A Civil Society Perspective on the ILC Draft Convention on Crimes Against Humanity

Hugo Relva[*]

Abstract

In a relatively short period of time, the International Law Commission has accomplished the impressive task of drafting and adopting the text of the Draft Articles on Prevention and Punishment of Crimes against Humanity. The Draft Articles circulated to states are promising. However, a number of substantive amendments appear to be necessary if the Draft Convention is to become a powerful tool "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes", as stated in the Preamble. Moreover, in order to avoid the rapid ossification of the new potential treaty, it is advisable for the articles to reflect the most significant developments in international law, and also allow for future progressive developments in the law, instead of reflecting a lowest common denominator acceptable to all states. This article suggests some revisions to existing provisions, new provisions which may make the text much stronger and finally identifies some important omissions which should be fixed by states at the time of adopting the Draft Convention.

Keywords: crimes against humanity, impunity, aut dedere aut judicare, amnesties, reservations.

1 Introduction

In a relatively short period of time, the International Law Commission (ILC) has accomplished the impressive task of drafting and adopting the text of the Draft Articles on Prevention and Punishment of Crimes against Humanity (hereinafter 'the Draft Convention' or 'the Draft Articles'). In doing so, the ILC has codified to some extent customary international law in the field of international criminal law related to crimes against humanity. The Draft Convention circulated to states – the text of the Draft Articles adopted on second reading in 2019 – is promising. And, the ILC recommendation to states to elaborate "a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles" is welcomed.[1]

* Legal adviser, Amnesty International.

1 Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session*, UN Doc. A/74/10 (2019), Chapter IV, Crimes against humanity, Para. 42.

doi: 10.5553/AJ/2352068X2020006002008

However, a number of substantive amendments appear to be necessary if the Draft Convention is to become a powerful tool "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes", as stated in the Preamble.[2] Moreover, in order to avoid the rapid ossification of the new potential treaty – think of how weak the 1948 Genocide Convention is to our contemporary eyes –, it is advisable for the articles to reflect the most significant developments in international law, and also allow for future progressive developments in the law, instead of reflecting a lowest common denominator acceptable to all states.

For Amnesty International, whether or not the Draft Articles should be adopted one day as a convention depends entirely on their content. That is, in the sort of obligations imposed on state parties, as well as on the rights enshrined for victims, witnesses and others, including those suspected of criminal responsibility. Consequently, and since 2015, Amnesty International has engaged with the ILC and raised concerns and also made recommendations to the different draft texts.[3]

In the following pages Amnesty International suggests some new provisions, which the organization believes will make the text much stronger. Amnesty International also recommends some revisions to existing provisions and finally identifies some important omissions in the ILC text, which should be fixed by states at the time of adopting the Draft Convention.

2 Draft Provisions That Should Be Reaffirmed by States

2.1 The Jus Cogens Character of the Prohibition of Crimes Against Humanity in the Preamble

Reiterating an ILC previous opinion, the fourth preambular paragraph of the Draft Articles recalls that the prohibition of crimes against humanity is not only a rule under customary international law but also a peremptory norm of general

2 *Ibid*., Para. 44.

3 On Amnesty International position on the Draft Articles *see* 'International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity', 28 April 2015; 'Joint Letter to the International Law Commission Special Rapporteur on Crimes Against Humanity', 23 February 2016; 'International Law Commission: Second Report on Crimes Against Humanity: Positive Aspects and Concerns', 5 May 2016; 'Joint Letter to the Special Rapporteur of the International Law Commission on Crimes against Humanity', 27 January 2017; 'International Law Commission: Commentary to the Third Report on Crimes Against Humanity', 7 April 2017; 'Amnesty International Conditional Support to the Draft Articles on Crimes against Humanity Adopted by the International Law Commission in First Reading', 20 October 2017; '17-Point Program for a Convention on Crimes Against Humanity', 20 February 2018; 'The Problematic Formulation of Persecution Under the Draft Convention on Crimes Against Humanity', 30 October 2018.

doi: 10.5553/AJ/2352068X2020006002008

international law (*jus cogens*).[4] In other words, as provided by the Vienna Convention on the Law of Treaties (VCLT), a norm accepted and recognized 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.

The International Criminal Tribunal for the former Yugoslavia (ICTY)[5] and the Inter-American Court of Human Rights[6] have both recognized in their judgments the peremptory character of the prohibition of crimes against humanity.

