

UNIVERSITY OF LAPLAND

FACULTY OF LAW

**CRIMES AGAINST HUMANITY –
THE NEED FOR A NEW TREATY AND ITS RELATIONSHIP TO THE
INTERNATIONAL CRIMINAL COURT**

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ABBREVIATIONS

CAH	Crimes Against Humanity
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
R2P	Responsibility to Protect
UN	United Nations

1. INTRODUCTION

During the time after World War II alone, there have been over 300 conflicts with over 100 million victims of crimes against humanity.¹ From 1975 to 1979, the Khmer Rouge regime tortured, starved, worked to death and killed an approximate of 2 million Cambodians for their political and social classes, or for being identified as intellectuals.² In 1994, 800,000 Rwandans were murdered in 100 days, about 75% of the Tutsi population in the country.³ Throughout the 1990's the ethnic cleansing in the former Yugoslavia evolved into religious genocide, forcible relocation, rape of women, and mass killing of non-Serbs.⁴ Today, after the ethnic cleansing by the Myanmar Army that started in 2017, around 1 million Rohingya Muslims seek shelter in neighboring Bangladesh.⁵ These are only to mention some of the recent crimes against humanity cases.

Crimes against humanity first emerged as an independent basis of individual criminal liability in international law during the trials of the German and Japanese leaders following the second World War. Subsequently, crimes against humanity were specifically included in the Charter of the International Military Tribunals at Nuremberg and Tokyo to address depredations directed against civilian populations by the state, including the state of the victim's nationality. Following the trials, the Nuremberg Principles embodied in the Nuremberg Charter and Judgement were adopted by the General Assembly in 1946 and codified by the International Law Commission in 1950.⁶ However, the promise of "never again" was repeatedly broken as the mass atrocities committed in the second half of the twentieth century shocked the world in their large scale and cruelty. There has been little accountability of any kind, whether the acts were committed by government officials, military leaders, rebels, insurgents, or low-level perpetrators.

With the adoption of the Rome Statute in 1998, crimes against humanity were finally codified and defined in an international treaty. However, it is a convention that by its

¹ Bassiouni 2010, p. 4.

² Un 2013, pp. 783-784.

³ Reyntjens 2015, pp. 19-21.

⁴ Paddeu 2015, pp. 198-199.

⁵ Amnesty International 2018, p. 8.

⁶ Sadat 2017, pp. 1-3.

own terms is law defined for the purposes of the Statute itself.⁷ The adoption of the Rome Statute considerably advanced the normative work on crimes against humanity but did not eliminate the need to fill the lacuna in the legal framework regarding the commission of atrocity crimes – most of which are neither genocide nor war crimes, but crimes against humanity. Also, the focus of the International Criminal Court is on high-ranking officials which leaves the prosecution of low- and mid-level perpetrators to domestic courts. Moreover, the gravity threshold of Article 17(1)(d) of the Rome Statute limits the ability of the International Criminal Court to prosecute all offenders. The fact remains that the Rome Statute defers to domestic prosecutions for crimes against humanity but imposes no obligation on its parties to adopt special penal legislation for these crimes, although the preamble implies that states should do so.⁸

It is an anomaly that we do not have an elaborate treaty on crimes against humanity when other parts of international humanitarian law are codified, notably in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and in the 1949 Geneva Conventions and their Additional Protocols.⁹ Because the International Criminal Court and the ad hoc international criminal tribunals have now heard hundreds of crimes against humanity cases, a substantial body of jurisprudence exists to guide states in domestic prosecutions of these crimes. In light of this and the persistence of crimes against humanity it is now appropriate to adopt a convention enabling states to prosecute these crimes more effectively.¹⁰

Against this background it is a great step forward that in 2014 the International Law Commission of the United Nations decided to add the topic of “crimes against humanity” to its active agenda. A set of articles were drafted, and in 2017 the Commission decided to transmit the entire set of draft articles to governments, international organizations and others for comments and observations. The Commission’s work on the draft articles is scheduled to continue in 2019.¹¹

⁷ Rome Statute, Article 7.

⁸ Report by Sadat & Pivnichny 2014, p. 4.

⁹ Corell 2015, p. 5.

¹⁰ Report by Sadat & Pivnichny 2014, p. 7.

¹¹ U.N. Doc. A/72/10, p. 215.

My research presents the gap that currently exists in international law without a comprehensive treaty on crimes against humanity and the possibility of filling this lacuna with the draft articles on crimes against humanity proposed by the International Law Commission. The relationship of this topic to the International Criminal Court is a natural and close one as the Court is the sole permanent international tribunal to handle crimes against humanity cases. As such, this thesis will go over some of the most important matters on the relation between the draft articles and the Rome Statute. The goal is to simultaneously answer the question how, contrary to the views of some critics, a treaty on crimes against humanity would complement the existing normative framework as well as the provisions of the Rome Statute.

This thesis begins with a short introduction to crimes against humanity and the efforts to codify them, including the admirable academic venture by the Crimes Against Humanity Initiative from which the present work by the International Law Commission got a spark. Chapter 3 explains the various reasons why a specified treaty on crimes against humanity is needed. The lacuna is primarily explained through presenting the different aspects and the functioning of the Rome Statute system, and the lack thereof, in addressing crimes against humanity. Some of the most notable challenges in practice are presented in order to state the consequences of the current legal state. Special attention and most space is given to the *aut dedere aut judicare* obligation as the cornerstone of reinforcing the legal framework. Finally, chapter 4 covers the most prevalent concerns on the proposed treaty's relationship to the International Criminal Court, with strong focus on the principle of complementarity in representing how these two, rather than competing, actually complete each other.

The relative novelty of the idea of a specified treaty on crimes against humanity naturally means that most sources are fairly recent and mainly articles. In order to shed light on the proposed treaty the preparatory documents of the International Law Commission are studied. The unique, possibly the most relevant of the recent works on the topic, Forging a Convention for Crimes Against Humanity, was an essential reference raising the various issues related to proposing a treaty on crimes against humanity. As the topic of this thesis heavily leans on the general principles and framework of international law

and its development, some of the most established international criminal law books proved to be of great value.

In terms of methodology, the primary method used in this research is legal dogmatic. My theoretical objective is to present the legal framework regarding crimes against humanity. There is an emphasis on the practical approach which presents the unsatisfying reality *lex lata*, including the heavy reliance on the International Criminal Court and the lack of national legislation on crimes against humanity.^{12, 13} As my research proposes adopting a new treaty, I will provide interpretation *de lege ferenda* and show how the proposed treaty would fill the existing gap in international law.

¹² Aarnio 1997, pp. 36-37.

¹³ Hirvonen 2011, pp. 21-22.

2. CRIMES AGAINST HUMANITY AND THE DRAFT TREATY

2.1 The History of Codifying Crimes Against Humanity

International law is essentially the product of state interests. Despite this era of globalization, it still remains under the shadow of state sovereignty. Progress, however, has been achieved as states' interests and the values that their societies embrace have merged, calling for greater conformity. States' international cooperation, spurred by economic globalization, has in some cases given rise to collective decision-making processes. International criminal law and human rights are among the developments in which state sovereignty has given way to collective interests and values. The progress has nonetheless been slower and more troublesome than in the economic field. What has been achieved is the result of ideas about human values throughout the history of several civilizations and necessity imposed by circumstances and events, not so much deliberative legislative policy planning. The evolution of crimes against humanity follows this same pattern.¹⁴

The contemporary status of crimes against humanity under international law cannot be understood or appreciated without reference to its history.¹⁵ The concept of crimes against humanity spurs from the scale and extent of the crimes committed during the two world wars and the consensus that certain crimes committed within states are subject to international law and adjudication. Crimes against humanity were first closely associated with the laws of war. These criminalizations have deep roots in history with the aim of limiting the devastations one nation can cause to another. Originally the crimes committed within a state were considered outside the scope of international law. The Holocaust presented a turning point in international law triggering the rapid development of international human rights law and international criminal law.¹⁶

The origins of the prohibition of crimes against humanity in international law lie in humanitarian principles regulating armed conflict. The concept of "laws of humanity" first

¹⁴ Bassiouni 2011, p. 43.

¹⁵ Van Schaack 1998, p. 787.

¹⁶ deGuzman 2011, p.1.

appeared in international law in the 1899 and 1907 Hague Conventions and form the genesis of crimes against humanity. The preambular paragraph, known as the “Martens Clause”, in the 1907 Convention states that in cases not otherwise covered therein, “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, *from the laws of humanity*, and the dictates of the public conscience (emphasis added).”¹⁷

Although crimes against humanity are as old as humanity, the genesis of a cognizable offence originates from the condemnations of the massacres of the Armenians by the Ottoman Empire.¹⁸ In a 1915 declaration the governments of Great Britain, France and Russia described the massacres as “crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres”. No such prosecutions came to follow, but the term resonated and the possibility to impose criminal liability for crimes against humanity was raised again in connection with the violations during World War I. Once again, no prosecutions for these crimes ensued.¹⁹

It was only after the World War II that the first prosecutions for crimes against humanity occurred. Thus far the traditional meaning of war crimes had not included crimes committed by a state power to its own citizens, but the aftermath of the Holocaust called for means to respond to the grave crimes committed by the Nazi regime. Consequently, The Charter of the International Military Tribunal for the Trial of the Major War Criminals (“Nuremberg Charter”) provided for jurisdiction not only over war crimes, but also over “crimes against humanity” and “crimes against peace”.²⁰ The following acts fall within the jurisdiction of the Tribunal:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any ci-

¹⁷ Hague Convention of 1907, preamble.

¹⁸ Van Schaack 1998, p. 787.

¹⁹ deGuzman 2011, p. 5.

²⁰ *Ibid*, pp. 1-5.

vilian 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.²¹

The post-World War II prosecutions for crimes against humanity spurred a lasting legal controversy. The Allies were accused of enforcing victor's justice in order to justify revenge on wartime enemies. The critics also asserted that the proceedings violated the principle of legality or *nullum crimen sine lege*, considering the defendants were retroactively punished for previously legal actions. Nevertheless, if this category of wartime wrongdoing had not been enshrined in customary international law, it gained the status shortly after the Nuremberg Trials.²²

In 1947 the United Nations General Assembly commissioned the International Law Commission ('Commission')²³ to formulate the principles of international law recognized in the Nuremberg Charter and Judgements, and to prepare a draft code of offences against the peace and security of mankind. The Commission's work continued for nearly five decades until the final draft code was submitted to the General Assembly in 1996.²⁴ The draft code defined crimes against humanity by listing various inhumane acts "when committed in a systematic manner or a large scale and instigated or directed by a Government or by any organization or group."²⁵ The draft code contributed greatly to the process that resulted in the Rome Statute of the International Criminal Court. In addition to these international advancements after the World Wars, a few states codified crimes against humanity in their national laws, and Canada, France and Israel conducted domestic prosecutions for crimes against humanity committed during the war.²⁶

The second milestone in the development of the law of crimes against humanity occurred in 1993 when the UN Security Council established the International Criminal

²¹ Article 2(6)(c) of the Nuremberg Charter.

²² Welgan 2014, pp. 2-3.

²³ See Chapter 2.4.1.

²⁴ Welgan 2014, pp. 6-7.

²⁵ ILC, Draft Code of Crimes Against the Peace and Security of Mankind, Article 18.

²⁶ deGuzman, p. 7.

