should apply to crimes against humanity in areas under both *de facto* and *de jure* control of the State concerned.

As framed, this provision would require States to develop mechanisms which they may use to promote the prevention of crimes against humanity.[53] The majority of the language for Article 4(1)(a) and the commentary concerning the treatment of the duty to prevent crimes against humanity broadly followed and applied to this crime derive from the findings of the ICJ in relation to the interpretation of this same obligation under Article 1 of the Genocide Convention in the *Bosnia Genocide Case*.[54] The obligation of prevention being placed on States is important and would be read in light of the circumstances and the risks they are being confronted with at the time.[55]

Measures taken, of course, must remain in full conformity with international law.[56] In other words, a State may not violate international law and unlawfully use force in the name of preventing crimes against humanity. The duty to take preventive measures could be seen as a form of codification, or perhaps more plausibly, as a form of progressive development. Yet, in many ways, the categorization may not be as significant. This is because, as with the case of the Genocide Convention, the safeguard for States remains in that they would have to choose to join such a convention by giving their consent in relation to the duty before it would apply to them.

Paragraph two of the Draft Article forecloses any exceptional circumstances as justifications for the crime. This paragraph was inspired by but is not entirely identical with article 2, paragraph 2 of the Convention against Torture. The provision was naturally tweaked to better fit the crimes against humanity context. As the Chair of the Drafting Committee explained,

> it was thought that an advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors.[57]

53 Int'l Law Comm'n, *supra* note 32, at Chapter IV, Article 4 commentary 13.

54 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Seb. & Montenegro), Judgment, 2007 I.C.J. Rep. 42 430-31 (February 26).

55 Rep. on Sixty-Seventh Session, *supra* note 10, at 53 (Crimes Against Humanity Draft Article 2 (Commentary)).

56 *Id.*

57 Int'l Law Comm'n, *supra* note 32.


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### 3.7 *Draft Article 5 – Non-Refoulement*

Draft Article 5, which is in some respects also preventive, contemplates that no person is to be expelled, returned (*refoulér*), surrendered or extradited to a State to

> territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.[58]

This language is largely derived from the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. But the textual addition of "territory under" has the effect of narrowing down the version included in the draft crimes against humanity text.[59] The focus should be on the change of jurisdiction which is not necessarily coextensive with territory.

The second paragraph of Draft Article 5 requires States to examine factors involving the situation that may lead to the individuals' human rights being violated; such grounds may include "flagrant or mass violations of human rights or of serious violations of international humanitarian law."[60] This clause, or close variants of it, has previously been included in a number of international and regional treaties including: the 1951 Convention relating to the Status of Refugees and the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.[61] Nonetheless, and appropriately so in my view, no exceptions to the rule similar to that found in refugee law was incorporated in the context of crimes against humanity.[62]

A wider formulation of this duty was already included in the Commission's own project on diplomatic protection.[63] The use of certain limiting language, concerning the formula regarding the "territory under the jurisdiction of" raises a number of concerns that might merit revisiting during the second reading stage. A related issue is whether, if a person is in danger of crimes against humanity, the obligation should be limited to assessing only that risk. Surely, it would be more consistent with the letter and spirit of the provision if the States concerned are required to assess the potential risk also in relation to other crimes. It is unclear whether the individual can be deported or sent back to a situation where other international crimes, such as war crimes or genocide or even other non-criminal gross human rights violations, are being committed. In the end, given that most of Draft Article 5 matches existing law and is found in numerous treaties and other instruments already widely accepted by States, it can be seen as a codifica-

58 *Id.* at 247 (Crimes Against Humanity Draft Article 5).
59 International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 23, 2010, 2716 U.N.T.S. 3.
60 Int'l Law Comm'n, *supra* note 10.
61 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 86.
62 Convention Relating to the Status of Refugees, *supra* note 61.
63 Int'l Law Comm'n, *supra* note 27.

tion of an existing and fundamental rule of international law that prohibits against refoulment. The rule is even sometimes said to carry a *jus cogens* character.

### *3.8 Draft Article 6 – Criminalization under National Law*

Draft Article 6 requires States to take measures to ensure that crimes against humanity are criminalized under their national law, which – if followed – would do much to prevent crimes against humanity from occurring.[64] This Draft Article, which is a mix of codification and progressive development, further obliges States to address in their national laws the liability of others as well: for various modes of liability, *including* committing, attempting, ordering; to provide for command or superior responsibility; and provide appropriate penalties for the gravity of the crimes; the liability of legal persons; while providing that liability would follow despite official position of a person, which would not serve to exclude the person from criminal responsibility and affirming the inapplicability of a statute of limitations and the superior orders defense for such crimes.[65]

Specifically, given divergent definitions of the crime in national laws, Draft Article 6 is significant in mandating that States take the necessary measures to ensure that crimes against humanity are criminalized under their national law *as such*, and equally importantly, that they ensure that such measures cannot be defeated by pleas to procedural bars that might otherwise gut the essence of the prohibition.[66] The Special Rapporteur believed that State practice regarding the liability of legal persons for the offences referred to in the Draft Articles was varied.[67]

However, even if that practice varies and could be argued not to be sufficient to reach the threshold of codification, several members of the Commission highlighted the need for a provision requiring the establishment of liability of legal persons for crimes against humanity.[68] There was considerable support in the Plenary discussions of the Commission for the inclusion of a provision of this kind, to account for new realities of legal persons being accomplices or aiders and abettors to the commission of mass violations of human rights, and in some cases, even crimes against humanity.[69] There are no doubt various parts of this provision that are forms of progressive development. There are also other parts, especially the modes of liability, that already have sufficient rooting in customary international law.

It is unfortunate that the ILC did not include other established modes of liability such as inciting/incitement and conspiracy, for crimes against humanity, both of which are found in its own prior and well-known work on the Draft Code of Crimes and in the Genocide Convention. Incitement as a form of accessorial liability seems well rooted in customary international law. It is a vital form of

64 Int'l Law Comm'n, *supra* note 58, at 265 (Crimes Against Humanity Draft Article 6).
65 *Id.*
66 *Id.*
67 Int'l Law Comm'n, 68th Sess., 3296th mtg. at 9, U.N. Doc. A/CN.4/SR.3296 (May 11, 2016).
68 Int'l Law Comm'n, 68th Sess., 3300th mtg. at 14, U.N. Doc. A/CN.4/SR.3300 (May 18, 2016).
69 *Id.*


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criminal participation in relation to genocide, and given the systemic nature of such core crimes, also in relation to crimes against humanity. This mode of criminal participation is reflected in state practice and in the practice of international criminal courts that have prosecuted crimes against humanity. Interestingly, the ILC departs from its earlier work by omitting both incitement and conspiracy from the draft crimes against humanity articles.

### *3.9 Draft Article 7 – Establishment of National Jurisdiction*

Draft article 7 addresses the obligation of States to establish jurisdiction over crimes against humanity in certain circumstances. It provides, in relevant part, that "[e]ach State shall take the necessary measures to establish its jurisdiction over the offences covered by the present Draft Articles…"[70] Its three subsections delineate the circumstances under which states shall take the necessary measures to establish jurisdiction: territorial jurisdiction, active personality jurisdiction, and passive personality jurisdiction. In order to properly appreciate this Draft Article, the contents must be explained prior to the analysis. Though it can already be said that the bulk of this would appear to be a form of codification even if there are also aspects that could be read as progressive development.