2.2 The Preambular Reference to Victims, Witnesses and Other's Rights, as well as the Right of Alleged Offenders to Fair Treatment

Since the Preamble explains the intent or purpose of the instrument, the reference to "[t]he rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment" in the ninth paragraph must be seen as an explicit recognition of the important role to be played by victims, witnesses and others in any trial on crimes against humanity. The reference to the right of alleged offenders to 'fair treatment' is also of fundamental importance, not less important than victims' rights.

It is also worth mentioning that the ninth paragraph of the Preamble appears to have been the inspiration of the verbatim fifth preambular paragraph of the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (Draft MLA Convention), made public in March 2020.

2.3 The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)

Draft Article 10 on the obligation to extradite or prosecute (*aut dedere aut judicare*) is a key component of the Draft Convention and one of its most potent provisions against impunity.[7] Through that provision, each state party in the territory under whose jurisdiction a person suspected of criminal responsibility for a crime against humanity is present must submit the case to its competent authorities for the purpose of a criminal investigation, unless the state decides to extradite the alleged offender to another state, or surrender the person concerned to an international criminal court or tribunal.

4 *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, 2001, p. 85 ("Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination"); *see also* Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session, supra* note 1, Chapter V, Peremptory norms of general international law (*jus cogens*), Conclusion 23 (Non-exhaustive list), Annex C.

5 *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-T, ICTY, Judgment, 14 January 2000, Para. 520 ("Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens, i.e.* of a non-derogable and overriding character").

6 *Almonacid Arellano et al. v. Chile*, IACtHR, Judgment, 26 September 2006, Para. 99 ("Said prohibition to commit crimes against humanity is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law").

7 *See* Amnesty International, 'International Law Commission: The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', February 2009.

The *aut dedere aut judicare* formula that the ILC has opted for, the so-called 'triple alternative formula' – either investigate or extradite to a third state or surrender the alleged perpetrator to an international court, is based in the provisions of the Enforced Disappearance Convention (CPED),[8] and is the most comprehensive approach to the issue. It considerably improves, for example, the old-fashioned formula contained in the Convention against Torture,[9] where alternatives for states are only to either submit the case to its competent authorities or extradite to a third state. The 'third alternative' formula has repeatedly been recognized by the International Committee of the Red Cross (ICRC) as one applicable to the 1949 Geneva Conventions.[10]

It is noteworthy that, from a conventional law perspective, the obligation to prosecute or extradite currently applies solely to the crimes of torture, enforced disappearance and grave breaches of the Geneva Conventions and Protocol I. Consequently, when the Draft Convention is adopted, including a provision on *aut dedere aut judicare,* crimes like murder, extermination, arbitrary imprisonment, enslavement and crimes of sexual violence, as long as committed as part of widespread or systematic attack against any civilian population, shall be subject to the obligation to extradite or prosecute (or surrender to an international court or tribunal).

2.4 Responsibility of Commanders and Other Superiors

One of Amnesty International's concerns has been the original wording of Article 6(3), related to the responsibility of commanders and other superiors. The former text, inspired by Article 28(b) of the Rome Statute, was not as strict as required by customary international law, as well as conventional international law, such as Protocol I, which hold civilian superiors to the same standards as military commanders. Fortunately, the amended version, as adopted on second reading in 2019, holds commanders and other superiors

> criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

8 International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006; entry into force: 23 December 2010), 2716 UNTS 3.

9 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; entry into force: 26 June 1987), 1465 UNTS 85.

10 ICRC, *Commentary I Geneva Convention*, Geneva, 1952, p. 366 ("[t]here is nothing in the paragraph [Art. 49, Para. 2, I Convention] to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties"). *See also* 2006 Commentary, Para. 2887 ("Lastly, it is important to stress that the preparatory work for the Conventions does not exclude the possibility of a State Party handing over an accused person to an international criminal court or tribunal. It was a deliberate choice of the 1949 Diplomatic Conference not to preclude this possibility").

doi: 10.5553/AJ/2352068X2020006002008

3 Draft Provisions Which Should Be Enhanced by States

3.1 Definition of Crimes Against Humanity

The Commentary to Draft Article 2 indicates that the ILC considers Article 7 of the Rome Statute as the most appropriate basis for defining crimes against humanity. Likewise, such definition is the most widely accepted one, as 123 states are party to the Rome Statute so far. However, Amnesty International reiterates its view that, whenever conventional or customary international law contains broader definitions, like in the cases of the crimes of enforced disappearance and persecution, respectively, these ampler definitions should be preferred and incorporated into the Draft Convention. In other words, states may go beyond the Rome Statute definitions of crimes, as they necessarily shall not collide with those under the Rome Statute.

