

Crimes Against Humanity in the “Western European & Other” Group of States

A Continuing Tradition *

Beth Van Schaack**

Abstract

The Western Europe and Other Group of states have a long history with crimes against humanity. They were pivotal in the juridical creation of this concept, in launching prosecutions in both international and national courts, and in formulating the modern definition of the crime. However, some members have expressed concerns around the International Law Commissions Draft Articles on the Prevention and Punishment of Crimes Against Humanity. This article provides a summary of the history of crimes against humanity in the Western Europe and Other Group of states, as well as the current status of crimes against humanity in their legal systems. It argues that although these states have successfully incorporated crimes against humanity into their legal frameworks, it would be beneficial for them to embrace the proposed Crimes Against Humanity Convention.

Keywords: crimes against humanity, Western Europe and Other Group of States, WEOG, Draft Articles on the Prevention and Punishment of Crimes Against Humanity.

1 Introduction

The Western Europe and Other Group (WEOG) of states has a long, and at times checkered, history with the concept of crimes against humanity.¹ WEOG states were pivotal in the juridical creation of this concept in order to address mass atrocities against civilians, in launching early prosecutions of the crime in inter-

* I am indebted to Daniella Stoltz for her excellent research assistance.

** Leah Kaplan Visiting Professor of Human Rights, Stanford Law School.

1 According to the United Nations, the WEOG encompasses 29 cross-regional states. See U.N. Department for General Assembly and Conference Management, available at <https://www.un.org/Depts/DGACM/RegionalGroups.shtml>. Europe: Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, and United Kingdom of Great Britain and Northern Ireland. Oceania: Australia and New Zealand. North-America: Canada. Western Asia: Israel and Turkey (the latter also participates in the Asian group, but votes in the WEOG group). The United States is a member for electoral purposes, but is technically an observer.

national and national courts,² and in formulating the modern definition that is now contained within the Statute of the International Criminal Court and the Draft Articles produced by the International Law Commission. Given their general support for the ILC’s initiative and widespread uptake of other human rights and international crimes treaties, it is anticipated that this group of states will be early adopters of a new treaty if and when it is opened for signature.³ That said, the WEOG members’ views are by no means uniform, and concerns continue to be expressed about the propriety of moving towards a multilateral treaty at this time, the interaction between the proposed treaty and other multilateral proposals devoted to addressing atrocity crimes, and some lingering definitional and jurisdictional issues. Given that crimes against humanity are already comfortably incorporated into many of the WEOG states’ domestic legal frameworks, it is only fitting that they should embrace this proposed Convention to contribute to the harmonization of the law, facilitate processes of mutual legal assistance beyond the region, and advance justice worldwide.

2 A Short History of Crimes Against Humanity in WEOG

Although the concept of crimes against humanity formally entered positive international criminal law in the post-World War II period with the Charters of the International Military Tribunals at Nuremberg and for the Far East, there are important antecedents that intimately touch upon events within and involving WEOG states. One of the first usages of the term appears in a 1842 treatise by Henry Wheaton, who described the slave trade as a “crime against humanity.” Wheaton, a U.S. jurist, thus “put the term into legal use more than a century before its more famous debut at Nuremberg”.⁴ Another early appearance occurred not within the WEOG *espace juridique* but rather in connection with the conditions of life in King Leopold’s Congo – events for which the Belgian king has poignantly apologized.⁵ In 1890, George Washington Williams – a minister, a veteran of the U.S. Civil War, a lawyer, and the first Black member of the Ohio state legislature – portrayed atrocities being committed within the Belgian Congo as

2 J.Y. Dautricourt, ‘Crime Against Humanity: European Views on Its Conception and Its Future,’ *Journal of Criminal Law and Criminology*, Vol. 40, No. 2, 1949-1950, pp. 170-175.

3 See generally OHCHR, Status of Ratification, Interactive Dashboard, available at <https://indicators.ohchr.org/>.

4 H. Wheaton, *Enquiry into the Validity of the British Claim to a Right of Visitation and Search*, Philadelphia, Lea & Blanchard, 1842, cited in Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law*, Oxford University Press, 2012, p. 114. Martinez cites a number of other even earlier references to piracy as a violation of the “laws of humanity” and to the perpetrators thereof as *hostis humanis generis* – “enemies of all humankind” – in the early writings of international law scholars, such as the Italian Alberico Gentili (1552-1608), who hailed from what we now know a WEOG state. See, e.g., *id.* at 119.

5 J. Rankin & J. Burke, ‘Belgian King Expresses “Deepest Regrets” For Brutal Colonial Rule,’ *The Guardian*, 30 June 2020.

Beth Van Schaack

“crimes against humanity” in an outraged letter to the U.S. Secretary of State.⁶ Around that same time, the majority Christian population on Crete was in revolt against Ottoman rule. On 6 September 1898, Muslim irregulars murdered hundreds of Cretan Christian civilians, the British vice-consul and his family, and fourteen British soldiers and sailors billeted in Candia. A group of mostly WEOG states, then known as the Great Powers (Russia, France, Italy, Great Britain and Austria-Hungary), intervened. When the fighting subsided, the British Commissioner in Crete staged trials involving charges of war crimes – for crimes against British soldiers – and crimes against humanity – for crimes committed against civilians.⁷