Tribunal for the former Yugoslavia (ICTY) to investigate and prosecute genocide, war crimes and crimes against humanity which had taken place in the former Yugoslavia.²⁷ The definition of crimes against humanity employed by the ICTY revived the original Nuremberg Charter's required nexus with armed conflict, but also expanded the list of criminal acts to include imprisonment, torture and rape.²⁸ In 1994 the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) pursuant to the genocide that had taken place earlier that same year. In the ICTR Statute the linkage between war and crimes against humanity was dropped, but the requirement that the inhumane acts must be part of a "systematic or widespread attack against any civilian population on national, political, ethnic, racial or religious grounds" was added. The establishment of ICTY and ICTR greatly contributed to the development of the law of crimes against humanity, both through the evolution of the definition and, perhaps more importantly, through the extensive production of case law addressing these crimes.²⁹

2.2 The Current Legal State

2.2.1 The Effects of the Cold War and Criminalizing Crimes Against Humanity

The evolutionary process of international criminalization of crimes against humanity lacks any form of structure or method and is mostly ad hoc responses to specific events.³⁰ The period during the Cold War between 1948 and 1989 halted the political considerations on the development of international criminal law. Despite the above-mentioned developments crimes against humanity have not been codified in an international treaty and the different tribunals charged with the prosecution of crimes against humanity have tended to use slightly different definitions of the crime. To date, there is no international consensus on the definition of crimes against humanity. In fact, there are several international definitions with some significant variations among them. For example, Article 4 of the ICTY Statute requires a connection between "crimes against

²⁷ deGuzman, p. 7.

²⁸ ICTY Statute, Article 5.

²⁹ deGuzman, p. 7.

³⁰ Haenen 2013, p. 796.

humanity” and a “conflict of an international or non-international character”. The ICTR Statute on the other hand does not require any sort of connection to armed conflict and as such transformed the nature of the crime.³¹

Despite the many similarities in the definitions of crimes against humanity in the international instruments including them, they are nonetheless different formulations. This brings out the question whether it is possible to identify the specific contents that form customary international law, especially in the light of the requirements of the principles of legality in international criminal law. Nevertheless, there is some uniformity and common elements in the formulations: (1) the perpetrators are state actors acting pursuant to a policy, and (2) engage in killing, torture, rape and other human depredations against civilians, usually on a widespread or systematic basis. The commonalities reveal the coalescence of customary international law around these certain elements as well as ones most vulnerable to being prosecuted for crimes against humanity, state actors. This explains the reluctance of some governments to support a specialized convention. Its absence widens the impunity cap for state actors perpetrating crimes against humanity.³²

2.2.2 The 1998 Rome Statute and Reaching Consensus

The 1998 Rome Statute of the International Criminal Court is considered to include the most authoritative and most widely ratified treaty-based definition of crimes against humanity to date.³³ Crimes against humanity are codified in Article 7 of the Statute. The first paragraph sets out a chapeau, under which conditions the commission of the following list of inhumane acts amounts to a crime against humanity³⁴:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or system-

³¹ Bassiouni 2010, pp. 582-584.

³² *Ibid.*

³³ Cryer 2014, p. 758.

³⁴ Haenen 2013, pp. 804-807.

atic³⁵ attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The list of acts that constitute crimes against humanity set out in Article 7(1) of the Rome Statute is not exhaustive: any act inhumane in nature and character may amount to a crime against humanity (Article 7(1)(k); an ‘other inhumane act’), provided the chapeau elements are met.³⁶

³⁵ See Chapter 4.3.2 on the contextual elements.

³⁶ Haenen 2013, p. 808.

Though Article 10 of the Rome Statute states that the Statute is not to be considered a definitive codification of international criminal law, the definition offered in the Statute does at least reflect the latest consensus of the international community.³⁷ As such, the text represents a set of political compromises rather than progressive norms criminalizing behavior on a broad scale.³⁸ Nevertheless, for reasons discussed in different parts of this thesis, it is preferable to maintain the Rome Statute's definition of crimes against humanity in a possible future specialized treaty, and address it in a way that complements the Rome Statute system.³⁹

Even though the Rome Statute was a big milestone in terms of establishing an international criminal tribunal, it applies only to cases to be tried before the International Criminal Court, that is, to a handful of perpetrators from the limited number of cases that fall within the jurisdiction of the Court. Furthermore, the Rome Statute does not require states to adopt implementing legislation on the crimes within the Statute.⁴⁰ The fact remains that a single, coherent treaty that establishes the principle of state responsibility as well as individual criminal responsibility for the commission of crimes against humanity is called for. In the words of Professor Leila Nadya Sadat, "... the adoption of the Rome Statute advanced the normative work of defining crimes against humanity considerably but did not obviate the need to fill the lacunae in the legal framework as regards the commission of atrocity crimes, most of which are crimes against humanity, and not genocide, and many of which are crimes against humanity, and not war crimes."⁴¹

2.3 The Crimes Against Humanity Initiative

Concerned about the problems of continued impunity for the commission of atrocity crimes, the Whitney R. Harris World Law Institute at Washington University School of Law launched the Crimes Against Humanity Initiative in 2008. The idea and inspiration

³⁷ Murphy 2015, p. 307.

³⁸ Sadat 2001, p. 261.

³⁹ U.N. Docs A/C.6/70/SR.20, para 6.

⁴⁰ Sadat 2014, p. 33.

⁴¹ Sadat 2011, p. Xxiii.

for the project came from Professor Leila Nadya Sadat, the Henry H. Oberschelp Professor of Law and Director of the Harris World Law Institute at Washington University in St. Louis.⁴²

The Initiative had three primary objectives: 1) to study the current state of the law and sociological reality as regards the commission of crimes against humanity; 2) to combat the indifference generated by an assessment that a particular crime is ‘only’ a crime against humanity rather than genocide; and 3) to address the gap in the current law by elaborating the world’s first global treaty on crimes against humanity. Directed by a Steering Committee of distinguished experts⁴³, the Initiative commissioned an academic study and the drafting of a model text of a Proposed International Convention for the Prevention and Punishment of Crimes Against Humanity.⁴⁴

A preliminary draft text of the Convention was circulated to participants at the Initiative’s first meeting in April 2009. The draft was prepared by professor M. Cherif Bassiouni, the chairman of the Drafting Committee of the Rome Diplomatic Conference establishing the International Criminal Court⁴⁵. Nearly 250 experts were consulted on the various drafts of the proposed convention and many of them attended the meetings convened by the Initiative. After several revisions, The Proposed Convention was approved by the Steering Committee in August 2010.⁴⁶

The Proposed Convention offered States, the International Law Commission, civil society and academics a platform for discussion. It provided a platform through which the experts could elaborate without the constraints of government instructions, although aware of political realities.⁴⁷

⁴² Goldstone 2011, p. xvi.

⁴³ The Steering Committee composed of Professor M. Cherif Bassiouni, Ambassador Hans Correll, Justice Richard Goldstone, Professor Juan Mendez, Professor William Schabas and Judge Christine Van den Wyngaert.

⁴⁴ Sadat 2017, pp. 10-11.

⁴⁵ Also, often regarded as the “Father of International Law”. M. Cherif Bassiouni passed away in 2017.

⁴⁶ *Ibid*, pp. 11-12.

⁴⁷ Sadat 2017, p. 12.

2.4 The United Nations and the Project on Crimes Against Humanity

In 2014, the initiative started to develop from academia into political reality as the topic “Crimes Against Humanity” was included in the International Law Commission’s current programme of work. The decision was in response to a report prepared by Professor Sean Murphy (Report to the International Law Commission, Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere aut judicare))⁴⁸. Mr. Sean Murphy was appointed as Special Rapporteur for the topic.⁴⁹

2.4.1 The International Law Commission

The International Law Commission was established by the General Assembly in 1947. The Commission’s establishment gave effect to Article 13, paragraph 1 (a), of the Charter of the UN and supports the objective of promoting the progressive development of international law and its codification.⁵⁰ The Commission holds its session annually in Geneva for a period of ten to twelve weeks. The Commission consists of 34 members, all experts in international law, that are elected for a term of five years.⁵¹

Mainly to address the unevenness in national laws, in 2014 the Commission launched a project to develop draft articles for what might become a new convention on the prevention and punishment of crimes against humanity. In addition, the aim is to fill a gap in existing treaty regimes on nationalisation of crimes against humanity and interstate cooperation with respect to such crimes.⁵²

The project involves preparing a series of draft articles that are expected to be completed in 2019. According to the Special Rapporteur, Sean D. Murphy, the draft articles should complement the Rome Statute and contain at least the following elements:

⁴⁸ See U.N. Doc. A/CN.4/L.829, also Sadat 2017, pp. 14-15.

⁴⁹ U.N. Doc. A/CN.4/SR.3227, p. 3.

⁵⁰ U.N. Doc. A/RES/174(II).

⁵¹ U.N. Doc. A/72/100, p. 138. Finnish legal expert, Dr. Marja Lehto, is one of the members of the Commission for the term of 2017-2021.

⁵² Murphy 2015, p. 306.

- 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
- 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.⁵³

A member of the Commission, Mr. Hassouna, stresses that “...the Commission should aim not only to prepare draft articles but also to convince Governments of their importance and relevance so as to ensure their eventual acceptance and implementation.” He concludes that there is an “urgent need to formulate and codify legal rules on the topic, as crimes against humanity were being committed with increasing frequency.”⁵⁴

The topic “Crimes against humanity” is scheduled to be considered next at the Commission’s seventy-first session in 2019. According to the Commission’s work programme, the fourth and final report is prepared for the session, including *inter alia* the comments received from governments, international organizations and others, and possible amendments to the draft articles adopted on first reading in 2017. Completion of the draft articles is scheduled on second reading.⁵⁵ Eventually the Commission will present

⁵³ Murphy 2015, p. 306-307.

⁵⁴ U.N. Doc. A/CN.4/SR.3349, p. 6.

⁵⁵ U.N. Doc. A/72/10, p. 215. The annual sessions usually start in April or May.

the draft to the UN General Assembly in the hope that states will decide to proceed with the adoption and ratification of such a treaty.⁵⁶

The detailed contents of the draft articles, as far as relevant for the topic of this thesis, will be studied in Chapter 4.

2.4.2 The General Assembly and Comments by Governments

Naturally, positive reception from states is of particular importance in order to ensure they become parties to the possible future treaty and enforce it. This chapter will introduce some of the key comments that governments addressed in the Sixth Committee⁵⁷ related to the draft articles and the possibility of a new treaty on the prevention and punishment of crimes against humanity.

During the debate in the Sixth Committee in 2016, thirty-nine states, including Iceland on behalf of the Nordic states, commented on the topic of “Crimes against humanity”. The states generally favoured the Commission’s work thus far and stressed the overall importance of the topic.⁵⁸ Several states welcomed the approach in making sure the Commission’s work does not conflict with existing instruments, especially the 1998 Rome Statute of the International Criminal Court.⁵⁹ As follows, several states supported the Commission’s decision to use wording similar to the Rome Statute, notably the definition of crimes against humanity.⁶⁰

⁵⁶ Murphy 2015b, p. 2.

⁵⁷ The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All of the United Nations Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly.

⁵⁸ See, for example, Croatia, Official Records of the General Assembly, Seventy-first session, Sixth Committee, 25th meeting (A/C.6/71/SR.25), paragraph 47; and El Salvador, *ibid.*, paragraph 50.

⁵⁹ See, for example, Argentina, *ibid.*, 29th meeting (A/C.6/71/SR.29), paragraph 85; Australia, *ibid.*, 25th meeting (A/C.6.71.SR.25), paragraph 90; Germany, *ibid.*, 26th Meeting (A/C.6/71/SR.26), paragraph 35; Iceland, on behalf of the Nordic countries, *ibid.*, 24th meeting (A/C.6/71/SR.24), paragraph 58.