First, territorial jurisdiction is based on the location of the crime. This subsection provides a basis to assert territorial jurisdiction

> when the offence is committed in that state's jurisdiction, regardless of the nationality of the perpetrator, or when the offence is committed on the high seas on board a vessel registered in that State.[71]

Second, active personality jurisdiction is a common form of jurisdiction in national law based on the nationality of the alleged offender. This subsection provides for the assertion of jurisdiction

> when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who habitually resides in that State's territory.[72]

Third, passive personality provides the final basis on which to assert jurisdiction. Passive personality has been described as controversial by some academics even though it exists in several national criminal systems. This final subsection provides that jurisdiction may be asserted "when the victim is a national of that State…"[73] National law is instrumental regarding this subsection because it will provide the definition. The commentary to Draft Article 12 is also insightful, although it does not relate to the aspect concerning the exercise of criminal jurisdiction, as it "includes anyone who has individually or collectively suffered harm,

70 Int'l Law Comm'n, *supra* note 37, at Chapter IV Article 7(1)(a).
71 *Id.*
72 *Id.* at art. 7(1)(b).
73 *Id.* at art. 7(1)(c).

including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights…"[74]

Moving on to paragraph two of the same Draft Article, which provides that:

> [e]ach State shall also take necessary measures to establish jurisdiction over the offences covered by the present Draft Articles … where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person…[75]

This paragraph creates a duty for states to establish such jurisdiction. However, it also considers the possibility that a State may extradite or surrender the alleged offender, which is addressed in greater detail in other Draft Articles, such as Draft Article 9.[76]

Next, the final paragraph of Draft Article 7 makes clear that "the exercise of criminal jurisdiction established by a State in accordance with its national law" is not excluded when using other jurisdictional grounds that may be available to it.[77] For instance, the exercise of jurisdiction on the basis of universal jurisdiction for crimes against humanity would be possible. The Commission did not explicitly say anything on this, which might strike the reader as odd given the seeming acceptance of the existence of universal jurisdiction for crimes against humanity, although it appeared understood that the omission of the reference did not constitute a departure from its earlier works on the subject. Indeed, under Article 8 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the Commission was clear that it would be up to States to establish broad forms of jurisdiction over atrocity crimes, including crimes against humanity, "irrespective of where or by whom those crimes were committed."[78] It can thus be concluded that the universality principle could still be a jurisdictional basis for the investigation and punishment of crimes against humanity.

Since it appears that there is universal criminal jurisdiction for crimes against humanity under customary international law, consistent with the views of many States as expressed before the Sixth Committee, Draft Article 7 could be misread as restricting the "combined approach to jurisdiction based on the broadest jurisdiction of national courts" envisioned by the ILC in 1996 in commentary paragraph (2) to Article 8 of draft code. Indeed, according to the Commission,

74 Antonio Coco, 'The Universal Duty to Establish Jurisdiction over and Investigate Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9, and 11 by the International Law Commission', *Journal of International Criminal Justice*, Vol 16, 2018, pp.751, 761.

75 Crimes Against Humanity Articles, *supra* note 92, at art. 7(2).

76 Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee (June 9, 2016).

77 Int'l Law Comm'n, *supra* note 37, at Chapter IV, Article 7(3).

78 *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, Supp. No. 10, at 110-11, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 1, 29, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).


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> The phrase "irrespective of where or by whom those crimes were committed" is used in the first provision of the article to avoid any doubt as to the existence of universal jurisdiction for those crimes.[79]

Additionally, this broad concept of universal jurisdiction has established support in international and domestic law and in other works as evidenced by, for instance, Principles 1 of both the Princeton Principles and the Madrid-Buenos Aires Principles of Universal Jurisdiction.[80]

*3.10 Draft Article 8 – Investigation*

Article 8 mandates that, when there are grounds to believe that crimes against humanity have been committed on their territory, the competent authorities of a state must take measures to ensure a prompt and impartial investigation.[81] This approach, of directing the issue of investigation to the States that may have crimes against humanity occurring in their territory, is in line with existing international instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Article 12 of which provides a base for the formulation of Draft Article 7.[82] Torture, when committed in a widespread or systematic context, is a crime against humanity.

More expressly, Draft Article 8 relates to a States' obligation to promptly and impartially investigate offences constituting crimes against humanity "in any territory under [their] jurisdiction."[83] To avoid unnecessary confusion, it could be explained in the commentary that the intention was to also encompass situations where there is both *de facto* and *de jure* exercise of such jurisdiction.[84] Undoubtedly, when crimes against humanity occur, the "competent authorities" of States have an obligation to proceed to a prompt and impartial investigation. However, neither the commentary, nor the text, of this Draft Article define or explain the term "competent authorities."

Competent authorities may be read narrowly as including only the law enforcement authorities of a State. It could also be read more broadly to encompass other types of judicial or quasi-judicial bodies created by a State to investigate or document atrocity crimes. Consequently, it would seem beneficial for the commentary to clarify whether quasi-judicial investigations such as special commissions of inquiry or truth commissions are encompassed in this Draft Article. Further, it may not be entirely clear whether competent authorities are only the

79 See 1996, vol. II, Part Two, *supra* note 78, at 29 paragraph 7.

80 See *The Princeton Principles on Universal Jurisdiction*, Princeton Program in Law and Public Policy (2001) http://hrlibrary.umn.edu/instree/princeton.html; FIBGAR, *International Congress on Universal Jurisdiction: Dissemination of the Madrid-Buenos Aires Principles on Universal Jurisdiction* (Sept. 10, 2015), https://fibgar.org/upload/proyectos/35/en/principles-of-universal-jurisdiction.pdf.

81 Crimes Against Humanity Articles, *supra* note 32, at Chapter IV, Article 8.

82 Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee (June 9, 2016).

83 Int'l Law Comm'n, *supra* note 32, at Chapter IV, Article 8.

84 *Report of the International Law Commission on the Work of Its Forty-Eighth Session, supra* note 78.


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law enforcement bodies, or as is typical in some States, would encompass investigative branches of the judiciary especially in civil law jurisdictions.

Questions that may arise about this provision concern the use of terms, for example, whether thorough and impartial should also be used, rather than only "prompt and impartial investigation" as currently worded. The formulation could then become "prompt, thorough and impartial investigation." Further, investigations should only qualify if they are carried out in good faith. Sham investigations that are intended to shield or exonerate the suspects should not qualify. One might also query about the type of knowledge that would trigger such an investigation. I tend to the view that a State's duty to ensure its competent authorities investigate should be automatically triggered as soon as the State simply becomes *aware* of the commission of the crimes against humanity. In the end, as to classification, it seems hard to put this provision into the category of codification or progressive development. The reality is that it could be a mix of both.

*3.11 Draft Article 9 – Preliminary Measures When an Alleged Offender is Present*

Article 9 provides that States have a duty, when an alleged offender is present in their territory, to take preliminary measures such as placing the suspect in custody or taking other legal measures. For the most part, Draft Article 9 is a replica of Article 6 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[85] A similar logic to codify and extend the standard to all crimes against humanity seems to, therefore, be warranted. The idea that States must take preliminary measures to address crimes against humanity has been expressed in General Assembly and Security Council resolutions. Given the paucity of investigations and prosecutions of the crime at the national level, however, it is not entirely clear whether this provision can be said to constitute codification or a form of progressive development.

*3.12 Draft Article 10 – Aut Dedere Aut Judicare*

The draft convention also includes the perhaps misnamed duty to prosecute or extradite (*aut dedere aut judicare*) in Draft Article 10.[86] This provision is a natural follow-up to Article 9 and provides that, if the circumstances so warrant, States must submit the cases to their competent authorities for the purpose of prosecution unless they extradite that person to another State or competent international penal tribunal.[87] In reality, as framed in the first draft convention, the provision only establishes an obligation on the State in the territory under whose jurisdiction *the alleged offender is present* to submit the case to its competent authorities for the purposes of prosecution, *unless* it extradites or surrenders the person to another State or competent international criminal tribunal. One issue that could arise is whether an international instrument should impose on prose-

85 Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee (June 9, 2016), http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2016_dc_chairman_statement_cah.pdf&lang=E.

86 Int'l Law Comm'n, *supra* note 37, at Chapter IV, Article 10.

87 *Id.*


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cutorial discretion by requiring the prosecution of a case when the decision to do so would typically depend on the quality and quantity of evidence available. Generally, members speaking in the ILC Plenary debate supported the inclusion of this provision, with some linguistic suggestions.[88] In the Drafting Committee, there was discussion over this provision – specifically the following:

> [W]hether to assert in [then] Draft Article 9 that the obligation contained therein was "without exception whatsoever and whether or not the offence was committed in a territory under its jurisdiction." This expression is used in some treaties as a matter of emphasis. The Drafting Committee concluded that it was not necessary to include this clause, but that the unequivocal nature of the obligation set forth in the Draft Article should be stressed in the commentary.[89]

This idea was indeed stressed in the commentary for this provision.[90]

> [D]iscussion also took place as to whether "international criminal tribunal" should be qualified by language to say that it must be a tribunal whose jurisdiction the sending State has recognized, as appears in article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance.[91]

However, this was ultimately deemed to be unnecessary.

The final report on the Commission's separate project, on the duty to prosecute or extradite, was clear that there are important gaps in existing international law concerning this duty in relation to most crimes against humanity.[92] Yet, a rudimentary equivalent that does not necessarily match the notion here can be found in the Genocide Convention.