These events were fresh in the minds of the delegates who attended the Peace Conference held in the Hague the next year, where a Russian proposal to establish a permanent international criminal court underwent intense discussion.⁸ The Russian delegate, Friedrich Martens, proposed the inclusion of the now-eponymous Martens Clause in the law-of-war treaties under negotiation. The clause provides that “until a more complete code of the laws of war has been issued,” civilians and combatants remain under the protection of the “principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”⁹ Soon after, the so-called Boxer Rebellion – an anti-imperialist uprising in China – reached its peak. The violence against Chinese Christians and Western missionaries prompted a ruthless intervention in 1900 from a coalition of (largely) WEOG states – Germany, Austria-Hungary, the United States, France, Great Britain, Italy, Japan, and Russia – and a demand that the perpetrators of “crimes against the law of nations, against the laws of humanity, and against civilization” be prosecuted. The trials before the International Commission of Inquiry, such as they were, conveyed global outrage at religious persecution, but were blind to the depredations of the intervenors and suffered from acute due process deficits by today’s standards.¹⁰ Together, these historical events reveal the utility of the concept of crimes against humanity: their prohibition protects all of humanity; they are not limited by principles of diplomatic protection or to a situation of armed conflict; they may be prosecuted by all members of the international community,

6 A. Hochschild, *King Leopold's Ghost*, Boston, Houghton Mifflin, 1999, p. 112. Williams also wrote an open letter to King Leopold, which is available at <https://www.blackpast.org/global-african-history/primary-documents-global-african-history/george-washington-williams-open-letter-king-leopold-congo-1890/>.

7 R.J. Prichard, ‘International Humanitarian Intervention and Establishment of an International Jurisdiction over Crimes Against Humanity: The National and International Military Trials in Crete in 1898,’ in J. Carey, W. Dunlap and R.J. Prichard (Eds.), *International Humanitarian Law: Origins*, Ardsley, New York, Transnational Publishers, 2003.

8 See F. Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II*, Oxford, Oxford University Press, 2020.

9 The clause appears in the Preamble of the 1899 and 1907 Hague Conventions. *Laws and Customs of War on Land (Hague II)*, 29 July 1899, 32 Stat. 1803, T.S. 403.

10 See B. Brockman-Hawe, ‘Accountability for “Crimes Against the Laws of Humanity” in Boxer China: An Experiment with International Justice at Paoting-Fu,’ *University of Pennsylvania Journal of International Law*, Vol. 38, No. 2, 2017, pp. 627-713.

even by states whose own nationals are not implicated as either victims or perpetrators; and they reach violence among co-nationals.

Crimes against humanity made a fleeting but significant appearance in the context of World War I. The 24 May 1915 Joint Declaration of France, Russia, and the United Kingdom stated that the massacre of the Armenians in the Ottoman Empire constituted “crimes ... against humanity and civilization,”¹¹ and the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War condemned the war for having been “carried on ... by barbarous or illegitimate methods in violation of ... the elementary laws of humanity.”¹² However, the U.S. delegation dissented from the recommendation that an international tribunal be convened to address these crimes insofar as such a tribunal would exercise jurisdiction over violations of what it considered non-justiciable “laws of humanity” versus established legal rules.¹³ The U.S. position ultimately prevailed, and the 1919 Treaty of Versailles and subsequent postwar treaties excluded reference to crimes against humanity.¹⁴ In the end, most WWI perpetrators escaped justice;¹⁵ although some courts martial went forward in Turkey.¹⁶ The British contemplated prosecutions in Malta; in the end, the potential defendants were released in prisoner swaps.

The post-World War II Charters of the Nuremberg and Tokyo Tribunals thus mark the first positive law formulation of crimes against humanity.¹⁷ Many current WEOG states joined the United Nations War Crimes Commission, which prepared the cases for prosecution before the two International Military Tribunals and in subsequent military commissions convened under Control Council Law No. 10 in the Allies’ respective zones of occupation.¹⁸ The charge of crimes against humanity, though then definitionally linked to the war, was crucial in these proceedings in that it enabled the Allies to prosecute harm to German civilians by their compatriots as well as harm to the citizens of Germany’s co-belligerents, such as the Nazi plunder of Jewish private property, use of Polish slave

- 11 France, Great Britain, and Russia Joint Declaration, 24 May 1915, *quoted in* W.A. Schabas, *Genocide in International Law: The Crimes Of Crimes*, Cambridge, Cambridge University Press, 2000, p. 16.
- 12 ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference,’ *American Journal of International Law*, Vol. 14, 1920, pp. 95-154, at 115.
- 13 Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities (4 April 1919), Annex 2, reprinted in *id.* at 127.
- 14 B. Van Schaack, ‘The Definition of Crimes Against Humanity: Resolving the Incoherence,’ *Columbia Journal of Transnational Law*, Vol. 37, 1999, pp. 787-880, at 797-850.
- 15 Z. Bohrer, ‘The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following *The Trial of the Kaiser* by William A. Schabas,’ *Israel Law Review*, Vol. 53, 2020, pp. 159-186.
- 16 V.N. Dadrian, ‘The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal,’ *International Journal of Middle East Studies*, Vol. 23, No. 4, 1991, pp. 549-576.
- 17 Charter of the International Military Tribunal, art. 6(c), 8 August 1945, 82 U.N.T.S. 279.
- 18 See D. Plesch, *Human Rights After Hitler*, Georgetown University Press, 2017. The UNWCC members were: Australia, the United States, Belgium, Britain, Denmark, the Netherlands, Yugoslavia, Greece, Luxembourg, Norway, New Zealand, China, Poland, Czechoslovakia, France, and Canada.