3.1.1 Enforced Disappearance

The definition of the crime against humanity of enforced disappearance in the Draft Convention is verbatim the text of Article 7(2)(i) of the Rome Statute.

> "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

As Amnesty International has previously stated, the Draft Convention should not include the restrictive language in Article 7(2)(i) of the Rome Statute, that defines an enforced disappearance as one requiring the perpetrator to have had the double intent to remove a person from the protection of the law and to do so for a prolonged period of time.[11] Such language is a *jurisdictional threshold* adopted by states just for the purposes of attributing competence to the International Criminal Court, and is absent in the definition of the crime in the CPED.[12]

Consequently, the expressions "removing a person from the protection of the law" and "for a prolonged period of time", which are vague and highly subjective, should be deleted from Draft Article 2, as they are inappropriate in a definition of a crime under international law.

3.1.2 Persecution

Article 2(1)(h) of the Draft Convention includes the crime against humanity of persecution in the following terms:

11 *See* Amnesty International, 'No Impunity for Enforced Disappearances: Checklist for Effective Implementation of the International Convention for the Protection of All Persons from Enforced Disappearance', 9 November 2011, p. 5.

12 CPED, Arts. 2 and 3.

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

The expression "in connection with any act referred to in this paragraph" is inspired by the near verbatim Article 7(1)(h) of the Rome Statute, which requires persecution to be committed "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".[13] The 'connection requirement', added in the Rome Statute just for the crime of persecution, is a *jurisdictional threshold* to restrict the competence of the International Criminal Court. It is not found in any of the major precedents to the Rome Statute, like the Statute of the ICTY, the Statute of the International Criminal Tribunal for Rwanda nor in subsequent statutes, like the ones of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Specialist Chambers and Specialist Prosecutor's Office in Kosovo, and the African Court of Justice and Human Rights (as amended by the Malabo Protocol, not yet into force). None of these statutes require any additional connection with other crimes for the crime against humanity of persecution.

It should be recalled that a number of states parties to the Rome Statute, while making crimes against humanity criminal under national law, have considered that no 'connection requirement' is necessary for the crime against humanity of persecution. Burkina Faso,[14] Burundi,[15] Congo (Republic of),[16] Canada,[17] Czech Republic,[18] Ecuador,[19] Estonia,[20] Finland,[21] France,[22] Georgia,[23] Germany,[24] Hungary,[25] Korea (Republic of),[26] Lithuania,[27] Montenegro,[28] Panama,[29]

13 Amnesty International, 'The Problematic Formulation of Persecution under the Draft Convention on Crimes against Humanity', 30 October 2018.
14 Burkina Faso, Code pénal (2018), Art. 422-1.
15 Burundi, Loi N°1/004 du 8 mai 2003, portant la répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre, Art. 3(h).
16 Republic of Congo, Loi N°8-98 du 31 octobre 1998, Art. 6(h).
17 Canada, Crimes Against Humanity and War Crimes Act, 2000, S.4(3) and 6(3).
18 Czech Republic, Criminal Code, Sec. 401 (1)(e).
19 Ecuador, Código Orgánico Integral Penal, Artículo 86.
20 Estonia, Penal Code, Para. 89(1).
21 Finland, Criminal Code, Chapter 11 (War Crimes and Crimes Against Humanity), Section 3(5).
22 France, Code pénal, Art. 212-1(8).
23 Georgia, Criminal Code, Art. 408.
24 Germany, Code of Crimes Against International Law, 2002, Section 7(10).
25 Hungary, Act C of 2012 on the Criminal Code, Section 143(h).
26 Republic of Korea, Act on the punishment of crimes within the jurisdiction of the International Criminal Court, Art. 9(7) (21 December 2007, Act 8719).
27 Lithuania, Criminal Code, Art. 100.
28 Montenegro, Criminal Code, Art. 427.
29 Código Penal de Panamá, 2007, Artículo 432(10).

doi: 10.5553/AJ/2352068X2020006002008

Portugal,[30] Serbia[31] and Spain[32] are some examples which do not require a connection with any other crime under international law for the crime against humanity of persecution.

In terms of case law, in the *Kupreškič* case, the ICTY rejected the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal,[33] and also concluded that "A narrow definition of persecution is not supported in customary international law".[34] A quite similar conclusion is found in the *Kordić & Čerkez* case.[35]

In sum, persecution should not be subject to any *jurisdictional threshold* and be an autonomous, separate crime against humanity, independent of any other crime under international law, as it may be committed even in the absence of other crimes.