⁶⁰ Third report on Crimes Against Humanity, pp. 4-5.

Several states, including the Nordic countries, also welcomed the obligation to adopt national laws on crimes against humanity, appreciating the importance of the harmonization of national laws in order to ensure efficient inter-state cooperation.⁶¹

Some states suggested the consideration of additional issues, such as extradition,⁶² reparation for victims,⁶³ amnesty⁶⁴ and mutual legal assistance.⁶⁵ It was also suggested that some issues should not be included in the work, such as civil jurisdiction⁶⁶ or monitoring mechanisms.⁶⁷ In general states indicated their support to the possibility of the draft articles becoming a new treaty⁶⁸ with only one state proposing that the project should focus on creating guidelines instead of a binding instrument.⁶⁹

The possible overlap with other instruments was also raised in the debate. One state considered that there might be simultaneous efforts on the topic in already existing regimes.⁷⁰ Some states mentioned the existence of an initiative by several states on the development of a convention focused on mutual legal assistance and extradition for all serious international crimes, and suggested the Commission cooperate with those involved in this initiative.⁷¹ Moreover, the Commission was urged to complete its work on the topic as swiftly as possible.⁷²

⁶¹ See, for example, Australia, *ibid.*, 25th meeting (A/C.6/71/SR.25), paragraph 90; Brazil, *ibid.*, 26th meeting (A/C.6/71/SR.26), paragraph 89; Hungary, *ibid.*, 24th meeting (A/C.6/71/SR.24), paragraph 78; and Iceland, on behalf of the Nordic countries, *ibid.*, paragraph 58.

⁶² See, for example, Spain, *ibid.*, paragraph 3; and Switzerland, *ibid.*, 24th meeting (A/C.6/71/SR.24), paragraph 67.

⁶³ See, for example, Poland, *ibid.*, 26th meeting (A/C.6/71/SR.26), paragraph 54.

⁶⁴ See, for example, Spain, *ibid.*, paragraph 3.

⁶⁵ See, for example, Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), paragraph 19; the Netherlands, *ibid.*, paragraph 40; and Portugal, *ibid.*, 25th meeting (A/C.6/71/SR.25), paragraph 93.

⁶⁶ See, for example, the United Kingdom, *ibid.*, 24th meeting (A/C.6/71/SR.24), paragraph 73.

⁶⁷ See, for example, Israel, *ibid.*, 25th meeting (A/C.6/71/SR.25), paragraph 43; and Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), paragraph 15.

⁶⁸ See, for example, Croatia, *ibid.*, 25th Meeting (A/C.6/71/SR.25), paragraph 47; Egypt, *ibid.*, 23rd meeting, (A/C.6/71/SR.23), paragraph 42; Hungary, *ibid.*, 24th meeting (A/C.6/71/SR.24), paragraph 78; and Germany, *ibid.*, 26th meeting (A/C.6/71/SR.26), paragraph 34.

⁶⁹ See Malaysia, *ibid.*, paragraph 66.

⁷⁰ See India, *ibid.*, 27th meeting (A/C.6/71/SR.27), paragraph 40.

⁷¹ See, for example, Argentina, *ibid.*, 29th meeting (A/C.6/71/SR.29), paragraph 85; Chile, *ibid.*, 25th meeting (A/C.6/71/SR.25), paragraph 100; Ireland, *ibid.*, 27th meeting (A/C.6/71/SR.27), paragraph 16; and the Netherlands, *ibid.*, 26th meeting (A/C.6/71/SR.26), paragraph 41.

⁷² See, the United Kingdom, *ibid.*, 24th meeting (A/C.6/71/SR.24), paragraph 73.

In July 2017, the Commission decided to transmit the draft articles on crimes against humanity, through the Secretary-General, to governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.⁷³

⁷³ Analytical Guide to the Work of the International Law Commission, Crimes against humanity.

3 THE NEED FOR A NEW TREATY

3.1 The Limited Role of the ICC

As noted above, Article 7 of the Rome Statute of the International Criminal Court (Court) and its related elements of crimes is the most important codification of crimes against humanity. The Rome Statute codifies crimes against humanity that are subject to its jurisdiction. But it has major weaknesses.⁷⁴

There are many limitations that speak in favor of a specialized treaty on crimes against humanity. First of all, the International Criminal Court's jurisdiction is basically limited to the territory and nationals of its state parties (Article 12(2)), unless there is an ad hoc acceptance of jurisdiction under Article 12(3) or a UN Security Council referral (Article 13(b)). A specialized treaty would offer the states the possibility to commit themselves to the fight against crimes against humanity without having to accept the jurisdiction of the Court. At the same time the ratification of a specialized convention on crimes against humanity could be the first step toward the ratification of the Rome Statute.⁷⁵

Another limitation is due to the principle of complementarity and the International Criminal Court's subsidiarity in relation to national jurisdictions – the Court can exercise its jurisdiction only if a state is not willing or able to prosecute the crime themselves (see more in chapter 4.2). Thus, the implicit pressure on national jurisdictions could be increased by a specialized treaty as it would create an additional normative obligation. Its force would increase in time and ultimately such a treaty could serve as a trigger for the intervention of the international community in the face of crimes against humanity.⁷⁶

In addition to complementarity, the regime explicitly requires “sufficient gravity” for a case to be admissible before the International Criminal Court (Article 17(1)(d)). This

⁷⁴ Stanton 2011, pp. 354.

⁷⁵ Ambos 2011, p. 295-296.

⁷⁶ *Ibid.*

gravity threshold is an additional requirement separate from the gravity of Rome Statute crimes as such. Therefore, some crimes against humanity do not pass the gravity test of the Rome Statute but might be covered by a specialized treaty.⁷⁷

At the time of drafting the Rome Statute, only little consideration was given to the gravity criterion.⁷⁸ Pre-Trial Chambers have attempted to summarize the applicable principles: “(I) a gravity determination involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; and (II) gravity must be assessed from both a quantitative and qualitative viewpoint and factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims are indicators of the gravity of a given case”.⁷⁹

Also, the capacity of the International Criminal Court is limited, and the Court will never be able to enforce the international law of crimes against humanity against most who violate it. No formal investigations have been initiated in many cases where the commission of crimes against humanity is of general knowledge and the Court has jurisdiction. The case of Colombia⁸⁰ offers an example where the Court’s jurisdiction has existed for over a decade. It is a well-established fact that effective prevention and prosecution of crimes against humanity is impossible without the active contribution and en-

⁷⁷ *Ibid.*

⁷⁸ Schabas 2017, p. 185.

⁷⁹ See for example Situation on Registered Vessels of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia (ICC-01/13), Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015.

⁸⁰ The civil war has been ongoing since 1958. The Office of the Prosecutor opened a preliminary examination in 2004 for possible crimes against humanity and war crimes by the Colombian government and rebel groups. The ICC decided not to claim jurisdiction over the cases, but approached the situation by staying involved in helping to keep the focus on domestic approaches to peace and justice. See, for example Discretion and State Influence at the International Criminal Court: The Prosecutor’s Preliminary Examinations, David Bosco, *American Journal of International Law*, Volume 111, Issue 2 April 2017, pp. 395-414.

forcement of national jurisdictions.⁸¹ The fact that the Rome Statute does not contain provisions on inter-state cooperation in connection with any of the crimes within the Court's jurisdiction adds to the challenges of effectively addressing the crimes.⁸²

3.2 The Lacuna

3.2.1 The Jurisdictional Principles and Challenges

To prosecute perpetrators of international crimes states need to have not only laws, statutes, or some sort of judge-made legal regulation punishing those crimes, but also legal provisions clarifying their scope of applicability. These legal provisions usually provide that the criminal laws of the state apply if the offence has a specific link with the state. The most traditional link is territoriality, by which criminal law applies with respect to acts or negligence taking place on the state's territory (*locus commissi delicti*). Another traditional link is active nationality, by which national criminal laws are applicable extraterritorially when the crime is committed abroad by a national of the forum state.⁸³ The actual prosecution of international crimes on the basis of these two jurisdictional links is however unlikely. International crimes (as could be the case, for instance, with crimes against humanity) express a sort of 'system criminality', which, without an effective international treaty, makes domestic prosecution in the state's territory or of the nationality of the alleged perpetrators rare. Therefore, it seems necessary to expand the reach of national criminal jurisdiction beyond the traditional bases of territoriality and active nationality.⁸⁴

As for the principle of passive nationality, whereby states possess jurisdiction over crimes committed abroad against their own nationals, it is somewhat distorted in the case of international crimes such as crimes against humanity. Their prosecution should not be based on a national link between the victim and the prosecuting state. This offers a nationalistic and narrow standard for bringing alleged criminals to justice, relying on

⁸¹ Ambos 2011, p. 295-296.

⁸² Bassiouni 2011, p. 58.

⁸³ Cassese 2013, pp. 278-279.

⁸⁴ *Ibid.*

the interest of a state to prosecute those who have allegedly attacked its own nationals. Thus, for instance in the case of crimes against humanity, the passive nationality principle cannot be relied upon.⁸⁵

Under the principle of universality any state can apply its criminal law over offenses regardless of the place where they were committed and the nationalities of the perpetrators or the victims. As a jurisdictional link the universality principle is uncertain since states adopt a variety of links for the assertion of universal jurisdiction and very few states consider that ‘unconditional’ universal jurisdiction is allowed for the prosecution of international crimes. Disagreement also persists over the list of crimes: some states do not consider crimes against humanity as a crime under universal jurisdiction.⁸⁶

There are no rules of customary international law to resolve which legal ground to prioritise.⁸⁷

The well-known *Lotus* case⁸⁸ from 1927 still serves as a starting point for discussion about the legality under international law of the exercise of extraterritorial criminal jurisdiction by domestic courts. It concerns a collision that occurred in the high seas between a French vessel and a Turkish vessel, which resulted in the sinking of the latter, with Turkish nationals as victims and a French national as the alleged offender. The case came before the Permanent Court of Justice, which had to decide whether Turkey could exercise its jurisdiction over the French national under international law. The majority view in *Lotus* was that the exercise of extraterritorial jurisdiction over international crimes would always be possible unless one can point to the existence of a rule of international law prohibiting it. The opposite, and possibly more modern, approach is that criminal jurisdiction is principally territorial and implies that in the matter of repression

⁸⁵ *Ibid.*, pp. 271-277.

⁸⁶ *Ibid.*, pp. 278-279.

⁸⁷ *Ibid.*, p. 291.