labor, the manufacture of Zyklon B poison gas, and the rampant perversion of justice in occupied territory – conduct that would not necessarily constitute war crimes or the crime of aggression.¹⁹ While the latter crime – deemed “the greatest menace of our times” – was the centerpiece of the Charter and the Nuremberg Trial (which was to be “the Trial to End All Wars”), the notion of crimes against humanity has proven to be a key component of the Nuremberg legacy. In celebrating this long history, however, one should not lose sight of the fact that while the victorious Allies prosecuted the Germans for their brand of racial supremacy, those same states had in the past fostered, and continued to practice, racial supremacy at home and abroad through, *inter alia*, colonialism, slavery, and variations on apartheid.²⁰

In the postwar period, and prior to the international criminal law renaissance in the mid-1990s, sporadic yet notable prosecutions of what we would now recognize as crimes against humanity occurred within WEOG courts, with mixed results. These include the cases against Paul Touvier²¹ and Klaus Barbie²² in France; Ivan Polyukhovich in Australia;²³ Erich Priebke in Italy;²⁴ Imre Finta in Canada;²⁵ Fritz Georg Hermann Pilz in the Netherlands;²⁶ the East German border guards in unified Germany;²⁷ John Demjanjuk in the United States, Israel,

- 19 See, e.g., *U.S. v. Krauch et al.* (“The I.G. Farben Case”), VII *Trials of War Criminals before the Nuernberg Military Tribunals*, Washington D.C., U.S. Government Printing Office, 1953; *P. and others*, Germany, Supreme Court in the British Occupied Zone, 7 December 1948, pp. 217-229.
- 20 See J. Reynolds & S. Xavier, “The Dark Corners of the World.” TWAIL and International Criminal Justice’, *Journal of International Criminal Justice*, Vol. 14, No. 4, 2016, pp. 959-983.
- 21 *République Française v. Paul Touvier*, No. 92-82409, Cour de Cassation, 27 November 1992, available at https://www.asser.nl/upload/documents/20121107T024316-touvier_cassation_arret_27-11-92.pdf. After being on the run for four decades, Touvier was prosecuted for complicity in crimes against humanity but died after serving two years in prison.
- 22 *République Française v. Klaus Barbie*, Case No. 83-93194, Cour de Cassation, 6 October 1983. Barbie was convicted of multiple counts of crimes against humanity and ultimately died in prison.
- 23 *Polyukhovich v. Commonwealth of Australia & Another*, [1991] HCA 32; (1991) 172 CLR 501 (14 August 1991). Polyukhovich had to be charged with war crimes given that Australia at the time had no crimes against humanity statute. He was acquitted for insufficient evidence.
- 24 *Repubblica Italiana c. Karl Hass & Erich Priebke*, Judgment of the Military Court of Appeal of Rome, 7 March 1998. The pair was sentenced to life imprisonment.
- 25 *Regina v. Imre Finta*, [1994] 1 S.C.R. 701. Finta was acquitted by a jury, a verdict upheld on appeal.
- 26 *In re Pilz. Holland*, No. 681, Special Court of Cassation, 5 July 1950 (finding no jurisdiction over crimes against humanity for withholding medical assistance since the victim was not part of the civilian population). See generally F.L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946-1949*, Oxford, Oxford University Press, 2017.
- 27 96 Entscheidungssammlung des Bundesverfassungsgerichts (BVerfGE) 96 (24 October 1966) (decision of the Federal Const. Court). See P.E. Quint, ‘Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command,’ *The Review of Politics*, Vol. 61, No. 2, 1999, pp. 303-330.

and Germany,²⁸ and Adolf Eichmann in Israel.²⁹ Although the facts underlying all of these prosecutions constitute crimes against humanity in today's terms, some of these trials proceeding under ordinary criminal law (with charges of murder for example), with war crimes charges, or under immigration law if the state in question had not yet fully incorporated crimes against humanity in its domestic penal codes. To the extent that they did involve crimes against humanity charges, some prosecutors were operating under definitions that now appear idiosyncratic, anachronistic, or even self-serving. For example, the French definition at the time was formulated in such a way as to exclude application to France's brutal occupation of Algeria.³⁰

Several of these cases ended in acquittal, in part because of particularities within the operative legal framework at the time, difficulties of proof, and a misunderstanding of the elements of international criminal law. Nonetheless, WEOG judges adjudicating these cases generated some influential precedent, for example rejecting the defense of superior orders, concluding that combatants could be the victims of crimes against humanity, and confirming that crimes against humanity are not subject to statutes of limitations. The latter outcome is consistent with two multilateral treaties (one that applies only within Europe) establishing the imprescriptibility of war crimes, crimes against humanity, and genocide.³¹ Incidentally, neither of these treaties is well subscribed to. Belgium, Malta, and the Netherlands are the only WEOG parties to the European treaty; no WEOG states ratified the general treaty, in part out of resistance to the inclusion of the crime of "apartheid" as an enumerated act.³²

Furthermore, defendants in many of these early crimes against humanity cases unsuccessfully pled breaches of the *ex post facto* prohibition, since the laws under which they were prosecuted had often been enacted after the events in question. The European Court of Human Rights ultimately rejected this retroactive defense in the border guards cases,³³ citing Article 7 of the European Con-

28 *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985) (allowing for Demjanjuk's extradition to Israel to stand trial for crimes against humanity). After a finding of mistaken identity, the Israeli court acquitted Demjanjuk of the charges in connection with Treblinka. He was later tried by Germany for operating within a different concentration camp.