3.2 Non-Applicability of Statute of Limitations

Article 6(6) of the Draft Convention provides for the non-applicability of statutory limitations to crimes against humanity, thus codifying a rule under customary international law.[36] However, the wording chosen by the ILC could be simplified. Instead of providing that state parties shall take the necessary measures to ensure that, under its criminal law, crimes against humanity shall not be subject to any statute of limitations, Draft Article 6(6) could simply provide, for example, that crimes against humanity shall not be subject to any statute of limitations. The suggested language is inspired by Article 29 of the Rome Statute, and would be a much more self-executing clause – thus facilitating its direct application by national courts.

3.3 The Right to Consular Assistance

Draft Article 11(2) provides for the right to consular assistance of nationals of the sending state deprived of liberty abroad. Such a clause, inspired by the provisions

30 Portugal, Lei No.31/2004 de 22 de julho adapta a legislação penal portuguesa ao Estatuto do Tribunal Penal Internacional, Artigo 5(h).

31 Serbia, Criminal Code, Art. 371 (Crimes Against Humanity).

32 Spain, Código Penal, Artículo 607 bis (1) (1º).

33 *The Prosecutor v. Kupreskic et al.*, IT-95-16, ICTY, Trial Chamber, Judgment, 14 January 2000, Para. 581.

34 *Ibid*., para. 615.

35 Kordić & Čerkez, IT-95-14/2, ICTY, Trial Chamber, Judgment, 26 February 2001, Para. 197.

36 C. Van der Wyngaert & J. Dugard, *in* A. Cassese, P. Gaeta & J.R.W.D. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 887 ("It is difficult to suggest that customary international law prohibits statutory limitations in respect of all international crimes in the light of the silence of multilateral treaties creating international crimes on this subject. This position is different in the case of 'core' crimes of genocide, war crimes, crimes against humanity and aggression. There is support for the view that the prohibitions of these crimes constitute norms of *jus cogens*, and a necessary consequence of such a characterization is the inapplicability of statutory limitations"). *See also Furundžija*, IT-95-17/1, ICTY, Trial Chamber, Judgment, 10 December 1998, Para. 157; *Kolk and Kislyiy v. Estonia*, ECHR (2006-I), 17 January 2006, at 399; *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, IACtHR, Judgment, 24 November 2010, p. 256.

of Article 36(1) of the Vienna Convention on Consular Relations (VCCR),[37] and which sets out an individual right,[38] is to be welcomed. However, Draft Article 11(2) may be enhanced in two respects.

Firstly, the right of consular agents to converse, correspond and arrange for the legal representation of the foreigner or stateless person in prison, custody or detention should be recognized, as it is in the VCCR. And secondly, the right to consular assistance should be extended, as recalled in Resolution 65/212 of the General Assembly, to any foreign national or stateless person regardless of their immigration status. Such an explicit addition seems to be encouraged by the ICJ judgment in the *Jadhav* case in 2019, which found that "Article 36 of the Convention [on Consular Relations] does not exclude from its scope certain categories of person"'.[39]

3.4 Victims, Witnesses and Others

Although Draft Article 12 is in general to be welcomed, it does not contain – unlike the Enforced Disappearance Convention, the Rules of Procedure and Evidence of the International Criminal Court or the Convention on Cluster Munitions – a definition of 'victim'. This omission is a major flaw in the draft text, since it leaves a fundamental definition entirely to the state parties' domestic legislation and practice. In such a way, a state party might decide to prevent some categories of individuals, organizations or institutions who have suffered individual or collective harm as the direct result of a crime against humanity from being granted reparation.

Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court could be, *mutatis mutandi*, a good example to follow for states while adopting the Convention. It provides that:

> Definition of victims
>
> For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> a 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court;
>
> b Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Inspired by the provisions of the Enforced Disappearance Convention and the Convention against Torture states may enhance Draft Article 12 by adding the obligation of state parties to examine complaints lodged by victims or their representatives, in order to determine whether there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed;

37 Vienna Convention on Consular Relations (Vienna, 24 April 1963. Entered into force on 19 March 1967), 596 UNTS 261.

38 *LaGrand Case (Germany v. United States of America)*, 27 June 2001, ICJ, Para. 77.

