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The ILC Draft Articles on Crimes Against Humanity

An African Perspective[*]

Alhagi B.M. Marong[**]

Abstract

Africa's contribution towards the development of the International Law Commission (ILC) Draft Articles should not be assessed exclusively on the basis of the limited engagement of African States or individuals in the discursive processes within the ILC, but from a historical perspective. When analysed from that perspective, it becomes clear that Africa has had a long connection to atrocity crimes due to the mass victimization of its civilian populations during the colonial and postcolonial periods and apartheid in South Africa. Following independence in the 1960s, African States played a leading role in the elaboration of legal regimes to deal with international crimes such as apartheid, or in the development of accountability mechanisms to respond to such crimes. Although some of these efforts proved unsuccessful in the end, the normative consensus that was generated went a long way in laying the foundations for the Rome Statute of the International Criminal Court, which, in turn, influenced the conceptual framework of the ILC Draft Articles. This article proposes that given this historical nexus, the substantive provisions and international cooperation framework provided for in the future crimes against humanity convention, Africa has more reasons to support than to oppose it when negotiations begin at the United Nations General Assembly or an international diplomatic conference.

Keywords: Africa, norm creation, crimes against humanity, colonial crimes, official immunity.

1 Introduction

The latest effort to elaborate elements of a future convention on crimes against humanity commenced in 2014, when the International Law Commission (ILC)

* The views expressed herein are those of the author, and do not necessarily reflect the views of the United Nations. I am grateful to Professors Leila Sadat and Charles Jalloh for comments on earlier versions of the article, and to Ashira Vantrees for her excellent research assistance. All errors and shortcomings remain my sole responsibility.

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doi: 10.5553/AJ/2352068X2020006002003

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placed this topic on its work programme.[1] Within a short space of five years, the ILC successfully elaborated Draft Articles comprising a draft preamble, fifteen draft articles and a draft annex, together with commentaries thereto.[2] It is hoped that these would form the basis of a future convention on crimes against humanity to be adopted by either the United Nations General Assembly (UNGA) or an international conference of plenipotentiaries.[3] In elaborating these articles, and consistent with its long-standing practice, the ILC did not allow itself to be constrained by the 'codification' and 'progressive development' mandates in its Statute. Instead, it set out to draft articles that "would be both effective and likely acceptable to States, based on provisions often used in widely adhered-to treaties addressing crimes, as a basis for a possible future convention".[4]

The objective of this article is to review the development of the ILC Draft Articles from the point of view of norm creation under international law. I argue that when judged exclusively by their initial pedigree from the discursive processes within the ILC, the articles and a future convention based on them may be perceived as yet another Eurocentric international law project, similar to how most other international law rules emerged in the aftermath of the Second World War. As discussed more fully later in this article, a review of the various reports of the Special Rapporteur from 2015 to 2019 shows that there was only a limited 'African voice' during debates on the draft articles within the Sixth Committee of the UNGA. Similarly, there was a discernible lack of responsiveness from African stakeholders (States, regional groupings, civil society and scholars) to the Secretary-General's invitation for comments on the first complete set of Draft Articles adopted by the ILC at its sixty-ninth session in 2017.

Although a critique of the discursive processes that led to the elaboration of the Draft Articles, as Eurocentric, arguably holds some merit, I suggest that such a critique has the potential to mask the true extent of Africa's contribution both to the development of crimes against humanity as a distinct category of serious international crimes and in their most recent formulation by the ILC. In making this argument, I take a historical view of how African States or individual Africans have influenced the discourse(s) that culminated in the emergence of various crimes against humanity, or crimes against humanity regimes. Two historical circumstances are relevant to this argument. First, during the colonial and post-colonial eras, up to and including the 1990s, Africa was a site, or produced several

1 The ILC has, however, had a long history of engagement with the topic of international crimes. In 1950, the ILC published its Report on the Principles of the Nürnberg Tribunal. This was followed, in 1954, by the draft Code of Offences against the Peace and Security of Mankind. In 1991, the ILC produced the draft Code of Crimes against the Peace and Security of Mankind, which was revised in 1996. None of these earlier studies resulted in the adoption of an international treaty.

2 Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10 (2019), p. 10 (hereinafter '2019 ILC Report').

3 C.C. Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity?', *American University International Law Review,* Vol. 28, No. 2, 2013, p. 382, for an analysis of the law and jurisprudence on crimes against humanity and why a convention could perform important gap-filling functions.

4 2019 ILC Report, *supra* note 2, at p. 23.

 African Journal of International Criminal Justice 2020 (6) 2
doi: 10.5553/AJ/2352068X202000602003

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sites, of large-scale victimization as a result of atrocities that arguably qualify as crimes against humanity. Second, Africa (both States and individual Africans) has been at the forefront of international advocacy for the criminalization and punishment of specific types of crimes against humanity, such as apartheid, or for the establishment of crimes against humanity regimes, and mechanisms for their condemnation and punishment. The proposed but stillborn apartheid tribunal and the proposed and later abandoned criminal tribunal under the African Charter readily come to mind. In the end, this article submits that these 'Africanist' contributions have served as historical building blocks towards the consensus that was ultimately arrived at in Rome, in 1998, and subsequently adopted in the ILC Draft Articles.

Given this history, I suggest that when we get to it, either at the UNGA or a diplomatic conference, African States would have many good reasons to support the future convention on crimes against humanity. Substantively, such a convention is expected to be largely congruent with the obligations of States Parties to the Rome Statute, especially as regards the core definition of crimes against humanity, which is deemed to reflect customary international law. Similarly, by requiring that States Parties enact national legislation and take measures within their national legal systems to prevent and punish crimes against humanity, the draft convention gives fresh impetus to the principle of complementarity of the International Criminal Court (ICC), at least as far as crimes against humanity are concerned. By doing so, the draft convention addresses a key concern of African States with the Rome system of justice – that is, the perceived neocolonial tendency associated with the trial of Africans, especially African political leaders, at The Hague. Equally important is the fact that through provisions on universal jurisdiction, *aut dedere aut judicare* (surrender or prosecute), extradition and mutual legal assistance, the Draft Articles provide a framework for intra-African (and international) cooperation, which, if effectively managed, could greatly advance the fight against impunity and the interests of victims of crimes against humanity committed in Africa.

While these developments foretell a potentially promising story for Africa and a future convention on crimes against humanity, there would be challenges ahead. First, because the future convention will only apply to crimes that are committed after its entry into force, the historical crimes committed in Africa will, yet again and for the most part, not be subject to accountability. Second, some thought needs to be given to the issue of procedural immunities for Heads of State and other senior government officials who may be charged with crimes against humanity in the domestic courts of other States Parties. In this regard, the need for foreign State officials to be in a position to engage in international relations on behalf of their countries must be balanced against the fight against impunity for serious international crimes. Third, the failure of the Draft Articles to address the issue of blanket amnesties is, potentially, a lost opportunity for the ILC to inspire progressive development of the law on this subject. Fourth, questions abound over whether many African governments would be willing, or able, to fully implement their obligations under the future convention, especially against powerful political and military elites in society. Conversely, there are con-

doi: 10.5553/AJ/2352068X2020006002003

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cerns that domestic law on crimes against humanity could be abused for nefarious political purposes, including targeting perceived political opponents and civil society actors. Finally, the elephant in the room is whether African governments have the wherewithal, or given the many other daunting socio-economic and development challenges facing them, can legitimately afford to commit the substantial financial resources that are required to carry out effective investigation and prosecution of serious international crimes such as crimes against humanity.

In the following sections, Part 2 briefly traces the development of the ILC Draft Articles from a historical perspective. Part 3 reviews the discursive processes within the ILC from 2013 to 2019 and attempts to identify a distinct 'African voice' during those processes. In Part 4, I highlight the key features of the future convention and argue that these provide good reasons for Africa to support its adoption. Part 5 addresses challenges that, in my view, may impact the implementation of the future convention in Africa, and in Part 6 I offer concluding remarks.

2 The ILC Draft Articles in Historical Context

As early as 1994, it was an African jurist, the late Cherif Bassiouni of Egypt, who first mooted the idea of a specialized convention on the prevention and punishment of crimes against humanity.[5] Although the immediate precursor to Bassiouni's proposal might have been the mass atrocities committed during the conflict in the territory of the former Yugoslavia, his views were informed by a fifty-year history of "tragic experiences […] of repeated atrocities" that were met with "political complacency".[6] For Africa, part of this historical record includes the secessionist war in Nigeria, which resulted in the death of an estimated one million people, the "tribal and political killings" in Burundi and Uganda during the 1960s and 1970s and the practices of apartheid in South Africa.[7] It is remarkable that as Bassiouni made the case for a crimes against humanity convention to address the gap in what he referred to as the "international normative proscriptive scheme", detailed and meticulous planning was underway in another African country to carry out the mass murder of civilians on an unprecedented scale. While the killing of 800,000 Tutsis and moderate Hutus in Rwanda in 1994 had not taken place at the time that Bassiouni wrote his article, that event underscored the legal (and moral) force of his argument that a convention was urgently needed.

In the face of such atrocities, it was inexplicable that almost half a century after the Second World War, the international community had failed to develop a more comprehensive normative architecture by which to hold accountable those individuals who commit mass atrocity crimes other than genocide or war crimes.

5 M. Cherif Bassiouni, 'Crimes Against Humanity: the Need for a Specialized Convention', *Columbia Journal of Transnational Law*, Vol. 31, 1994, pp. 457-494, at p. 491 (hereinafter 'Specialized Convention').
6 *Ibid.*, p. 458.
7 *Ibid.*, p. 491.

doi: 10.5553/AJ/2352068X202006002003

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The inexistence of an international legal instrument for the trial and punishment of those alleged to have committed crimes against humanity represented a yawning gap in the legal framework to address mass atrocity crimes.