29 *Attorney-General of the Government of Israel v. Eichmann* (Israel Dist. Ct.), Case No. 40/61 (1961). Eichmann was tried under Israel's Nazi and Nazi Collaborators' Punishment Law 5710-1950, which allows Israeli courts to punish Nazi perpetrators for crimes against Jews during World War II. He was found guilty and sentenced to death. See 'John Demjanjuk (1920-2012),' Jewish Virtual Library, available at <https://www.jewishvirtuallibrary.org/john-demjanjuk>.

30 J. Viout, 'The Klaus Barbie Trial and Crimes against Humanity,' *Hofstra Law & Policy Symposium*, Vol. 3, No. 1, 1999, pp. 155-166; L.N. (Wexler) Sadat, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again,' *Columbia Journal of Transnational Law*, Vol. 32, 1994-1995, pp. 289-380.

31 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. I, 16 November 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes art. 1, 27 June 2003, ETS No. 082.

32 See C. Gevers, 'Prosecuting the Crime Against Humanity of Apartheid: Never, Again,' *African Yearbook of International Humanitarian Law*, Vol. 1, 2018, pp. 25-49.

33 *Streletz, Kessler & Krenz v. Germany*, ECHR (2001); *K.-H. W. v. Germany*, ECHR (2001).

Beth Van Schaack

vention on Fundamental Rights and Freedoms, which allows for prosecutions for acts that were criminal under international law even if they were not so designated under national law at the time the defendant acted.³⁴

The wars of succession in the former Yugoslavia and the genocide in Rwanda led to the modern codification of crimes against humanity by the Security Council in the statutes of the two *ad hoc* tribunals.³⁵ In their jurisprudence, the tribunals clarified key elements of the crime: its double *mens rea*, how to distinguish crimes against humanity from ordinary crimes, the obsolescence of the “war nexus,” the cognizability of many forms of sexual violence under the constitutive acts of torture as well as the “catch all” of “other inhumane acts,” and the notion of persecution as an umbrella crime against humanity. These developments informed the creation of a consensus definition within the Rome Statute and a veritable movement around the globe to update domestic penal codes with the modern definitions of international crimes so that no perpetrator can now claim they had no notice that their depredations could subject them to prosecution anywhere they are found. These two global crises also produced dozens of crimes against humanity cases in WEOG courts as perpetrators fled their *loci delicti*.³⁶ These prosecutions all benefited from the extensive, and now relatively settled, jurisprudence emerging from the *ad hoc* tribunals as well as burgeoning expertise within domestic war crimes units.

3 Contemporary Snapshot of the Codification of Crimes Against Humanity in WEOG States

The vast majority of WEOG penal codes now contain a modern prohibition on crimes against humanity,³⁷ attributable to these states’ widespread ratification of the Rome Statute.³⁸ Many WEOG crimes against humanity statutes incorporate

34 European Convention on Fundamental Freedoms and Human Rights art. 7(2), 3 September 1953, 213 U.N.T.S. 221 (“2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”). See also International Covenant on Civil and Political Rights art. 15(2), 16 December 1966, 999 U.N.T.S. 171 (same).

35 See, e.g., Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 5, S.C. Res. 827, 25 May 1993.

36 See, e.g., *R. c. Munyaneza*, 2009 QCCS 2201 (CanLII) (11 May 2009). See generally K. Corrie, ‘Beyond Arusha: The Global Effort to Prosecute Rwanda’s Genocide,’ *Open Society Justice Initiative*, 17 April 2013.

37 The U.S. Library of Congress has collected many of these statutes, available at <https://www.loc.gov/law/help/crimes-against-humanity/>.

38 The Rome Statute does not, as a technical matter, require states to adopt implementing legislation (except in the state cooperation (Article 88-93) and offenses against the administration of justice (Article 70(4)) contexts), but, as a practical matter, many states have harmonized their penal codes to the ICC definitions, if only to enjoy the privilege of complementarity and reduce fragmentation in the law.

by reference or mirror the ICC Statute’s definition;³⁹ some include minor modifications,⁴⁰ such as incorporating the ICC’s Elements of Crimes directly;⁴¹ whereas others remain more peculiar.⁴² A handful of WEOG states have also penalized particular crimes against humanity (such as slavery, trafficking, torture, disappearances and so forth),⁴³ at times without enacting an omnibus crimes against humanity statute. These individual crimes against humanity and related crimes are all subject to a dedicated multilateral treaty requiring (or inspiring) codification – such as genocide, war crimes, trafficking, slavery, and terrorism – attesting to the potential impact of a crimes against humanity treaty on spurring domestic codification.⁴⁴ In terms of forms of responsibility, WEOG states usually allow for the prosecution of “ancillary offenses,” such as attempt, conspiracy, instigation, ordering offenses, and superior responsibility.⁴⁵ Canada, for one, can prosecute accessories after the fact.⁴⁶ In addition, some statutes recognize corporate liability for crimes against humanity.⁴⁷

- 39 See, e.g., Chapter 8, Australian Criminal Code Act 1995 (with amendments by virtue of the International Criminal Court Act 2002); Art. 136ter, Belgian Criminal Code (enacted by way of Act of 5 August 2003 on Serious Violations of International Humanitarian Law); Article 212-1, French Code Pénal; Article 50, U.K. International Criminal Court Act of 2001; Article 7, Irish International Criminal Court Act. No. 30/2006; Article 2, Icelandic Law on Penalties for Genocide, Crimes Against Humanity, War Crimes and Crimes Against Peace, No. 144 (2018); Article 136ter, Luxembourg Law of 27 February 2012 Adapting Domestic Law to the Provisions of the Rome Statute of the Court; Article 54, Malta Criminal Code, 2002; § 4, Dutch Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act); Article 10, New Zealand International Crimes and International Criminal Court Act 2000; § 102 Norway Penal Code; § 2 Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes, SFS 2014: 406.
- 40 The Andorran Penal Code, for example, defines all crimes against humanity in terms of a discriminatory *animus* (i.e., the victim was persecuted on the basis of their membership in a political racial, national, ethnic, cultural or religious group). Article 459, Penal Code of Andorra. Likewise, Finland and Spain have made some subtle amendments, but the essence of the crime remains the same. See Section 3, Finnish Criminal Code; Article 607bis, Spain Código Penal.
- 41 See, e.g., § 6, German Act to Introduce the Code of Crimes Under International Law, Völkerstrafgesetzbuch [VStGB], 29 June 2002; Article 9, Law No. 31/2004 adapting Portuguese Criminal Legislation to the Statute of the International Criminal Court.
- 42 See, e.g., § 283, Liechtenstein Strafrechtsgesetzbuch (StGB) (1988); Article 77, Turkish Criminal Code (2004).
- 43 See, e.g., § 312a (torture), § 312b (disappearances), § 321 (genocide), § 321a (crimes against humanity), § 321b (war crimes) Austrian Strafrechtsgesetzbuch.
- 44 See, e.g., Article 8, Greek Penal Code.
- 45 See, e.g., Articles 460(2) (attempt, conspiracy, instigation), 462-63 (superior responsibility), Andorran Penal Code; Article 268.115, Australian Criminal Code; Article 136 septies, Belgian Criminal Code; § 5(1) Canadian Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24; §§ 55, 65 U.K. ICC Act; Article 53E, Malta Criminal Code (superior responsibility); § 108 Norway Penal Code (penalizing conspiracy and incitement to commit crimes against humanity).
- 46 § 4(1.1), Canadian Crimes Against Humanity Act.
- 47 See Article 136 sexies, Belgian Criminal Code (allowing for the prosecution of anyone involved in the manufacture or transport of an instrument or device or any other object in the knowledge that it will be used to commit crimes against humanity); § 5, Norway (allowing for prosecutions of an enterprise registered in Norway).

Beth Van Schaack

Many WEOG states have subjected crimes against humanity to universal and other forms of extraterritorial or “extended geographical” jurisdiction,⁴⁸ such as active and passive personality jurisdiction.⁴⁹ Canada, for example, extends jurisdiction to individuals who, after the offense is alleged to have been committed, are “present in” Canada.⁵⁰ This is the same formulation utilized by the United States in many of its universal jurisdiction statutes, although it does not yet have a law defining crimes against humanity.⁵¹ Other WEOG statutes allow for such jurisdiction so long as it is required, or allowed, by an international treaty to which the state is a party – a contingency that a Convention on crimes against humanity would satisfy.⁵² In such circumstances, war crimes are often subjected to broader jurisdictional regimes than crimes against humanity within WEOG codes because of the universal jurisdiction mandate within the 1949 Geneva Conventions.⁵³ States that assert universal jurisdiction over crimes against humanity have, on occasion, enacted certain limitations upon, or forms of political oversight over, the exercise of universal jurisdiction. These include: disallowing charges if the individual has already been tried for the offense elsewhere (*ne bis in idem*);⁵⁴ compelling a showing that the individual cannot be extradited to, or prosecuted in, the *locus delicti*;⁵⁵ requiring proof of “double criminality;”⁵⁶ or requiring the approval of the Attorney-General, Chief of Public Prosecution, or other senior official before charges can be brought.⁵⁷ By way of example, German courts can exercise full universal jurisdiction over crimes against humanity, although prosecutors have discretion to decline to move forward if the accused is

48 See, e.g., Articles 15.3, 15.4, 268.117, Australian Criminal Code; § 2, Netherlands International Crimes Act; § 8 New Zealand ICC Law; §6(3) Swedish Criminal Code.

49 Articles 113-6 (active personality jurisdiction) and 113-7 (passive personality jurisdiction), French Code Pénal; Article 5, Iceland Penal Code; Article 5, Malta Criminal Code; Article 12, Turkish Criminal Code.

50 § 8, Canada Crimes Against Humanity Act. When it comes to ICC crimes – but not crimes of terrorism, torture, or terrorism – French law controversially raises the bar and applies only to individuals who “usually reside” in French territory. See Article 689-11, Code De Procédure Pénale (C. Pr. Pén).

51 See B. Van Schaack & Z. Perovic, “The Prevalence of “Present In” Jurisdiction,” *Proceedings of the Annual Meeting of the American Society of International Law*, Vol. 107, 2013, pp. 237-242.

52 See, e.g., Article 113-12, French Code Pénal; Article 689, French C. Pr. Pén; § 8, Danish Criminal Code, Order No. 909, as amended; Article 8(k), Greek Penal Code; Article 6, Swiss Criminal Code of 21 December 1937 (as amended).

53 See, e.g., Article 12, Irish Penal Code (allowing for expansive jurisdiction over war crimes). A bill to expand universal jurisdiction over other international crimes, including crimes against humanity, has been under consideration. See Universal Jurisdiction of Human Rights Bill 2015.

54 See, e.g., Article 8(8), Andorran Penal Code.

55 See, e.g., Articles 64 and 65, Austrian StGB; Article 7-4, Luxembourg Code d’Instruction Criminelle; Article 5, Portugal ICC Law.