39 *Jadhav Case (India v. Pakistan)*, 17 July 2019, ICJ, Para. 75 (and 95).

doi: 10.5553/AJ/2352068X2020006002008

the obligation to inform victims of the progress and results of the examination of the complaint and any subsequent investigation; and also by providing victims with legal representation where appropriate.[40]

4 Some Important Omissions

4.1 Prohibition of Amnesties and Other Similar Measures of Impunity

Amnesties and other similar measures of impunity for crimes under international law, including crimes against humanity, are prohibited, as they prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families. The prohibition has crystallized into a rule under customary international law, as per judgments rendered over the last decades by the ICTY,[41] the Inter-American Court of Human Rights,[42] the European Court of Human Rights,[43] the African Commission on Human and People's Rights[44] and the Special Court for Sierra Leone,[45] among other international or internationalized courts or tribunals.

40 *See* Amnesty International, 'International Law Commission: Commentary to the Third Report on Crimes against Humanity', 7 April 2017.

41 *Furundžija*, IT-95-17/1, Trial Chamber, Judgment, 10 December 1998, Para. 155 ("It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition").

42 *See Almonacid Arellano et al. v. Chile*, IACtHR, Judgment, 26 September 2006, Para. 129 ("The crime committed against Mr. Almonacid-Arellano cannot be susceptible of amnesty pursuant to the basic rules of international law since it constitutes a crime against humanity"); *see also Dos Erres v. Guatemala*, IACtHR, Judgment, 24 November 2009, Para. 129; *Gomes Lund v. Brazil*, IACtHR, Judgment, 24 November 2010, Para. 180; and, *Gelman v. Uruguay*, IACtHR, Judgment, 24 February 2011, Para. 225.

43 *Ould Dah v. France*, ECHR (2009-I), at 464. ("The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State"). *See also Abdülsamet Yaman v. Turkey,* ECHR (2004), Para. 55.

44 *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, African Commission on Human and Peoples' Rights (ACHPR), Decision, 15 May 2006, Para. 201 ("[t]here has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights [violations] has become a rule of customary international law"). *See also Malawi African Association and Others v. Mauritania case*, ACHPR, Decision, 11 May 2000, Para. 83.

45 *Prosecutor v. Moinina Fofana,* SCSL -2004-14-AR72(E), SCSL, Appeals Chamber, Decision, 25 May 2004, Para. 3 ("[t]here is a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law").

Also reflecting an increasing *opinio juris*, national legislation in Argentina,[46] Burkina Faso,[47] Burundi,[48] the Central African Republic,[49] Colombia,[50] Comoros,[51] Côte d'Ivoire,[52] the Democratic Republic of the Congo,[53] Dominican Republic,[54] Ecuador,[55] Gambia,[56] Guatemala,[57] Kosovo,[58] Macedonia,[59] Nicaragua,[60] Panama,[61] Paraguay,[62] Uruguay[63] and Venezuela[64] prohibits amnesties for crimes under international law, including crimes against humanity.

4.2 Prohibition of Military Courts

As Amnesty International has stated in the past, trials by military courts of serving military personnel for alleged breaches of military discipline, like insubordination, are not considered incompatible with international human rights standards, as long as the alleged breaches are not 'ordinary crimes', violations of human rights or crimes under international law.[65] But since trials of those suspected of criminal responsibility for crimes against humanity must be held before independent and impartial tribunals, only ordinary civilian courts in each state, to the exclusion of military jurisdictions, should be vested with jurisdiction to try those crimes.

A significative asset for the new Convention could be the adoption of a clause, similar to the Inter-American Convention on Forced Disappearance of Persons,[66] providing that any person suspected of criminal responsibility for crimes against humanity shall be tried before an ordinary civilian court, "to the exclusion of all other special jurisdictions, particularly military jurisdictions".

46 Ley 27.156, Prohibición de indultos, amnistías y conmutación de penas en delitos de lesa humanidad, 31 July 2015 (Official Gazette), Art. 1.
47 Loi 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé, Art. 14.
48 Loi n°1/05 du 22 avril 2009, Code Pénal du Burundi, Art. 171.
49 Loi No.08-020 portant amnistie générale à l'endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles, 13 Oct. 2008, Art. 2.
50 Peace Agreement, signed on 24 November 2016, Sec. 40.
51 Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome, Art. 14.
52 Loi nº 2003-309 du 8 août 2003 portant amnistie, Art. 4.
53 Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques, Art. 4; *see also* Loi Nº 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, 29 février 2016 (Journal Officiel), Art. 34 bis.
54 Ley No. 550-14, Código Penal de la República Dominicana, Art. 95.
55 Constitución de la República del Ecuador, Art. 80.
56 13 December 2017, Art. 19.
57 Ley de Reconciliación Nacional, 27 December 1996, Art. 8.
58 Law No. 04/L-209 on Amnesty, 11 July 2013, Art. 4.
59 Law on Amnesty, Official Gazette 18/2002, Art. 3.
60 Criminal Code, *Ley 641*, Art. 130.
61 Código Penal de Panamá, Art. 115(3).
62 Ley 5.877, 29 September 2017 (Official Gazette), Art. 10.
63 Ley 18.026 of 4 October 2006, Art. 8.
64 Constitución de la República Bolivariana de Venezuela, Art. 29.
65 Amnesty International, Fair Trials Manual – Second Edition, 9 April 2014, p. 221.
66 OAS, A-60 (Belem do Pará, Brazil, 9 June 1994. Entered into force: 28 March 1996), Art. IX.