For this reason, several efforts were made in the past to develop a legislative framework for the prevention and punishment of crimes against humanity.[8] More recently, in 2008, the Whitney R. Harris World Law Institute at the University of Washington launched the Crimes Against Humanity Initiative with the principal objective "to address the gap in the current law by elaborating the first-ever comprehensive specialized convention on crimes against humanity".[9] However, the "academic offering" that Washington University, in collaboration with over 250 renowned international experts, made to the global community of States in the form of a proposed convention on crimes against humanity was not to be taken up. It was prescient that Sadat, writing in 2011, asked,

> What will become of the proposed International Convention on the Prevention and Punishment of Crimes Against Humanity? [...] will states embrace this "academic offering" and take up the challenge to negotiate a convention for the suppression of crimes against humanity? Or will indifference and inaction continue to be the hallmark of international policy?[10]

As far as States are concerned, indifference and inaction continued to be the hallmark of international policy on this issue. Therefore, when the ILC adopted the crimes against humanity project as part of its work programme in 2014, this marked a refreshing reboot in efforts to establish a dedicated crimes against humanity regime, and by so doing, to fill the gap in the normative architecture for dealing with mass atrocity crimes. The UNGA took note of the ILC's decision to include crimes against humanity in its work programme, suggesting, one would hope, a new willingness by States to engage on the issue.[11] I would, however, suggest that the real test of the commitment of States to do so will lie in what happens when the Draft Articles come up for adoption by the UNGA or an international conference. Here, one would hope that States once again assume a leadership role as they did in the lead-up to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, and in their endorsement of the Nürnberg Principles, which advanced the principle of individual criminal responsibility, among others, for both war crimes and crimes against humanity.

With the UNGA's endorsement, or at least acknowledgement, of its work programme, the ILC proceeded to consider the topic, dedicating its sixty-seventh (2015), sixty-eighth (2016) and sixty-ninth (2017) sessions to it. At the end of each of these sessions, the Special Rapporteur produced a detailed report and

8 *See supra* note 1 and accompanying text for these earlier ILC efforts.

9 L.N. Sadat, 'Forging a Convention for Crimes against Humanity', *in* L.N. Sadat (Ed.), *Forging a Convention for Crimes against Humanity,* Cambridge, Cambridge University Press, 2011, p. 229, at p. 240.

10 *Ibid*., p. 248.

11 GA Res. 69/118, 10 December 2014.

doi: 10.5553/AJ/2352068X2020006002003

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commentary on the draft articles for review and debate by the ILC. So it was that in 2015, the ILC debated and provisionally adopted four draft articles with commentaries; in 2016, it provisionally adopted an additional six draft articles with commentaries; in 2017, it adopted on first reading, a complete set of Draft Articles on Crimes against Humanity comprising a draft preamble, fifteen draft articles and a draft annex with commentaries.[12]

3 An African Voice in the Development of the ILC Draft Articles

3.1 Discursive Processes Within the ILC

By its Statute, Article 2, Paragraph 1, the ILC is made up of thirty-four individuals with recognized competence in international law, who are elected by the UNGA for a term of five years, which can be renewed once. No two members of the ILC may be nationals of the same country, and membership of the ILC must represent the main forms of civilization and the principal legal systems of the world. Currently, of the thirty-four individuals elected as members of the ILC for the five-year period from 2017 to 2021, 8 members come from Africa.[13] With almost one-quarter of the entire membership of the ILC, it is expected that Africa will make a qualitative contribution to the important work of the ILC, especially on the topic of crimes against humanity. This is necessary not only to bring the individual members' expertise to bear on the deliberations of the ILC, but also to add Africa's unique historical experience with mass atrocities, atrocities that, if committed today, would arguably constitute crimes against humanity.

In tracing an Africa footprint in the normative development of the Draft Articles on Crimes against Humanity, one is confronted by a record of limited engagement by African States with the topic before the ILC. This is illustrated by African States' failure, in large part, to respond to the ILC's requests for comments as well as their limited contribution to debates within the Sixth Committee of the UNGA. I note, however, that this lack of engagement is not unique to African States; it appears to be a more general challenge for the ILC with respect to other topics that are on its work programme, although given the relevance of the topic of crimes against humanity to the African context, one would have hoped that these States would depart from their 'business-as-usual' posture.

For example, during the debate in the Sixth Committee in 2013, South Africa was the only African country that reportedly made a contribution, and even this was limited to an initial expression of doubt about whether a dedicated convention on crimes against humanity was really needed. South Africa and other States reasoned that due to the existence of the Rome Statute, there exists no lacuna in

12 2019 ILC Report, *supra* note 2, Paras. 1-3.

13 The current Africa representation on the ILC comes from Algeria, Cote d'Ivoire, Egypt, Kenya, Morocco, Sierra Leone, South Africa and Tanzania.

doi: 10.5553/AJ/2352068X202006002003

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the existing international law framework on crimes against humanity.[14] Two years later, however, during the 2015 debate in the Sixth Committee, South Africa was among 38 States that welcomed the ILC's work on the four draft articles then presented by it, noting that they largely reflected State practice and jurisprudence, and expressing support for the ILC's approach of using the definition of crimes against humanity under the Rome Statute as a basis for its definition under the Draft Articles.[15] During the 2016 debate, Egypt and Sudan were among 39 States that provided positive comments on the ILC's work on crimes against humanity, including the draft articles that had been adopted at that stage.[16] Of the 52 States that made presentations on the ILC's 2017 annual report before the Sixth Committee, only five were from Africa.[17] Similarly, as of 15 February 2019, following the Secretary-General's circulation of the Draft Articles to UN Member States for comments, only two African countries, Morocco and Sierra Leone, submitted written comments.[18] In addition, I have not seen any comments or representations from African regional or subregional groupings such as the African Union (AU), the Economic Community of West African States or the Southern African Development Community.

This limited engagement (though it was in some cases quite vocal, as in the comments made by Sierra Leone) may, at first blush, lead one to conclude that the Draft Articles represent yet another example of externally driven international law (making), with little or no involvement by Africa and her citizens. As I argue more fully later in this article, this conclusion would be misleading. Africa has had a long-standing connection to the development of norms that now have crystallized in the form of crimes against humanity. During the colonial era, and throughout the period of apartheid domination in South Africa, this connection

14 S. Murphy (Special Rapporteur on Crimes Against Humanity), *First Report on Crimes against Humanity*, U.N. Doc. A/CN.4/680, 17 February 2015, Paras. 17-18, pp. 9-10. France, Iran, Malaysia, the Netherlands and the Russian Federation were the other countries associated with this initial scepticism. It is noteworthy that as the work of the ILC progressed on this topic, South Africa became a strong supporter of the project.

15 S. Murphy (Special Rapporteur on Crimes Against Humanity), *Second Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/690, Annex II, 21 January 2016, Paras. 3-4, pp. 14-15.

16 S. Murphy (Special Rapporteur on Crimes Against Humanity), *Third Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/704, 23 January 2017, Para. 3, p. 4. Sudan's comments, however, were fairly lukewarm in recalling the need for the Draft Articles to respect the national sovereignty of States and noting that historical antecedents on which the articles were based, including the Nürnberg and Tokyo tribunals' Statutes, smacked of victors' justice.

17 S. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725 + Add. 1, 18 February 2019, Para. 4. The five African States were Algeria, Malawi, Mozambique, South Africa and Sudan.

18 *Ibid*., Para. 5. Consistent with its objective of identifying a distinct African voice in the elaboration of the ILC Draft Articles, this article will highlight the important comments and suggestions made by Sierra Leone and Morocco throughout the discussion that follows. Additionally, at least one African scholar is on record to have submitted a memorandum to the Special Rapporteur. *See* O. Bekou, University of Nottingham, Letter to the Special Rapporteur (1 December 2018). At the level of the ILC, I note the contributions of African scholars Maurice Kampto, Chris Maina Peters, Charles Jalloh and Dire Tladi to the discourse on crimes against humanity, although some of these may not necessarily be reflected in official reports.

doi: 10.5553/AJ/2352068X2020006002003

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manifested itself through the suffering and brutalization inflicted on members of the civilian population in Africa. Christopher Gevers refers to this phenomenon as Africa being "productive of international criminal law".[19] From the period following independence in the 1960s to negotiations leading up to the adoption of the Rome Statute in the late 1990s, Africa and Africans assumed a more assertive voice, advocating for the trial and punishment of historical crimes committed against their kith and kin, such as colonial crimes and apartheid. They also advocated for the establishment of accountability mechanisms to try alleged perpetrators, including the proposal for a dedicated international tribunal to prosecute apartheid crimes and the establishment of a criminal chamber to deal with serious international crimes under the African human rights mechanism. Furthermore, African States campaigned tirelessly for the inclusion of specific, Africa-relevant crimes against humanity in global or regional legal instruments, such as the 1968 Convention on Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Apartheid Convention and the Rome Statute of the ICC.[20]

3.2 *Early Sites of Victimization in Africa*

According to Christopher Gevers, two *Blue Books* published in 1916 and 1918, respectively, document the atrocities that were committed by European colonizers against civilian populations in colonized African societies.[21] The 1916 publication concerned "reports of atrocities committed in the Cameroons during [colonial] raids on 'native' villages [...] as well as alleged atrocities in East Africa and German South-West Africa". The 1918 publication dedicated "over 200 pages solely to the 'history and treatment' of the 'native races' under [colonial] domination, from the moment of colonization until the outbreak of the war". Specifically, reference was made to an "extermination order" issued against members of the Herero ethnic group by a European military general in 1904 to "let no man, woman, or child be spared – kill them all".[22]

19 C. Gevers, 'African and International Criminal Law', *in* K.J. Heller et al. (Eds.), *The Oxford Handbook of International Criminal Law*, Oxford, Oxford University Press, 2020, n. 25 and accompanying text (hereinafter Africa and ICL).

20 *Ibid.*, nn. 132 and 139. In 1963, Oliver Tambo of the African National Congress (ANC) told the UNGA that apartheid was "genocide masquerading under the guise of a civilized dispensation of justice". Five years later, in 1968, the Representative of Kenya, speaking before the Third Committee of the UNGA during negotiations on the non-applicability of statutory limitations convention, noted the following: "It was not sufficient to refer to [existing] international law in defining the crimes in question since that law, which has been formulated in the past by the developed countries, did not take into account certain present-day realities which were of the highest importance for the young countries. It was important that the convention should apply to crimes past, present and future. Apartheid was one of the gravest crimes against humanity being committed today and it would render the draft convention meaningless if [it] were omitted".