56 See, e.g., Article 689-11, French C. Pr. Pén.

57 See, e.g., Articles 16, 268.121, Australian Criminal Code; §9(3) Canada Crimes Against Humanity Act.

not present in Germany, the accused is being prosecuted elsewhere, or there are no links to Germany.⁵⁸

In addition, several states make clear that there is no immunity – including head of state immunity – for individuals accused of committing international crimes.⁵⁹ WEOG states have similarly eliminated other potential defenses (e.g., duress, necessity, and superior orders) when it comes to crimes against humanity.⁶⁰ Those statutes that do allow the defense of superior orders indicate that the order may not be manifestly unlawful and that a command to commit a crime against humanity is always unlawful.⁶¹ Other defenses that are, at times, precluded in connection with crimes against humanity charges include the defense of *res judicata* if it appears that the earlier proceedings were undertaken for the purpose of shielding the defendant from criminal responsibility, were otherwise not conducted impartially or independently, or were conducted in a manner that was inconsistent with an intent to bring the suspect to justice. Several codes confirm the earlier jurisprudence from the region that there is no statute of limitations for crimes against humanity,⁶² and it is no defense that crimes against humanity were not penalized in the territory where the defendant acted.⁶³

In terms of penalties, several WEOG states single out crimes against humanity for more serious penalties than other felonies or have enacted a schedule of penalties based upon the severity of the constitutive act committed (with higher penalties for murder and sexual violence, or crimes committed pursuant to a plan or policy,⁶⁴ and lesser penalties for imprisonment or deportation).⁶⁵ Finland, for example, recognizes the concept of “aggravated” crimes against humanity.⁶⁶ In its penalties, Andorra includes a lustration provision, banning superiors involved in crimes against humanity from public posts.⁶⁷ Several states allow for fines, restitution, and reparations as well.⁶⁸

58 §§ 152, 153f, German Strafprozessordnung. See P. Kroker & A.L. Kather, ‘Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany,’ *EJIL: Talk!*, 12 August 2016.

59 See, e.g., Article 8(7), Andorran Penal Code. But see Article 1bis, Belgian Criminal Procedure Code; § 16 Netherlands International Crimes Act (recognizing head of state immunity under certain circumstances).

60 See, e.g., Articles 27, 464, Andorran Penal Code; Article 268.116, Australian Criminal Code; Article 136 octies, Belgian Criminal Code; Article 7, Iceland Crimes Against Humanity Law.

61 See, e.g., § 11(3), Netherlands International Crimes Act.

62 See, e.g., Article 81, Andorran Penal Code; § 12, Canada Crimes Against Humanity Act; § 91, Norway Penal Code.

63 § 13, Canada Crimes Against Humanity Act.

64 See, e.g., Articles 35(1), 460, 461, Andorran Penal Code.

65 See, e.g., Articles 268.8 (subjecting murder to life imprisonment); 268.10 (subjecting enslavement to a penalty of 25 years), Article 268.12 (subjecting imprisonment to a term of 17 years), Australian Criminal Code; Article 136 quinquies, Belgian Criminal Code; Article 10, Irish ICC Act; Article 607bis, Spain Código Penal.

66 Article 4, Finnish Criminal Code.

67 Article 464, Andorran Penal Code.

68 See, e.g., Article 10, Irish ICC Act; § 3, Danish Act on the International Criminal Court, No. 342/2001.

Beth Van Schaack

The United States has no crimes against humanity statute even though the offense appears in multiple places in the U.S. Code and in state law.⁶⁹ Although the United States lacks a substantive crimes against humanity statute, all branches of the government have endorsed the concept of crimes against humanity and the exercise of present-in jurisdiction over other international crimes. By way of example, Congress has directed the President, with the assistance of the Secretary of State and the Ambassador-at-Large for War Crimes Issues (now Global Criminal Justice), to “collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law” with an eye toward ensuring accountability. In particular:

The President shall consider what actions can be taken to ensure that any government of a country or the leaders or senior officials of such government who are responsible for crimes against humanity, genocide, slavery, or other violations of international humanitarian law ... are brought to account for such crimes in an appropriately constituted tribunal.⁷⁰

The 2018 Elie Wiesel Genocide and Atrocities Prevention Act contains a range of measures aimed at improving the United States’ response to mass atrocities, including crimes against humanity.⁷¹

Turning to the executive branch, in a submission in the *Tadić* case before the International Criminal Tribunal for the former Yugoslavia, the United States noted that

the relevant law and precedents for the offenses in question here – genocide, war crimes, and crimes against humanity ... clearly contemplates international as well as national action against the individuals responsible. Prescription of these crimes has long since acquired the status of customary international law, binding on all states.⁷²

In an effort to improve the filters barring perpetrators from entering the United States,⁷³ President Barack Obama issued Presidential Proclamation 8697 on 4 August 2011. The proclamation suspends the entry of individuals who have

69 See J. Bava, ‘Prosecuting Extraterritorial Atrocity Crimes Under State Law: An Analysis of the Puerto Rico Model,’ *Vermont Law Journal*, Vol. 44, 2019, pp. 327-378.

70 Investigations of Violations of International Humanitarian Law, 22 U.S.C. § 8213 (3 August 2007).

71 Elie Wiesel Genocide and Atrocities Prevention Act of 2018, P.L. 115-441 (2019).

72 *Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of the Prosecutor of the Tribunal v. Dusan Tadić* (17 July 1995) at 20.