doi: 10.5553/AJ/2352068X2020006002008

4.3 Prohibition of Reservations

As the ILC explains in the Commentary, and in accordance with its practice, the Draft Convention does not contain any provision on the so-called 'final clauses', such as ratification, reservations, entry into force, withdrawal, amendments, etc.[67] However, the ILC observed some years ago that "there is well established practice in this area: there are more reservations to human rights treaties and codification treaties than to any other type of treaty".[68] Consequently, a ban on reservations, like in the Rome Statute, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, among others, seems to be appropriate to ensure that all states parties to the Convention assume the same obligations and closes the door to states making reservations, which may defeat the object and purpose of the treaty.[69]

4.4 Federal States' Obligations

As originally suggested by the Special Rapporteur Sean Murphy, the Draft Convention should contain a provision on the territorial scope of the Convention, stating that the Draft Convention shall be binding upon each party in respect of its entire territory.[70] Such a provision, reflecting customary international law, is based on Article 29 of the VCLT,[71] but it is also set out in the 1966 International Covenant on Civil and Political Rights, the 1989 International Covenant on Civil and Political Rights Second Optional Protocol, aiming at the Abolition of the Death Penalty, and the 2006 Enforced Disappearance Convention. Unfortunately, the ILC considered this question as one of the final clauses of a treaty and therefore left it to the discretion of states while negotiating and adopting the Draft Convention.

4.5 Non-Applicability of Statutory Limitations to Civil Tort Claims

Genocide, crimes against humanity and war crimes are not subject to statute of limitations. In order to guarantee the right of victims to an effective remedy, the same rule should apply to criminal or civil proceedings in which victims of crimes against humanity seek full reparation for their injuries. As a progressive development of international law, a new clause should provide the non-applicability of

67 Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session, supra* note 1, Chapter IV, at p. 23. On Amnesty International's position, *see* Amnesty International, 'International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity', 28 April 2015.

68 Int'l Law Comm'n, *Report on the Work of Its Sixty-Third Session*, UN Doc. A/66/10/Add.1 (2011), Chapter IV, Reservations to Treaties, 3.1.5.3, Commentary (12).

69 Amnesty International, 'The International Criminal Court: Making the Right Choices – Part IV, Establishing and Financing the Court and Final Clauses', 1 March 1998.

70 S. Murphy (Special Rapporteur on Crimes Against Humanity), Third Report on Crimes Against Humanity, UN Doc. A/CN.4/704, 23 January 2017, Para. 211.

71 VCLT, Art. 29 ("Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory").

doi: 10.5553/AJ/2352068X2020006002008

statutes of limitations for civil tort claims – whether made in a civil, criminal or administrative proceeding.[72]

5 Conclusion and Recommendations

Needless to say, a treaty codifying crimes against humanity would fill an important gap in international criminal law and could consolidate states' obligation to investigate and prosecute such crimes.

The Draft Articles adopted by the ILC in 2019 contained, as said, a number of positive provisions which deserve the strong support of states, like preambular paragraphs on *jus cogens* and victims, witnesses and other, the obligation to extradite or prosecute (*aut dedere aut judicare*) and the responsibility of commanders and other superiors.

Some other clauses need to be amended for them to become useful tools against impunity, like the definition of crimes against humanity of enforced disappearance and persecution, the wording of the prohibition of statutory limitations, the right to consular assistance and the provision on victims, witnesses and other.

Finally, the Draft Convention contains some important omissions which states must incorporate. The prohibition of amnesties and other similar measures of impunity, a ban on military courts and reservations, a clause on federal states and the non-applicability of statutory limitations to civil tort claims are among them.

72 *See, e.g.*, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 23 ("When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries").