The International Law Commission's Draft Articles on the Prevention and Punishment of Crimes Against Humanity

Incitement/Conspiracy as Missing Modes of Liability

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Abstract

The International Law Commission's Draft Articles on the Prevention and Punishment of Crimes Against Humanity does not include the inchoate crimes of conspiracy or incitement. However, this choice has generated a great deal of academic commentary. This article critically assesses the choice of the drafters to exclude conspiracy and incitement liability, arguing that their decision was flawed. It examines the comments made by academics, as well as participants in the work of the Commission on this draft convention. Additionally, it scrutinizes the methodology employed by the Commission in reaching this conclusion. Finally, it presents a conceptual analysis of the desirability for the inclusion of these two inchoate crimes, arguing that their inclusion would assist in meeting the policy of preventing crimes against humanity.

Keywords: modes of liability, International Law Commission, crimes against humanity, incitement, conspiracy.

1 Introduction

The Draft Articles on the Prevention and Punishment of Crimes Against Humanity (draft articles) set out the following modalities of involvement in crimes against humanity:

> Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
> a committing a crime against humanity;
> b attempting to commit such a crime; and
> c ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.[1]

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1 Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10 (2019), p. 66, Art. 6.2; Art. 6.3 adds command/superior responsibility.

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The commentary to this article makes it clear that this iteration was coached in broad language "so as not to require States to alter the preferred terminology or modalities that are well settled in national criminal law" with as primary example for this approach the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[2] A negative benchmark was not to include the inchoate crimes of conspiracy or incitement in the draft convention because the 1998 Rome Statute[3] only provides for these forms of liability for genocide.[4] There was no further reasoning set out for this choice while the previous commentary on this point contained the following erroneous statement:

> the concepts of 'soliciting', 'inducing' and 'aiding and abetting' are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in an action that constitutes the offence.[5]

This article will critically assess this choice by the International Law Commission (Commission) at three levels. First it will examine comments made by academics, as well as participants in the work of the Commission on this draft convention. Secondly, the methodology employed by the Commission in reaching this conclusion will be scrutinized and finally, a more conceptual analysis of the possible desirability for the inclusion of these two inchoate crimes will be offered.

2 Views of Academics and Participants Are the Lack of Inchoate Liability in the Draft Convention

There is near unanimity among academics that not including the inchoate offences of conspiracy and incitement is a missed opportunity for the Commission to make the circle of perpetrators for crimes against humanity more relevant in view of present realities and that relying on the paucity in the text of the Rome Statute, which was concluded over 20 years ago, in this regard is short-sighted.[6]

The discussion among academics with respect to inchoate crimes and crimes against humanity took place in four different contexts: observations about the Rome Statute and the lack of conspiracy in general and incitement only for

2 *Ibid*., pp. 71-72, Para. 15.

3 Rome Statute of the International Criminal Court adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 June 1998, entered into force on 1 July 2002, A/CONF.183/9, Art. 5.

4 *Supra* note 1, pp. 70-71, Para. 13.

5 Int'l Law Comm'n, *Report on the Work of Its Sixty-Ninth Session*, U.N. Doc. A/72/10 (2017), at Ch. IV, p. 64, Para. 13; this statement was adjusted in the final report, *supra* note 1, Para. 13 by stating: "Paragraph 2 does not cover the concept of incitement as an inchoate or incomplete offence (*i.e.*, an offence that can occur even if the crime is not consummated, such as 'attempt' in subparagraph 2 (b)). At the same time, the various terms found in paragraph 2 (c) do encompass the concept of incitement to a crime against humanity when the crime in fact occurs."

6 These views are not fully represented in S. Murphy (Special Rapporteur on Crimes Against Humanity), Fourth Report on Crimes Against Humanity, U.N. Doc. A/CN. 4/725, 18 February 2019, pp. 55-56, nn. 335 and 341.

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genocide;[7] the need to extend those inchoates in the context of hate speech; as part of the project to create a crime against humanity convention; and comments in regard to the draft International Law Commission (ILC) convention.

The reason why the Rome Statute did not include conspiracy or incitement is not entirely clear. Bill Schabas is of the view that conspiracy was missed by the drafters of the Rome Statute due to an "oversight by exhausted drafters"[8] but this account has been put in doubt by other commentators,[9] who view the omission as a compromise where the common purpose form of participation in Article 25(3)(d) of the Rome Statute was seen as a substitute for conspiracy.[10] With respect to incitement, it has been said that since the general approach to drafting the Statute was a conservative one, there was no appetite at all to extend this form of involvement to other crimes than genocide.[11]

With respect to hate speech, scholars are of the view that extending the inchoate offence of incitement to other international crimes would make sense from both a logical perspective[12] and a prevention angle.[13]

The Proposed Convention on Crimes Against Humanity that was concluded in 2010 by a group of international law experts meeting at the Washington University School of Law in St. Louis[14] contains a provision providing for incitement

7 Art. 25(3)(f) of the Rome Statute, *supra* note 3 refers to attempt as applicable to all crimes while Art. 25(3)(a) mentions direct and public incitement only for genocide.

8 W.A. Schabas, *Genocide in International Law*, 1st ed., Cambridge, Cambridge University Press, 2000, pp. 266-7, repeated in W.A. Schabas, *International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford, Oxford University Press, 2016, p. 584 and W.A. Schabas, 'Prevention of Crimes Against Humanity', *Journal of International Criminal Justice*, Vol. 16, 2018, p. 725, a view confirmed by Roger Clark *in* G.S. Gordon, *Atrocity Speech Law, Foundation, Fragmentation, Fruition*, 1st ed., Oxford, Oxford University Press, 2017, p. 375, n. 32. Schabas has also said: "My recollection is that the distinction between inchoate or 'common-law' conspiracy and conspiracy as a form of complicity was not well understood by those who negotiated the provisions at the Rome Conference."

9 J.D. Ohlin, 'Incitement and Conspiracy to Commit Genocide', *in* P. Gaeta (Ed.), *The UN Genocide Convention: A Commentary*, Oxford, Oxford University Press, 2009, p. 220; J.A. Okoth, *The Crime of Conspiracy in International Criminal Law*, The Hague, T.M.C. Asser Press, 2014, pp. 180-181.

10 Okoth, *supra* note 9, p. 181, explains this compromise as follows: "On the one hand, the mode of liability adopted in Article 25(3)(d) avoids the express language of punishing conspiracy thereby meeting demands of the civil law countries. On the other hand, like the concept of conspiracy under common law jurisdictions, it creates criminal responsibility for participation in group criminality seemingly meeting the demands of this later group of countries, with the modification that such conduct can only be punished if the underlying crime has been attempted or carried out." *See also* Schabas, 2018, *supra* note 8, p. 725, who says: "Some of the participants in the drafting of Article 25 believed, mistakenly, that conspiracy pursuant to Article III of the Genocide Convention was adequately addressed in Article 25(3)(d) of the ICC Statute."

11 Gordon, *supra* note 8, pp. 374-375, quoting Roger Clark.

12 W. Timmermann & W.A. Schabas, 'Incitement to Genocide', *in* P. Behrens & R. Henham (Eds.), *Elements of Genocide*, London, Routledge, 2012, p. 173; W. Timmerman, *Incitement in International Law*, London, Routledge, 2015, p. 263; Gordon, *supra* note 8, pp. 22 and 375-376.

13 M.E. Badar & P. Florijančič, 'The Prosecutor v. Vojislav Šešelj: A Symptom of the Fragmented International Criminalisation of Hate and Fear Propaganda', *International Criminal Law Review*, Advance Articles, March 2020, 'Conclusion'.

14 L.N. Sadat, *Forging a Convention for Crimes Against Humanity*, 2nd ed., Cambridge, Cambridge University Press, 2013.

for crimes against humanity but not conspiracy.[15] This approach seems to have been the result of the views expressed by one of the experts in this project, Elies van Sliedregt, who is of the view that since "indirect perpetration is encapsulated in the Proposed Convention, providing for (a choate type of) intellectual perpetratorship, makes the inclusion of a conspiracy concept less necessary".[16]

The direct commentary on the draft articles includes Leila Sadat who opines that "[o]ne could also add incitement as a mode of liability in proposed draft Article 6"[17] while Bill Schabas says that:

> The fact that there are unfortunate gaps in Article 25 of the ICC Statute is not a good reason to omit direct and public incitement and conspiracy to commit crimes against humanity from the draft articles. Nor is there validity to the contention that these inchoate forms of crimes against humanity are not included in some national legal systems.[18]

Van Sliedregt slightly modified her earlier views regarding conspiracy and has argued that both this inchoate crime and incitement should be extended to crimes against humanity in the following words:

> we should rethink conspiracy's once controversial status in international criminal law and welcome its possible inclusion in Article 6 of the ILC draft, albeit at the moment there is just a reference in the ILC commentary. While I doubt conspiracy has a basis in existing international law – either custom or general principles – it has, over the years, gained a less controversial position in domestic law. [...] While incitement is not a general liability concept under international law, it is adopted in domestic jurisdictions. It may be labelled in different ways, like the mentioned 'solicitation' or 'encouragement', or present itself as 'failed instigation', describing the situation in which no crime actually occurs or is attempted after the instigation, but the instigator is still held liable. The case for criminalizing incitement is a moral one: prompting an individual to commit a crime may be even more reprehensible than assisting someone who has already decided to commit a crime. In the law on genocide, incitement entails inchoate liability only if 'direct' and 'public'. I would suggest these requirements to equally apply for incitement to commit CAH.[19]

15 Crimes Against Humanity Initiative, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, Whitney R. Harris World Law Institute* (Washington University School of Law, St. Louis, 2010) *in* Sadat, *supra* note 14, Appendix I, Art. 4(e), pp. 367 and 470.

16 *Ibid.*, p. 254.

17 L.N. Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity', *Journal of International Criminal Justice*, Vol. 16, 2018, pp. 683-704, at 702.

18 Schabas, 2018, *supra* note 8, p. 725.

19 E. van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law', *Journal of International Criminal Justice*, Vol. 16, 2018, pp. 729-749, at 746-748.

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Einarsen and Rikhof are of the view that:

> While a reluctance to transfer the notion of incitement from the crime of genocide, which has been part of ICL since 1948, to crimes against humanity, or to reinstate conspiracy to its status before 1998, would be understandable – and while such an extension would indeed have been a progressive development of international law – it would have been better to state the criminal law policy for declining such an extension rather than to provide a confusing and likely incorrect legal justification for its views.[20]

Badar and Florijančič, referring to the same erroneous statement in the 2017 Report of the Commission as mentioned in the Introduction and noting that the reason not to include conspiracy or incitement because it was not in the Rome Statute, comment rather incredulously that

> If this implies a stance that the law of 1998 should remain as it is, just because it is formulated this way, it would defeat entirely the mission of the ILC to progressively develop the law in light of the new challenges that arise with time.[21]

A number of states provided comments during the consulting phase of this project with respect to Article 6 in general[22] but only two states provided comments regarding the omission of conspiracy and incitement, namely Iceland (on behalf of the Nordic countries) and Sierra Leone.[23] Iceland indicated the draft convention should not be narrower than the modes of responsibility in the Rome Statute and many national criminal codes while specifically stating that the Nordic countries have criminalized conspiracy and incitement.[24] Sierra Leone argued for the inclusion of the two inchoate offences because of its recognition in customary international law, the fact that the Commission itself had recognized incitement in its 1954 Draft Code and that the statement in the earlier draft of the draft convention that these offences were included in other forms of accessorial liability was incorrect.[25] During the debate in the Sixth Committee it noted again that the