21 C. Gevers, 'The "Africa Blue Books" at Versailles: World War I, Narrative and Unthinkable Histories of International Criminal Law', *in* I. Tallgren & T. Skouteris (Eds.), *The New Histories of International Criminal Law,* Oxford, Oxford University Press (2019) , nn. 31 and 35 and accompanying text. *See also* Gevers, *supra* note 19, nn. 13-14.

22 Gevers, *supra* note 19, nn. 14 and 15 and accompanying text.

doi: 10.5553/AJ/2352068X2020006002003

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It appears that the documentation of these atrocities might have been pivotal to the work of the Commission on the Responsibility of the Authors of the War, and influenced the proposal to establish an international tribunal for the trial of those responsible for serious crimes committed during the First World War. However, and this is Gevers's principal thesis, despite this "presence" of atrocities against African colonial subjects, and the reliance placed on them to rationalize the proposal for the establishment of an international tribunal at Versailles, the tribunal that was ultimately proposed did not provide for the prosecution of crimes committed against Africans. These crimes were notably and inexplicably "absent" from "the international justice to be dispensed at Versailles".[23]

In the post-Second World War era, Africa continued to be a site of international crimes perpetrated by colonial powers against colonial subjects, with truly astounding levels of victimization. For example, one author estimates that between 200,000 and 1.5 million Algerians lost their lives during that country's war of independence. Similarly, in Kenya, between 130,000 and 300,000 Kenyans were allegedly killed at the hands of the colonizers, although the colonial power put the level of victimization at the much lower figure of 11,503 deaths.[24]

Following independence, the secessionist war in the Eastern part of Nigeria from 1967 to 1970 led to the death of approximately one million people. While there were no prosecutions for the international crimes allegedly committed during the Biafran War, the suffering and loss of human life was deeply offensive to humanity; it is the sort of carnage that, if committed in a different historical era, could have led to international investigation and prosecution in a manner not dissimilar to the global response to Rwanda in 1994, and Sierra Leone a few years earlier. The Biafran conflict, therefore, was another example of Africa being a site of victimization for atrocity crimes and was influential in shaping society's attitude towards such crimes.[25]

3.3 African States as Norm Entrepreneurs

As Biafra was unfolding, newly independent African States were becoming more and more assertive in their espousal of international legal norms to challenge actions they deemed offensive of basic human values. At the forefront of these efforts was Africa's campaign against apartheid, an institutionalized regime of systematic oppression and domination by the White minority government of South Africa over their non-White compatriots. Beginning in 1960, but especially after the formation of the Organization of African Unity (OAU) in 1963, African States canvassed global opinion against the policies of the apartheid regime in South Africa. In resolution after resolution both within the OAU and the UNGA,

23 *Ibid*., n. 22 and accompanying text. Reference is also made to the 1945 "massacre" of 45,000 Algerian colonists "in reprisal for the murder of 80 to 105 [European] settlers" at the end of the Second World War. Needless to say, this alleged atrocity has also gone unpunished to this day.

24 *Ibid*., nn. 95, 102 and 103 and accompanying text, citing C. Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya,* New York, Holt Paperbacks, 2005.

25 *Ibid*., nn. 109-113 and accompanying text. On the level of victimization during the Biafran conflict as well as tribal killings in Burundi and Uganda in the 1960s and 1970s, *see* Bassiouni, *supra* note 5, at p. 492.

doi: 10.5553/AJ/2352068X2020006002003

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African States called for the condemnation of racial discrimination in South Africa, the severance of economic and diplomatic ties with the apartheid regime, travel bans, trade embargoes and other forms of economic sanctions, and for South Africa to be suspended from bodies such as the Commonwealth of Nations and the UNGA.[26] According to one author,

> [T]hese efforts by members of the OAU, coupled with their concerted efforts at various sessions of the U.N. General Assembly and the Security Council, brought to the attention of the international community that apartheid was a crime that had to be fought by the international community as a whole.[27]

Implicit in this statement was a recognition that apartheid offended universal human values and, as such, States had an *erga omnes* obligation to challenge it wherever they could. When, therefore, the International Court of Justice (ICJ) dismissed on the ground of *locus standi*, the case filed by Ethiopia and Liberia on behalf of the OAU for a declaration that South Africa had violated international law through its policies of racial discrimination in Namibia (and by extension in South Africa), African countries moved their fight to the UNGA.[28] But they did not stop there: in a move that foretold tensions between African States and the ICC almost four decades later, newly independent African countries in 1966 threatened a mass withdrawal from the ICJ over its decision in the *Namibia* case.[29] However, despite their protestations, these States remain in the ICJ up to this day, as they have by and large remained in the ICC. This perhaps signals the continent's long-standing commitment to the international rule of law.

In 1966, as a result of strong advocacy by African countries, the UNGA adopted a resolution declaring apartheid as a crime against humanity.[30] In 1968, as African countries continued to serve as norm entrepreneurs within the UNGA, apartheid was included in the list of crimes under the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Most significantly, in 1973, African countries again championed efforts for the adoption of the Apartheid Convention by the UNGA.[31] The Convention criminalized apartheid and called for the establishment of a dedicated international tribunal to try apartheid offenders. It also provided for universal jurisdiction for apartheid crimes to be prosecuted within domestic courts, again driving home the point that, by its nature, apartheid offended the conscience of humanity as a

26 G.W. Mugwanya, *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System*, New York, Transnational Publishers, 2003, pp. 175-179.

27 *Ibid*., p. 178.

28 *See South-West Africa, Second Phase*, Judgement, 1966, ICJ Rep. 6.

29 Gevers, *supra* note 19, n. 137 and accompanying text.

30 GA Res. 2202(XXI), 16 December 1966. By Resolution 556 adopted on 23 October 1984, the UNSC also affirmed that apartheid was a crime against humanity.

31 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the UNGA on 30 November 1973, entered into force on 18 July 1976, UNTS, Vol. 1015, 243 (Apartheid Convention).

doi: 10.5553/AJ/2352068X2020006002003

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whole, and deserved condemnation and punishment by all members of the international community.

Although the international tribunal that was proposed under the Apartheid Convention did not come to fruition, some have argued that it significantly influenced, or might even have provided the template for, the Rome Statute.[32] Professor Bassiouni, who drafted the Statute for the proposed apartheid tribunal, was also the Chair of the drafting committee of the Rome Statute. Bassiouni made no secret of the fact that the draft he proposed in the 1970s played a large and influential role in constructing the founding instrument of the world's first permanent international criminal court.[33] Coming back to the present, if one considers that the definition of crimes against humanity in the ILC Draft Articles is based on Article 7 of the Rome Statute, it becomes fairly evident that Africa's advocacy for, and early efforts to construct, an international law regime against crimes against humanity (in this case apartheid) was the precursor to, and provided an essential foundation for, the development of international law in this issue area.

During negotiations for the African Charter on Human and Peoples' Rights, African countries gave serious consideration to the idea of a human rights court with jurisdiction to try serious international crimes. However, the highly influential Senegalese jurist Kebba M'baye, author of the Charter, dissuaded States from pursuing this proposal. In doing so, he argued that a criminal court within the framework of the emergent regional human rights regime would be premature. Further, he noted that such a regime may be duplicitous of other regional or international efforts, given that the Apartheid Convention, which had then been recently adopted, had already provided for the establishment of an international tribunal with competence to try apartheid and other international crimes. Argu-

32 C. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, The Hague, Brill-Nijhoff, 2005, pp. 39-40 (where he notes that the Rome Statute was "patterned after the 1980 draft statute to establish an international criminal jurisdiction to enforce Article V of the Apartheid Convention"). Earlier, Bassiouni had also argued that Article V of the Apartheid Convention "clearly established" the legislative authority for the creation of an international criminal court. *See* C. Bassiouni, 'Study on Ways and Means of Insuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the Establishment of the International Jurisdiction Envisaged by the Convention', U.N. Doc. E/CN.4/1426, 19 January 1981, at p. 46.

33 *Ibid.* According to Bassiouni, "the only international legislative authority for an International Penal Tribunal is the Apartheid Convention […] nothing precludes the States parties to this draft Convention from enlarging upon its jurisdiction to permit the International Penal Tribunal to investigate, prosecute, adjudicate and punish other conventional crimes."

doi: 10.5553/AJ/2352068X2020006002003

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ing further, M'baye referenced efforts that were then underway at the United Nations for the establishment of a permanent international criminal court.[34]

As discussed, it was the Egyptian jurist Bassiouni who was tasked by the UN Commission on Human Rights to study the proposal for the establishment of a tribunal under the Apartheid Convention. The draft tribunal Statute that Bassiouni proposed had jurisdiction not only to try apartheid, but other serious international crimes as well. Therefore, it was particularly disappointing when the proposed apartheid tribunal did not come into existence, especially at a time that African States had already lost the opportunity to provide for criminal jurisdiction under the African Charter on Human and Peoples' Rights.[35] Moreover, as we know, the prospect of a permanent international criminal court also failed to materialize for another two decades, until 1998, when the Rome Statute of the ICC was adopted.

Africa continued to serve as a site of large-scale victimization in the 1990s, as well as of advocacy for the fight against impunity for international crimes. The killing of 800,000 Tutsis and moderate Hutus in Rwanda from April to June 1994 remains, without doubt, the single-most catastrophic incident of the 1990s. However, internal armed conflicts in Sierra Leone, Liberia, the Democratic Republic of the Congo and Uganda, while productive of a lower number of victims, were no less offensive to human conscience when viewed from the prism of their brutality and callousness. According to one author, a key feature of modern internal armed conflicts is that the number of civilian deaths far exceeds that of combatants. Apart from the killing of scores of civilians, such conflicts were characterised by rape, other forms of sexual violence, torture, mutilation of human limbs, use of child soldiers and even cannibalism.[36]

It is not surprising, therefore, that Africa continues to provide the bulk of the material allegations upon which prosecutions for crimes against humanity are currently based. A look at the indictment practice of the Prosecutors of the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the ICC bears this out. From 1997 to 2003, the ICTR charged 90 individuals with 242 counts of crimes against humanity, representing over 44 percent of the charges laid by ICTR Prosecutors.[37] Similarly, the SCSL filed 77 counts of crimes against humanity against its eight indictees, representing 42.3 percent of charges laid, as compared with war crimes, which accounted for 57.3 percent of

34 A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', *European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 933-946, at p. 937. Without going into details, I note here that other leading African scholars have played pivotal roles in the elaboration of specific international or regional regimes, including the work of another Senegalese jurist, Dodou Thiam, Judges Taslim O. Elias (Nigeria) and Abdul Koroma (Sierra Leone), formerly of the ICJ. In the context of the ILC's work, one must also acknowledge the contributions of Maurice Kampto (Cameroon), Chris Maina Peters (Tanzania), Charles Jalloh (Sierra Leone) and Dire Tladi (South Africa) to the crimes against humanity project.