⁸⁸ The Case of the S.S. *Lotus*.

of international crimes one should point to a rule of international law allowing the exercise of extraterritorial jurisdiction.⁸⁹

The two approaches still persist in discussions concerning the scope of states' jurisdiction. This divide is naturally linked to the concept of sovereignty and the role and function of international law as sovereign states as its primary subjects. According to the principle of equal sovereignty of states criminal jurisdiction is primarily territorial; only exceptionally, notably when a rule of international law so establishes, can states assert their criminal jurisdiction over acts committed outside their territories.⁹⁰

However, the concept of international crimes seems to be inevitably subject to the necessity to expand the reach of national jurisdiction. The emerging culture of accountability for international crimes such as crimes against humanity calls for the exercise of criminal jurisdiction on the basis of extraterritorial principles.⁹¹ In this regard, international instruments have sought to encourage states to establish a fairly wide range of jurisdictional bases under national law to address the most serious crimes of international concern to remove safe havens for perpetrators of such crimes. To set an example, according to the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes" set out in the draft Code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed". Further, the extensive scope of such jurisdiction was necessary because "[t]he Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court".⁹²

Divergence persists as to the need for a jurisdictional link to the forum state in terms of universal jurisdiction, above all the presence of the suspect in the territory of the state as per the requirement set out by the principle of legality. A treaty allowing, or better yet,

⁸⁹ Gaeta 2012, pp. 596-601.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² U.N. Doc. A/72/10, p. 77.

obliging the establishment of extraterritorial jurisdiction can help settle the disagreement, as could be with the proposed treaty on crimes against humanity.⁹³ If the domestic courts were empowered to prosecute for crimes against humanity on the basis of the treaty and at the same time disregard the international rules on immunities, they could be at the forefront of the struggle against impunity for crimes against humanity.⁹⁴

3.2.2 **Aut Dedere Aut Judicare**

3.2.2.1 The obligation to prosecute

The preamble of the proposed treaty states that “[c]onsidering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance”.⁹⁵

In order to prosecute, the appropriate jurisdiction needs to be established. International rules on criminal jurisdiction of states over international crimes can be classified into three categories. First, there are rules that authorize states to establish or to exercise their criminal jurisdiction on the basis of specific grounds or with respect to a specific class of crimes. Second, there are rules that oblige enacting the necessary national legislation to provide for criminal jurisdiction on the basis of specific grounds. Finally, there are rules that compel states to exercise their criminal jurisdiction over persons charged with international crimes on the basis of specific grounds.⁹⁶

This distinction between the categories has important practical consequences: rules belonging to the second and third categories impose international obligations, the third stronger than the second. The obligation to exercise jurisdiction over persons charged

⁹³ Gaeta 2012, pp. 596-601.

⁹⁴ *Ibid.*

⁹⁵ U.N. Doc. A/CN.4/L.892.

⁹⁶ Cassese 2013, pp. 281-285.

with international crimes is an obligation to bring them to trial if there exist serious allegations of wrongful conduct.⁹⁷

Some multilateral treaties on international crimes require contracting states to pass legislation to establish criminal jurisdiction. In the draft treaty on crimes against humanity this requirement is set forth in draft Article 6: “Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law”, and further detailing which acts are required to constitute as offences under states’ national law. These provisions aim to prevent impunity and deter specific offences by guaranteeing that there is always a state that has jurisdiction over such offences. However, to ensure the most effective repression of international crimes, it is not always sufficient merely to oblige contracting states to provide for the legislation prohibiting a certain act. This is particularly so in some states where prosecutors are not always obliged to institute criminal proceedings if given a notice that a crime is alleged to have occurred. In such a case, a state may fully comply with its international obligation by adopting the required criminal legislation, but nonetheless fail to bring to justice alleged perpetrators of international crimes.⁹⁸

The most effective means of preventing international crimes and avoiding impunity is to set an international obligation to prosecute alleged perpetrators. If a state is internationally obligated to prosecute and punish the alleged authors of international crimes it may not enact national laws or enter into international agreements granting amnesty for such crimes without breaching international commitments and being subject to international responsibility.⁹⁹ As a matter of fact, it would be appropriate for other states having jurisdiction over those crimes to refuse to recognize the validity of the state’s national legislation and actions, and to initiate their own proceedings against the alleged perpetra-

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ However, one must keep in mind that compliance with international law and with the fundamental principles of the international community as a whole relies on the good will of each state. The notion of countermeasures may contribute towards compliance with and the enforcement of international law. See *State Responsibility In International Law*, Paraschiv, Daniel-Stefan in *Geopolitics, History and International Relations*; Woodside Vol. 5, Iss. 1, (2013), pp. 154-159.

tors. Second, in states where prosecutors enjoy the aforementioned discretionary powers the obligation to exercise criminal jurisdiction would make judicial penal action by prosecutors mandatory. Third, there may be rules of international law establishing an international obligation to prosecute on the basis of legal grounds not already included in national systems; for instance, universality. Such rules may have self-executing character offering jurisdictional grounds for penal action: where national legislation contains a provision expressly referring back to international law by providing that national courts may exercise jurisdiction on any legal ground (e.g. universality) provided for in an international treaty. Several multilateral treaties addressing international crimes, as well as the proposed treaty on crimes against humanity in its Article 10, impose an obligation to exercise criminal jurisdiction.¹⁰⁰

3.2.2.2 The Safety Net: Extradition

In case a state does not prosecute a person suspected of crimes against humanity, the proceedings ought to be started in another state or tribunal to avoid impunity. Inter-state cooperation in criminal matters comprises of provisions that support criminal proceedings in a different forum. In international crimes, such as crimes against humanity, inter-state cooperation is essential for the effective enforcement of responsibility. The proposed treaty recognizes this and provides for the horizontal cooperation (see more about the horizontal relationship in chapter 4.4) with states in Article 14 in order to give effect to the treaty's provisions.¹⁰¹

In 1973, the General Assembly of the United Nations in its resolution 3074 (XXVIII) of 3 December 1973 highlighted the importance of international cooperation in the extradition of persons who have allegedly committed crimes against humanity, where necessary to ensure their prosecution and punishment. In that context, the General Assembly stated that “States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes

¹⁰⁰ *Ibid*, p. 285.

¹⁰¹ Olson 2011, p. 329.

and, if they are found guilty, in punishing them” (para. 4). Furthermore, “[p]ersons against whom there is evidence that they have committed ... crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall cooperate on questions of extraditing such persons” (para. 5). Also, “States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of ... crimes against humanity” (para. 8). In 2001, the Sub-Commission on the Promotion and Protection of Human Rights reaffirmed the principles set forth in General Assembly resolution 3074/102 and urged “all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity”.¹⁰³

Without a specific bilateral treaty or national legislation on extradition most states cannot extradite. To remove this obstacle, the proposed treaty provides clearly that crimes against humanity are to be considered an extraditable offense. To eliminate the variances, inconsistencies and ineffectiveness in extradition, the proposed treaty in itself establishes the legal basis for extradition for crimes against humanity. This also assists in addressing the problem that approximately half of the states do not have legislation containing provisions on extradition, and even if they do, it does not necessarily include crimes against humanity.¹⁰⁴

¹⁰² Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, resolution 2001/22 of 16 August 2001, Fifty-third session (E/CN.4/SUB.2/RES/2001/22), para. 3.

¹⁰³ *Ibid.*, para. 2.

¹⁰⁴ Olson 2011, p. 329.

3.2.2.3 The Customary Law Requirements for Extradition

Even though the requirements for extradition vary, according to customary law two requirements are necessary: double (or dual) criminality¹⁰⁵ and the principle of speciality. The first requirement sets forth that the crime charged in the requesting state must also be found in the criminal laws of the requested state. In this regard, the Commission decided that there was no need to include in the draft articles a dual criminality requirement, such as appears in Article 46, paragraph 9, of the 2003 United Nations Convention against Corruption. The draft articles on crimes against humanity define crimes against humanity in draft Article 3 and, based on that definition, mandate in draft Article 6, paragraphs 1 to 3, that the “offences” of “crimes against humanity” exist under national criminal laws of each state. As such, dual criminality should automatically be satisfied in the case of a request for mutual legal assistance under the draft articles.¹⁰⁶

The second requirement provides that a person who has been extradited from one country to another may only be prosecuted on the charges for which he was extradited. However, crimes against humanity are often jointly committed with war crimes and genocide.¹⁰⁷ Perhaps for such special nature of international crimes, and the *aut dedere aut judicare* obligation accompanying them, there is no provision implementing the principle of speciality in the proposed treaty.

In addition, grounds for refusal remain great obstacles to extradition, such as charges considered to be political. Political offenses are often considered as mandatory grounds for refusal of extradition, which creates an issue with crimes against humanity that often are the result of a state policy. Therefore, to avoid abuse of this exclusion, crimes

¹⁰⁵ Whereas double criminality has generally been considered to concern the substantive crime, the *Pinochet* case raised another aspect of double criminality: “jurisdictional double criminality”. Pinochet’s counsel argued that certain charges, particularly those relating to torture and conspiracy to torture, were not extradition crimes because at the time of their commission there was no jurisdiction in the United Kingdom for such crimes *committed abroad*. See Christine M. Chinkin, International Decision, United Kingdom House of Lords, (Spanish request for extradition), *Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3). [1999] 2 WLR 827, 93 AM. J. INT’L L. 703 (1999).

¹⁰⁶ U.N. Doc. A/72/10, p. 109.

¹⁰⁷ Olson 2011, p. 329.

against humanity must be clearly and expressly excluded from being regarded as political offence or having a connection with a political offence. The draft treaty solves the issue with Article 13, paragraph 2; “[f]or the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives”. Finally, it must be recalled that extradition is always restricted by the principle of non-refoulement.¹⁰⁸

3.2.2.4 The Need for Judicial Assistance

If a crime was not committed on the prosecuting state’s territory, it is likely to need judicial assistance in order to prosecute. The assistance is usually necessary, *inter alia*, with regard to witness testimony, physical evidence or the freezing of assets. Traditionally this happened through “letters rogatory” between the concerned states. However, the process usually takes a long time, with no obligation on the requested state to accept and with no guarantee that the evidence is in a form useful for the proceedings. To overcome some of these obstacles, in the 1960s states started to conclude bilateral and regional legal assistance treaties. Nevertheless, the number of such treaties has remained low, as is the number of states having domestic legislation addressing judicial cooperation. Therefore, to be effective at combatting impunity, the proposed treaty on crimes against humanity is necessary to guarantee and expedite effective fulfillment of requests of one state courts to those of another.¹⁰⁹ During the Sixth Committee debates in 2015 and 2016, states expressed the view that provisions on mutual legal assistance for crimes against humanity at the international level were lacking and should be included in the proposed treaty.¹¹⁰

Article 14, paragraph 1 of the proposed treaty provides for mutual legal assistance, setting forth that “[s]tates shall afford one another the widest measure of mutual legal as-

¹⁰⁸ Sliedregt 2011, pp. 229-332.

¹⁰⁹ Olson 2011, p. 336.

¹¹⁰ See, for example, Switzerland, Official Records of the General Assembly, Seventieth session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22), paragraph 20; and the Netherlands, Official Records of the General Assembly, Seventy-first session, Sixth Committee, 26th meeting (A/C.6/71/SR.26), para 40.

sistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article”, and continuing with more detailed provisions on the assistance.

Mutual legal assistance treaties include essentially similar exclusions as found in extradition treaties dealt with above, such as double criminality and speciality. These requirements can raise difficulties in effective legal assistance and enforcement.¹¹¹

However, the proposed treaty provides an exhaustive list of bases on which mutual legal assistance may be refused. Most of the reasons seem to be heavily influenced by the necessity to make political compromises, such as the ones provided in paragraph 8, subsections b-d of the Annex to the proposed treaty:

- (b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
- (c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- (d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

In developing the draft articles on mutual legal assistance, guidance was found in existing treaties that address a specific type of crime, such as torture or corruption. Draft Article 14 and the draft annex are modelled on Article 46 of the 2003 United Nations Convention against Corruption, with some modifications. As a structural matter, the Commission considered it useful to include provisions applicable in all circumstances, while also setting forth provisions that only apply when there is no mutual legal assistance treaty between the requesting and requested state or when application of the draft annex is otherwise deemed useful to facilitate cooperation. This approach was considered to

¹¹¹ Olson 2011, pp. 336-337.

create balance in the draft articles, while grouping together in a single place provisions applicable only in certain situations.¹¹²

3.2.2.5 Legal Assistance According to the “Mini Legal Assistance Treaty”

International treaties on a specific crime usually either include a less detailed ‘short-form’ article or a more detailed ‘long-form’ article on mutual legal assistance. Both forms constitute the core obligation to cooperate, but the ‘long-form’ offers more on how such cooperation operates.¹¹³ The proposed treaty includes detailed articles on mutual legal assistance that incorporate, inter alia, the purposes for which assistance may be requested, the grounds for refusal, designation of a central authority to handle requests, and the procedures for making a request. Such exact provisions help ensure that states can successfully and effectively assist one another. In fact, these articles actually create a “mini legal assistance treaty” within the larger treaty.¹¹⁴ This is especially useful in case the two states concerned have no other multilateral or bilateral legal assistance treaty in force between them. Simultaneously, the proposed treaty welcomes other treaties on the topic; States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article (Article 14, paragraph 5).

One of the biggest challenges with regard to inter-state cooperation concerns evidence. The proposed treaty provides that “[m]utual legal assistance shall be afforded to the fullest extent possible *under relevant laws, treaties, agreements and arrangements of the requested State* with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable in accordance with draft Article 6, paragraph 7, in the requesting State” (emphasis added). This approach is contrary to the more common one where the law of evidence to be applied is the law of the forum state. Recognizing the validity of evidence gathered by an-

¹¹² U.N. Doc. A/72/10, p. 111.

¹¹³ Third report on Crimes Against Humanity, pp. 44-45.

¹¹⁴ Olson 2011, p. 337.

other state that may have different legal standards and procedures may pose constitutional and other difficulties for state implementation. This approach is particularly challenging for common law countries, where the defense intensely tests the prosecution's evidence. Including a provision whereby the requested state ought to honor specific conditions on, for example, the gathering of evidence asked by the requesting state might ease the complications with foreign-obtained evidence.¹¹⁵

3.2.2.6 Forum Conveniens

In certain cases, it may be favorable for a state to transfer criminal proceedings to another state. Such circumstances may occur if the transferee state has more significant contacts with the parties, and is therefore a *forum conveniens*, or on the contrary, the transferring party is a *forum non conveniens*, or for public policy reasons to best achieve justice.¹¹⁶ According to Cherif Bassiouni, “[t]ransfer of criminal proceedings is therefore a way of avoiding the prospects of impunity, facilitating the prosecution of multi-state complex crimes, resolving conflicts between states arising out of political considerations relating to a given case, and serving the interests of justice”¹¹⁷.

Naturally, states are not required to accept transfer of criminal proceedings without the mandate of a treaty or national legislation. On a regional level there is a comprehensive treaty, the 1972 European Convention on the Transfer of Criminal Proceedings in Criminal Matters¹¹⁸, the form of cooperation of which is often referenced in international criminal law treaties¹¹⁹. The convention proposed by the Crimes Against Humanity Initiative provides various permissible reasons for transferring criminal proceedings¹²⁰, but the Commission has not, at least not thus far, included this form of cooperation in its work.

¹¹⁵ *Ibid.*, pp. 338-339.

¹¹⁶ *Ibid.*, p. 340.

¹¹⁷ Bassiouni 2008, p. 515.

¹¹⁸ Olsen 2011, p. 340.

¹¹⁹ See e.g. UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 8, opened for signature Dec. 20, 1988, U.N. Econ. & Soc. Council, U.N. Doc E/CONF.82/15.

¹²⁰ Proposed Convention, Annex 4.

3.2.3 Cooperation Between the ICC and States

3.2.3.1 The Feeble Obligation to Cooperate

Dealing with crimes against humanity cannot be left to the International Criminal Court alone. For international criminal tribunals such as the International Criminal Court, state cooperation is crucial for the effectiveness of judicial process as there is no enforcement agencies at its disposal. Even if there were, they would not be empowered to perform certain acts within the jurisdiction of a sovereign state.¹²¹ It follows that in order to operate the International Criminal Court must turn primarily to state authorities and request them to take action to assist the court's officers and investigators: without the assistance of other authorities, they cannot seize evidentiary material, compel witnesses to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants. A great challenge for the international justice system is to establish, sometimes in hostile or chaotic environments, processes where both the prosecution and the defence have a reasonable opportunity to collect evidence and to obtain the arrest and surrender of the persons accused.¹²²

Article 86 of the Rome Statute states that "State Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes" within its jurisdiction. However, the obligation to cooperate is limited to forms of cooperation laid out in Part IX of the Rome Statute. Although the forms of cooperation set out in Article 93 are broad and cover the needs of most investigations, there is no obligation to cooperate in unforeseen circumstances.¹²³

The ICC prosecutor may bypass the usual obligation of making 'requests' and take direct action in only two circumstances, pursuant to Article 99(4). First, when a state party is 'clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request'.

¹²¹ Sluiter 2009, p. 187.

¹²² Cassese 2013, p. 298.

¹²³ *Ibid.*, pp. 303-304.

This provision is addressed to a situation where the government machinery has become dysfunctional or been displaced by a rebel force, and thus requires inability and unavailability. Second, the prosecutor, without judicial authorization, may execute a request that does not require ‘compulsory measures’ under three conditions: I) the act is ‘necessary for the successful execution’ of the request; II) the act does not ‘prejudice [...] other Articles in this Part’; and III) ‘all possible consultations’ have been made with the state. For example, an interview with a willing witness in the absence of state authorities could be such a measure. However, state parties are authorized under Regulation 108 of the International Criminal Court Regulations to challenge the action, which concurrently suggests that the action may need to be disclosed to the state first. Furthermore, the immunity of International Criminal Court staff depends either on the state agreeing to the separate International Criminal Court convention on immunities, or upon a grant of immunity by the Security Council.¹²⁴

The International Criminal Court’s request-based model reflects protection of the prerogatives of states. A further shortcoming is the absence of any express obligation of states to transfer a witness to appear before the Court, although they are required to comply with requests for the ‘taking of evidence, including testimony under oath’ (Rome Statute, Art. 93(1)(b)). Most likely, also in accordance with the dominant practice in the inter-state context, the states may be obliged to compel the appearance of a witness on its own territory (say, for a video-link appearance), but need not compel a transfer outside its territory.¹²⁵

The prosecutors and investigators of the International Criminal Court often find themselves operating on weak and challenging legal frameworks. On the other hand, a referral by the state itself normally implies that it wishes to cooperate fully, and a Security Council referral usually imposes obligations of cooperation independent of the Rome Statute. For example, in the conflicts in Darfur and Libya the Security Council resolutions have required the addressees to ‘cooperate fully and provide any necessary assistance’. On the other hand, the precise extent of these additional obligations remains un-

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

clear, and hopefully more precise resolutions in the future will enumerate such obligations. One much discussed disagreement is whether an arrest warrant arising from a Security Council referral prevails over any diplomatic immunity enjoyed under international law by a non-state party national wanted by the Court while visiting the territory of a state party. International Criminal Court Pre-Trial Chambers on the other hand does not seem to be in such doubt and have reported to the Security Council on the non-execution by state parties of warrants of arrest.^{126, 127}

3.2.3.2 The Ineffectiveness of the Rome Statute System

The treaty-making process that led to the adoption of the Rome Statute was a result of a state-oriented approach. As such, a few important points should be mentioned regarding the weaknesses of the state cooperation model. First, the Rome Statute lays down a general objective to cooperate (Article 86 a), though it serves as a general statement that is spelled out in several provisions. The specific enumeration of obligations to cooperate and the extensive legislative safeguards, as described above, are intended to restrict as much as possible the judicial power of interpretation of the duty to cooperate. In addition, the state parties can refuse to comply with any other type of assistance which is prohibited by their law (Article 93(1)).¹²⁸

Second, the Rome Statute does not specify whether the collecting of evidence, execution of summonses and warrants, etc. is to be executed by officials of the International Criminal Court prosecution with possible assistance of state authorities, or whether instead it will be for the state authorities to undertake those acts at the request of the prosecutor. Concluding from the requirement in the Rome Statute to comply with the requirements of national legislation, it seems that the framers of the Statute intended the latter. However, in practise much of the evidence gathered by the International Criminal

¹²⁶ See, e.g., Al-Bashir (Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya).

¹²⁷ Cassese 2013, pp. 303-304.

¹²⁸ *Ibid.*

Court has been collected directly by the Court investigators with the assistance of state authorities.¹²⁹

Third, the principle of complementarity and the general right of states to challenge the Court's jurisdiction and the admissibility of a case may obstruct or even prevent states' cooperation and the exercise of the Court's jurisdiction (Article 19(7)).¹³⁰

Fourth, it seems that the Rome Statute has left the dilemma of international versus national justice to the relevant states. In case of competing requests, i.e. a request for arrest and surrender of a person, from the Court, and a request for extradition from a state not party, the request from the Court does not automatically prevail. The state party may decide between the two requests when the state is bound by an extradition treaty with the requesting state (Article 90 (6) and (7)).¹³¹

Also, the Rome Statute substantially caters to state concerns by creating a national security exception to requests for assistance. Article 93(4) provides that 'a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security'. Article 72, which this provision refers to, forms a complex mechanism with formal modalities that is time-consuming and laborious.¹³²

Finally, in the event that the states do not cooperate, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. However, the Rome Statute does not specify any consequences of a Court's finding of non-cooperation by a state.¹³³

¹²⁹ Taylor 2017, p. 128.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Klamberg, pp. 550-552.

¹³³ *Ibid.*

3.2.4 The Weakness of National Laws

3.2.4.1 States as the Primary Forums

The relevant international rules on states' criminal jurisdiction over international crimes ought to take a more global and extensive approach. The customary international law confines itself to authorizing states to exercise criminal jurisdiction, provided such exercise does not collide with existing rules and principles of international law. Clearly, this regulation is too vague; in particular, it does not clarify which impediments under general international law may prevent the exercise of criminal jurisdiction by individual states. Also, if there is no treaty on the matter, customary international law does not clarify to what extent states may exercise extraterritorial jurisdiction without breaching international principles or rules. The weakness of customary international law is especially significant in the field on national repression of international crimes that are lacking a treaty, such as crimes against humanity; states are under no international obligation to establish criminal jurisdiction over these crimes, let alone exercise it, even if they have a territorial link with them.¹³⁴

Even if Article 7 on crimes against humanity in the Rome Statute reflects customary international law, there are many countries that will not prosecute or extradite someone solely on the basis of customary international law but insist upon having a national statute in order to prosecute someone.¹³⁵

The Rome Statute defines the International Criminal Court as “complementary to national jurisdictions”.¹³⁶ In other words, national jurisdictions are the primary forums for dealing with crimes against humanity. However, only few countries have enacted national legislation outlawing crimes against humanity, though many of the crimes are covered by other parts of their criminal code. The proposed treaty would provide a stepping stone for states to enact the law on crimes against humanity into their domestic

¹³⁴ *Ibid.*, pp. 289-290.

¹³⁵ Murphy 2015b, p. 9.

¹³⁶ Rome Statute, preamble and Article 1.

law.^{137, 138} The proposed Article 6 on criminalization under national law sets forth the necessary measures to ensure that crimes against humanity constitute offences under national criminal law.¹³⁹

3.2.4.2 The Lack of National Laws

Several studies have sought not just to compile the existence of national laws on crimes against humanity, but to analyse the scope of these laws both in terms of the substantive crimes and the circumstances in which jurisdiction may be exercised over such crimes.¹⁴⁰ In 2013, George Washington University conducted a study to identify the national laws of every country in the world on crimes against humanity. The clinic only managed to analyse about 83 countries, focusing on the ones that prior studies had claimed to possess laws on crimes against humanity. It found that of those 83 countries, only 34 actually had a national law on crimes against humanity, which means that many countries that are reported as having such a law do not in fact have one. Often the law referred to actually dealt with crimes, not crimes against humanity. This means only about 40% of these countries actually had a law on crimes against humanity.^{141, 142}

¹³⁷ Stanton 2011, pp. 356-357.

¹³⁸ In addition to other obstacles in spreading crimes against humanity into national laws, some states have faced difficulties in enacting crimes against humanity legislation without a treaty. One example is Sweden: although it adopted an International Criminal Court Cooperation Statute in 2002 and acts constituting crimes against humanity have long been prohibited under the Swedish criminal code, Sweden only adopted a specific criminal prohibition on crimes against humanity, aligning its code with the Rome Statute, in 2014. See Lag om straff för folkmord, brott mot mänskligheten och krigsförbrytelser (Svensk författningssamling [SFS] 2014:406) (Swed.); Lag om samarbete med Internationella brottmålsdomstolen (Svensk författningssamling [SFS] 2002:329) (Swed.).

¹³⁹ Draft Treaty on Crimes Against Humanity.

¹⁴⁰ First Report on Crimes Against Humanity, p. 31.

¹⁴¹ Carrillo and Nelson 2014, p. 483.

¹⁴² Crimes against humanity is included in the Criminal Code of Finland (39/1889). Chapter 11 Section 3 provides that a person who, as part of a broad or systematic assault on civilian population, (1) kills or enslaves another, subjects him or her to trade by offer, purchase, sale or rent, or tortures him or her, or in another manner causes him or her considerable suffering or a serious injury or seriously harms his or her health or destroys a population by subjecting it or a part thereof to destructive living condition or in another manner, (2) deports or forcibly transfers population lawfully residing in an area, (3) takes a person as a prisoner or otherwise deprives him or her of his or her liberty in violation of fundamental provisions of international law or causes the involuntary disappearance of a person who has been deprived of his or her liberty, (4) rapes another, subjects him or her to sexual slavery, forces him or her into prostitution, pregnan-

The study also looked into the definition of crimes against humanity to see if it corresponded with the one in the Rome Statute. The clinic found that, of the 34 countries that had a law on crimes against humanity, only 10 of them repeated Article 7 of the Rome Statute.¹⁴³ Instead, most of them had a statute which was not as thorough as, or significantly differed from the Rome Statute definition.¹⁴⁴ Therefore, only 10 out of the 83 countries studied had a national statute that replicated the Rome Statute definition.

In addition, the study looked into the circumstances in which the states exercise jurisdiction over persons when applying the national law. Most countries only exercise criminal jurisdiction over crimes that occur in the country's territory and some countries also exercise jurisdiction over their nationals if they commit crimes abroad (see chapter 3.2.1 for jurisdictional principles). The clinic determined that out of the 83 countries, only 21 allow for the exercise of jurisdiction in situations where the crimes against humanity occur outside its territory, by a non-national, but then the offender comes to the country's territory.¹⁴⁵ This being the case a state triggers potential jurisdiction before the International Criminal Court when joining the Rome Statute only with respect to crimes occurring in its territory or by its nationals.

The unevenness in national laws on crimes against humanity has significant consequences with respect to inter-state cooperation in the pursuit of sanctioning offences; if the respective national laws are not comparable, national legal systems usually do not allow for cooperation (see chapter 3.2.2.3 on the principle of dual criminality). Moreover, in the absence of national laws allowing for the exercise of jurisdiction over non-

cy or sterilization or commits other corresponding aggravated sexual violence against him or her, (5) engages in racial discrimination or persecutes a recognizable group or community on the basis of political opinion, race, nationality, ethnic origin, culture, religion or gender or on other comparable grounds, shall be sentenced for a crime against humanity to imprisonment for at least one year or for life. An attempt is punishable. Section 4 sets forth the aggravated crime against humanity: If in a crime against humanity (1) the offence is directed against a large group of persons, (2) the offence is committed in an especially brutal, cruel or degrading manner or (3) the offence is committed in an especially planned or systematic manner, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for an aggravated crime against humanity to imprisonment for at least eight years or for life. (2) An attempt is punishable.

¹⁴³ Carrillo and Nelson 2014, p. 493.

¹⁴⁴ *Ibid.*, p. 482.

¹⁴⁵ *Ibid.*, p. 508.

nationals for crimes against humanity committed against non-nationals abroad leads to offenders simply avoiding prosecution by moving to another state.¹⁴⁶

3.2.5 Is There Already a Treaty?

Those opposing a treaty on crimes against humanity might state that there is no normative gap as we already have a treaty on genocide. In fact, large-scale massacres of ethnic or religious groups were first criminalized as a subclass of the category of crimes against humanity. However, after the adoption of the Genocide Convention of 1948 and the following development of customary international law, genocide became a category of crimes *per se* with its own requirements for criminal liability. It is true that both crimes share at least three elements: I) both include very serious offences that shock our senses of humanity attacking the most fundamental aspects of human dignity; II) they are always part of a larger context, either because they are large-scale and massive infringements of human dignity or because they are linked to a broader practise of misconduct; and III) although they need not be perpetrated by state officials or by officials of entities such as insurgents, they are usually carried out with the complicity or at least the toleration of the authorities.¹⁴⁷

However, the objective and subjective elements of the two crimes vary in many ways. In terms of the objective element, the two crimes may fall under both categories: for instance, killing members of an ethnic or religious group. Yet crimes against humanity have a broader scope, for they may include acts that, as such, do not constitute genocide (for example, imprisonment and torture). By contrast, the subjective elements do not overlap, though the intent of seriously discriminating against members of a particular group is shared by both crimes. Genocide requires the intent to destroy a group, whereas it is only for crimes against humanity that knowledge of the widespread or systematic practise is required.¹⁴⁸ Also, genocide is often a difficult case to make.¹⁴⁹

¹⁴⁶ First Report on Crimes Against Humanity, p. 33.

¹⁴⁷ Cassese 2013, p. 127-128.

¹⁴⁸ *Ibid.*

¹⁴⁹ One of the most horrific examples of post-World War II crimes against humanity, referred to in the introduction to this thesis, was the Cambodian genocide from 1975 to 1979 when the

Among the three core international crimes¹⁵⁰ only crimes against humanity lack a treaty focused on building up national laws, national jurisdiction and inter-state cooperation in the fight against impunity.¹⁵¹ The draft treaty on crimes against humanity would, if adopted, provide a model for states to fill this lacuna.¹⁵²

3.2.6 Reinforcing International Criminal Law

A treaty on crimes against humanity could define the crimes universally, solidifying the definitions and providing a strong counterforce to the ambiguities of the definitions, thus curing the uncertainty in customary law. A new treaty is also needed for the purposes of extending the rule of law on crimes against humanity beyond the International Criminal Court and international tribunals, implanting consistent definitions of crimes against humanity into the laws of states around the world. This would in time develop a global body of case law and further define crimes against humanity.

The treaty could also provide means for inter-state cooperation in enforcement of the treaty and facilitate extradition and international judicial assistance by universalizing the

Khmer Rouge regime killed an estimated 1.7 – 2.5 million Cambodians. Gareth Evans, President of International Crisis Group, provides the chilling truth: “The beginning of wisdom for me on this subject was the realization, very early on, that for all its compelling general moral authority, the Genocide Convention had absolutely no legal application to the killing fields of Cambodia, which nearly everyone still thinks of as the worst genocide of modern times. Because those doing the killing and beating and expelling were of exactly the same nationality, ethnicity, race, and religion as those they were victimizing – and their motives were political, ideological, and class-based rather than having anything to do with the characteristics described in the Genocide Convention – the necessary elements of specific intent required for its application were simply not there”. See *Crimes Against Humanity and the Responsibility to Protect*, p. 3, in *Forging a Convention on Crimes Against Humanity*, ed. Leila Nadya Sadat, 2011, School of Law, Washington University in St. Louis.

¹⁵⁰ Also referred to as atrocity crimes. Traditionally these three include war crimes, genocide and crimes against humanity, and constitute the crimes within the International Criminal Court’s jurisdiction. However, as of 17 July 2018, the Court’s jurisdiction over crimes of aggression was also activated (See ICC-ASP/16/L.10, Draft resolution proposed by the Vice-Presidents of the Assembly, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017).

¹⁵¹ The other two being genocide and war crimes, regulated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and The Geneva Conventions of 1949 respectively.

¹⁵² Nolte 2017, p. 2.

law on crimes against humanity.¹⁵³ Detailed and specific provisions on inter-state cooperation in the areas of fair and effective investigations, prosecutions, and punishment of persons found guilty of crimes against humanity are vital. Retaining the definition of the Rome Statute's Article 7 would allow building on the consensus already existing between 114 state parties but should add substantial and detailed provisions on the obligations of states in carrying out the maximum *aut dedere aut judicare*.¹⁵⁴ The common body of law would also facilitate international cooperation in training law enforcement officers to enforce it.¹⁵⁵

Also, one of the arguments in favour of a new specialized treaty on crimes against humanity is its possible deterrence effect. Research results on deterrence effect in criminal law are contradictory, but it is relatively certain that the most important deterrence factor is the existence of a more or less functioning criminal system that entails the risk of detection and prosecution. A specialized treaty on crimes against humanity may have a positive impact on compliance and may deter future criminals.¹⁵⁶ An international convention on crimes against humanity would also increase pressure on governments that commit crimes against humanity and could offer provisions emphasizing states' obligations to prevent the occurrence or reoccurrence of such crimes. These crimes would be violating international law that will be part of *jus cogens* and customary international law.¹⁵⁷ While crimes against humanity may not entirely disappear as a result of a specialized treaty, it would send a signal among the potential criminals.¹⁵⁸ International criminal law conventions have seldom addressed issues of prevention, which a new treaty could do."¹⁵⁹

The normative gap that presently exists in the international legal framework should be filled. From the end of WWII until 2008 there were some 310 conflicts that generated an estimated 100 million victims, and crimes against humanity have been committed in

¹⁵³ Stanton 2011, pp. 356-357.

¹⁵⁴ Bassiouni 2011, p. 58.

¹⁵⁵ Stanton 2011, pp. 356-357.

¹⁵⁶ Ambos 2011, p. 296-301.

¹⁵⁷ Stanton 2011, pp. 356-357.

¹⁵⁸ Ambos 2011, p. 296-301.

¹⁵⁹ Bassiouni 2010, p. 591.

all these conflicts.¹⁶⁰ Charges for crimes against humanity were never brought against all perpetrators of the crime.¹⁶¹ Having a comprehensive and enforceable convention on crimes against humanity is the foundation of preventing such crimes and avoiding impunity.¹⁶² Therefore, the implementation of the draft treaty on crimes against humanity would be the next logical step in the progressive development of international criminal law.¹⁶³ As Mr Cherif Bassiouni put it, “the need for a convention on crimes against humanity is both essential and urgent”.¹⁶⁴

¹⁶⁰ Bassiouni 2011, p. 58.

¹⁶¹ Bassiouni 2011, p. 51.

¹⁶² Cassese 2013, p. 285.

¹⁶³ Murphy 2015b, p. 5.

¹⁶⁴ Bassiouni 2011, p.58.