20 T. Einarsen & J. Rikhof, *A Theory of Punishable Participation in Universal Crimes*, 1st ed., Oslo, TOAEP Publisher, 2018, p. 301.
21 Badar & Florijančič, *supra* note 13, Ch. 5.2.
22 Murphy, *supra* note 6, pp. 53-58.
23 *Ibid*., p. 57.
24 Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting, 29 November 2016, Para. 59.
25 Int'l Law Comm'n, Comments and observations received from Governments, international organizations and others, U.N. Doc. A/CN.4/726 (2019), pp. 72-73. This was repeated in the statement by Sierra Leone to the Sixth Committee of the UNGA, 29 October 2019, p. 5, available at: http://statements.unmeetings.org/media2/23328748/-e-sierra-leone.pdf.

omission of incitement and conspiracy did not affect the position under customary international law.[26]

Non-state organizations also expressed views on this topic. The Latin America Regional Workshop on the Draft Articles of a Convention on Crimes Against Humanity, which represented civil society, international and regional organizations and governments from across the Americas, indicated in its recommendation 5 of 28 September 2018 to the Special Rapporteur to include incitement as a form of liability. The same recommendation was made by the Peace and Justice Initiative in a document entitled 'Crimes Against Humanity Convention, Submission on Speech Crimes', based on the fact that "that the preventive function of prohibiting certain harmful forms of speech has not been fully realized as a matter of international criminal law".[27]

Lastly, the Crimes Against Humanity Initiative Steering Committee[28] of the Whitney R. Harris World Law Institute of the School of Law of the Washington University in St. Louis in its "Comments and Observations on the 2017 Draft Articles on Crimes Against Humanity as Adopted on First Reading at the Sixty-ninth Session of the International Law Commission" of 30 November 2018 was of the view that

> As former U.S. Ambassador Stephen Rapp has noted, incitement is often a key precursor to the commission of crimes against humanity and genocide. For this reason, it seems useful to require States to prohibit, consistent with their obligations under international human rights law, 'advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence'. This could be placed either in the Commission's draft article on prevention, or incitement could be added as a mode of liability to Draft Article 6.[29]

Some members of the Commission itself expressed opinions on the inclusion of inchoate crimes in the draft convention. In 2016, Ms. Jacobsson was of the view that

26 *Report of the International Law Commission on the Work of Its Seventy-First Session* (2019), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat by the Secretariat, U.N. Doc. A/CN.4/734 (2020), p. 27, Para. 137.

27 Peace and Justice Initiative, 'Crimes Against Humanity Convention, Submission on Speech Crimes', pp. 16-17 with an elaboration on pp. 25-29 and a conclusion on p. 31.

28 *See* Crimes Against Humanity Initiative, Whitney R. Harris World Law Institute at Washington University in St. Louis School of Law, available at: http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/. The Steering Committee of the Initiative consisted of six eminent specialists in international criminal law and human rights law.

29 Whitney R. Harris World Law Institute at Washington University in St. Louis School of Law, 'Comments and Observations on the 2017 Draft Articles on Crimes Against Humanity as Adopted on First Reading at the Sixty-ninth Session of the International Law Commission, 30 November 2018, at pp. 12-13, available at: http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2019/02/HarrisInstituteCrimesAgainstHumanityILCCommentsNovember302018.pdf.

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> However, the concept of incitement should not be ignored: the Radio Télévision Libre des Mille Collines broadcasts were a prime example of the terrible effects that incitement could have. Even if the Special Rapporteur considered that the concept was covered in draft article 5 (1), she was of the view that it should be listed expressly.[30]

On the other hand, Mr. Hassouna said that:

> The Commission should not expand the commentary, as suggested by some States, to indicate that crimes against humanity could be prosecuted under other categories of crime, nor should it include conspiracy or incitement among the forms of liability contained in Paragraph 2.[31]

The most detailed comments came from Mr. Jalloh who indicated among other things that

> [t]he prohibition of incitement should be reflected in the draft articles on crimes against humanity, particularly because such crimes were easier to prove than the crime of genocide, which required special intent[32]

and

> the 1954 draft Code of Offences against the Peace and Security of Mankind and the 1996 draft Code of Crimes against the Peace and Security of Mankind, had provided separately for incitement and conspiracy to commit crimes against humanity, war crimes or genocide.[33]

3 Critical Analysis of the Reasons Not to Include Incitement and Conspiracy

The following comments are intended to expand on some of the arguments made in the previous section while also providing a line of reasoning not previously utilized or only slightly touched upon by other commentators. These comments are primarily related to the codification aspect of the work of the ILC, although one could certainly wonder why no attempt was made to infuse the draft articles with

30 Int'l Law Comm'n, Provisional summary Record of the 3300th Meeting of the Sixty-Eight Session, U.N. Doc. A/CN.4/SR.3300 (2016), p. 7.

31 Int'l Law Comm'n, Provisional summary Record of the 3454th Meeting of the Seventy-First Session, U.N. Doc. A/CN.4/SR.3454 (2019), p. 12.

32 Int'l Law Comm'n, Provisional summary Record of the 3458th Meeting of the Seventy-First Session, U.N. Doc. A/CN.4/SR.3458 (2019), pp. 11-12.

33 *Ibid.*, p. 13. These views were also expressed by C.J. Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity', *African Journal of International Criminal Justice*, Vol. 5, 2019, pp. 119-167, at 140-141; and C.J. 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 366-367.

the second goal of the ILC, namely progressive development of international law.[34]

Some of the above comments, which addressed the 2017 version of the draft articles, such as the confusion exhibited between regular modes of liability in the preparatory phase of the commission of an international crimes, such as instigation and inducing on one hand and inchoate crimes, which do not require subsequent criminal conduct, namely attempt, conspiracy and incitement, have been addressed in the commentary to Article 6(2) of the most recent version of the draft articles as has been the fact that these forms of inchoate liability were also mentioned in another treaty dealing with crimes against humanity[35] and in the 1996 draft Code of Crimes Against the Peace and Security of Mankind. With respect to the latter, the commentary makes it clear that conspiracy and incitement were treated as modes of liability rather than inchoate crimes;[36] however, the commentary omits the fact that the 1954 version of the draft Code did include conspiracy and incitement while it does not explain the reason for this change.[37]

However, the justification given by a mere reliance on the fact that the Rome Statute does not employ these two inchoate offences is not satisfactory from a methodological point of view. Throughout the commentaries of the draft articles,

34 Einarsen & Rikhof, *supra* note 20, pp. 299-303; for a more general discussion re progressive development of international law by the ILC, *see* C.J. Jalloh, 'Introduction', *FIU Law Review*, Vol. 6, 2019, pp. 975-976; P. Galvão Teles, 'The ILC's Past Practice on Practice on Progressive Development Codification of International Law – An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility', *FIU Law Review*, Vol. 6, 2019, pp. 1027-1042, at 1040-1041; A.N. Pronto, 'Codification and Progressive Development of International Law: A Legislative History of Article 13(1)(a) of the Charter of the United Nations', *FIU Law Review*, Vol. 6, 2019, pp. 1101-1123, at 1120-1121.

35 The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968, entered into force on 11 November 1970, Art. 2.

36 This observation is correct, *see* Einarsen & Rikhof, *supra* note 20, pp. 291-292.

37 The reason was stated in the negative by explaining why the inchoate offence of attempt was included without saying anything about conspiracy and incitement although the justification for including attempt could have easily applied to the other two offences as well when the Commission stated: "First, a high degree of culpability attaches to an individual who attempts to commit a crime and is unsuccessful only because of circumstances beyond his control rather than his own decision to abandon the criminal endeavour. Secondly, the fact that an individual has taken a significant step towards the completion of one of the crimes [...] entails a threat to international peace and security because of the very serious nature of these crimes." *See* Yearbook of the International Law Commission, 1996, vol. II, part 2, p. 22, Para. 17.

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there is extensive reference to transnational criminal law (TCL) instruments,[38] including other parts of Article 6 but this is not done in respect to the two inchoate offences under review.[39]

Even Article 6(2), which establishes liability, refers to two TCL treaties, namely the Torture Convention and the Forced Disappearance Convention.[40] While these two treaties are a subset of TCL instruments by regulating aspects of human rights, they are not the only ones. There are three other such treaties dealing with slavery, apartheid and child sexual exploitation, of which the first includes conspiracy as a form of personal liability and the second includes both conspiracy and incitement.[41]

When going further afield in TCL, and also including treaties regulating aspects of drug trafficking, terrorism and organized crime, one would find further examples of the inclusion of conspiracy, both dated before and after the Enforced Disappearance Convention,[42] which is used as an important landmark in the commentary of the draft articles.[43] Of special interest is the fact that the most

38 Unlike international criminal law, which is regulated directly by international law, including creating individual liability, transnational criminal law covers the indirect suppression by international law through domestic criminal law of criminal activities that have actual or potential transboundary effects. Enforcement of transnational law is always indirect, accomplished through prosecution by domestic courts. While international criminal law can have as its sources all three forms recognized by general international law, transnational criminal law has only treaties as its sources, although these treaties can be international or regional agreements. These so-called suppression treaties have three essential features that distinguish them from international criminal law arrangements and from other international treaties. The first of these aspects is the obligation of state parties to criminalize within their domestic laws the conduct that is the subject matter of the treaties. Second, these treaties oblige state parties to utilize an expanded version of jurisdiction that goes beyond the one usually used at the domestic level, namely territorial or active nationality jurisdiction. They can also include passive nationality jurisdiction or protective jurisdiction; however, the treaties do not go so far as to include universal jurisdiction. The last and most important feature of these treaties is the fact that they oblige states parties either to prosecute perpetrators of the crimes mentioned in the treaties or to extradite such persons (called the *aut dedere aut judicare* obligation). Several crimes have had a trajectory from transnational to international crimes; both genocide and war crimes had their genesis in treaties containing some of the just-mentioned features, namely the Genocide Convention and the Geneva Conventions with their Additional Protocols while several crimes against humanity, such as torture, enforced disappearance and apartheid were also inspired by their TCL counterparts with the same name. It is important to note that only the crimes themselves have had this transformation and not other aspects regulated in the transnational treaties, such as procedural aspects or, in most cases, modes of liability. For more detailed information, *see* R. Currie & J. Rikhof, *International and Transnational Criminal Law*, Toronto, Irwin Law, 2020, pp. 13-19 and 364-477.

39 Murphy, *supra* note 6, Addendum 1, pp. 15-21.

40 *Ibid.*, pp. 15-16.

41 Einarsen & Rikhof, *supra* note 20, pp. 280-281.

42 *Ibid.*, p. 285.

43 *Supra* note 2, pp. 71-72.

recent antiterrorism instruments, the 2010 Beijing Convention[44] and Protocol,[45] have included conspiracy,[46] which is an internationally accepted expansion of the forms of liability in the 1997 Terrorist Bombings Convention,[47] which was the inspiration for the Rome Statute and at that time the most recent TCL treaty. In this context, it is also difficult not to draw a parallel with the discussion of the liability of legal persons set out in Article 6(8) where a comparison with TCL treaties is made and where the lack of inclusion of this type of liability in the Rome Statute was not seen as a barrier to have to become part of the draft articles.[48]

Secondly, while an observation that the inchoate crimes of conspiracy and incitement in general have entered the realm of customary international law might be difficult to make at the moment (although likely if connected with genocide), there are clear indications that there is a higher occurrence of such inclusion at the national level, certainly in common law countries but also increasingly in civil law countries. This has been said regarding, for instance, Germany, Spain, France,[49] the Netherlands,[50] Bosnia and Herzegovina, Slovenia, Belgium,[51] the Nordic countries,[52] Croatia and Switzerland[53] and Lebanon.[54]

In addition to specific references to inchoate crimes, countries have also expanded the reach of criminal participation in recent years to cover more preparatory acts for terrorist and organized criminality,[55] going beyond the traditional forms known in international criminal law, such as planning, ordering, instigating, inducing and soliciting, and as a result getting closer to the purpose and parameters of the inchoate offences of conspiracy and incitement. Threats to carry out a terrorist activity, advocating or promoting such an activity, receiving or providing training for the same purpose as well a number of provisions dealing with involvement with a terrorist group have become a mainstay of antiterrorism

44 The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, adopted by the International Conference on Air Law on 10 September 2010, entered into force on 1 July 2018.

45 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted by the International Conference on Air Law on 10 September 2010, entered into force on 1 January 2018.

46 The two protocols also include the concept of threat, not known in international criminal law.

47 The International Convention for the Suppression of Terrorist Bombings, adopted by resolution A/RES/52/164 of the General Assembly on 15 December 1997, entered into force on 23 May 2001.

48 *Supra* note 2, pp. 81-83.

49 Okoth, *supra* note 9, pp. 74-77 and 151 with respect to conspiracy.

50 Einarsen & Rikhof, *supra* note 20, p. 501, also re conspiracy although indicating that the jurisprudence might require a subsequent act.

51 Coalition for the International Criminal Court (CICC), Implementing the Rome Statute of the International Criminal Court, 2017, p. 56, available at: www.coalitionfortheicc.org/sites/default/files/cicc_documents/implementing_rome_statute.pdf.

52 *Supra* note 25, Para. 59.

53 Derived from a sample from the website Legislation online, an overview of the criminal codes of OSCE participating states, *see*www.legislationline.org/documents/section/criminal-codes.

54 Judgment, *Ayyash* (STL-011-01/T/TC), Trial Chamber, 18 August 2020, Para. 6200.

55 For modalities in dealing with organized criminality in civil law countries, *see* Okoth, *supra* note 9, pp. 53-58 (Germany); 60-64 (Spain); 65-69 (France); and 70-72 (Italy).

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legislation in Europe, North America and Australia.[56] If such an expansion is seen as desirable to combat nefarious types of crime but which has not yet reached the level of an international crime, like crimes against humanity,[57] serious consideration should be given to at least include general forms of liability, which can address such preparatory criminal behaviour.

Another observation is of a more conceptual nature. According to Juliet Okoth, the reasons why conspiracy for genocide was criminalized or why common law countries use conspiracy as an inchoate offence are twofold:

> The first is its role in the prevention of crime, also known as the early intervention rationale. An agreement to commit a crime presents with it the potential danger of its adherents actually setting out to realize its criminal objective. Second, conspiracy is seen to have an important role in combating criminal enterprises, since any group dedicated to the commission of crimes is considered to present an on-going threat to society.[58]

The reason for criminalizing incitement was set out in the very first international case dealing with this crime, the *Akayesu* case, saying:

> In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.[59]

If these reasons apply to genocide, it is difficult to understand why that would not be the case for crimes against humanity. The eventual outcomes of the underlying acts of genocide are similar as for crimes against humanity while the specific crime of extermination is virtually indistinguishable from genocide[60] and while the most obvious difference is that the *mens rea* for genocide is higher than for crimes against humanity,[61] this should not be sufficient reason to limit the circle of perpetrators for one crime compared to the other and leave important perpetrators unpunished. This resemblance between genocide and crimes against

56 J. Rikhof, 'Complicity in Exclusion for Terrorist Crimes', *in* J. Simeon (Ed.), *Terrorism and Asylum,* The Hague, Brill, 2020, pp. 163-167.

57 Currie & Rikhof, *supra* note 38, pp. 355-361.

58 Okoth, *supra* note 9, pp. 38-39. *See also* in Canada, where the *Supreme Court in R. v. Déry*, 2006 SCC 53, Para. 44 said: "the reason for punishing conspiracy before any steps are taken towards attaining the object of the agreement is to prevent the unlawful object from being attained, and therefore to prevent this serious harm from occurring."

59 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, Para. 562.

60 Compare Art. 6(c) with Art. 7(2)(b) in the Rome Statute for instance while Art. 7(2)(b) is replicated in the draft convention as Art. 2(2)(b).

61 Currie & Rikhof, *supra* note 38, pp. 114-117 & 130-131.

humanity has been noted by other United Nations agencies, such as the United Nations Office on Genocide Prevention and the Responsibility to Protect, which says

> atrocities crimes, particularly genocide and crimes against humanity, are not spontaneous acts. Instead, they develop as a process over time, as a result of which it is possible to identify warning signs that they may occur.[62]

This leads to the last observation, namely the fact that the phenomena, for which inchoate crimes are excellent vehicles to prevent, are on the rise. Hate speech, for which incitement has already been used in the jurisprudence of the international tribunals, is becoming much more of a dangerous trend, especially in the era of social media.[63] With respect to conspiracy, preparatory acts such as providing weapons or other materials to governments involved in international crimes have been the subject of investigations and prosecutions, especially in Europe[64] and again, while regular forms of indirect participation have been usefully employed to hold individuals and corporations liable, a legal device whereby such activities could be halted at an even earlier phase would even be more effective and have possibly even more of a deterrent effect. One wonders whether these developments in hate speech and arms trafficking had taken place to this extent in the twentieth century and whether there would have been more appetite for the inclusion of inchoate offences of incitement and conspiracy in the Rome Statute.

62 *See* www.un.org/en/genocideprevention/prevention.shtml. *See also* the 2005 World Summit Outcome Document, U.N. Doc A/Res/60/1, 24 October 2005, which says in Para. 138: "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means."

63 *See, e.g.*, statement by the United Nations Secretary General in the foreword of the United Nations Strategy and Plan of Actions on Hate Speech, May 2019, available at: www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf. *See also*, for the observation of the connection between hate speech and international crimes in the specific situation of Myanmar, a particular egregious recent example, Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc, A/HRC/39/CRP.2, 17 September 2018, pp. 166-170, 173, 177 and 320-345, which was referenced in the Order for Provisional Measures by the International Court of Justice in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), 23 January 2020, Para. 55; and the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III, ICC-01/19, Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, Para. 65.

64 For a general overview of cases, including cases of nefarious assistance to other governments, *see* J. Rikhof, 'Extra-Territorial Jurisdiction Update – Jurisprudence', *Philippe Kirsch Institute Global Justice Journal*, Vol. 4, No. 15, 2020; *See also* L. Rome, 'The Case for Prosecuting Arms Traffickers in the International Criminal Court', *Cardozo Law Review*, Vol. 36, 2015, pp. 1149-1189.

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4 Conclusion

The above discussion suggests that there is a virtual consensus among academics to include the inchoate offences of conspiracy and incitement in a new treaty on crimes against humanity, and there are a number of legal and policy reasons why inclusion of these crimes in the draft articles would not only be helpful but also logical.

The first legal reason to include these two inchoates would be to adopt the same approach as was taken during the negotiations of the Rome Statute and find inspiration for extended liability in transnational criminal treaties. Whether such treaties are to be in the area of human rights, as was done for other draft articles than the one dealing with extended liability or whether, as had been the case in 1998, the most recent transnational criminal treaty is given the most consideration, the result would be the same, namely a more prominent place for incitement and conspiracy.

Secondly, the two inchoates in question are no longer within the exclusive realm of common law countries and can now also be found increasingly in civil law jurisdictions even outside the area of genocide, which points to a desire by countries to criminalize offences, which are preparatory in nature rather than committed during the execution phase of undesirable behaviour. This trend can be seen especially in the area of combating terrorism where it is already quite common to try to prevent terrorist activities by extended personal liability to preparatory acts long before an actual terrorist act is carried out, including in a number of countries the criminalization of associations with or even membership in terrorist groups.

More on a policy level, there has been a general trend in recent years and definitely since the conclusion of the Rome Statute to place more emphasis on the prevention of international crimes, specifically genocide and crimes against humanity; addressing hate speech and trafficking of weapons, which are increasingly seen as major contributors to those international crimes, are prime examples of this trend. A legal response in the form of incitement and conspiracy would assist a great deal in meeting this goal of prevention, especially as the reasoning behind using those two inchoates for genocide is virtually identical to crimes against humanity and in that manner would close the gap of impunity of an important category of international criminals.

For these reasons, not using incitement and conspiracy in the draft articles because it was not done over twenty years ago when negotiating the Rome Statute is a poor legal and policy justification. They should be added to Draft Article 6.2(b), which would then read "inciting, conspiring or attempting to commit such a crime" while the commentary should explain that the incitement should be direct and public.