73 See White House, *Fact Sheet: President Obama Directs New Steps to Prevent Mass Atrocities and Impose Consequences on Serious Human Rights Violators* (4 August 2011) available at www.whitehouse.gov/the-press-office/2011/08/04/fact-sheet-president-obama-directs-new-steps-prevent-mass-atrocities-and.

committed multiple offenses, including crimes against humanity.⁷⁴ Furthermore, development and security assistance is barred from any government that engages in a pattern of human rights that would encompass crimes against humanity unless it can be shown that any assistance will directly benefit the people in such a country.⁷⁵ Crimes against humanity have also found a home in the bankruptcy code, which excludes payment to victims of war crimes, crimes against humanity, and terrorism from the definition of “current monthly income.”⁷⁶ Finally, the federal courts have adjudicated cases involving crimes against humanity claims under customary international law.⁷⁷ Having a U.S. crimes against humanity statute would add ready content to all these statutory references and obviate the need to refer to customary international law. So far, however, draft legislation has stalled.⁷⁸

Elsewhere within WEOG states, the contemporaneous wars in Syria and Iraq are producing new crimes against humanity prosecutions under these modern definitions, many of which are derived from the Rome Statute. In what may be the first trial to involve harm to the Yazidi people, Taha A.-J. and his German wife Jennifer W. are on trial in Germany for murder, human trafficking, war crimes, crimes against humanity, and genocide in connection with their purchase and mistreatment of a Yazidi woman and her five-year-old daughter – tragically, the child died of thirst while in their custody in Iraq.⁷⁹ Another important case to come out of Germany involves two senior figures from the Syrian General Intelligence Service who have been indicted for crimes against humanity: Anwar R. and Eyad A.⁸⁰ Anwar R. stands accused of killing and mistreating individuals in Syrian custody during interrogations. Eyad A. allegedly manned a check point where he endeavored to identify deserters, protesters, and members of the opposition and transfer them to the prison where Anwar R. operated. A third suspect, Abdulha-

74 The U.S. Department of State’s Foreign Affairs Manual, which provides guidance to foreign service officers and other Departmental staff, defines crimes against humanity with reference to the international criminal law definition. 9 FAM 40.8 (27 February 2014).

75 22 U.S.C. § 2151n (Human Rights and Development Assistance); 22 U.S.C. § 2304.

76 11 U.S.C. § 101(10A(B)).

77 See, e.g., *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349343, at *2 (N.D. Cal. 2007) (extensively analyzing and applying *chapeau* elements of crimes against humanity to Nigerian military attacks on environmental activists); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005) *aff’d sub nom. Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014) (holding ‘that there is a customary international law norm against crimes against humanity’ but dismissing crimes against humanity claims against alleged corporate accomplice to Colombian air force raid on civilians under the political question doctrine).

78 See B. Van Schaack, ‘Crimes Against Humanity: Repairing Title 18’s Blind Spots,’ in D.M. Amann & M. DeGuzman (Eds.), *Arcs of Global Justice – Essays in Honour of William A. Schabas*, 2018, p. 341.

79 ‘Germany Indicts Iraqi Man over Death of Yazidi Slave Girl,’ AP, 21 February 2020. See also M. Masadeh, ‘A Lost Phone Brings a Female ISIS Returnee to Trial for Crimes Against Humanity,’ *Just Security*, 22 May 2020 (discussing the similar Yazidi slave case against Omaima A.).

80 K. Connolly, ‘Germany Arrests Two Syrians Suspected of Crimes Against Humanity,’ *The Guardian*, 13 February 2019.

mid A., was simultaneously apprehended in France.⁸¹ The arrests were the result of a joint investigation team formed between Germany and France. Boutros Massroua, a Lebanese citizen, unsuccessfully defended himself in Canadian immigration proceedings against charges of being complicit in crimes against humanity in connection with his work repairing vehicles for ISIL. On appeal, Massroua is pressing his claim that he worked for ISIL under duress – a defense that has been rejected by two lower courts; he will likely be deported to Lebanon.⁸² These cases and others have been facilitated by a formal network of international crimes units that unite Western Europe and other WEOG members.⁸³

In addition, some notable cases are proceeding in Europe against corporate actors.⁸⁴ For example, the Franco-Swiss cement company LafargeHolcim has been investigated for complicity in war crimes and crimes against humanity based on the company's breach of an E.U. embargo on Syrian oil by Lafarge's cement factory in northern Syria.⁸⁵ This marks the first time that a parent corporation has been criminally indicted for crimes against humanity, an outcome allowed by French law, although those charges were eventually dismissed.⁸⁶ Beyond the Syrian conflict, Lundin Petroleum – a Swedish company – and two of its principals are being prosecuted in Sweden for alleged war crimes and crimes against humanity in South Sudan.⁸⁷ These cases, while difficult, demonstrate that the concept of crimes against humanity in the WEOG states is fully operationalized.

4 WEOG Support for the ILC Draft Articles

In general, the WEOG states have expressed strong support for the ILC Draft Articles, the prospects for a new multilateral treaty on the prevention and punishment of crimes against humanity, and the convening of an international conference of plenipotentiaries or a General Assembly process to finalize the text. States in particular welcome the prospects of harmonizing domestic law with the Rome Statute. This positive attitude is consistent with the interventions of the Council of Europe and the European Union during the original General Assembly proceedings and with a European Union-wide policy in favor of domestic international crimes prosecutions, including under the principle of universal

81 V. Romo, '3 Syrian Ex-Intelligence Officials Arrested on Charges Of Torture,' *NPR*, 13 February 2019.

82 S. Bell, 'The ISIS Mechanic: Man Now Living in B.C. Fixed Trucks for Terror Group. Is He Complicit in War Crimes?,' *Global News*, 25 April 2019.