4 THE RELATION BETWEEN THE ICC AND THE PROPOSED TREATY

4.1 Complementarity

4.1.1 Concurrent Jurisdiction and the Constitutive Instruments

Which court should take precedence when international and national court have concurrent jurisdiction, and under what conditions? The problem arises when one or more states may assert their criminal jurisdiction over a specific crime on the basis of one of the accepted heads of jurisdiction, as described above (see chapter 3.2.1), and at the same time an international criminal court is empowered to adjudicate the same crime by virtue of its constitutive instrument.¹⁶⁵

There are no rules of customary international law to resolve this matter. When no treaty rules directly address the possible conflict of jurisdiction between states, conflicts between national and international criminal courts are addressed by the constitutive instruments of the relevant international criminal court. These instruments also address the matter of judicial cooperation between states and the relevant international criminal court. Specifically, they lay down the powers of the relevant international criminal court to issue requests of cooperation to states as far as investigation, arrest, surrender of suspects, etc., are concerned, and lay down the corresponding obligations of states in this respect.¹⁶⁶

4.1.2 Complementarity in the Rome Statute

4.1.2.1 The Priority of National Courts

The coordination of concurrent jurisdiction between the International Criminal Court and national courts over a specific case is based on the principle of complementarity. This principle is laid down in the preamble of the Rome Statute: "...the International

¹⁶⁵ Cassese 2013, p. 291.

¹⁶⁶ *Ibid.*

Criminal Court established under this Statute shall be complementary to national criminal jurisdictions...” and is spelled out in Articles 15, 17, 18, and 19. Simply put, the Court is barred from exercising its jurisdiction over a case, and must declare it inadmissible whenever a national court asserts its jurisdiction over the same person(s) for the same crime and I) under its national law the state has jurisdiction; and II) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in a proper manner, not to prosecute the persons concerned.¹⁶⁷ In addition, the Court III) may not prosecute and try a person who has already been convicted of or acquitted by another court with respect to the same conduct, if the trial was fair and proper (*ne bis in idem*)¹⁶⁸ Thus, the Court does have jurisdiction over a case and to override national criminal jurisdiction whenever the state is unable or unwilling to genuinely carry out the investigation or prosecution, or its decision not to prosecute the person concerned has resulted from its unwillingness or inability to genuinely prosecute that person. If the state, for whatever reason, chooses not to investigate or prosecute, the case is admissible before the International Criminal Court.¹⁶⁹

The key word ‘complementarity’ is a term that does not appear anywhere in Statute, other than in its preamble as described above. The term may be somewhat misleading since the relationship between international and national justice is often far from ‘complementary’ — rather the two systems work in opposition. In fact, professor James Crawford, the rapporteur of the International Law Commission at the time of drafting the Rome Statute, has said that the word ‘complementarity’ was chosen because ‘subsidiarity’ had already been taken by the European Union.¹⁷⁰

By the principle of complementarity national systems are given priority in terms of resolving their own human rights problems and only if they fail to do so may the International Criminal Court proceed. However, the term ‘positive complementarity’ has emerged, by which a more collaborative relationship is encouraged.¹⁷¹

¹⁶⁷ See Article 17 of the Rome Statute.

¹⁶⁸ See Article 20 of the Rome Statute.

¹⁶⁹ Cassese 2013, pp. 296-298.

¹⁷⁰ Schabas 2017, pp. 171-172.

¹⁷¹ *Ibid.*, p. 171.

4.1.2.2 ‘Unwillingness’ and ‘Inability’

The important concepts linked to complementarity, ‘unwillingness’ and ‘inadmissibility’, are clarified in Article 17(2) and (3). A state may be considered unwilling when: I) the national authorities have undertaken proceedings for the purpose of shielding the person concerned from criminal responsibility; or II) there has been an ‘unjustified delay’ in the proceedings showing that the authorities have no intent to bring the person concerned to justice; or III) the proceedings are not being conducted independently or impartially or in any in general in a way showing the intent to bring the person to justice. A state being ‘unable’ refers to situations where there is a collapse of judicial system and the state is not able to I) detain the accused or to have him surrendered by the authorities or bodies that hold the person in custody; or II) to collect the necessary evidence; or III) to carry out criminal proceedings. One should also add cases where the national court is unable to try a person on account legislative obstacles, such as amnesty law, or a statute of limitations, making it impossible to start the proceedings.¹⁷²

Although Article 17 indicates admissibility if a state is ‘unwilling’ or ‘unable’ to investigate or prosecute, the Court has made a comment about a third condition, not explicitly discussed in the provision. Where a state is ‘inactive’, the Court has taken the view that an examination of the issues of inability or unwillingness is not necessary.¹⁷³ According to the Appeals Chamber:

[I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are on-going investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to

¹⁷² Cassese 2013, pp. 296-298.

¹⁷³ Schabas 2017, p. 175.

put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to Article 17(1)(d) of the Statute.^{174, 175}

4.1.2.3 The Extent and Rationale of Complementarity

According to Article 18(1), in addition to the state parties to the Rome Statute complementarity also applies to states not parties. Also, complementarity applies regardless of the trigger mechanism of the Court's proceedings; when the case has been brought to the Court by a state party (Articles 13(a) and 14): or it has been initiated by the prosecutor's own motion, given that the prosecutor has been authorized by the Pre-Trial Chamber to commence a criminal investigation (Articles 13(c) and 15); and when it is the UN Security Council that has referred to the Court a situation in which one or more of the crimes falling under the Court's jurisdiction appears to have been committed (Articles 13(b) and 52(c)).

The principle of complementarity and the general right of states to challenge the International Criminal Court's jurisdiction may obstruct or even prevent states' cooperation and the exercise of the Court's jurisdiction.¹⁷⁶ However, the Court's complementarity to the criminal jurisdiction of national courts has several advantages. It saves the Court from drowning in cases from all over the world as its capacity does not allow for a large amount of cases. In any case, it seems natural to leave the majority of international crimes to be dealt with at national courts that may properly exercise their jurisdiction based on a link with the case.¹⁷⁷

¹⁷⁴ "Having regard to paragraph 10 of the preamble and Article 1, the Court shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court."

¹⁷⁵ Katanga et al. (ICC-01/04-01/07 OA 8), Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial by Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78.

¹⁷⁶ Article 19(7) of the Rome Statute.

¹⁷⁷ Cassese 2013, pp. 296-298.

National courts are usually in a better position in finding evidence and to control the accused. Also, complementarity resonates better with state sovereignty and could better achieve the goals of accountability.¹⁷⁸

4.1.2.4 The Procedural Article 90 and the Intended Harmony

In the event that a state party to the Rome Statute receives a request for the surrender of a person to the International Criminal Court and also from another state for extradition of the person pursuant to the proposed treaty, Article 90 of the Rome Statute provides a procedure to resolve the competing requests. The proposed treaty should be drafted so that state parties to the Rome Statute can follow that procedure even after joining the treaty on crimes against humanity.¹⁷⁹

While the International Criminal Court is a key international institution for prosecution of high-level persons who commit crimes against humanity, the Court was not designed nor given the resources to prosecute all persons responsible for such crimes. Instead, the Court is founded on the idea that, in the first instance, national jurisdictions are the proper place for prosecution assuming that appropriate national laws are in place.¹⁸⁰

The proposed treaty on crimes against humanity is intended to work in harmony with the Rome Statute and to help support the overall mission of the International Criminal Court by strengthening the functioning of the national jurisdictions.¹⁸¹ According to Special Rapporteur Murphy's views in his first report on crimes against humanity, "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 International Criminal Court."¹⁸²

¹⁷⁸ *Ibid.*

¹⁷⁹ Murphy 2015, p. 307.

¹⁸⁰ *Ibid.*, p. 308.

¹⁸¹ International Justice Resource Center.

¹⁸² First Report on Crimes Against Humanity, p.10.

4.1.3 The Requirement of Concordance

The issue of concordance between crimes in national criminal justice and the Rome Statute has been a topic of much debate and is a prerequisite for complementarity. Pre-Trial Chamber I has implied that States should implement the crimes as they are spelled out in the Rome Statute and that it is not enough to prosecute the underlying ‘ordinary’ crimes, such as murder or rape.¹⁸³

This issue was also present in the *Lubanga* case¹⁸⁴, where the question was whether the national courts could prosecute the specific offence of enlistment of child soldiers when the International Criminal Court was proceeding to deal with genocide and crimes against humanity. Unfortunately, the matter was not covered in the Court’s ruling, but there are good arguments as to why the mechanistic comparison of charges might be too strict. If the purpose is to address impunity, the fact that an offender is being held accountable for serious crimes should satisfy the requirements of international law. In this context, the absence of crimes against humanity in many national criminal laws weakens the functioning of the principle of complementarity. Through the proposed treaty states could incorporate the Rome Statute crimes against humanity within national law and promote complementarity.

4.1.4 Problems Related to International Trials

International criminal courts present a number of advantages over domestic courts, particularly those sitting in the territory of the state where atrocities have been committed. However, for all the merits of international trials, there are numerous and grave problems related to such trials that support complementarity. As noted above in chapter 3.2.3.1, the crucial problem international courts face is the lack of enforcement agencies directly available to those courts for the purpose of collecting evidence, searching premises, seizing documents, or executing arrest warrants and other judicial orders. As a re-

¹⁸³ Situation in Libya, Pre-Trial Chamber I, para 41.

¹⁸⁴ Lubanga case.

sult, international courts rely heavily on the cooperation of states and are dependent on international diplomacy and states' good will.¹⁸⁵

Also, there is a need for international criminal courts to merge the different approaches of judges that come from a different cultural and legal background. Another serious problem is the excessive length of international criminal proceedings, which primarily results from the inherent difficulties of international proceedings. These rise, for instance, from the complexity of such crimes as crimes against humanity, which normally is a manifestation of collective criminality and involves several persons; the difficulty of collecting evidence that may be scattered over large territories and several states; the need to prove some special ingredients of the crimes charged, such as the existence of a widespread or systematic practice for crimes against humanity; and language problems.

The adoption of the adversarial system further slows down the proceedings and the inquisitorial system feature of keeping the accused in custody both in the pre-trial phase and during trial and appeal are hardly consistent with the right to a 'fair and expeditious trial' and the presumption of innocence. Another major flaw of international trials is that the courts can prosecute and try only those who bear the heaviest responsibilities for international crimes, the leaders or the high-ranking military officers. The thousands of people who have physically carried out murder, torture, rape, and other heinous acts remain unprosecuted. These perpetrators are the ones the survivors and the relatives of the victims would like to see held accountable.¹⁸⁶

4.2 Regulating Conflicts in the Proposed Treaty

Considering the draft treaty on crimes against humanity and its relationship to competent international criminal courts, several states in the Sixth Committee have stressed that the draft articles should avoid any conflict with the rights or obligations of states with respect to competent international tribunals. In addition, many states specifically

¹⁸⁵ *Ibid.*

¹⁸⁶ Cassese 2013, pp. 269-270.

mentioned the need to avoid any conflict with the Rome Statute of the International Criminal Court.¹⁸⁷

The draft articles have been written considering the objective to avoid any such conflicts. For example, draft Article 9 on *aut dedere aut judicare* allows a state to surrender the alleged offender to a “competent international criminal tribunal”. In this way, the state avoids conflict with draft Article 9 when there is an obligation to surrender.¹⁸⁸ In general, the draft articles have been designed to promote compatibility with the constituent instruments of competent international criminal tribunals. Perhaps the most important factor in this sense is the draft Article 3 that includes the identical definition of “crimes against humanity” with the one found in the Rome Statute.¹⁸⁹

There do not appear to be any conflicts between the rights or obligations of states introduced in the draft articles and their rights and obligations with respect to competent international criminal tribunals. Nevertheless, to avoid any possible unclarity, there would appear to be value in expressly addressing an unforeseen situation where a conflict might arise. Otherwise, in the event that a treaty is adopted based on the draft articles, a conflict between a state’s rights or obligations under that convention and its rights or obligations under a treaty establishing an international criminal tribunal might depend on which instrument is more recent (1969 Vienna Convention, Article 30).¹⁹⁰

Including an even broader provision in the draft articles relating to any conflict with other international or national law or instruments might be considered. In general, treaties concerning crimes in international law and human rights do not address the broad possibility of conflicts with other sources of rights and obligations. Most treaties are drafted taking into account conflicts provision-by-provision leaving any other possible conflicts to be resolved through the law of the treaties, as contained in the 1969 Vienna

¹⁸⁷ Third Report on Crimes Against Humanity, p. 92.