In the circumstances, though this point is not free of some doubt, considering the practices of States in relation to other crimes since the 1950s, it would appear that the inclusion of this standard can be said to be a form of codification of existing law albeit applied in relation to crimes against humanity. This helps to fill a void in the contemporary legal framework that could not exist in relation to this crime since no multilateral treaty has been concluded to prohibit it in the same way we have had for torture or enforced disappearances.

### *3.13 Draft Article 11 – Fair Treatment of the Alleged Offender*

Draft Article 11 of the first reading text requires that States shall take necessary measures pertaining to the rights of alleged offenders.[93] It requires that any per-

88 *See* Int'l Law Comm'n, *supra* note 85.
89 *Id.* at 13-14
90 *Id.*
91 *Id.*
92 Final Report of the Int'l Law Comm'n, The Obligation to Extradite or Prosecute (2014), http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf.
93 Int'l Law Comm'n, *supra* note 37, at Chapter IV, Article 11(1) (2017).

son against whom measures are being taken in connection with an offence covered by the Draft Articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law. It also requires the person who is arrested or detained to be notified of the right to communicate without delay with the State of nationality of the person or the State which is otherwise entitled to protect his/her rights. Such persons also have the right to a visit by the representative of the State(s) concerned.

The provision has two components at least one of which represented pure codification. The first relates to the concept of fair trial rights, which will fall in the former category and second, the issue of fair treatment, most likely constituting progressive development. There are aspects of the provision, which for example confers the benefits of consular access also to stateless persons, that may or may not reflect current customary international law and thus amount to progressive development.

Fair trial rights are relatively narrower in scope and are provisions prevalent in national constitutions, legislation, and numerous decisions found at all levels of national courts and regional and international courts and tribunals. The pedigree of this provision in international human rights, including in the International Bill of Rights[94] and in regional and national instruments is so well settled, that it would be consistent with a view that it amounts to the extensive State practice that is required for codification. Such fair trial standards, which could be read as inclusive of the broader notion of "fair treatment," also apply in the field of international criminal law. Indeed, just about all the statutes of international penal courts established to prosecute international crimes since World War II, including crimes against humanity, incorporates fair trial provisions. The references to the highest protections offered by international law provide an additional form of protection to alleged offenders under the Draft Article.[95]

Two questions arise for me here. First, the language of the Draft Article and its commentary carries some ambiguity. On the one hand, it suggests that it is intended to ensure the "fair treatment" of "any person" against whom measures are being taken in connection with crimes against humanity covered by the Draft Articles "at all stages of the proceedings." One could read the latter to include preliminary investigations against a suspect in line with Draft Article 9, paragraph 2, through to commencement of criminal proceedings when the target of the investigation is arrested or detained.[96] Suspects, before they are formally charged,

94 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 9, Dec. 14, 1973, 1035 U.N.T.S. 167; Convention against Transnational Organized Crime art. 16, Dec. 12, 2000, 2225 U.N.T.S. 209; Vienna Convention on Consular Relations art. 36, Mar. 4, 1964, 596 U.N.T.S. 261; Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 10, (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

95 Int'l Law Comm'n, *supra* note 32 at 90.

96 Int'l Law Comm'n, *supra* note 32, at Chapter IV, Article 9.


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enjoy certain rights. The clearest expression of this can be found in the Rome Statute. Though this standard here would be applicable in relation to national courts, which have other protections, it might be helpful to clarify how this distinction can be accommodated.

Second, although it seems implied, there is no specification in the Draft Articles that the fair treatment provision (and for that matter several others such as Draft Article 9, 11 and 12) may only apply to natural (not also legal persons). It might be worth clarifying this since some national jurisdictions may provide for the prosecution of legal persons for crimes against humanity under Draft Article 6. Any provisions in that regard must be consistent with the national law of the State concerned. Presumably, since a corporate body is a mere legal fiction through which human beings act, it might not be entitled to the same fair trial rights as those enjoyed by a natural person.

### *3.14 Draft Article 11 – Victims, Witnesses, and Others*

The draft convention also provides, under Draft Article 12, for the protection of the rights of victims, witnesses and others. It is not typically found in international instruments before the 1980s but now has a similar place in, among others, Article 68 of the Rome Statute. The provision, a form of progressive development, requires each State to take the necessary measures to ensure that any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; provides for protective measures for complainants, victims, witnesses and others who participate in any investigation, prosecution, extradition or other proceeding; and requires States to ensure that victims of a crime against humanity have the right to obtain reparation for material or moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution, compensation, satisfaction, rehabilitation, cessation, and guarantees of non-repetition.[97]

This broadly framed provision indicates that the rights of victims under international law are of significance also in the context of crimes against humanity. The clause addresses a range of issues, from participation to reparations for victims of crimes against humanity. This provision, in view of the enhanced standing for victims in both modern international human rights and international criminal law, could be read as constituting codification. It could be understood as an existing standard merely extended to apply to a draft convention. The case could be stronger for progressive development.

In the Drafting Committee debate of this clause, some members of the Commission suggested the inclusion of the elements set forth in Article 68 of the Rome Statute in the commentary to Draft Article 12.[98] There were also some reservations about this provision. While many members welcomed it, some ques-

97 *Id.* at 92.

98 Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee on Crimes Against Humanity, art. 12 (June 1, 2017), http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_cah.pdf&lang=E.

tioned whether it would be better to include a definition of who a victim is. I could see the argument to not have a definition, which was the preference of the Special Rapporteur and ultimately the Commission itself. At the same time, in my view, a basic definition of "victims" could have been provided to establish a floor, rather than a ceiling, for States.

In plain terms, this means that it would be without prejudice to a broader definition that may be available to provide even greater protections under national law. This could better ensure that a common or shared understanding of victimhood is provided for, as different national systems would have different definitions. A basic definition could also help ensure greater consistency and greater rights across different national jurisdictions. For instance, in some national systems, legal persons can be victims. Yet, in the crimes against humanity context, it might be more in line with the goals of the prohibition of the crime to encompass natural persons only. The latter posture would be consistent with Rule 85 of the ICC's Rules of Procedure.[99]

A second potential issue relates to the duty to provide a remedy for victims in the form of reparations which, in principle, I fully share. That said, I wondered whether it would be imposing a realistic obligation for many States afflicted with mass commission of crimes against humanity to provide that the State must ensure that the victims of a crime against humanity have the right to obtain reparation for material and moral damages on an individual or collective basis. This could work well in circumstances of small-scale commission of such crimes. It would no doubt be highly beneficial for victims. On the other hand, since crimes against humanity occur when there are widespread or systematic attacks against a civilian population, the question arises whether the same obligation might not work as well in situations of commission of mass atrocity crimes.

For example, take States such as Sierra Leone, Rwanda, and Liberia, all of which were embroiled in devastating conflicts or transitioning out of them in the 1990s. Hundreds of thousands were victims of those conflicts. The question is when there are so many victims, how is one to approach the problem. In some of these atrocity contexts, the concerned State may also be on the verge of failure and have many priorities. Can such States realistically give effect to such a right to obtain individual and collective reparations? The commentaries to the provision seemed to acknowledge this difficulty, leaving a margin of discretion for States. But that margin might not be as wide as might be necessary for post conflict States. There were also additional concerns about, if the crimes are perpetrated by non-State actors rather than State actors, what duty would that entail for the concerned States. Will they bear the duty, say in civil wars, to compensate the victims even if they or their organs did not cause or participate in causing the harm?

99 *Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session*, U.N. Doc. ICC-ASP/1/3, at 10 (2002) (Rules of Procedure and Evidence, Rule 85).


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### *3.15 Draft Article 13 – Extradition*

The purpose of this relatively lengthy Draft Article 13 is to set out the rights, obligations and procedures applicable to the extradition process, in the event that extradition is to take place.[100] It anticipates each of the offences covered by the Draft Articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. This provision can be described as a "mini-extradition treaty within the treaty."[101] It is one of the most important provisions, considering present gaps in the law, which I fully supported. It is rooted, at bottom, in a long line of legal instruments on extradition that may suggest its inclusion constitutes a form of codification of existing law, again, albeit, now applied specifically to crimes against humanity.

Furthermore, although they frequently occur in political contexts and are sometimes perpetrated for political gain, core international crimes such as genocide, crimes against humanity and war crimes are not to be regarded as "political offences" for the purposes of denying extradition. Paragraph 2 of the Draft Article makes this clear. This principle is enshrined in Article VII of the Genocide Convention.[102] Equally, though not found in the 1949 Geneva Conventions, it is consistent with the more recent State practice when concluding multilateral treaties addressing specific international and transnational crimes.[103] Thus, its inclusion likely would help crystallize State practice and consolidate customary international law.

