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# New Mechanisms for Punishing Atrocities Committed in Non-international Armed Conflicts

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# NEW MECHANISMS FOR PUNISHING ATROCITIES IN NON-INTERNATIONAL ARMED CONFLICTS

SEAN D MURPHY \*

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This lecture addresses the topic of ‘new mechanisms for punishing atrocities in Non-International Armed Conflicts’ (‘NIACs’). I take it as a given that there are numerous non-international armed conflicts occurring worldwide, including in Afghanistan, Iraq, Nigeria and Syria and that there will continue to be such conflicts in the future. I also take it as a given that there are serious atrocities occurring as a part of those NIACs, including the targeting of civilians; leading to their death and injury, enslavement, forcible transfers of populations, enforced disappearances, torture, sexual violence and persecution, just to name a few. And, finally, I take it as a given that we would like to find a way to deter and to punish such atrocities.

To that end, my lecture will focus on the value in this context of pursuing robust action against ‘crimes against humanity’. First, I will begin by indicating briefly why the concept of crimes against humanity is especially useful when dealing with NIACs. Secondly, I will indicate that we have had considerable success in creating international tribunals, notably the International Criminal Court (‘ICC’), for prosecuting such crimes, but far less success in doing so through national courts. Thirdly, I will argue that key mechanisms for developing national capacity for such prosecutions, as well as associated interstate cooperation, may lie in a new multilateral convention on the prevention and punishment of crimes against humanity.<sup>1</sup>

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<sup>1</sup> For prior arguments in favour of such a convention, see M Cherif Bassiouni, “‘Crimes against Humanity’: The Need for a Specialized Convention” (1994) 31 *Columbia Journal of Transnational Law* 457; M Cherif Bassiouni, ‘Crimes against Humanity: The Case for a Specialized Convention’ (2010) 9 *Washington University Global Studies Law Review* 575; Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011); Morten Bergsmo and Song Tianying (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl, 2014).

## I CRIMES AGAINST HUMANITY AND NIACS

‘Crimes against humanity’ are crimes that are so heinous — so horrible — that they are viewed as an attack on the very quality of being human. Moreover, such crimes are so heinous that they are an attack not just upon the immediate victims, but also upon all of humanity, and hence the entire community of humankind has an interest in their punishment.<sup>2</sup>

By way of example, the torture of an individual by a government official in the course of a NIAC is an international crime, but standing alone it is not a crime against humanity. If that act of torture occurs, however, as a part of a widespread or systematic attack upon a civilian population — perhaps pursuant to a governmental policy that is targeting thousands of civilians for torture — then the individual act of torture becomes a crime against humanity. In essence, when the perpetrator is a part of a broad campaign to do serious harm to a civilian population, the individual crime becomes even more aggravated and merits special treatment as a crime against humanity. Such violence is one of the main concerns that arises in most NIACs.

Although the codification and application of crimes against humanity has led to some doctrinal divergences, the concept contains a few basic elements that are common across all formulations:

- First, these crimes are international crimes; it matters not whether the national law of the territory on which the act was committed has criminalised the conduct.
- Secondly, these crimes are directed against a civilian population and hence, have a certain scale or systematic nature that generally extends beyond isolated incidents of violence and that are usually associated with a state or organisational policy.
- Thirdly, these crimes concern the most heinous acts of violence and persecution known to humankind: murder; torture; sexual violence; and so on.

Two further elements are especially important in the context of NIACs. They are that:

- Fourthly, these crimes can be committed within the territory of a single state or can be committed across borders. Thus, these crimes can arise in the context of either international or non-international armed conflicts.
- Fifthly, these crimes can be committed either by state actors or by non-state actors, at least when the latter act as part of an organisational policy to commit the attack. As such, a rebel group engaged in a NIAC against its government is subject to the prohibition of these crimes.

Some historical background may help explain the emergence of these elements. Up until the 20<sup>th</sup> century, little attention was paid to whether

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<sup>2</sup> Hannah Arendt characterised the Holocaust as a ‘new crime, the crime against humanity — in the sense of a crime “against the human status”, or against the very nature of mankind’. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking, 1965) 268.

international law prohibited violence by a government directed against its own people. Hence, the *Hague Conventions* of 1899 and 1907 addressed conduct occurring as a part of *interstate* armed conflicts, but did not address atrocities inflicted domestically by a government.<sup>3</sup>

In the aftermath of World War I, further thought was given to whether international law regulated such atrocities. In 1919, a special legal commission advocated for the inclusion of provisions in the *Treaty of Versailles*<sup>4</sup> on prosecuting leaders for committing atrocities against their own people,<sup>5</sup> but no such provisions were ultimately adopted, and no prosecutions for crimes against humanity ensued.

## II PROSECUTIONS IN INTERNATIONAL AND NATIONAL COURTS

### A *International and Special Courts or Tribunals*

Even so, the seeds were sown for such prosecutions in the aftermath of World War II. The 1945 *Charter of the International Military Tribunal* established at Nürnberg (*'Nürnberg Charter'*)<sup>6</sup> included 'crimes against humanity' as a component of the Tribunal's jurisdiction. The *Nürnberg Charter* defined such crimes in art 6(c) as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>7</sup>

Notice that this definition of crimes against humanity was linked to the existence of an international armed conflict — the acts only constituted crimes against humanity if committed 'in execution of or in connection with' a crime against peace or a war crime. In fact, the basic justification at that time for intruding into matters that traditionally were within the national jurisdiction of a state was the crime's connection to interstate armed conflict.

The Nürnberg Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war.<sup>8</sup> 'Crimes against humanity' were also

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<sup>3</sup> See, eg, *Hague Convention (II) with respect to the Laws and Customs of War on Land*, opened for signature 29 July 1899 (entered into force 4 September 1900); See, eg, *Hague Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] UKTS 9 (entered into force 26 January 1910).

<sup>4</sup> *Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles)*, opened for signature 28 June 1919, 2 USTS 43 (entered into force 10 January 1920).

<sup>5</sup> Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (29 March 1919) partially reprinted in (1920) 14 *American Journal of International Law* 95.

<sup>6</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal*').

<sup>7</sup> *Ibid.*

<sup>8</sup> See Roger S Clark, 'Crimes against Humanity at Nuremberg' in George Ginsburgs and V N Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Martinus Nijhoff, 1990) 177.

included in the 1946 *Charter for the Tokyo Tribunal*<sup>9</sup> but ultimately no persons were convicted of such crimes by that tribunal.

There was hope that, in the 1950s, it would be possible to establish a permanent international criminal court, but the United Nations General Assembly deferred action, and throughout the period of the Cold War no further international tribunals were developed.

In 1993, however, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia ('ICTY').<sup>10</sup> Article 5 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('ICTY Statute') included 'crimes against humanity' as part of the ICTY's jurisdiction. The chapeau of that article reads that the ICTY 'shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population'.<sup>11</sup>

Notice how this language does not require any connection to an international armed conflict, but does require a connection to an armed conflict. The historical record indicates that the drafters were interested in having crimes against humanity in the former Yugoslavia prosecuted whether or not that conflict was ultimately characterised by the tribunal as international in character. Hence, the *ICTY Statute* established a definitive break from the *Nürnberg Charter* so as to take account of crimes against humanity in a NIAC.

Article 5 of the *ICTY Statute* then proceeds to list several crimes, such as murder, extermination and enslavement. Through its extensive jurisprudence, the ICTY also developed important guidance as to exactly what must be proven when prosecuting an individual for crimes against humanity. Ultimately, a large number of defendants before the ICTY were successfully convicted of such crimes.<sup>12</sup>

In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda ('ICTR').<sup>13</sup> Article 3 of the *Statute of the International Tribunal for Rwanda* ('ICTR Statute') established 'crimes against humanity' as part of the tribunal's jurisdiction.<sup>14</sup> Although art 3 retained the same list of proscribed acts as existed for the ICTY, the chapeau's language abandoned any nexus to armed conflict. Like the ICTY, the jurisprudence of the ICTR provides important guidance as to what must be proven when prosecuting an individual

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<sup>9</sup> See *International Military Tribunal for the Far East*, TIAS 1589 (proclaimed 19 January 1946, amended 26 April 1946) art 5(c).

<sup>10</sup> See SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993).

<sup>11</sup> See SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/Res/955 (8 November 1994).

<sup>12</sup> Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334, 342–6.

<sup>13</sup> See SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/Res/955 (8 November 1994).

<sup>14</sup> *Ibid* annex ('*Statute of the International Tribunal for Rwanda*') art 3.

for crimes against humanity. And here, too, many defendants before the ICTR were convicted of such crimes.<sup>15</sup>

As is well-known, negotiations in the late 1990s led to the adoption in 1998 of the *Rome Statute*, establishing the ICC.<sup>16</sup> Article 5 of the *Rome Statute* includes crimes against humanity within the ICC's jurisdiction. Article 7(1) defines what is meant by a 'crime against humanity': 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

Article 7(1) then proceeds to list a series of acts: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment in violation of fundamental rules of international law; torture; rape or other forms of sexual violence; persecution; enforced disappearance; the crime of apartheid; and other inhuman acts of a similar character intentionally causing great suffering.<sup>17</sup>

Article 7(2) provides a series of definitions, the first of which is especially important.<sup>18</sup> Article 7(2)(a) defines an '[a]ttack directed against any civilian population' as meaning: '[A] course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.<sup>19</sup>

One thing to note about this definition is that, like the *ICTR Statute*, there is no requirement that the underlying acts be in connection with an 'international armed conflict', nor even any requirement that they be in connection with an 'armed conflict'. So atrocities committed within a NIAC are fully covered.

Another thing to note is that the words 'pursuant to or in furtherance of a State or organizational policy to commit such an attack' (emphasis added) contemplate crimes against humanity perpetrated by non-state perpetrators. Jurisprudence from the ICC suggests that 'organizational' includes any organisation or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, the ICC indicted for crimes against humanity Germain Katanga, who was the leader of an armed militia operating in the Democratic Republic of the Congo ('DRC') known as the Patriotic Resistance Force in Ituri. In referring to the policy requirement for the crime, the Pre-Trial Chamber in the *Katanga* case stated: 'Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack

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<sup>15</sup> Sadat, above n 12, 346–9. See also Stephan Meseke, 'La contribution de la jurisprudence des tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda à la concrétisation de l'incrimination du crime contre l'humanité [The Contribution of the Jurisprudence of International Criminal Tribunals for the former Yugoslavia and Rwanda in the Criminalisation of Crimes Against Humanity]' in Mario Chiavario (ed), *La justice pénale internationale entre passé et avenir* [International Justice Criminal between the Past and the Future] (Daloz, 2004) 173.

<sup>16</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

against a civilian population'.<sup>20</sup> So this, too, is an important feature of crimes against humanity for NIACs, where there is invariably a non-state actor group involved in the conflict.

Since entry into force of the *Rome Statute* in July 2002, several defendants have been indicted and some convicted by the ICC for crimes against humanity. For example, in March 2014, the ICC Trial Chamber II issued its judgment that Katanga committed murder, through other persons, as a crime against humanity during an attack in February 2003 on a village in the DRC.<sup>21</sup>

Crimes against humanity have also featured in the jurisdiction of 'hybrid' tribunals that contain a mixture of international law and national law elements. The Sierra Leone Special Court, established in 2002 pursuant to an agreement between Sierra Leone and the UN, includes crimes against humanity as a part of the Special Court's jurisdiction.<sup>22</sup> Several defendants have been indicted and some convicted by the Special Court for crimes against humanity, including the former President of Liberia, Charles Taylor.<sup>23</sup>

Special courts have been set up within a few national legal systems (at times with international judges participating) and some of these courts have exercised jurisdiction over crimes against humanity. For example, the East Timor Special Panels, established in 2000, had jurisdiction over crimes against humanity committed between January and October 1999 in East Timor.<sup>24</sup> The relevant language of that tribunal's statute was almost a verbatim repetition of art 7 of the *Rome Statute*, and the Special Panels convicted several defendants for crimes against humanity. Likewise, the Extraordinary Chambers in the Courts of Cambodia, established by Cambodia in 2001, included within art 5 of its statute 'the power to bring to trial all Suspects who committed crimes against humanity',<sup>25</sup> leading to the trial of certain defendants for such crimes.

Finally, crimes against humanity have also featured at times in the jurisprudence of regional human rights courts and tribunals, such as the

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<sup>20</sup> *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 30 September 2008) 126–7 [396].

<sup>21</sup> *Prosecutor v Katanga (Judgment)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) 155 [436], 158 [443]–[444].

<sup>22</sup> *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002); *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (2000) enclosure ('*Statute of the Special Court for Sierra Leone*').

<sup>23</sup> *Prosecutor v Taylor (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-03-01-A, 26 September 2013). See René van der Wolf (ed), *The Case against Charles Taylor* (International Courts Association, 2013).

<sup>24</sup> *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UN Doc UNTAET/REG/2000/15 (6 June 2000) s 5.

<sup>25</sup> *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea 2004* (Cambodia) art 5.

Inter-American Court of Human Rights<sup>26</sup> and the European Court of Human Rights.<sup>27</sup>

In light of such historical developments, it is now well-settled that, under international law, criminal responsibility attaches to an individual for committing crimes against humanity, including those occurring in NIACs. As the ICTY Trial Chamber in the *Tadić* case indicated, ‘since the *Nürnberg Charter*, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned’.<sup>28</sup>

## B National Courts

These are impressive achievements with respect to international tribunals. But how have crimes against humanity fared under *national law*?

The national laws of several states do address in some fashion crimes against humanity, thereby allowing national prosecutions falling within the scope of those laws. Indeed, in the decades following Nürnberg, various national prosecutions occurred, such as the *Eichmann* and *Demjanjuk* cases in Israel, the *Menten* case in the Netherlands, the *Barbie* and *Touvier* cases in France and the *Finta*, *Mugesera* and *Munyaneza* cases in Canada.<sup>29</sup> Crimes against humanity typically arose in the context of criminal prosecutions, but they also arose in the context of extradition or immigration proceedings.

In recent years, under the influence of the *Rome Statute*, many states have adopted or amended national laws that criminalise crimes against humanity. For example, I note that there are two federal statutes in Australia that concern prosecutions in Australia for crimes against humanity: (1) the *Criminal Code Act of 1995*,<sup>30</sup> and (2) the *International Criminal Court (Consequential Amendments) Act of 2002*.<sup>31</sup> Together, the two statutes provide that Australian courts have jurisdiction in cases involving crimes against humanity, even if the offences are also crimes within the jurisdiction of the ICC. Further, jurisdiction is available whether or not the offence was committed in Australia, but the

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<sup>26</sup> See, eg, Javier Dondé Matute, ‘Los elementos contextuales de los crímenes de lesa humanidad y la Corte Interamericana de Derechos Humanos’ [Contextual Elements of Crimes against Humanity in the Inter-American Court] in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds), *Sistema Interamericano de protección de los derechos humanos y Derecho Penal internacional* [Inter-American System for the Protection of Human Rights and International Criminal Law] (Konrad-Adenauer-Stiftung, 2011) vol 2, 205.

<sup>27</sup> See, eg, *Korbely v Hungary (Judgment)* [2008] IV Eur Court HR 299, 348 [82].

<sup>28</sup> *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 224 [623].

<sup>29</sup> *A-G (Israel) v Eichmann* [Israel Supreme Court] (appeal judgment) No 336/51 (29 May 1962); *State of Israel v Ivan (John) Demjanjuk* [Jerusalem District Court] (trial judgment) No 373/86 (18 April 1988); *Ivan (John) Demjanjuk v State of Israel* [Israel Supreme Court] (appeal judgment) No 347/88 (29 July 1993); *Menten v Federal Republic of Germany* (1987) 101 ILR 443 [The Hague Court of Appeal]; *Cour de cassation* [French Court of Cassation], 85-95166, 20 December 1985; *Cour de cassation* [French Court of Cassation], 92-82409, 27 November 1992; *R v Finta* [1994] 1 SCR 701; *Minister of Citizen and Immigration v Mugesera* [2005] 2 SCR 100; *Munyaneza v The Queen* [2014] QCCA 906 (Quebec Court of Appeal).

<sup>30</sup> *Criminal Code Act 1995* (Cth).

<sup>31</sup> *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

Attorney-General must give permission for charges to be brought under the relevant provisions.

Various studies have attempted to compile and analyse the scope of such national laws, both in terms of the substance of the crimes and the circumstances when jurisdiction may be exercised over such crimes. For example, in 2013 the George Washington University Human Rights Clinic in Washington DC published a study entitled 'Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction',<sup>32</sup> which reached several interesting conclusions, some of which I would like to share with you.

First, the 2013 study canvassed the findings of earlier studies and found that, when read collectively, those earlier studies indicated that:

- At best, 54 per cent of UN member states have some form of national law relating to crimes against humanity;<sup>33</sup> and
- At best, 66 per cent of *Rome Statute* parties have some form of national law relating to crimes against humanity.<sup>34</sup>

Secondly, the 2013 study undertook an in-depth, qualitative review of the national laws of a sample of 83 states. That review concluded that only 41 per cent of states in the sample actually possessed a national law specifically on 'crimes against humanity'.<sup>35</sup> Of the 58 *Rome Statute* parties within the sample of 83 states, the review indicated that just 48 per cent of them possessed a national law specifically on 'crimes against humanity'.

Thirdly, for the 34 states that possessed a national law specifically on 'crimes against humanity', the 2013 study analysed closely the provisions of those laws. Of those states, only 29 per cent adopted verbatim the text of art 7 of the *Rome Statute* when defining the crime.<sup>36</sup> As such, of the 83 states within the sample, only about 12 per cent adopted the formulation of *Rome Statute* art 7 in its entirety. Instead, most of the 34 states possessing a national law on 'crimes against humanity' deviated from the language of art 7, some in a very substantial way.

Finally, the 2013 study analysed whether the 34 states that possess a national law specifically on 'crimes against humanity' could exercise jurisdiction over a non-national offender who commits the crime abroad against non-nationals. The study concluded that only about 25 per cent of the states within the sample were able to exercise such jurisdiction over 'crimes against humanity'. Further, of the 58 *Rome Statute* parties within the sample, only 33 per cent possess a national

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<sup>32</sup> International Human Rights Law Clinic, 'Comparative Law Study and Analysis of National Legislation relating to Crimes against Humanity and Extraterritorial Jurisdiction' (Report, George Washington University Law School, July 2013), updated and reprinted in part in Arturo J Carrillo and Annalise K Nelson, 'Comparative Law Study and Analysis of National Legislation relating to Crimes Against Humanity and Extraterritorial Jurisdiction' (2014) 46 *George Washington International Law Review* 481.

<sup>33</sup> *Ibid* 487.

<sup>34</sup> *Ibid* 488.

<sup>35</sup> *Ibid* 493.

<sup>36</sup> *Ibid* 492.

law specifically on ‘crimes against humanity’ and are able to exercise such jurisdiction.<sup>37</sup>

This unevenness in the adoption of national laws relating to crimes against humanity has collateral consequences with respect to interstate cooperation in seeking to sanction offences. Existing bilateral and multilateral agreements on mutual legal assistance and on extradition typically require that the offence at issue be criminalised in the jurisdictions of both the requesting and requested states (a requirement referred to as ‘double criminality’); if their respective national laws are not comparable, then cooperation usually is not required. With a large number of states having no national law on crimes against humanity, and with significant discrepancies among the national laws of states that have criminalised the offence, there exist at present considerable impediments to interstate cooperation.

Further, the absence in most states of national laws that allow for the exercise of jurisdiction over non-nationals for crimes against humanity inflicted upon non-nationals abroad means that offenders often may seek sanctuary by moving to a state unconnected with the crime. Even in circumstances in which states have adopted harmonious national laws on crimes against humanity, there may exist no treaty obligation as between the states to cooperate with respect to the offence, including by way of an obligation to extradite or prosecute the offender.

### III INTERNATIONAL LAW COMMISSION’S PROJECT ON CRIMES AGAINST HUMANITY

Principally to address this unevenness in national laws, in July 2014 the International Law Commission (‘the Commission’) embarked on a project to develop draft articles for what might become a new convention on the prevention and punishment of crimes against humanity.<sup>38</sup> The Commission appointed me to serve as special rapporteur for the project.

The project will involve preparing a series of draft articles beginning in the summer of 2015 and continuing for the next few years, which will likely contain at least the following elements:

- An obligation upon states to prevent crimes against humanity;
- An obligation upon states to incorporate crimes against humanity into their national law;
- An obligation upon states to exercise jurisdiction over acts that constitute crimes against humanity when they occur in their territory or by their nationals, or when an offender who allegedly committed such crimes turns up in their territory;
- An obligation upon states to either submit the offender to prosecution or to extradite the offender (*aut dedere aut judicare*);
- An obligation upon states to engage in mutual legal assistance with other states; and

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<sup>37</sup> Ibid 505–13.

<sup>38</sup> See International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Sixth Session*, UN GAOR, 69<sup>th</sup> sess, Supp No 10, UN Doc A/69/10 (5 May–6 June and 7 July–8 August 2014) 247 [266]. See also *Report of the International Law Commission on the Work of Its Sixty-Sixth Session*, GA Res 69/118, 69<sup>th</sup> sess, Agenda Item 78, UN Doc A/RES/69/118 (18 December 2014) para 7.

- An obligation to go to international dispute resolution in the event of a disagreement between states as to the application or interpretation of the agreement.

One reason for such a convention is to help fill a gap not just in national laws but in our existing treaty regimes — we have a *Genocide Convention*<sup>39</sup> to address genocide and we have the 1949 *Geneva Conventions*<sup>40</sup> to address serious war crimes, but we have no convention focused on nationalisation of crimes against humanity, nor on interstate cooperation with respect to such crimes.

When embarking on this project, one issue that the Commission considered was how such a convention would relate to the *Rome Statute*. Certainly, a convention on crimes against humanity should avoid any conflicts with the *Rome Statute*, given the large number of states that have adhered to it, and should draw upon the language of the *Rome Statute*, as well as associated instruments and jurisprudence, whenever appropriate.

For example, in the event that a state party to the *Rome Statute* receives a request from the ICC for the surrender of a person to the ICC and also receives a request from another state for extradition of the person pursuant to the proposed convention, art 90 of the *Rome Statute* provides a procedure to resolve the competing requests. The draft articles of the proposed convention should be crafted to ensure that states party to the *Rome Statute* can follow that procedure even after joining the convention on crimes against humanity.

Moreover, in several ways the adoption of a convention could promote desirable objectives not addressed in the *Rome Statute*, while simultaneously supporting the mandate of the ICC.

First, the *Rome Statute* regulates relations between its states party and the ICC, but does not regulate matters among the parties themselves (nor among parties and non-parties). In other words, the *Rome Statute* is focused on the ‘vertical’ relationship of states to the ICC, but not the ‘horizontal’ relationship of interstate cooperation. Part IX of the *Rome Statute* on ‘International Cooperation and Judicial Assistance’ implicitly acknowledges that interstate cooperation on crimes within the jurisdiction of the ICC should continue to operate outside the *Rome Statute*, but does not direct itself to the regulation of that cooperation. A convention on crimes against humanity could expressly address interstate cooperation on the investigation, apprehension, prosecution and punishment in national legal systems of persons who commit crimes against humanity, an objective fully consistent with the *Rome Statute*’s object and purpose.

Secondly, the ICC is focused upon punishment of persons for the crimes within its jurisdiction, not upon steps that should be taken by states to prevent

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<sup>39</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, open for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

<sup>40</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

such crimes before they happen. A new convention on crimes against humanity could include obligations relating to prevention that draw upon comparable obligations in other treaties, such as the *Genocide Convention* and the *Convention against Torture*,<sup>41</sup> as well as recent jurisprudence, such as the International Court of Justice's decisions in the *Bosnia and Herzegovina v Serbia and Montenegro* and *Croatia v Serbia* genocide cases.<sup>42</sup> As such, a convention on crimes against humanity could clarify a state's obligation to prevent crimes against humanity and provide a basis for holding states accountable in that regard.

Thirdly, while the ICC is a key international institution for prosecution of high-level persons who commit these crimes, the ICC was not designed (nor given the resources) to prosecute all persons responsible for crimes against humanity. Rather, the ICC is predicated on the notion that, in the first instance, national jurisdictions are the proper place for prosecution in the event that appropriate national laws are in place (the principle of complementarity).<sup>43</sup> Further, in some circumstances the ICC may wish to transfer a suspect in its custody for prosecution in a national jurisdiction, but may be unable to do so if the national jurisdiction is not capable of charging the suspect with crimes against humanity. Given that the ICC does not have the capacity to prosecute all persons responsible for crimes against humanity, or to strengthen national legal systems in this regard, a new convention could help reinforce the ICC by developing greater capacity at the national level for prevention and punishment of such crimes.

Fourthly, and relatedly, a convention on crimes against humanity would require the enactment of national laws that criminalise crimes against humanity which, as I have discussed, currently many states have not done, including many states party to the *Rome Statute*.

As such, rather than conflict with other treaty regimes, a well-designed convention on crimes against humanity could help fill a gap in existing treaty regimes and, in doing so, simultaneously reinforce those regimes.

#### IV CONCLUSION

Let me conclude by noting that, when one looks across the globe at various areas of conflict, it is disheartening to see that crimes against humanity appear to be occurring in many places, most notably in NIACs. The system of international law has come very far in defining what is meant by such crimes and by establishing international courts and tribunals with jurisdiction over such crimes.

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<sup>41</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>42</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment)* (International Court of Justice, General List No 118, 3 February 2015).

<sup>43</sup> See Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, 2008); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008).

But much remains to be done in developing national laws, in promoting cooperation among states for investigation, prosecution or extradition of offenders and in finding ways to help prevent such crimes from occurring *ab initio*. Perhaps a new convention on the prevention and punishment of crimes against humanity — such as currently exist for genocide and serious war crimes — would help in addressing such problems. Indeed, a global convention on prevention, punishment and interstate cooperation with respect to crimes against humanity appears to be a missing piece in the current framework of international humanitarian law, international criminal law and international human rights law. Such a convention could help to further stigmatise such egregious conduct, could draw further attention to the need for its prevention and punishment and could help to harmonise national laws relating to such conduct, thereby opening the door to more meaningful interstate cooperation on the investigation, prosecution and extradition for such crimes.

Whether or not this initiative for a new convention is the means for doing so, stopping crimes against humanity in non-international armed conflicts is one of our signature challenges for the 21<sup>st</sup> century.