83 See Guidelines On The Functioning Of The Network For Investigation And Prosecution Of Genocide, Crimes Against Humanity And War Crimes (15 November 2018).

84 See *supra* note 47.

85 See ECCHR, *Lafarge in Syria – Accusations of Complicity in Grave Human Rights Violations*, available at <https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>.

86 See Art. 121-2, C. Pén. ("Legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives"); 'Lafarge Charged with Complicity in Syria Crimes Against Humanity,' *The Guardian*, 18 June 2018.

87 J. Crawford, 'Lundin Faces Prosecution for Sudan Oil War Abuses,' available at www.Justiceinfo.net, 26 October 2018.

jurisdiction.⁸⁸ At this point, only a few WEOG states – *e.g.* Canada, Turkey, and the United States – have been more cautious and recommended further consideration of the Draft Articles and the treaty proposal.

Several WEOG states in their comments have made mention of another atrocity crimes multilateral treaty effort and questioned the interaction between it and the proposed crimes against humanity treaty. In 2011, the Dutch announced an initiative to create a new Mutual Legal Assistance (MLA) Treaty for International Crimes, which would enable cooperation in the investigation and prosecution of genocide, crimes against humanity, and select war crimes.⁸⁹ It draws its inspiration from the suite of mutual legal assistance treaties (MLATs) devoted to transnational crimes that fall under the purview of the U.N. Office on Drugs and Crime, such as the U.N. Convention against Transnational Organized Crime and its anti-trafficking Protocols.⁹⁰ Whereas some states (*e.g.*, Belgium) have noted that the MLA initiative will complement the crimes against humanity treaty, others (*e.g.*, Greece) expressed concern that pursuing the two projects would create confusion and lead to inefficiencies. As it stands, non-WEOG states must utilize bilateral MLATs and extradition treaties to facilitate cooperation around the prosecution of international crimes in domestic courts. In this regard, WEOG states already benefit from Europe-wide institutions such as Europol,⁹¹

88 See Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, 2018/C 334/07, Official Journal of the European Union (4 July 2017), P8_TA(2017)0288, para. 42 (“Encourages the EU and its Member States to fight against impunity and to lend active support to international efforts to bring to justice members of non-state groups ... calls for the development of a clear approach to the prosecution of ISIS/Daesh fighters and their abettors, including by using the expertise of the EU network for investigation and prosecution of genocide, crimes against humanity and war crimes”). See also *id.* at para. 51 (encouraging member states to prosecute nationals and people under their jurisdiction who have committed atrocity crimes in Iraq and Syria); para. 52 (calling upon member states to apply the principle of universal jurisdiction in tackling impunity).

89 See generally Madaline George, ‘Some Reflections on the Proposal for a New Mutual Legal Assistance Treaty for International Crimes,’ *Opinio Juris*, 11 January 2019.

90 U.N. Convention Against Transnational Organized Crime, 15 November 2000, 2225 U.N.T.S. 209.

91 See, *e.g.*, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA, and 2009/968/JHA, L 135/53, art. 3 (14 May 2016) (indicating that Europol “shall support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy, as listed in Annex I,” which includes international crimes).

Beth Van Schaack

the European Arrest Warrant (EAW),⁹² and the Eurojust Genocide Network⁹³ – institutions not available to states in other regional groupings. The MLAT initiative would enable global cooperation around all atrocity crimes in a way that would complement the proposed crimes against humanity Convention. The MLA Initiative is discussed further in this same issue of this journal by Larissa van den Herik.

5 Conclusion

Given the high degree of penetration of the concept of crimes against humanity within WEOG states, it is worth considering what the promulgation and ratification of a crimes against humanity Convention will add to WEOG enforcement of the prohibition on crimes against humanity. Although crimes against humanity have long been prohibited by customary international law, having a dedicated multilateral treaty prohibiting the crime facilitates the ability of victims and others to take concrete legal action in domestic and international courts. Many states cannot initiate criminal prosecutions under customary international law alone; rather, a statute is needed. While many WEOG states have enacted a crimes against humanity statute in connection with their ratification of the ICC Statute, others have not. Widespread ratification of the crimes against humanity treaty will encourage this domestic incorporation and also a harmonization of the substantive law (which in turn, facilitates global extradition processes). In addition, the International Court of Justice (ICJ) cannot assess potential state responsibility for crimes against humanity without a treaty according it jurisdiction to do so. The Torture and Genocide Conventions, for example, contain compromissory clauses granting the ICJ jurisdiction over disputes relating to the interpretation, application, or fulfilment of the treaty, including those alleging to the responsibility of state parties for breaches – a jurisdictional pathway already traversed by WEOG states.⁹⁴ Indeed, several WEOG states have welcomed the idea of compulsory ICJ jurisdiction in their interventions. The treaty will also create a set of tools for international cooperation in law enforcement. While the WEOG states are already quite organized when it comes to crimes against humanity prosecutions in the region, the proposed treaty will enable states in other regions to follow suit, strengthening the system of international justice worldwide.

92 Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002/584/JHA [2002] OJ L 190/1. The EAW replaces the process of extradition between E.U. member states and abolishes dual criminality for many categories of crimes.

93 Council Decision 2203/335/JHA, Official Journal 118/12, of 8 May 2003 on the Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes. Europol and the European Investigation Order Directive also support member states in combating forms of international organized crime and terrorism. See Eurojust, Genocide Network, <http://www.eurojust.europa.eu/practitioners/networks-and-fora/pages/genocide-network.aspx>.

94 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement, ICJ Reports 2012, p. 422.