One concern with this provision is that Draft Article 13, paragraph 1, provides for "each of the offences covered by the present Draft Articles" to be deemed extraditable offences. There seems to be some lack of clarity regarding scope of application. One plausible reading is that this only applies to Draft Article 3, which defines crimes against humanity, and is the object of the entire Draft Articles. Another reading is that it would additionally include Draft Article 6 requiring States to take the necessary measures to ensure that various other acts (such as attempting or ordering and soliciting crimes against humanity) are also offences under their national criminal laws. The former interpretation might be the preferable one. This uncertainty would be hopefully clarified by the Commission during the second reading stage of the topic. This article, being largely derived from existing standards albeit applied in transnational crimes and other contexts, could largely constitute customary international law and therefore be a form of codification.

100 Int'l Law Comm'n, *supra* note 98.

101 *Id.*

102 Convention on the Prevention and Punishment of the Crime of Genocide art. 7, Dec. 9, 1948, 78 U.N.T.S. 277.

103 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287.

*3.16 Draft Article 14 – Mutual Legal Assistance*

Draft Article 14 contains general obligations with respect to mutual legal assistance. It requires States to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Draft Articles in accordance with the Draft Article. Like the preceding clause on extradition, this detailed provision on mutual legal assistance appears equally fundamental to the regime that would be established by a future crimes against humanity convention based on the ILC draft.

The wide scope of paragraph 1 and its applicability to the different forms of "investigations," "prosecutions," and "judicial proceedings" seems important. Mutual legal assistance is to be provided to the "fullest extent possible" under paragraph 3. In paragraph 3, which sets out types of assistance that may be sought, the list contained therein is illustrative and not intended to be exhaustive. We can also assume that requests for mutual assistance may also be made for more than one of the purposes mentioned. The provision also has an annex which must be read together with it.

In the end, though seemingly applied for the first time in the context of this crime, I am tempted to argue that this provision constitutes codification of existing law. There were also some changes to standard clauses found in extradition treaties to better address the specificities of crimes against humanity. The removal of the dual criminality requirement makes sense, in the context of crimes against humanity since it would otherwise stand as an obstacle to inter-State cooperation. But it might constitute a form of progressive development. Given the nature of crimes against humanity, this seems warranted – as mentioned in my intervention on the topic during the first reading in 2017.[104]

*3.17 Draft Article 15 – Settlement of Disputes*

The purpose of Draft Article 15, which is the last substantive provision in the first reading of the draft convention, is to govern the settlement of inter-State disputes concerning the interpretation or application of the Draft Articles. The Commission typically does not address such final clauses, since these types of issues are usually the preserve of States. In this case, it was felt that it ought to do so. It thereafter sought to adopt a provision that would give a measure of flexibility for States in that they could agree to arbitration instead of litigating their differences before the ICJ.

Such an approach makes sense, especially in the context of treaties that entail reciprocal obligations for States, for instance, treaties of an economic nature. I wondered whether, given the inherently humanitarian purpose of the subject matter under consideration, this approach would be a realistic one. Furthermore, for reasons of parity, I preferred that the Commission basically follow the dispute settlement clause provided in Article IX of the 1949 Genocide Convention.[105]

104 U.N. Int'l Law Comm'n., 69th Sess., 3350th mtg. at 9, U.N. Doc. A/CN.4/SR.3350 (May 3, 2017).

105 Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Jan. 12, 1951, 78 U.N.T.S. 277.


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## 4 Some Potentially Problematic Aspects of the First Draft Convention on Crimes Against Humanity

### *4.1 General Remarks*

On balance, though in my view a potentially groundbreaking development from an ICL point of view, it can be noted that some of the ILC's draft provisions were at times sensitive within the Commission itself. Thus, as is so often the case with such processes, it seems important to explore what the ILC omitted from its first ever draft crimes against humanity convention. For the same reasons, wearing the hat of an independent academic, one might query certain choices made by the Commission. Among the various substantive issues that the ILC did not fully address in the Draft Articles in my view, some of which were well debated within the Commission, four aspects seem particularly worth highlighting. Here, I will set aside controversies regarding final clauses, such as the issue of permissibility of reservations or the format of the dispute settlement clause, to focus only on four aspects. Those issues are important, but generally tend to be matters for States to address during treaty negotiations.

My concerns relate to the following four substantive issues: (1) retention of potentially problematic aspects of the definition of crimes against humanity; (2) the lack of a full immunity clause, tracking Article 27 of the Rome Statute in its entirety, for a convention aimed at complementing the ICC's jurisdiction; (3) the lack of a provision prohibiting State grants of blanket amnesties for crimes against humanity; and lastly, (4) lack of a substantive proposal for a treaty monitoring mechanism. Addressing these issues might have been more in line with the underlying purpose of such a convention. They would have been, if not codification, useful proposals for States as forms of progressive development. It would then have been up to States to accept or reject them once they receive the final text and recommendation from the Commission in the General Assembly.

### *4.2 The Use of the ICC Definition of Crimes Against Humanity*

As already indicated, the ILC Draft Article 3 definition of crimes against humanity was largely copied from Article 7 of the Rome Statute. It was said that only three slight textual changes were necessary to reflect the different context in which the definition is being used.[106] The reality was that some of these changes were deeper and more substantive. They had the effect of narrowing down the definition of the crime even vis-à-vis the Rome Statute definition. In this regard, three potential criticisms could be highlighted.

First, Article 7 of the Rome Statute contains a definition of "gender" which was a compromise provision to satisfy certain groups that wanted to specify a meaning that would guide the future application.[107] Interestingly, this definition of gender appears to have been overtaken by events since the adoption of the Rome Statute in July 1998. More inclusive definitions of the term have been offered by numerous human rights bodies. To the point that even organs of the

106 Int'l Law Comm'n, *supra* note 32, at Chapter IV, Article 3 commentary 1 (2017).
107 *Id.* at 59.

ICC itself, such as the Office of the Prosecutor ("OTP"), has abandoned this definition as per the Prosecutor's June 2014 "Policy Paper on Sexual and Gender Based Crimes."[108] Though that OTP policy paper was published several years ago, the issue appeared to not have been raised or even debated in the Commission up to the first reading stage. It would be interesting to see whether States and others will make submissions on the issue, and if so, what the response of the ILC might be.

One possibility would be to review the definition if the members could agree a change is required and use a more recent definition of gender. The challenge with this option would be that what is accurate today might be quickly deemed out of touch with evolving understandings in another ten, twenty, or thirty years. This will essentially bring us back to where we are now with the ICC Statute. Another option, which is perhaps more likely as it is more practical, would be to simply delete the definition. The disadvantage of the latter approach might be that an inconsistency may result for States party to the Rome Statute, which may have incorporated this aspect into their national law, when domesticating the ICC Statute. The solution, of course, would be – should those same States join the future convention – to modify their national laws to match the draft convention approach. Of course, there will be some States that prefer the retention of the ICC definition, for reasons of consistency or a deep commitment to the Rome Statute definition of gender.

A second issue concerns the definition of some of the underlying crimes in the Rome Statute. Some were seen as narrower than customary international law following the ICC Statute's adoption on 1 July 1998.[109] For instance, the ICTY Trial Chamber in *Kupreškić* has found that the ICC definition of the crime of persecution is not consistent with customary international law.[110] By using the ICC definition of crimes against humanity, in Article 7, the ILC risks reinforcing a definition of persecution as a crime against humanity that was not only considered narrower than customary law but that contradicts its own earlier position on the matter. This is especially the case during its work on crimes against humanity in the Draft Code of Crimes Against the Peace and Security of Mankind.

Of course, the inconsistent definitions of crimes against humanity dates back many decades, starting with the Nürnberg and Tokyo Tribunal definitions through to an array of definitions used in the modern ad hoc tribunals such as the ICTY and ICTR and even the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind. In Article 5 of the ICTY Statute, the crime required a link to armed conflict, whether international or non-international in character. Whereas, in Article 3 of the ICTR Statute, the crime was defined to require discriminatory intent in order to establish proof of it whether on "national, political,

108 International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, ICC (June 2014), https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf.

109 *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002.

110 Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-A, Appeal Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).


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ethnic, racial or religious grounds" which requirement was not reflected in Article 18 of the 1996 Draft Code. If anything, there has been a shifting mix of legal ingredients concerning, in addition to the requirement of a nexus to an armed conflict, whether a widespread and/or systematic attack against any civilian population, or discriminatory grounds, are required. These elements of the definition have, in the words of Larissa van den Herik, "been swapped back and forth in a cacophony of definitions."[111] And, we have not yet even mentioned the apparent confusion, including among ICC judges, surrounding the State or organizational policy requirement of crimes against humanity contained in Article 7 of the Rome Statute.[112]

One might make suggestions for changes for the second reading stage of the project. Let us take a prominent example of the crime of persecution as a crime against humanity. As defined, it prohibits, in Draft Article 3(1)(h),

> persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes.

A good potential change could be to Draft Article 3 paragraph 1(h) to remove the wording "in connection with the crime of genocide or war crimes" since this terminology does not reflect customary international law.

The deletion of the entire second half of subparagraph (h) will bring the definition of persecution as a crime against humanity into consistency with the prior work of the ILC on the Draft Code of Crimes against the Peace and Security of Mankind as well as its definition under customary international law. Indeed, this connector requirement between the crime of persecution and two other core crimes, which is specific to the ICC, cannot be found in the statutes of any of the ad hoc international or internationalized tribunals, nor in the national legislation of States in different parts of the world or in the authoritative leading case law. A related issue is that, even if the connector is kept, then it would make sense to revise it for the sake of consistency. Revising it allows the curing of an omission. The reason being that, at present, it essentially excludes another important ICC connector crime from the definition (*i.e.*, the crime of aggression) while retaining

111 Larissa van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity', *in* Shane Darcy & Josephy Powderly (Eds.) *Judicial Creativity at the International Criminal Tribunals*, Oxford, Oxford University Press, 2010 p. 80.80 (Shane Darcy & Joseph Powderly eds., 2010).

112 Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), https://www.legal-tools.org/doc/338a6f/pdf/ (containing a seminal ruling regarding the scope of crimes against humanity); *see also* Charles C. Jalloh, *Situation in the Republic of Kenya*, 105 Am. J. Int'l L. 540 (2011) (discussing the seminal ruling regarding the first ever *proprio motu* prosecutorial investigation pursuant to Article 15 of the Rome Statute); Charles C. Jalloh, *What Makes a Crime Against Humanity Crimes Against Humanity*, 28 Am. U. Int'l L. Rev. 381, 419 (2017) [hereinafter *What Makes a Crime*].

the connection requirement for the other three Rome Statute crimes. This is an understandable omission as the ICC States only incorporated and activated that crime four months after the ILC first reading text was adopted.

As the ICTY Trial Chamber ruled in *Kupreškić*, "although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law."[113] This appears all the more striking considering that the application of the provisions contained in Part II of the Statute (on jurisdiction, admissibility and applicable law), including Article 7 on crimes against humanity, are restricted by Article 10 of the ICC Statute which affirms in unequivocal language that "Nothing in the Statute shall be interpreted as *limiting* or *prejudicing* in any way *existing* or *developing* rules of international law for purposes other than this Statute."[114] It follows, as the States that drafted the Statute themselves made clear, "the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of, among other crimes, crimes against humanity."[115]

Further, the complexity of defining persecution could lead to confusion. This is because the retention of a connecting link to "any act referred in this paragraph" could be read as a requirement of a link to one of the underlying crimes against humanity set out in paragraph 1, namely, (a) murder, (b) extermination, (c) enslavement, (d) deportation or forcible transfer of population, etc. This would be a high threshold but would be consistent with general understandings of this paragraph in the ICC Statute and most academic literature.

On the other hand, some academics such as Robert Cryer and others have speculated that if the connection required can be "satisfied by a linkage to even one other recognized act (a killing or other inhumane act),"[116] the "requirement should not pose a significant obstacle for legitimate prosecutions of persecution."[117] In any event, as the ICTY Trial Chamber explained in *Kupreškić*, this restriction in the definition

> might easily be circumvented by charging persecution in connection with "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k).[118]

Relatedly, it seems possible to contemplate a serious form of persecution, which is not connected to another underlying crime. The ICTY/ICTR jurisprudence, for

113 Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-A, Appeal Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

114 Rome Statute of the International Criminal Court art. 10, 1 July 2002, 2187 U.N.T.S. 3.

115 Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-A, Appeal Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

116 Robert Cryer, et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2014.

117 *Id.*

118 Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-A, Appeal Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).


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the most part, have considered persecution in situations where it examined crimes for which an accused had already been found responsible and then examined whether those same crimes were also committed with a discriminatory intent, and if so, the person was then *also* responsible for the crime of persecution. This shows gravity without a connection. Moreover, in the ad hoc tribunals, there have been instances where persecution was used almost as a residual crime with no connection whatsoever to the contents of other residual crimes, specifically in the area of hate speech and property crimes; to require a connection could stunt this development altogether.

On the other hand, to complicate matters even further, the crime as defined in the ILC's first draft of the crimes against humanity convention is evidently narrower than the present definition of it under customary international law. It seems settled that today the crime would require "a widespread or systematic attack against any civilian population." It equally seems settled that it can be committed by perpetrators, during times of war or peace. Yet, other questions remain. For instance, take the State policy requirement, which is arguably settled under customary law.[119] The ICTY Appeals Chamber, in its earlier caselaw found the State or organizational policy requirement relevant, but later it held in *Kunarac* in 2002 that the crime as defined in customary law no longer required proof or furtherance of a State or organizational policy for finding the existence of a crime against humanity. This important judicial decision was made in contradiction to the decision of States meeting in Rome in 1998, which had chosen to codify the State or organizational policy requirement in the chapeau of Article 7(2)(a) of the Rome Statute.

Against this wider historical context, it seems prudent to emphasize that, for the ILC, the focus was not to resolve the legal debate between the customary law or Rome Treaty definitions of crimes against humanity. The Commission seemed to choose the ICC definition purely for pragmatic reasons. It should not be read as a rejection of the wider definition still available to States to investigate and prosecute the crimes under customary international law. For that reason, I welcomed the explanation in its commentary to the definition contained in Article 3 of the draft crimes against humanity convention. The ILC has explained that the definition it had borrowed from Article 7 of the ICC Statute was "appropriate" mainly because it had already been accepted by more than 120 State parties to the Rome Statute.[120] The Commission also considered it highly relevant that the same definition is now being used by many States when adopting or amending their national laws to domesticate the ICC Statute. On top of that, a good number of States, which are presumably more likely to accept the future convention, had indicated that they supported the ILC crimes against humanity project on the

119 *See What Makes a Crime, supra* note 112; William A. Schabas, 'State Policy as an Element of International Crimes', *Journal of Criminal Law & Criminology*, Vol. 98, 2008, pp. 961-62; Larry May, *Crimes against Humanity: A Normative Account,* Cambridge University Press, Cambridge, 2004; Claus Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections of the March 2010 ICC Kenya Decision', *Leiden Journal of International Law*, Vol. 23, 2010, p. 861.

120 Rome Statute of the International Criminal Court, 1 July 2002, 2187 U.N.T.S. 3.

condition that it retained consistency with the Rome Statute. So, this is all about pragmatics, which in context makes sense, rather than about freezing developments in the customary law of crimes against humanity.

The threshold question, in relation to these three select concerns about the definition now being used by the Commission and borrowed from the Rome Statute: (1) the meaning of gender, (2) persecution, and (3) the State or organizational policy, will be whether to reopen Article 7 of the Rome Statute based definition in the ILC draft upon second reading. If it is reopened, the question will be what changes can be justified, and what changes cannot be justified, and the basis for making that decision. Guidance could be found using standard criteria. For example, making only the changes proposed by a large group of States. On the other hand, if States do not raise the issues and the ILC does not revisit the definition, it could be argued that consistency with the ICC would have been achieved. The cost could be that an opportunity for potentially positive advances in clarifying the law of crimes against humanity, especially as codified in a possible future convention, would have been lost. Assuming, of course, the States themselves do not choose to amend the draft definition if and when they negotiate a crimes against humanity convention based on an ILC draft.

Overall, the criticisms raised above do not take up the question whether the Commission should have reflected advances since the Rome Statute was adopted in July 1998 to use, for example, the broader definition of enforced disappearances reflected in the treaty adopted by the General Assembly in New York in December 2006. Nor did they take up the possible need that might have existed to include severe damage to the environment as crimes against humanity. Of course, States could always choose to address those issues once they receive the final ILC draft crimes against humanity treaty in 2019 – as they did with respect to address several matters arising from the Commission's draft statute for a permanent ICC in 1996.

### *4.3 Failure to Prohibit Immunities for Crimes Against Humanity*

A second issue that the Commission did not address in the text of the Draft Articles as adopted on first reading was the question of immunity of State officials, or for that matter, the officials of international organizations in relation to investigations and prosecutions of crimes against humanity. As discussed in the Special Rapporteur's Report,

> treaties addressing crimes typically do not contain a provision on the issue of immunity, leaving the matter to other treaties addressing the immunities of classes of officials or to customary international law.[121]

The Special Rapporteur listed several treaties and conventions that do not include provisions on immunity of State officials or officials of international organizations. Ultimately, the position was that the Commission need not address the issue of immunity in the context of the crimes against humanity topic. There was

121 Murphy, *Third Rep., supra* note 36, at 281.


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already a separate topic considering the issue of immunity of State officials from foreign criminal jurisdiction. This position makes sense, and ultimately, is defensible.

But there was also another view. In the Plenary debate, of the Special Rapporteur's report, I and several members proposed that the Commission could address one aspect of the immunity issue. It could, for the sake of complementing the ICC system at the national level, advance the equivalent of Article 27 of the Rome Statute in our Draft Articles.[122] Article 27 is the ICC's irrelevance of official capacity clause, which makes procedural and substantive immunities, whether at the national or international level, irrelevant for the purposes of prosecution of four of the most serious international crimes, including crimes against humanity.

For the ICC States Parties, this rule applies because the States have consented by expressly accepting this clause. The thought was that using such a clause could offer a more complementarity regime to the ICC even if it is a form of progressive development rather than codification of existing law. States would have the opportunity to not only pronounce on that clause in written comments, but to also decide whether to keep it, should they accept to negotiate a convention on crimes against humanity based on an ILC draft. The non-inclusion of a full Article 27 equivalent seemed to also be problematic because, at the least, the ILC should not advance a gap-filling draft crimes against humanity convention partly rationalized on a logic of parity with the Genocide Convention while including less than the minimum terms provided for in the parallel treaty adopted in 1948 for the prevention and punishment of the crime of genocide.

As far back as 1947, the ILC was tasked with formulating the Nürnberg Principles referred to at the opening of this article. Those were later endorsed by the General Assembly. Principle III provides that

> the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.[123]

Building on that development, which is said to constitute customary international law, Article IV of the 1948 Genocide Convention explicitly provided that

> persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.[124]

122 *See* Mr. Murase (Japan), U.N. Doc. A/CN.4/SR.3349, at 5 (May 2, 2017); Ms. Escobar Hernandez (Spain) A/CN.4/SR.3350, at 7 (June 2, 2017); Mr. Šturma (Czech Republic) A/CN.4/SR.3351, at 12 (June 12, 2017); Mr. Peter (United Republic of Tanzania) A/CN.4/SR.3352, at 8. *But see* Mr. Huang (China) A/CN.4/SR.3352, at 10 (June 2, 2017).

123 Int'l Law Comm'n, Rep. on the Work of Its Second Session, U.N. Doc. A/1316 (1950).

124 Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, 12, Jan. 1951, 78 U.N.T.S. 277.

It followed that, if as far back as 1948 States were willing to give up the immunities of their leaders involved with the commission of genocide for the purposes of prosecution in their own territories; or those of other contracting parties to the convention at the *horizontal* level; or before an international penal tribunal that might be established for such purpose at the *vertical* level, why might the Commission not ask them to consider doing so for the equally heinous crimes against humanity? That fundamental question, in my view, was insufficiently debated and ultimately remained unanswered by the ILC which essentially followed the preference of the Special Rapporteur on the issue.

Interestingly, in both its past work on the 1954 and 1996 Draft Code of Crimes, the Commission had carefully examined the issue of official position. It concluded that such a principle was totally irrelevant to the question of individual criminal responsibility in Articles 3 and 7 respectively, which were to apply in respect of both national and international courts. In fact, in its helpful commentary to Article 7 of the 1996 Draft Code, the Commission did not mince words when it stated:

> 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.[125]

Accordingly, in adopting a more recent stance that apparently reverts to an earlier abandoned distinction between substantive and procedural immunities with the applicability of the former to crimes against humanity but not the latter, the ILC can be said to have adopted a contradictory doctrinal position. The new position appears to not have taken into enough account if not ignored the prior work of the Commission and may raise other questions. Indeed, it muddies the waters concerning the value of the practice of States in respect of crimes against humanity, since at least the Nürnberg and Tokyo Tribunals. This is because the statutes of those special tribunals also engendered the same non-immunity clauses as reflected in Article 7 of the Nürnberg Charter and Article 6 of the Tokyo Charter as well as Article 11(4) of Control Council Law No. 10. Ironically, the same ILC, in the context of its separate project on immunity of state officials from foreign criminal jurisdiction, has provisionally adopted Draft Article 7 providing that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of, among others, crimes against humanity. The Commission had adopted an earlier article addressing immunity *ratione personae*, in Draft Articles 3 and 4, which remain intact for the troika for all acts performed during or prior to their term of office. The immunities continue to attach under Draft Article 6(3) even after the term of office ends.

125 Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 50 (1996) (Articles of the draft Code of Crimes against the Peace and Security of Mankind).


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The ILC's 2017 decision not to include a full irrelevance of official capacity clause, in the draft crimes against humanity convention, could also risk the significant advances made by States in developing the admittedly still nascent field of international criminal law. The trend, which many thought settled until recently, has been to limit immunities in the context of the commission of core crimes since at least the early 1990s if not much earlier back to Nürnberg, a process to which the Commission itself has made useful contributions. Indeed, since the adoption of the Nürnberg Principles, the statute of every full international criminal tribunal has repeatedly affirmed the essence of the Third Nürnberg Principle. Thus, we find the logic of the principle enshrined in Article 7(2) of the ICTY Statute and Articles 6(2) of the ICTY and SCSL Statutes, and ultimately, it was embedded in a fuller form in Article 27 of the ICC Statute. A plea to official capacity has not been successful in the judicial practice of all the modern tribunals as the trials of *Milosevic*,[126] *Kambanda*,[127] and *Taylor*[128] amply demonstrated.

Despite the significant precedents, which admittedly occurred in an international tribunal rather than *national court* context, it was positive that the ILC could find compromise to include a Draft Article 6, paragraph 5 in the first reading text of the convention. That barebones, but still important provision, along the lines of Article 27(1) of the Rome Statute of the ICC, provides that "[e]ach State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this Draft Article was committed by a person the holding of an official position is not a ground for excluding criminal responsibility."[129] This clause was directed at ensuring that States will take measures to deny persons involved with crimes against humanity the opportunity to claim exemption from substantive criminal responsibility or to use it as a defense to criminal liability. Elsewhere, in the commentary, it is also usefully clarified that official position is not a mitigating factor that can be used to claim a reduction in a sentence.

The commentary to the compromise clause, however, goes on to make crystal clear that at paragraph 31 that "paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law."[130] In addition, the commentary clarifies that "paragraph 5 is without prejudice to the Commission's work on the topic of "[i]mmunity of State officials from foreign criminal jurisdiction." The provision, in Draft Article 7, indicates that immunities *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of crimes against humanity which are as defined in Article 7 of the Rome Statute. Yet, to be consistent with the ILC's own work on the immunity topic, which had provided that no exceptions to immunity would apply in relation to crimes against humanity, it would have been proper to examine the

126 Prosecutor v. Milosevic, Case No. IT-02-54, Decision on Preliminary Motions, 26-34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001).

127 Prosecutor v. Kambanda, Case No. ICTR-97-23, Judgment, (Oct. 19, 2000).

128 Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, (Sept. 26, 2013).

129 Rome Statute of International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

130 Int'l Law Comm'n, *supra* note 38.

implications for this topic.[131] The ICC definition of the crime, of course, formed the basis for the ILC definition (as discussed above in Part III). This would mean, that if given effect, it might have meant there would also be no immunity *ratione materiae* for crimes against humanity at the national level.

Consequently, although a handful of members argued against watering down the ILC's historically strong position against immunity for core crimes, the result is that the first reading of the Draft Articles on crimes against humanity do not contain the equivalent of Article 27(2); instead, it only contains a rough equivalent of Article 27(1). Adding the second paragraph would have rendered immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, as no bars preventing the courts of a State Party to the future convention from exercising their jurisdiction over such a person. The consent of the State, expressed through ratification or accession, would effectively have acted as a national jurisdiction's waiver of any available immunities of its leaders from prosecution for crimes against humanity in the national courts of other States. The State consent element offers the vital safeguard needed, even if one believes that customary law immunities at present remain intact for crimes against humanity before the national court of third states for heads of state, heads of government or foreign ministers, as the ICJ ruled in its somewhat controversial *Arrest Warrant* ruling in early 2002.[132]

Following Article 27 in its entirety would, in the end, arguably have been more consistent with the Rome Statute position. The ILC first reading approach of divorcing Article 27, paragraph 1 from Article 27, paragraph 2 was not inevitable. Although it has sometimes been disputed whether it removed all procedural and substantive immunities, or only some of them, an alternative approach might have been to resort to full importation of Article IV of the Genocide Convention. That provision basically stated that persons who commit genocide, or conspiracy to genocide, or incitement to genocide, shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. If the full Article 27 of the ICC Statute could not be reproduced in the first draft of the ILC's draft crimes against humanity convention, why not use similar language to that of the Genocide Convention which seemed to be familiar with and to enjoy broad support among States.

That said, this alternative suggestion, which seemed initially agreeable to the Special Rapporteur, later changed without explanation. The Rapporteur fell back on the Article 27(1) equivalent, when inserting the prior negotiated compromise. No reason for the change was given. One can speculate that this might have been because of a desire to avoid the possible argument of parity with Article IV of the Genocide Convention. Such an article could then have simply provided that persons committing crimes against humanity shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Some literature under the latter, as well as the ILC's prior work, suggests that all forms

131 Tladi, *supra* note 41.

132 Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case', *European Journal of International Law*, Vol. 13, 2002, p. 877.


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of procedural and substantive immunities are irrelevant for the purposes of investigation and prosecution of that crime. The same would be true for crimes against humanity.

If that argument holds water, for the crime of genocide, it would perhaps not be too much of a stretch to accept and argue that the same can be true for crimes against humanity in respect of State parties to a future draft crimes against humanity convention. Copying the whole of Article 27, rather than picking it apart, might have ensured greater coherency with the ICC regime at least in relation to the treatment of officials of the ICC's current 123 State parties who may commit crimes against humanity.

In the end, one could see the above argument as idealistic, especially given the current environment where the very idea of multilateralism and international law appears to be under attack. From this point of view, it might be that the Commission has taken a position that is more realistic and more in line with the world in which it is functioning today. A world that reflects pushback at international institutions such as the type of pushback we see between the ICC and African States. The latter has been very much driven by concerns about potential abuse and misuse of rules on immunity.[133] In this environment, it can be argued that a more pragmatic view might be that the project as a whole, even in the absence of a proposal for a full immunity clause, reflected the right balance since it is a more incremental way of developing ICL. In any event, though this seems quite unlikely, States could always choose to incorporate such a standard during their negotiations of a new crimes against humanity treaty. By the same token, they could even choose to amend other aspects of the Draft Articles such as the definition of the crime to address, for instance, severe environmental destruction as a crime against humanity.

### *4.5 Failure to Reject Blanket Amnesties for Crimes Against Humanity*

A third issue regarding another element of the draft convention is that the text of the Draft Articles did not substantively address the challenging issue of amnesties for crimes against humanity. It was thought that State practice regarding amnesties was too varied to resolve the question whether amnesties for crimes against humanity are permissible before national courts. There was no "consensus" on the issue since earlier treaties such as the Genocide, Geneva, Apartheid and Torture Conventions did not prohibit amnesties. Conversely, Article 6(5) of Additional Protocol II encouraged States to enact amnesties to end hostilities. More recent instruments addressing serious international crimes, such as the ICC Statute and the Enforced Disappearances Convention, did not preclude amnesties either. The conclusion can thus be reasonably reached, as did the Commission, and that there is at present no general prohibition imposed on States from passing amnesty laws for these types of crimes.

On the other hand, some members of the Commission were of the view that the ILC's no blanket amnesty clause position could have better considered the

133 Paola Gaeta & Patryk I. Labuda, 'Trying Sitting Heads of State', *in* Charles C. Jalloh & Ilias Bantekas (Eds.), *The International Criminal Court and Africa,* Oxford, Oxford University Press, 2017.

rich if admittedly still evolving domestic, regional, and international jurisprudence on the topic. The Special Rapporteur's third report on the topic, speaking mostly to the Belfast Guidelines on Amnesty and Accountability, seemingly obfuscated the issue.[134] It did not fully account for the distinction between blanket and conditional amnesties, which might lead to different legal results. The ILC could have better grappled with the rich body of jurisprudence of the ad hoc international criminal tribunals on amnesty and their full implications for the system. From there, the ILC could have then contemplated whether, and if so, how to apply a similar system at the horizontal inter-State level.

Let me take the example of the SCSL 13 March 2004 Appeals Chamber decision on amnesty in the *Kallon* Case.[135] In that case, the defendant filed a preliminary challenge to the jurisdiction of the SCSL. He submitted that the Government of Sierra Leone was bound to observe the amnesty granted under Article IX[136] of the Peace Agreement to the RUF and that it could not thereafter participate in establishing a special tribunal whose statute included a clause denying legal effect to the amnesty conferred on them. The Appeals Chamber determined that the grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as the crime is concerned, to the criminal jurisdiction of the State of Sierra Leone which was exercising such sovereign power.[137]

That said, where jurisdiction was shared with other States – as would be the case for a future crime against humanity convention – one State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. The SCSL Appeals Chamber rightly ruled that, for this reason, it would be unrealistic to regard as universally effective the grant of amnesty by a State regarding grave international crimes, such as crimes against humanity, in which there would exist a broad grant of jurisdiction as per the provisions discussed earlier.[138] Indeed, it would stand to reason, as the SCSL Appeals Chamber explained that "[a] State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."[139] If this is true, of the Sierra Leone vis-à-vis the SCSL situation, would it not be even more true for a future crime against humanity convention which States can freely agree to?

Furthermore, one could also take note of the policies of the Secretary-General of the United Nations since the Lomé Peace Accord in July 1999. Under that policy, blanket amnesties are not permissible for core international crimes.[140] In the end, although the practice of an organ of an international organization may not

134 Murphy, *Third Rep., supra* note 36 at 285-97.

135 Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004).

136 *Id.*

137 *Id.*

138 *Id.* at 67.

139 *Id.*

140 Rep. of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, at 21; *see* Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004).


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be conclusive evidence of the practice of the Member States in that regard, it is also not entirely irrelevant to the analysis given that States have yet objected to the Secretary General's policy. The ILC has in fact, while working on the topic of identification of customary international law, accepted that it might secondarily be relevant to look at the practice of States undertaken within the context of an international organization. In the final analysis, on the amnesty issue, the Commission compromise forged was the fall back inclusion of some commentary better discussing the more recent State practice relating to amnesties in Draft Article 10 on "*Aut dedere aut judicare*" at paragraphs 8 to 11.

The commentary is fairly strong in almost looking down on amnesties. It acknowledges "that a national law would not bar prosecution of a crime against humanity by a competent international criminal tribunal or foreign State with concurrent jurisdiction over that crime."[141] And, even within the State that has adopted the amnesty, the ILC has now made ever clearer that

> its permissibility would need to be evaluated, inter alia, in the light of that State's obligations under the future Draft Articles requiring that they criminalize crimes against humanity, as well as against their duty to comply with their *aut dedere aut judicare* obligation as well as those in relation to victims and others.

These are important elements that needed to be added to the commentary for clarification of the ILC position on amnesty, lest it be another carte blanche for States to continue to pursue such amnesties in their national law including for crimes against humanity which are some of the world's worst crimes. It was not obvious that these important clarifications would have been made without the serious pushback from a minority of members of the Commission. The present author played a role leading informal negotiations to find an acceptable compromise on the amnesty issue as well as immunities/irrelevance of official capacity.

### *4.6 Absence of a Recommendation on a Monitoring Mechanism*

Finally, the ILC draft articles has not proposed any provisions for a monitoring mechanism, such as that under the Convention against Torture. A monitoring mechanism could help ensure future State party compliance with the obligations derived from a future convention on crimes against humanity. Such monitoring mechanisms are standard features of the major human rights treaties, including the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR). They are also found in many other modern human rights instruments, including those concerning racial discrimination,[142] women,[143]

141 Murphy, *Third Rep., supra* note 36, at 297.

142 International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

143 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

children,[144] and disability.[145] Monitoring bodies are also familiar in criminal law treaties such as the Torture Convention. The Third Report of the Special Rapporteur surveyed monitoring mechanisms, such as those within the UN human rights system, that already exist and could include crimes against humanity; however, the Special Rapporteur preferred not to make a specific proposal in this regard, a view that found support within the Commission.[146]

Though controversial, it was argued that the element of choice on whether to propose one was more a matter of policy rather than law.[147] The decision turns on, for example, the availability of resources and the relationship of a new mechanism with those that already exist. So, it was argued, such issues are best left for States to decide, should they wish to do so.[148] Borrowing from an ILC Secretariat study of the issue, it was observed that the present treaty monitoring body system had caused significant financial and other strains on States. States could also choose to establish a treaty monitoring body for crimes against humanity alongside other such mechanisms already in place, as part of cost rationalization. This is all true and defensible.

A minority view was that the Commission is equally well placed to offer a recommendation. A monitoring body was both a legal and policy question, meaning that the ILC could study the issue and formulate a recommendation. This group did not accept that this was only a matter of policy, but also saw it as about being effective in the design of a horizontal treaty framework.[149] A small number of members even appeared to favor the idea of a monitoring body.[150] Given the stage of the project, it would be interesting to see if any State wishes to see a recommendation for a monitoring body for crimes against humanity. In the absence of an independent enforcement mechanism, the future convention could be extremely weak and dependent solely upon State cooperation, which can be more regularly monitored if a treaty body mechanism is contemplated.[151] Thus, rather than being a policy question outside of the ILC's domain, this was a technical legal

144 Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

145 Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3.

146 Murphy, *Third Rep., supra* note 36, at 10.

147 *Id.* at 238.

148 *Id.*

149 Int'l Law Comm'n, Sixty-Ninth Session, Provisional summary record of the 3350th meeting (May 3, 2017), U.N. Doc. A/CN.4/SR.3350, at 10-11 (June 2, 2017) (Mr. Jalloh Statement, concerning the existence of a treaty-based monitoring mechanism).

150 *Id.* at 10 (Mr. Park Statement, supporting a possible monitoring mechanism); Int'l Law Comm'n, Sixty-Ninth Session, Provisional summary record of the 3351st meeting (May 4, 2017), U.N. Doc. A/CN.4/SR.3351, at 7-8 (June 12, 2017) (Mr. Hmoud Statement, supporting the inclusion of a monitoring mechanism in the Draft Articles); *id.* at 13-15 (Mr. Saboia Statement, supporting the inclusion of a monitoring mechanism to ensure a future convention fulfills its goals); Int'l Law Comm'n, Sixty-Ninth Session, Provisional summary record of the 3353rd meeting (May 8, 2017), U.N. Doc. A/CN.4/SR.3353, at 3 (June 2, 2017) (Mr. Ouazzani Statement, supporting a monitoring body mechanism); *id.* at 6 (Mr. Vazquez-Bermudez Statement, supporting the Draft Articles calling for the creation of two monitoring mechanisms); *id.* at 7 (Mr. Gomez-Robledo Statement, calling for the Commission to make a recommendation regarding a monitoring mechanism).

151 *What Makes a Crime, supra* note 112, at 419.


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question of a long-awaited treaty instrument concerning a core crime under international law.

Thus, rather than taking no substantive proposals forward, the Commission should not shy away from weighing the pros and cons of such a mechanism and offering up a studied recommendation to States. The Commission could have even developed alternative options for States to consider using the existing mechanisms to cover this future convention, even if on an optional protocol basis. The latter would allow the main instrument to focus on prevention and punishment of crimes against humanity. The optional protocol would then provide the choice to join the treaty monitoring system. In any event, as with other aspects of the proposed draft crimes against humanity convention as a whole, it would be up to the States to decide ultimately whether they would retain or abandon any final ILC proposals concerning a treaty monitoring body. An interesting historical footnote here is that, while the main ILC proposals for the ICC draft statute were retained, in some cases such as the trigger mechanism which provided for an independent prosecutor, the ILC was more modest in its proposals than States when they met at Rome in 1998 to negotiate the ICC instrument.

For that reason, it may be that had a clause been included and properly justified, it would likely have bolstered the case for such a mechanism to UN Member States. Whereas the converse, that is the non-inclusion of one, might also weaken the case for it. It could be misread as sending a signal that the ILC did not consider the topic important enough. Ultimately, the omission of a recommendation was hidden behind policy rationales, but at bottom, it seemed aimed at increasing the future political acceptability of the future convention. The same might be said, concerning the issues of immunity, amnesties, and even the definition of crimes against humanity. This concern appears true about other aspects of the draft convention as well.

In sum, there are many positive aspects the ILC's first draft convention on crimes against humanity. The present author is highly encouraged by the progress that the Commission has accomplished to date since taking up the crimes against humanity topic in 2014. One must particularly appreciate that we have a full draft convention that may offer a single commonly accepted definition of the crime, as well as the explicit duties that are required of State parties under Articles 4 to 15 of the draft convention, including the crucial elements of prevention and punishment, as well as modalities for extradition and mutual legal assistance. The latter were borrowed from the transnational crimes context and offer the additional advantage of addressing current normative gaps in the Rome Statute legal framework.

I am also highly encouraged by the generally positive responses received from approximately fifty States during the debate on crimes against humanity in the Sixth Committee in October 2017. It is my hope that many if not all those States, as well as others, will go on to provide the detailed commentary that the Commission has invited by December 2018. This will enable the ILC, especially if States reflect and provide guidance on the difficult questions including the definition, immunities, amnesties, and monitoring mechanisms, to further strengthen the

final instrument that it will present to them after completion of the second and final reading of the draft convention.

One potentially major challenge, which is already evident, is that all friends of the ILC and ICL will need to work hard to ensure that States in the General Assembly do not place the draft convention on the shelf – as they have so often done with many other more recent ILC projects. There are States that are working on a parallel mutual legal assistance initiative, led by the Netherlands. The content of the draft treaty that they seek to conclude is not known, save that it will address mutual legal assistance and extradition for three core crimes, namely, crimes against humanity, genocide and war crimes. Those same States will hopefully also support, if not adopt, the outcome of the ILC's work when it is completed as possibly a starting point for the negotiation of their treaty text.[152] I hope that the ICC too, which so far has shown little substantive interest in the crimes against humanity project, will engage with the Commission on the issue – as the ICRC does regularly on subjects concerning the law of armed conflict.

## 5 Conclusion

Overall, this article sought to demonstrate that the ILC's mandate to promote the progressive development and codification of international law permeates all its work. The mix of the two can be found in many of its projects over the course of the past seventy years. That in turn reflects the integrated nature of the tasks of codification and progressive development of international law. This mix of progressive development and codification can also be found in the subfield of international criminal law, as demonstrated by this article, which has focused on the Commission's latest project in this subfield in relation to the topic crimes against humanity. The paper has suggested that some, if not most of the 15 draft provisions adopted by the Commission on first reading in 2017, may reflect codification of existing law. To the extent that the extension of an existing rule already recognized by States to cover a new situation will fall within the meaning of that term under Article 15 of the Statute and in the practice of the Commission.

In any event, even if some of the other provisions can be said to be progressive development, that too would be within the mandate entrusted to the ILC by States. Indeed, far from being separable, the tasks seem intertwined, interdependent and indivisible. In this scheme, even within a single provision such as the crimes against humanity definition, there will be aspects that can also be said to reflect customary international law meaning that those aspects will be considered rather than forms of progressive development. The recognition of the delicate task seems to be confirmed by the earlier practice and experience of the ILC and the works of academics.

It is also appropriate for the effective prevention and punishment of one of the worst crimes known to international law for the Commission, where necessary, to advance gap filling proposals even though these may amount to progres-

152 U.N. Sixth Comm., 72nd Sess., 20th mtg. at 22, U.N. Doc. A/C.6/72/SR.20 (Oct. 25, 2017).


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sive development. Importantly, to the strict constructionists of international law that might insist on a clear distinction between the two tasks, it is important to emphasize that it will in the end be up to States to decide how to approach the Commission's final work product. This topic on crimes against humanity will be no different. The way it has been treated also properly recognizes the separation of functions between the role of independent experts and the representatives of States in the Sixth Committee of the General Assembly. It is hoped that, when they eventually receive the recommendation of the Commission on the draft convention on crimes against humanity, States will find it fit to take the item forward and finally fill one of the currently missing links in the substantive law of international crimes. Well over half a century later, this important crime will have been put on the same plane as genocide and war crimes, both of which were codified in multilateral treaties as far back as 1948 and 1949. If States choose to do so, it would potentially constitute one of the Commission's most important contributions to the development of the nascent field of ICL.