35 *Ibid.*

36 L.N. Sadat, 'Crimes Against Humanity in the Modern Age', *American Journal of International Law*, Vol. 107, 2013, pp. 334-377, at p. 339.

37 *Ibid.*, pp. 346-347.

doi: 10.5553/AJ/2352068X202006002003

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SCSL charges.[38] So too did ICC Prosecutors charge 137 counts of crimes against humanity or 44.6 percent of total counts charged in respect of the eight Africa situations that have come before the Court.[39]

The foregoing discussion shows that despite Africa's 'limited voice' in the recent formulation of the Draft Articles on Crimes against Humanity, the continent's historical experience speaks to a long-standing connection to mass atrocity crimes committed against its civilian populations during the colonial and postcolonial eras, especially during apartheid in South Africa. Due to this experience, independent African States became more active participants in the development of international legal regimes for the suppression and punishment of crimes against humanity, culminating in the adoption of the Rome Statute in 1998. Considering the influence of the Rome Statute on the development of the ILC's draft crimes against humanity convention, Africa, then, has been a constant presence in the development of this area of international law, a presence that sometimes can appear fledging and transient, but one that has always percolated beneath the surface.

In the next section, I will highlight key provisions of the draft Convention that, in my view, provide reasons for African States to support the Convention when it comes up for negotiation in the near future.

4 Key Provisions of the ILC Draft Articles

4.1 Overall Objectives

One of the principal objectives of the proposed crimes against humanity convention is to fill the existing gap in the international legal framework for dealing with atrocity crimes. Since the end of the Second World War, three main crimes – genocide, war crimes and crimes against humanity – have provided the focus of international efforts to fight against impunity for serious violations of international law. These core international crimes have featured in the subject matter jurisdiction of most international criminal tribunals and courts established in the post-war environment. However, unlike war crimes and genocide, the prevention and punishment of which are governed by international conventions, there is no equivalent convention for crimes against humanity. Under these circumstances, one of the objectives of the ILC Draft Articles is to provide the basis for a future convention that would govern the prevention and punishment of crimes against humanity while providing a legal framework for interstate cooperation among its future Parties.[40]

In this regard, it is important to highlight Sierra Leone's contribution to the overall scope and objectives of the Draft Articles. In its comments on the Draft Articles, Sierra Leone suggested that the ILC should emphasize prevention and

38 *Ibid.*, pp. 349-350.

39 *Ibid.*, pp. 356-357. The eight situations that are reflected in these charges are the Central African Republic (CAR), Cote d'Ivoire, the Democratic Republic of the Congo, Kenya, Libya, Mali, Sudan (Darfur) and Uganda.

40 2019 ILC Report, *supra* note 2, at p. 22.

doi: 10.5553/AJ/2352068X2020006002003

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punishment as co-equal objectives of the emerging convention on crimes against humanity and reflect this in the title to the Draft Articles. In Sierra Leone's view, the forward-looking objective of prevention complements the objective of punishment, which seeks to penalize conduct that has already taken place. It noted that previous attempts to elaborate a convention on crimes against humanity, as well as the 1948 Genocide Convention, all place emphasis on the twin objectives of prevention and punishment of atrocity crimes. From an African perspective, it is important to note that this proposal, by Sierra Leone, gained the support of the members of the ILC, leading to the current title of the Draft Articles, "Prevention and Punishment of Crimes against Humanity".[41]

The need for a convention on crimes against humanity can hardly be gainsaid. First, crimes against humanity are as prevalent, if not more prevalent, than genocide and war crimes. As shown earlier in this article with reference to Leila Sadat's work,[42] overall, crimes against humanity have formed the bulk of charges laid by international prosecutors of the ad hoc tribunals established in the 1990s, as well as of the SCSL and the ICC. This suggests, perhaps, that there were many more victims of crimes against humanity in the post-Second World War era than any of the other two core crimes. Indeed, if one considers genocide itself as "an acute form of crimes against humanity", then the case for a global convention on crimes against humanity becomes that more imperative.[43] Crimes against humanity potentially have a broader scope and reach than both genocide and war crimes, given that they no longer require a nexus to armed conflict.[44] Finally, the fact that offences far less egregious than crimes against humanity, including corruption and transnational organized crime, have been the subject of international conventions to govern their prevention and punishment through mechanisms of interstate cooperation underlines the need for a dedicated crimes against humanity convention, which, many would argue, is now long overdue.[45]

41 Int'l Law Comm'n, Crimes against Humanity: comments and observations received from Governments, international organizations and others, U.N. Doc. A/CN.4/726, 21 January 2019, pp. 18-19 (hereinafter 'ILC, Comments from Governments').

42 Sadat, *supra* note 36.

43 *Ibid.*, p. 347. The pervasive nature of crimes against humanity charges at the ad hoc tribunals has led some scholars to describe them as "crimes against humanity courts". *See* G. Sluiter, 'Chapeau Elements of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals', *in* L.N. Sadat (Ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge, Cambridge University Press, 2011, at p. 103. *See also* W.A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge, Cambridge University Press, 2006, pp. 185-186, where he argues, "If the statutes of the three tribunals (ICTY, ICTR, and SCSL), only contemplated crimes against humanity within their subject-matter jurisdiction, this would change little in terms of their operations, except to reduce the length of trials and the legal debates about arcane subjects." Sadat, however, disagrees with this proposition noting that Schabas view is an overstatement, given that war crimes charges are more useful than crimes against humanity charges in certain types of atrocity crime situations. Sadat, *supra* note 36, p. 342, n. 50 and accompanying text.

44 ILC, Comments from Governments, *supra* note 41, at p. 17 where Sierra Leone notes that crimes against humanity have the widest scope of application compared with the two other core international crimes.

45 2019 ILC Report, *supra* note 2, at p. 22.

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4.2 *Consistency with Existing Definitions of Crimes Against Humanity*

One of the principal ways by which the ILC endeavoured to inject both effectiveness and likely acceptance by States was to draft articles that do not conflict with the obligations of States under existing Statutes governing the work of the ad hoc tribunals and the ICC. For example, the ILC went to great pains to ensure that the delicate international consensus reached at Rome in 1998 in terms of the definition of crimes against humanity in Article 7 of the ICC Statute is essentially maintained in Draft Article 2, except for a few minor language adjustments. These adjustments were meant to reflect the different context of the Statute as opposed to a future convention, to delink the offence of persecution from crimes within the jurisdiction of the ICC and to remove the definition of gender.[46]

The Draft Articles therefore maintain substantive consistency with extant statutory frameworks governing crimes against humanity. In addition, however, they seek to build on, or supplement, the international cooperation regime that exists under the Rome Statute.[47] The provisions on international cooperation under the Rome system of justice govern the vertical relationship between the ICC and its States Parties. On the other hand, by focusing on the development of legal norms and processes within and interstate cooperation across nations, the Draft Articles govern a horizontal relationship between States. If properly implemented, this network of national laws on crimes against humanity would deny sanctuary to alleged perpetrators of such crimes and thus contribute to the global fight against impunity.

Through their focus on the prevention and punishment of crimes against humanity within domestic legal systems, the Draft Articles potentially reinforce the Rome Statute's complementarity framework. This is an important development for African countries, especially considering the difficult relationship between the ICC and the continent over the alleged targeting of Africans and African leaders and their prosecution at The Hague. The Draft Articles place upon States the obligation to enact national laws for the prevention and punishment of crimes against humanity within domestic courts, and for horizontal cooperation between Parties to the future convention on matters such as extradition and mutual legal assistance. Through these provisions, the draft convention gives fresh impetus to the primacy of jurisdiction that African States enjoy over serious international crimes, either because such crimes take place on territory within their jurisdiction or the perpetrators are nationals of the country or its citizens are victims of the alleged criminality.[48] The future crimes against humanity convention being proposed by the ILC is, therefore, largely congruent with African

46 *Ibid.*, p. 30, where the ILC notes that as at mid-2019, 122 States Parties to the Rome Statute had accepted the definition of crimes against humanity under Art. 7, and this definition was being used as a template by many countries to formulate or amend their national law on crimes against humanity.

47 ILC, Comments from Governments, *supra* note 41, p. 16 related to Sierra Leone's suggestion that the Draft Articles maintain the integrity of the Rome Statute, but also progressively develop the law of crimes against humanity through the development of national legal frameworks within States.

48 *See* Draft Art. 7(1) for the various bases of national jurisdiction under international law.

doi: 10.5553/AJ/2352068X2020006002003

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countries' desire to regain some of the prestige and dignity perceived to have been lost through the ICC's alleged overzealous assertion of jurisdiction over African cases, notwithstanding the regime of complementarity that serves as the cornerstone of the ICC's founding Statute.

4.3 Prohibition of Crimes Against Humanity as Jus Cogens

Building on a long line of legal authorities, preambular Paragraph 4 of the Draft Articles recalls that the prohibition of crimes against humanity is a *jus cogens* norm.[49] In other words, it is a peremptory norm of general international law that is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[50] In 2001, the ILC commentary on Article 26 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts noted that the prohibition against crimes against humanity is "clearly accepted and recognized" as a peremptory norm. In *Belgium v. Senegal*, the ICJ found that the prohibition on torture has the character of a *jus cogens* norm.[51] According to the ILC, this holding suggests that if a single prohibited act, such as torture, rises to the level of a peremptory norm, the commission of similar acts on a widespread or systematic basis, amounting to crimes against humanity, would also enjoy *jus cogens* status. The ICC Trial Chamber has also held, in one of the Kenya cases, that "[i]t is generally agreed that the interdiction of crimes against humanity enjoys the stature of *jus cogens*".[52] National courts in both Kenya and South Africa have also had their say on the peremptory character of the prohibition against specific types of crimes against humanity.[53]

4.4 Prevention of Crimes Against Humanity

The general obligation to prevent crimes against humanity is found in Draft Article 3, Paragraph 2, while Draft Article 4 sets out the steps that States are required to take within the framework of their domestic legal systems to prevent

49 2019 ILC Report, *supra* note 2, at pp. 24-25. Draft Articles, Para. 4, Preamble, states, "*Recalling also* that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)".

50 Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, UNTS, Vol. 1155, No. 18232, p. 331, Art. 53.

51 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgement, ICJ Reports 2012, p. 422, at 457, Para. 99.

52 *Prosecutor v. William Samoei Ruto and Joshua Arab Sang*, ICC-01/09-01/11, Para. 90.

53 *See National Commissioner for the South African Police Service v. Southern African Litigation Center and Another*, Judgement, South African Constitutional Court, 30 October 2014, South African Law Reports 2015, Vol. 1, p. 315, Para. 37: "Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm." The Kenya Court of Appeal, in *Attorney-General and 2 Others v. Kenya Section of International Commission of Jurists*, Judgement, 16 February 2018, stated as follows: "Some of the largely accepted examples of those norms from which no derogation is permitted but are obligatory equally upon the State and non-State actors include the prohibition of […] genocide, crimes against humanity, war crimes, torture, piracy and slavery."

doi: 10.5553/AJ/2352068X2020006002003

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such crimes. It also sets out the parameters for cooperation between States, as well as between States and international and other organizations. As proposed in the Draft Articles, the obligation to prevent crimes against humanity is a two-pronged one, involving an internal and external dimension. Internally, within territory under their control, States are required to adopt "legislative, administrative, judicial and other appropriate preventive measures"; externally, States have an obligation to cooperate with their peers, as well as international and other organizations, in order to prevent crimes against humanity from taking place *ab initio*. The obligation to take domestic measures within national legal systems to prevent crimes against humanity is, however, not open ended. Such preventive measures must not themselves violate international law norms, including rules related to the use of force and human rights law.[54]

A critical element of domestic preventive measures is the obligation to criminalize crimes against humanity under national law, as well as the various forms of direct and indirect perpetration that are recognized under international law, including superior or command responsibility.[55] At the same time, States must legislate for the non-applicability of defences such as governmental or superior orders, the irrelevance of the perpetrator's official position to his or her criminal responsibility and that statutes of limitation shall not apply to crimes against humanity.[56] Linked to the preventive duty of States is the traditional obligation to impose criminal penalties – through appropriate investigations, trial and punishment – on individuals who engage in conduct that constitutes crimes against humanity.[57]

A corollary obligation, and one that seeks the progressive development of the Nürnberg Principle that crimes against international law are committed by individuals, not by abstract entities, is found in Article 6, Paragraph 8, which requires that subject to the provisions of their national law, States adopt legislative measures to establish the liability of legal persons (*i.e.* corporations) for crimes against humanity.[58] While such liability may not be exclusively criminal and can take the form of administrative or civil sanctions, this draft article marks an important development in this area of international law, considering that the issue of liability of legal persons has not been a feature of the Statutes of the ad hoc tribunals, the SCSL or the ICC.[59]

As explained in Sierra Leone's comments on this draft article, corporate criminal liability bears particular resonance for Africa, where crimes against humanity

54 ILC, Comments from Governments, *supra* note 41, Sierra Leone, at p. 57.
55 Draft Art. 6, Paras. 1, 2, and 3.
56 Draft Art. 6, Paras. 4, 5, and 6.
57 Draft Art. 6, Para. 7.
58 Draft Art. 6, Para. 8.
59 2019 ILC Report, *supra* note 2, Commentary on Draft Art. 6, Para. 8. The ILC noted that while the Nürnberg Charter provided for the possibility that the International Military Tribunal (IMT) may declare any group or organization as a criminal organization, and did in fact make such declarations in a number of cases, only natural persons were tried before the IMT.

doi: 10.5553/AJ/2352068X2020006002003

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have been committed in the context of conflicts over control of natural resources.[60] According to Sierra Leone, unless provisions on corporate criminal liability are adopted in the domestic laws of States to punish "the true beneficiaries of contemporary resource wars", there would remain a global impunity gap that would continue to undermine the effectiveness of the fight against impunity.[61] Conflicts in Sierra Leone and Liberia in the early 1990s, as well as the apparently intractable, on-off internal armed conflict in the Democratic Republic of Congo, are examples of such resource conflicts. Often lying at the heart of these conflicts are the interests of business corporations that tend to fuel local conflicts through financial incentives to governments, rebel groups or other warring parties, in exchange for access to natural resources. A convention on crimes against humanity would allow States Parties to criminalize such conduct within their domestic legal systems, and by doing so, enhance the jigsaw of legal norms for the prevention and punishment of such crimes. Given Africa's particular interest in the subject, it is not surprising that, in 2014, the AU amended the Statute of the African Court of Justice and Human Rights to provide for jurisdiction over legal persons for international crimes, including crimes against humanity.[62]

Going back to the obligation of prevention, Sierra Leone also invited the ILC to consider a number of important issues, including the need to clarify that the duty of prevention under the draft convention is not contingent upon the existence of a prior legal instrument setting out such a prevention requirement, and that the obligation is not necessarily limited by territoriality. Another important contribution was Sierra Leone's suggestion for the ILC to link its work on the prevention obligation with the principle of the Responsibility to Protect (R2P) as elaborated in the 2005 World Summit Outcome, and endorsed by both the UNGA and the AU.[63]

4.5 Universal Jurisdiction

The Draft Articles require States to take measures to establish jurisdiction where an alleged offender is present within territory under their jurisdiction, but none of the traditional jurisdictional bases under Draft Article 7, Paragraph 1, are applicable.[64] This is the classic case of universal jurisdiction, by which States can legitimately exercise criminal jurisdiction over individuals suspected of committing serious international crimes, not on the basis of the specific national interests of the State concerned or its citizens, but in defence of universal human

60 ILC, Comments from Governments, *supra* note 41, Sierra Leone, at p. 76: "Blood diamonds provided a cover for shady entrepreneurs and companies to profit from the suffering of our people and the plunder of our resources".

61 *Ibid.*

62 AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Art. 46 C (hereinafter 'Malabo Protocol').

63 ILC, Comments from Governments, *supra* note 41, Sierra Leone, at pp. 59-60.

64 Draft Art. 7, Para. 2: "Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles."

doi: 10.5553/AJ/2352068X202006002003

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values.[65] When properly implemented, universal jurisdiction provides a useful tool in the international legal framework for the prevention of crimes against humanity, as it denies safe haven to perpetrators or the opportunity for them to engage in 'forum shopping' those jurisdictions that have no (traditional) connection to the offence and have not enacted enabling legislation for the exercise of universal criminal jurisdiction. One author has, for example, argued that when viewed from the perspective of the relationship between the ICC and national courts, universal jurisdiction permits domestic courts to fill gaps in the accountability process for those cases where the ICC lacks jurisdiction to act.[66] Therefore, notwithstanding the objections to universal jurisdiction, its seeming resurgence in the context of atrocities committed in Rwanda, and more recently Syria, serves to underscore the utility of this legal tool to help plug the impunity gap, especially where passive personality and other connections can be established by the jurisdiction-invoking State.

4.6 Aut Dedere Aut Judicare

Linked to the exercise of universal jurisdiction under Draft Article 7, Paragraph 2, is the duty to submit cases to appropriate national authorities with a view to their prosecution, or to extradite or surrender such suspects to other States or an international court or tribunal. This principle, often expressed in the Latin formula *aut dedere aut judicare* derives its origin from the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and is often referred to as the 'Hague Formula'. According to the ILC, the Hague Formula consists of two legal 'obligations', and two legal 'possibilities'. The former are the obligation of apprehension and the obligation of reference to the competent authorities of the State; the latter are the possibility of extradition and the possibility of prosecution. In other words, despite widely held views to the contrary, the principle of *aut dedere aut judicare* does not entail an obligation to prosecute; the obligation is to "submit the case to its competent authorities for the purpose of prosecution", which implies that a State's authorities may decide, following investigations, that there exists insufficient legal basis to pursue a prosecution.[67] In considering a similar provision under Article 7(1) of the Torture Convention, the ICJ in *Belgium v. Senegal* stated as follows:

65 C.C. Jalloh, 'The Place of the African Criminal Court in the Prosecution of Serious International Crimes', *in* C.C. Jalloh & I. Bantekas (Eds.), *The International Criminal Court and Africa,* Oxford, Oxford University Press, 2017, p. 289, at p. 290. *See also* ILC, Comments from Governments, *supra* note 41, Sierra Leone, at p. 82, noting Sierra Leone's view that universal jurisdiction already exists for crimes against humanity under customary international law.

66 M. du Plessis, 'The Crimes against Humanity Convention, (Overlooked) African Lessons, and the Delicate Dance of Immunity', *Journal of International Criminal Justice*, Vol. 17, 2019, pp. 1-12, at p. 9: "What the Constitutional Court's judgment [in the Torture Docket case] shows is the real possibility for national courts to do the work that the ICC cannot, or will not; that is, to act as a gap-filing accountability measure in those cases where the ICC would not ordinarily have jurisdiction. Here again, it would do so through the practice of "universal jurisdiction".

67 2019 ILC Report, *supra* note 2, at p. 93.

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> The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. [...] The obligation to submit the case to the competent authorities, [...] may or may not result in the institution of proceedings, in light of the evidence before them, relating to the charges against the suspect.
>
> However, if the state in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight.[68]

The obligation to extradite or prosecute is an important principle in the context of Africa's fight against impunity for serious international crimes. As we saw, the obligation was invoked by Belgium in its quest for the extradition of former Chadian President Hissène Habré from Senegal, for trial in Belgium under that country's universal jurisdiction statute. While Senegal did not extradite Habré to Belgium, it is believed that pressure from the ICJ litigation, as well as campaigns by domestic and human rights organizations, contributed immensely towards the AU's decision to establish a Criminal Chamber within the Senegalese judicial system that ultimately tried and convicted the erstwhile Chadian ruler for crimes against humanity. Similarly, as we speak, the former Gambian President Yahya Jammeh is living in exile in Equatorial Guinea since his defeat at elections in December 2016, despite allegations linking him with serious crimes, including torture, murder, rape and enforced disappearances, that potentially rise to the level of crimes against humanity. In fact, in November 2019, the then Attorney-General and Minister of Justice of The Gambia announced that evidence before the ongoing Truth, Reconciliation and Reparations Commission (TRRC) of The Gambia appears to suggest that former President Jammeh might have committed crimes against humanity during his 22 year rule. Tambadou further underscored the government's commitment to arrest and prosecute the former President if he ever stepped foot in The Gambia.[69]

4.7 International Cooperation – Extradition and Mutual Legal Assistance

One of the more attractive features of the draft convention is the advanced regime of international cooperation that it seeks to put in place through provisions on extradition and mutual legal assistance under Draft Articles 13 and 14, respectively. In formulating these provisions, the ILC relied on long-standing treaty practice related to both extradition and mutual legal assistance in a broad

68 *Belgium v. Senegal, supra* note 51, Paras. 94-95.

69 Remarks by Abubacarr Marie Tambadou, Attorney-General and Minister of Justice of The Gambia, on the occasion of the commencement of the New Legal Year, 19 January 2020. On 1 July 2020, the UN Secretary-General, António Guterres, appointed Tambadou as the Registrar of the Mechanism for the International Criminal Tribunals (MICT), based in The Hague, the Netherlands.

doi: 10.5553/AJ/2352068X202000600200З

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range of issue areas. In its written comments, Sierra Leone noted that Draft Articles 13 and 14 are some of the "most important provisions of the entire draft articles on crimes against humanity", especially considering their important gap-filling function.[70]

Draft Article 13 is modelled on the extradition provisions of the UN Convention against Corruption, which is adhered to by close to 190 UN Member States, thus reflecting broad international consensus.[71] The key elements of the self-contained extradition regime under Draft Article 13 are that crimes against humanity are to be deemed as extraditable offences under existing extradition treaties, and shall be included as extraditable offences in future treaties to be negotiated between States. Building upon similar provisions in conventions dealing with genocide and war crimes, Draft Article 13 also provides that crimes against humanity shall not be considered as political offences for which an extradition request may be declined. Article 13 also performs an important gap-filling role as it provides that where a requested State requires an extradition treaty with a requesting State where no such treaty exists, it may choose to rely on the provisions of the Draft Articles as the legal basis for the extradition in respect of crimes against humanity. In view of the obligations of States, under Draft Article 6, to criminalize crimes against humanity in their national law, the extradition regime under the Draft Articles does not require dual criminality. Indeed, it appears that such a requirement would have been superfluous, considering that each Party to the future convention would have criminalized crimes against humanity under its domestic law.

As discussed, Draft Article 13, on extradition, is also linked to Draft Article 10, dealing with the *aut dedere aut judicare* principle. Read together, these provisions require States to submit cases to their appropriate prosecutorial authorities in situations where persons alleged to have committed crimes against humanity are present within territory under their jurisdiction, or to extradite or surrender such persons to States having jurisdiction under Draft Article 7(1) or to an international criminal tribunal or court.

The provisions of Draft Article 14 and the annex deal with mutual legal assistance during investigation, prosecution and judicial proceedings related to crimes against humanity. They are based on Article 18 of the 2000 UN Convention on Transnational Organized Crime, as reproduced in Article 46 of the 2003 UN Convention against Corruption. These two conventions enjoy a large and increasing membership among States, with the Organized Crime Convention boasting of 190 Parties as at mid-2019, none of which have entered a reservation to the mutual legal assistance provisions. Given this broad international consensus, it was eminently reasonable for the ILC to adopt this provision for the purpose of the proposed crimes against humanity convention.

70 ILC, Comments from Governments, *supra* note 41, Sierra Leone, at p. 112.

71 C.C. Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development or Both?', *Case Western Reserve Journal of International Law,* Vol. 52, 2020, pp. 331-405, at p. 378, describing Draft Art. 13 as a "mini-extradition treaty within a treaty" and noting that it is one of the most important provisions considering present gaps in the law (hereinafter 'ILC First Draft Convention').

doi: 10.5553/AJ/2352068X2020006002003

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Draft Article 14 requires States to afford each other the widest measure of mutual legal assistance in respect of allegations against both natural and legal persons, although in the case of the latter, the obligation is delimited by the requirements of the national law and treaty obligations of the requested State. Draft Article 14, Paragraph 3, provides a non-exhaustive list of purposes for which mutual legal assistance may be sought, including the identification and location of suspects, victims and witnesses; recording evidence from witnesses; service of judicial documents; asset tracing and freezing the proceeds of crime; and facilitating the voluntary appearance of persons in the requesting State. Similar to the provisions on extradition, the ILC's proposals on mutual legal assistance constitute another self-contained regime that performs important gap-filling functions, in situations where a mutual legal assistance treaty does not exist between a requesting and requested State. In those circumstances, Draft Article 14, Paragraph 8, provides that the draft annex shall govern requests for mutual legal assistance between the States. Finally, and for reasons similar to those under the extradition provisions, there is no dual criminality requirement for mutual legal assistance under the future crimes against humanity convention.

5 Looking Ahead – Legal and Other Challenges

In the foregoing discussion, I attempted to highlight the key provisions of the ILC Draft Articles that, in my view, make the proposal for a future convention on crimes against humanity attractive for Africa. In addition to substantive provisions such as consistency between the definition of crimes against humanity and extant obligations of African States under the Rome Statute, it is also significant that the Draft Articles focus on normative development within national legal systems. I argued that these provisions place the initiative for the prevention and punishment of crimes against humanity back with African countries, and address a key grievance that these countries have had with the Rome system of justice, that is, the arrest and trial of African leaders at The Hague. Additionally, the discussion recognized that through its provisions on *aut dedere aut judicare*, extradition and mutual legal assistance, the future crimes against humanity convention provides an advanced framework for intra-African cooperation in investigation, prosecution and judicial proceedings related to crimes against humanity committed on the continent. If implemented properly, these provisions could go a long way in furthering Africa's fight against impunity for serious international crimes, including crimes against humanity.

However, I also recognize that the voyage ahead would not necessarily be all smooth sailing, nor would the road be without bumps along the way. In this part of the article therefore I will briefly address some of the challenges that could impact the implementation of a future crimes against humanity convention in Africa.

doi: 10.5553/AJ/2352068X202006002003

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5.1 *Non-Retroactivity*

From an African perspective, it is problematic that the ILC chose fidelity to Article 28 of the Vienna Convention on the Law of Treaties over the imperative to promote accountability for crimes against humanity that predate the adoption of the (future) convention. In doing so, the ILC relied on the views of the ICJ in *Belgium v. Senegal*, which held that the obligation to prosecute alleged perpetrators of acts of torture under the 1984 Torture Convention applies to incidents that took place after the Convention entered into force for the State concerned.[72]

Although this view does not take away the competence of States to pursue accountability under customary international law or adopt national legislation for the trial and punishment of historical crimes against humanity, the fact that such crimes would not immediately fall within the remit of the future convention denies African countries the opportunity to leverage the international cooperation mechanisms provided under the draft convention for dealing with the continent's past history of victimization. As Christopher Gevers has argued in a different context, the principle of non-retroactivity of criminal legislation, including international criminal legislation, has the potential to sometimes operate against the interests of justice.[73] For African countries, the fact that crimes against humanity continue to be committed in a number of conflict (and non-conflict) settings, even as a future convention for the prevention and punishment of such crimes is being minted, suggests that it would have been preferable for the draft convention to preserve the option for States to apply the terms of the convention to crimes against humanity that predate the coming into force of the convention. I believe such retroactive application would be fully consistent with the international law principle of *nullum crimen sine lege* (no punishment except for acts that were prohibited by law), given that crimes against humanity, as defined under the draft convention, reflect customary international law. In view of the fact that the proposed convention does not provide for this option, or at least it does not do so expressly, it is hoped that African countries would, when enacting their domestic laws on crimes against humanity, adopt a more liberal attitude towards temporal jurisdiction, such that their national legal systems may investi-

72 2019 ILC Report, *supra* note 2, at p. 27.

73 Gevers, *supra* note 19, n. 208, argues that, historically, while crimes against Africans have informed the establishment of mechanisms of criminal accountability going back to the Treaty of Versailles at the end of the First World War, the prospective application of these regimes or their racial politics has meant that crimes against Africans have not formed part of their subject matter jurisdiction. Although the ICTR and SCSL looked back at crimes that had already taken place, they had to operate within the limits of the territorial and temporal jurisdiction conferred by their founding instruments. The Rome Statute of the ICC provides for the trial and punishment of apartheid as a (historical) crime against humanity. However, that Statute also takes legal effect from the date it entered into force for its State Parties and does not enjoy retroactive application. In the circumstances, the prohibition of the crime against humanity of apartheid in the Rome Statute remains at best a pyrrhic victory for Africa. Indeed, the historical neglect of crimes against Africans was so evident at Rome that the representative of the OAU had to remind the assembled delegates that "Africa had a particular interest in the establishment of the Court, since its peoples had been the victims of large-scale acts of war and violence, even in the post-colonial era".

doi: 10.5553/AJ/2352068X2020006002003

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gate, prosecute and punish those who allegedly committed crimes against humanity prior to the adoption of the convention.

5.2 The Immunity Question

Going back to the Nürnberg and Tokyo Charters in the aftermath of the Second World War, a long line of international legal instruments have provided that the official status of an individual accused of one of the core international crimes, including crimes against humanity, is irrelevant to their criminal responsibility. More recently, this principle is reflected in the Statutes of the ad hoc tribunals, the SCSL and the ICC. It is therefore no longer controversial that persons accused of such crimes cannot invoke their official position in trials before international courts and tribunals. That much is clear from the decision of the SCSL Appeals Chamber in the case of former Liberian President Charles Taylor, who, at an early stage following his arrest and surrender to the SCSL, challenged the Court's jurisdiction over him on the basis of his status as a former Head of State.[74] In rejecting Taylor's plea of immunity from jurisdiction, the Court referred to "a principle [...] now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court".[75]

In other words, it was the view of the Appeals Chamber that Charles Taylor's official position as an incumbent Head of State at the time that the Special Court indicted him for war crimes and crimes against humanity did not bar his prosecution. Since the SCSL *Taylor* decision, other African Heads of State or Government have also been charged with crimes before international tribunals. The ICC arrest warrants against Sudanese President Omar Hassan Al-Bashir and Muammar al-Gaddafi of Libya are now well-known examples. Much earlier, Jean Kambanda's status as former Prime Minister of Rwanda afforded him no protection from the jurisdiction of the ICTR.

That official capacity does not bar prosecution before an international tribunal for serious crimes is now said to constitute a principle of customary international law.[76] The question that follows, in the context of the draft convention on crimes against humanity, is whether official capacity may avail a senior State official such as a Head of State, Head of Government or Minister of Foreign Affairs immunity before the domestic courts of another State. According one commentator,

> under customary international law, incumbent heads of state are entitled to personal immunity from arrest and criminal prosecution in the territory of foreign states when facing charges of international crimes before a domestic court.[77]

74 *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004.
75 *Ibid*., Para. 52.
76 Jalloh, *supra* note 71, at p. 391.
77 M. Frulli, 'Piercing the Veil of Head-of State Immunity: The Taylor Trial and Beyond', *in* C.C. Jalloh (Ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge, Cambridge University Press, 2014, pp. 325-339, at p. 326.

doi: 10.5553/AJ/2352068X202006002003

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In this regard, it is important to recall Draft Article 6, Paragraph 5, which requires States to enact domestic legislation excluding the application of official capacity as a defence to a charge of crimes against humanity. In its commentary on this provision, the ILC explained that pursuant to Paragraph 5, "an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility". The ILC added,

> [b]y contrast, 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.

This is an important distinction. It is consistent with the views expressed by the ICJ in the *Arrest Warrant Case (Congo v. Belgium)* that serving high-ranking officials of a State, such as Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunity from the criminal jurisdiction of other States even when charged with serious international crimes. This is for good reason because the immunity granted to such officials is not for their personal benefit, but to facilitate the discharge of the functions of their office. Given this objective, it is undesirable to have the threat of arrest or prosecution by other States hanging over a senior State official as he engages in international representation on behalf of his government. For this reason, serving State officials enjoy full immunity from the criminal jurisdiction of other States, and inviolability of their persons.[78]

The immunity that pertains to such official positions, however, does not apply when they leave office. In the *Arrest Warrant Case*, the ICJ noted that when a senior official no longer holds office, he or she will not enjoy, under international law, the immunities that pertained to the previous official position. As such, there is no bar to the arrest and prosecution of such former officials before the domestic courts of other States for crimes against humanity.

This position is consistent with the ILC commentary that Draft Article 6, Paragraph 5, has no effect on the procedural immunity afforded to foreign State officials before national courts of other States. On this view, the draft convention preserves the right of States to pursue their interstate relations during the incumbency of their most senior officials, while ensuring that the international community's interest in challenging impunity is safeguarded by the possibility of bringing such officials to trial after they leave office. It was a compromise position adopted by the ILC following the adoption of the first reading of the Draft Articles, given the difference of opinion among some of its members, who felt that the ILC should not make a proposal that departed from long-standing precedent and practice going back to the Nürnberg and Tokyo tribunals' Statutes, the ad hoc tribunals' Statutes, the Rome Statute and indeed the prior work of the ILC

78 *Democratic Republic of the Congo v. Belgium (Arrest Warrant Case), Judgement,* ICJ, 14 February 2002, Para. 58: "The Court has carefully examined state practice [...] [i]t has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent [State officials] where they are suspected of having committed war crimes and crimes against humanity."

doi: 10.5553/AJ/2352068X2020006002003

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itself. Essentially, it was the view of these members of the ILC that the Draft Articles should include a full statement of the irrelevance of official position to the criminal responsibility of senior State officials such as what is contained in Article 27 of the Rome Statute.[79]

As far as Africa is concerned, the provision has contemporary relevance and potentially important implications. It is reminiscent, in part, of the arguments of former Chadian President Hissène Habré against the jurisdiction of the Senegalese courts to prosecute him. Looking forward, this draft article would be relevant to the cases of former African leaders who are currently living in exile in other States and who may have to face justice in the domestic courts of third States.

5.3 Amnesties

The ILC Draft Articles do not specifically address the question of amnesties for crimes against humanity, although the ILC discusses the issue in its commentary on Draft Article 10, dealing with the obligation of States to submit a case to competent prosecutorial authorities under the *aut dedere aut judicare* principle.

The ILC's discussion acknowledges that international practice on the amnesty question has been mixed. While the Statutes of the 1990s ad hoc tribunals and the ICC do not contain a provision on amnesties, those of more recent vintage, including the SCSL and the Extra-Ordinary Chambers in the Courts of Cambodia (ECCC), provide that a grant of amnesty under domestic law shall not bar the exercise of their respective criminal jurisdictions. In the case of *Prosecutor v. Kallon*,[80] the SCSL Appeals Chamber held that an amnesty granted under the Lomé Peace Agreement would not bar a prosecution for serious international crimes before the SCSL. In arriving at this conclusion, the Appeals Chamber reasoned that the grant of an amnesty or pardon was a sovereign act that is closely linked to the criminal jurisdiction of the State granting amnesty, and does not bind other States in the context of trials for serious international crimes, over which there is concurrent jurisdiction among States. This is the case with crimes against humanity, the prevention and suppression of which is in the interests of all States.[81]

This position is also supported by the practice of the UN Secretary-General not to recognize blanket amnesties in respect of the core international crimes of genocide, war crimes and crimes against humanity, a view that was first invoked on the occasion of the signing of the Lomé Peace Agreement between the government of Sierra Leone and the Revolutionary United Front (RUF) in 1999.[82]

79 Jalloh, *supra* note 71, at pp. 389-397.

80 *Prosecutor v. Kallon*, SCSL-2004-15-AR72(E), Decision on the Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.

81 Jalloh, *supra* note 71, at p. 398.

82 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Lomé, 7 July 1999. For a discussion of the amnesty provisions of the Lomé Peace Agreement in light of the SCSL's jurisprudence, *See* L.N. Sadat, 'The Lomé Amnesty Decision of the Special Court for Sierra Leone', *in* C.C. Jalloh (Ed.), *The Special Court for Sierra Leone and Its Legacy: The Impact for Africa and International Law*, Cambridge, Cambridge University Press, 2014, pp. 311-324.

doi: 10.5553/AJ/2352068X202006002003

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As one of the witnesses to the Lomé Peace Agreement, the Special Representative of the UN Secretary-General appended a note to his signature in which he stated the UN's understanding that the amnesty provisions in Article IX are not applicable to international crimes, including genocide, war crimes and crimes against humanity. The following year, the Secretary-General's report to the UN Security Council (UNSC) on the establishment of the Special Court for Sierra Leone, while noting that amnesties can, as a legal concept, be adopted in the context of peace agreements, underscored that such amnesties do not apply to core international crimes.[83] This position was further restated by the UNSC in its resolution 1315 (2000).[84]

In 2004, the Secretary-General's report on the Rule of Law and Transitional Justice also stated that amnesties can never be permitted to excuse genocide, war crimes, crimes against humanity and gross violations of human rights. It noted, however, that "carefully crafted amnesties" that support a gradual return to peace and security should be encouraged.[85]

More generally, with respect to internal armed conflicts, Article 6.5 of the Additional Protocol II to the 1949 Geneva Conventions calls on governments to "grant the broadest possible amnesty" to persons who had participated in a conflict or were detained as result of it. According to the International Committee of the Red Cross (ICRC), however, Article 6.5 does not extend to amnesties for war crimes.

The International Criminal Tribunal for the Former Yugoslavia, (ICTY), the Special Court for Sierra-Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have also pronounced themselves on the question of amnesties, holding in each case that they do not apply to serious international crimes. In fact, the SCSL and the ECCC have, respectively, referred to a "crystallizing international norm" and "emerging consensus" prohibiting blanket or general amnesties in relation to serious international crimes. In the *Prosecutor v. Saif al-Islam Gaddafi*, the ICC Pre-trial Chamber observed what it referred to as

> a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law.[86]

In dealing with this issue, the majority of the Appeals Chamber took the view that the Pre-trial Chamber's observation on the amnesty question was *obiter dicta*, and that "[i]t suffices to say only that international law is still in the developmental

83 SC Res. S/2000/915, 4 October 2000, Paras. 22-23.

84 SC Res. S/1315 (2000), 14 August 2000, preambular Para. 5.

85 United Nations, *Report of the Secretary-General on the Rule of law and Transitional Justice in Conflict and Post-Conflict Societies,* U.N. Doc. S/2004/616, 23 August 2004, Para. 32.

86 *The Prosecutor v. Saif al-Islam Gaddafi*, Decision on the admissibility challenge by Dr. Saif Al-Islam Gadaffi pursuant to Arts. 17(1) (c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-0662, 5 April 2019, Para. 61.

doi: 10.5553/AJ/2352068X2020006002003

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stage on the question of acceptability of amnesties".[87] However, in a well-reasoned Separate Opinion, Judge Carranza expressed the view that the Appeals Chamber should examine the issue further in order to clarify the legality or otherwise of amnesties or similar measures when dealing with the commission of atrocious crimes that seriously violate core human rights. Having analysed the provisions of numerous treaties, principles and standards in the field of international human rights law, the practice of the UN Human Rights Committee and jurisprudence from both the Inter-American Court on Human Rights and the European Court of Human Rights, Judge Carranza concluded that amnesties or similar measures for international core crimes prevent States from fulfilling their obligations to investigate, prosecute and punish grave human rights violations and are therefore contrary to international human rights law.[88]

In light of this long line of legal authorities affirming that the grant of amnesties is inapplicable to serious international crimes, one wonders why the ILC chose not to include a prohibition against the grant of amnesties in the draft convention. Here again, as in its reasoning on immunities, the ILC seems to draw a distinction between international courts and tribunals on the one hand, and national courts on the other. Based on this distinction, the ILC appears to support the view that amnesties, especially blanket or general amnesties granted by one State, do not apply to trials before international courts or tribunals. Nor can domestic amnesties bar the prosecution of serious international crimes before the domestic courts of another state under the principle of universal jurisdiction.[89]

It appears to me that there is a case to be made that the suitability of amnesties should, perhaps, be assessed by reference to the nature of the crimes alleged against an accused, rather than the forum in which the crime is being tried. This view is consistent with the jurisprudence of the ICTY, SCSL and ECCC, that amnesties should not apply to serious crimes such as crimes against humanity. As stated in Sierra Leone's comments, it is important to distinguish between blanket or unconditional amnesties, and limited or conditional ones, and that State practice may support the existence of a rule that blanket amnesties are not compatible with serious crimes such as genocide, war crimes and crimes against humanity. For this reason, considering the overall objective of putting an end to impunity for those who commit crimes against humanity, Sierra Leone suggested that the Draft Articles should provide that blanket amnesties are not permissible in respect of these crimes. Although no such provision ultimately found its way into the ILC's proposal, Sierra Leone's suggestion is one that appears to enjoy broad and increasing international support.[90]

However, it is also important to recognize that there are legitimate public interest justifications for the grant of an amnesty. Judicial decisions on the point acknowledge this as well. These include situations of armed conflict, where the

87 *The Prosecutor v. Saif al- Islam Gaddafi*, Judgement, Appeals Chamber, 9 March 2020, Para. 96.

88 *The Prosecutor v. Saif Al-Islam Gaddafi*, Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza, 21 April 2020, Para. 105.

89 2019 ILC Report, *supra* note 2, at pp. 97-98.

90 ILC, Comments from Governments, *supra* note 41, Sierra Leone, at pp. 95-96.

doi: 10.5553/AJ/2352068X202006002003

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only viable means of securing a much-needed peace agreement and bringing an end to human suffering might be through granting an amnesty to some of the warring parties. It is in contexts such as these that the United Nations called for "carefully crafted amnesties". I share the view that, in such situations, there is scope to consider the possible application of conditional amnesties before national courts. Where this is the case, States would do well to consider circumscribing the scope of such amnesties, including a conditions-based approach, such as public confessions, apologies for past crimes or testimony before truth commissions that are geared towards creating a historical record of past human rights abuses.

5.4 Other Challenges

Historically, African countries have been pacesetters in subscribing to newly established regimes for the prevention of international crimes and establishment of accountability forums for those who are accused of such crimes. This leadership role is evidenced by the fact that, in 1949, the State of Ethiopia became the first to ratify the Genocide Convention. Half a century later, in 1999, Senegal became the first country to ratify the Rome Statute of the ICC.[91] As is well known, African countries also constitute the majority of States Parties to the ICC Statute.

Given this historical record, it is no easy task to argue that African countries may lack political will to fully implement the draft convention on crimes against humanity. However, some commentators have expressed concern about the ability or willingness of African States to hold accountable powerful military and political elites who may be accused of crimes against humanity.[92] In my view, this challenge may have less to do with political will, than limited State or institutional capacity. For example, concerns about the security implications of prosecuting the former Liberian leader Charles Taylor at the SCSL's seat in Freetown, and his continued presence in the West African subregion, compelled the United Nations to move his trial to The Hague. Similarly, the inability of the government of Uganda, and by extension the ICC, to capture the leadership of the Lord's Resistance Army (LRA), including Joseph Kony, so many years after the ICC issued arrest warrants against them, speaks to either limited State capacity or insufficient intra-Africa cooperation in the field of criminal justice.

Weak State capacity, and lack of political will, may also explain the failure to implement the ICC arrest warrants against former Sudanese President Omar Hassan Al-Bashir, whose arrest and detention only came after he lost power through a popular uprising in 2019. Prior to that, neither the Sudanese law enforcement and judicial authorities, nor those of other African countries, showed any interest in enforcing the ICC arrest warrants against Al-Bashir, despite his frequent travels to many African States Parties to the Rome Statute. Indeed, the Al-Bashir affair was one of the main fault lines between the ICC and the African Union,

91 Gevers, *supra* note 19, at n. 76 and accompanying text. Ethiopia ratified the Genocide Convention on 1 July 1949, and Senegal ratified the Rome Statute on 2 February 1999.

92 Abass, *supra* note 34, at pp. 945-946.

doi: 10.5553/AJ/2352068X2020006002003

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given the wilful blindness of several African countries, including Egypt, Kenya, Malawi and South Africa, towards the ICC arrest warrants in the face of Al-Bashir visiting their capital cities. For these countries, the ICC arrest warrants unfairly targeted African leaders and were therefore deservedly ignored.[93]

At the same time, there has been concern that a future convention on crimes against humanity and the enactment of these crimes under domestic law could afford present or future African strongmen the opportunity to abuse these laws for nefarious political objectives, including targeting perceived political opponents.[94]

Finally, there is the issue of costs. The investigation and prosecution of serious international crimes is expensive business. Some commentators have estimated that the trial of Charles Taylor at The Hague cost the international community approximately USD 50 million. This amount far exceeds the annual budgets of the legal and judicial sectors in many African countries. The question therefore arises, whether, given all the other socio-economic and development challenges facing them, in the health, education, agriculture and infrastructure fields (to name but a few), African countries can afford to invest the substantial financial resources that would be required for investigation, prosecution and judicial proceedings related to crimes against humanity. This is not to mention the issue of potential reparations to the victims of such crimes as provided for under Draft Article 12, Paragraph 3. Again, while the objective of the proposed reparations regime is laudable, the fact remains that many countries, especially post-conflict countries, would lack the resources to make good on a reparations programme, especially where reparations take the form of financial compensation. This is due not only to the number of victims typically associated with mass atrocity crimes, but also because post-conflict societies would normally be faced with many other pressing priorities, not least of which is the need to rebuild State institutions and public infrastructure. As noted in Sierra Leone's comments to the ILC, African post-conflict countries are no exception to this reality.[95]

6 Concluding Remarks

The draft convention on crimes against humanity is particularly relevant to Africa. From colonial times to the post-Second World War period, from independence in the 1960s to the era of the ad hoc tribunals in the 1990s, atrocity crimes were committed in Africa on a massive scale. It is fair to state that the vast majority of these crimes have gone unpunished. The accountability process that followed the Treaty of Versailles after the First World War did not include jurisdiction to prosecute crimes allegedly committed against Africans, nor did the post-Second World War international tribunals. The pattern of impunity for

93 G. Nadi & K.D. Magliveras, 'The International Criminal Court and the African Union: A Problematic Relationship' in C.C. Jalloh & I. Bantekas (eds), *The International Criminal Court and Africa*, Oxford, Oxford University Press (2017), p. 111 at pp. 120-126.

94 *Ibid.*, p. 934.

95 ILC, Comments from Governments, *supra* note 41, Sierra Leone, at p. 106.

doi: 10.5553/AJ/2352068X2020006002003

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crimes committed in Africa or against Africans continued in the period following independence, as demonstrated in the unsuccessful efforts of African States to promote accountability for apartheid crimes. While the advent of the ad hoc tribunal for Rwanda and the SCSL in the 1990s somewhat broke this pattern of impunity, those mechanisms were constrained by limited territorial and temporal mandates. So too is the ICC, which can only investigate or prosecute crimes relevant to its State Parties from the time that the Statute enters into force in respect of such Parties, or jurisdiction is otherwise delimited by virtue of a UNSC referral pursuant to Article 13(2) of the Rome Statute. The ICC therefore has no scope for addressing historical crimes, not even for apartheid, which was grafted onto its jurisdiction at the tail end of negotiations.

Given these historical circumstances, the draft convention on crimes against humanity, with its focus on the development of domestic legal frameworks for the prevention and punishment of such crimes, marks an important development. From an African perspective, it is critical that the draft convention would not only contribute to the progressive development of national law on this subject, but also enhance interstate cooperation through mechanisms such as extradition and mutual legal assistance.

By preserving the procedural immunity of serving Heads of State and other senior officials before the domestic courts of other States, the draft convention potentially addresses the concerns expressed by such States about the abuse of universal jurisdiction.[96] By so doing, it seeks to balance the need for State officials to be in a position to conduct international relations on behalf of their countries without hindrance with the imperative to promote accountability for serious international crimes after such officials cease to hold office.

The draft convention also holds promise as far as relations between Africa and the ICC are concerned. The focus on domestic legal and judicial measures for the prevention and punishment of crimes against humanity reinforces the ICC's complementary regime and potentially addresses perceptions of unfair targeting of African political leaders by the Hague-based Court. In this regard, the draft convention provides an opportunity for African States to exercise their primary jurisdiction to investigate and prosecute crimes against humanity and to cooperate among themselves to that end.

In the end, it is my hope that Africa has more reasons to support the draft convention than to oppose it. The concerns discussed regarding its application to future crimes, and by implication, once again ignoring historical crimes committed on the continent, as well as issues related to immunities, amnesties and costs, can all potentially be addressed in the context of negotiations. After all, although the draft convention provides an excellent starting point for negotiations, States would have an opportunity to craft a final text that reflects the needs and aspira-

96 P. Alston & R. Goodman, *International Human Rights*, Oxford, Oxford University Press, 2013, at p. 1138 note that concerns about abuse and selective exercise of universal jurisdiction led the AU in 2009 to call for the UN to hold a formal inquiry into the scope and application of universal jurisdiction. In 2012, the UNGA voted to establish a working group on universal jurisdiction. More recently, there has been a proposal for the ILC to study the topic of universal jurisdiction.

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tions of their populations, especially the innumerable victims of crimes against humanity. For example, given the limited economic resources available in such countries vis-à-vis the other development priorities they face, would it be worth considering the establishment of a reparations fund for victims of crimes against humanity in Africa? Or would this be too ambitious? Should African States limit their domestic laws to forms of reparation other than financial compensation? In the interests of global solidarity, should the future convention include provisions for resource enhancement for poorer countries to investigate and prosecute crimes against humanity? Going forward, the fundamental question will be whether African States would give preference to the interests of victims of crimes against humanity by supporting the draft convention, or focus on protecting the narrow interests of current and future military and political leaders who may be called to account for atrocities committed against their own people? In my view, the choice could not be clearer – legally and morally.

doi: 10.5553/AJ/2352068X2020006002003