¹⁸⁸ *Ibid.*, p. 93.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

Convention on the Law of Treaties, customary international law, or other rules of international law addressing conflicts.¹⁹¹

Nevertheless, some treaties do contain general provisions on the possibility of conflicts between the treaty and other rules. For example, the Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment contains a “without prejudice” clause¹⁹² with respect to other treaties and national laws on the same crimes. Though such a provision addresses both international and national law, it does not contain any details on a situation where such law provides lower protection than the Convention.¹⁹³

However, certain treaties focus solely on the treaty’s relationship with international law, stating that nothing in the treaty “shall affect other rights, obligations and responsibilities of States under international law”. Article 19, paragraph 1 of the International Convention for the Suppression of Terrorist Bombings provides such a provision. Here, too, the provision does not expressly address a situation where other instruments provide lesser protection than the relevant convention.¹⁹⁴

In contrast, some treaties specifically address the situation where either international or national law provides lesser protection. Article 37 of the International Convention for the Protection of All Persons from Enforced Disappearance states: “Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in: (a) The law of a State Party; (b) International law in force for that State.” Hence, in a situation where other international or national law provides lesser protection, the relevant provisions of

¹⁹¹ Third Report on Crimes Against Humanity, p. 94.

¹⁹² Article 16, paragraph 2, of the Convention provides: “The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.”

¹⁹³ Third report on Crimes Against Humanity, p. 94.

¹⁹⁴ *Ibid.*

the International Convention for the Protection of All Persons from Enforced Disappearance take precedence.¹⁹⁵

The possibility of including a broad provision addressing potential conflicts was addressed during the process of crafting the draft articles. Nevertheless, the draft articles have generally been crafted to prevail over conflicting national law, except as otherwise specified in the context of particular draft articles. For example, draft Article 7, paragraph 3, provides that “[the] present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law”. Several proposed provisions also seek to calibrate the relationship between the present draft articles and other sources of law, such as Article 13 on extradition, Article 14 on mutual legal assistance and Article 12 on victims, witnesses and others.¹⁹⁶

A broad provision on potential conflicts might unintentionally undermine the present draft articles anytime they conflict with national law. For example, a provision allowing for the operation on national law whenever it is more conducive to mutual legal assistance might be viewed as allowing a state to deviate from the assistance afforded by states to one another under the draft Article 14. Therefore, as possible conflicts in context of specific issues have already been given attention in the draft articles, a broader provision was not included in the draft treaty.¹⁹⁷

4.2.1 Draft Article 15

4.2.1.1 Conflict with the Purpose of the Proposed Treaty on Crimes Against Humanity

When launching the International Law Commission’s project on crimes against humanity, the Commission considered how such a convention would relate to the Rome Statute. Given the large number of states that have adhered to it, a treaty on crimes against humanity should avoid any conflicts with the Statute.¹⁹⁸

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, pp. 94-95.

¹⁹⁷ *Ibid.*, p. 95.

¹⁹⁸ Murphy 2015, p. 307.

Several international treaties provide examples of provisions that attempt to address potential conflicts, whereby rights or obligations under one treaty supersede those arising under another.¹⁹⁹ Considering such examples and in light of the reference in draft Article 9 to “competent international criminal tribunal”, in Special Rapporteur Murphy’s third report the following draft Article 15 was proposed:

“In the event of a conflict between the rights and obligations of a State under the present draft articles and its rights and obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail.”²⁰⁰

The Commission considered the Special Rapporteur’s third report on the draft treaty on crimes against humanity in its meetings in May 2017. The relationship to competent international criminal tribunals was among the topics the third report focused on, and as such the matter was debated during the meetings.²⁰¹

The members of the Commission had several concerns regarding draft Article 15 on the relationship to competent international tribunals. To start with, the draft treaty had in general been written in a manner avoiding any conflict with states’ rights or obligations in relation to international criminal tribunals. As such there does not appear to be any conflict between the rules set forth in the draft articles and those set forth in the instruments establishing international criminal tribunals such as the Rome Statute. It also seems unlikely that such a conflict would arise, given that the subject matter of the draft articles was to facilitate jurisdiction on the national level.²⁰²

It seems that draft Article 15 was written with the Rome Statute in mind, though other international criminal tribunals might well be established in the future. The Rome Stat-

¹⁹⁹ See ex. Article 103 of the UN Charter.

²⁰⁰ Third report on Crimes Against Humanity, pp. 93-96.

²⁰¹ The ILC held its sixty-ninth session at the United Nations Office at Geneva from 1 May to 2 June and from 3 July to 4 August 2017 and considered the third report in its 3348th to 3354th meetings, held from 1 to 9 May 2017. See U.N. Docs A/CN.4/SR.3348, A/CN.4/SR.3349, A/CN.4/SR.3350, A/CN.4/SR.3351, A/CN.4/SR.3352, A/CN.4/SR.3353, A/CN.4/SR.3354.

²⁰² U.N. Doc. A/CN.4/SR.3352, p. 12.

ute itself had been based on the principle of the primacy of national jurisdiction (see more about complementarity in chapter 4.1.), and it seems that the proposed draft Article 15 is in direct conflict with that principle. It was maintained that it was confusing to cover the principle of complementarity with a rule that seemed to contradict it and that it was inadvisable to override legal rules that would otherwise operate with respect to complicated issues concerning international tribunals.²⁰³

Draft Article 15 might in fact undermine the fight against impunity by prioritizing international criminal jurisdictions and the constitutive instruments of international criminal tribunals and leave room for interpretative confusion between the Statute and the proposed treaty on crimes against humanity.²⁰⁴ It is not altogether clear that the provisions of the constitutive instrument of an international criminal tribunal such as the Rome Statute should prevail.²⁰⁵

One reason why Article 15 was originally included in the draft was to ensure the integrity and primacy of state's obligations under the constitutive instruments of competent international criminal tribunals such as the Rome Statute of the International Criminal Court. There is naturally a need to ensure the draft articles do not conflict with the Rome Statute, but it is questionable whether draft Article 15 would properly address the concern.²⁰⁶ If the Commission wished to preserve the draft Article 15, it was proposed that the provision would be specified with certain conditions. One way of amending the provision could be to include a reference to the application of general principles. However, this raised concerns about what exactly such a standard meant and who would determine whether it was being met.²⁰⁷ It was also suggested that the reference to a "competent" international criminal tribunal could be clarified in the commentary so that such a tribunal must comply with the fundamental principles of international law.^{208, 209}

²⁰³ U.N. Doc. A/CN.4/SR.3348, p. 10.

²⁰⁴ U.N. Doc. A/CN.4/SR.3349, p. 5.

²⁰⁵ U.N. Doc. A/CN.4/SR.3348, p. 10.

²⁰⁶ U.N. Doc. A/CN.4/SR.3350, p. 5.

²⁰⁷ U.N. Doc. A/CN.4/SR.3354, p. 7.

²⁰⁸ U.N. Doc. A/CN.4/SR.3352, p. 6.

²⁰⁹ U.N. Doc. A/CN.4/SR.3349, p. 7.

The proposed wording draft Article 15 might deter some states from participating in the treaty.²¹⁰ On the other hand the draft Article might have the undesirable effect of discouraging further ratifications of the Rome Statute.²¹¹ The inclusion of the provision on the relationship might also complicate relations between parties and non-parties to the Rome Statute.²¹²

Many members of the International Law Commission expressed uncertainty about whether there was a need for Article 15 on the relationship to competent international tribunals or if it was appropriately formulated. The members rather seemed to have the opinion that the provision brought along several issues and was actually in conflict with the underlying purpose of the future treaty.²¹³ The consensus appeared to be that draft Article 15 seemed contrived²¹⁴ and the legal bases of on which the provision was founded on were considered unclear.²¹⁵

Summing up the discussion on his third report, Special Rapporteur Murphy stated that “[A]ttempting to find language dealing with the issue of unspecified and unknown conflicts carried risks that might not be offset by any great benefits. Existing treaties that dealt with crimes against humanity contained no such provisions and did not appear to encounter any difficulty in relation to international criminal tribunals.”²¹⁶

4.2.1.2 Support for the Inclusion of Draft Article 15

However, there is also support for the inclusion of draft Article 15 on the relationship to international criminal tribunals. In its Commentary to the Third Report on Crimes Against Humanity, Amnesty International supports the inclusion of draft Article 15 in the future treaty. It is of the view that there does not seem to be any conflicts between the obligations of states under the proposed treaty and the Rome Statute, but agrees to

²¹⁰ U.N. Doc. A/CN.4/SR.3351, pp. 3-4.

²¹¹ U.N. Doc. A/CN.4/SR.3353, p. 7.

²¹² U.N. Doc. A/CN.4/SR.3352, p. 12.

²¹³ *Ibid.*, p. 5.

²¹⁴ U.N. Doc. A/CN.4/SR.3351, pp. 3-4.

²¹⁵ *Ibid.*

²¹⁶ U.N. Doc. A/CN.4/SR.3354, p. 7.

the comment by Special Rapporteur Murphy in his third report that there might be value in expressly addressing an unforeseen situation where a conflict may arise. Amnesty International believes the draft Article is on the whole progressive and solves the question of potential conflict in the right direction. However, it is stated that draft Article 15 may be strengthened, as in its current wording it may allow a state party to the treaty on crimes against humanity to be relieved from some obligations under the treaty by adhering to another treaty whose provision may collide with fundamental principles of international law or human rights. Thus, an addition is suggested, one that requires that an international criminal court has been established in full accordance with fundamental principles of international law or in agreement with the general principles of law recognized by the community of nations.²¹⁷

4.2.2 The “Without Prejudice” Clause

In the course of drafting the articles some states expressed the desire for the draft articles not to conflict in any way with the rights or obligations of states with regard to competent international criminal tribunals²¹⁸ and suggested that the most appropriate way to preserve the integrity and universality of the Rome Statute might be a simple “without prejudice” clause. Such clauses have been used in other international instruments, such as in Article 10 of the 1998 Rome Statute, which reads: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.²¹⁹

A possible conflict arising between the obligations under the Rome Statute and the future treaty on crimes against humanity might be resolved on a case-by-case basis based on different rules of international law, treaty provisions or general principles of law.²²⁰ It was also suggested that the preamble could be expanded to contain a reference to the

²¹⁷ Amnesty Commentary to the Third Report on Crimes Against Humanity, pp. 24-25.

²¹⁸ U.N. Doc. A/CN.4/SR.3353, p. 5.

²¹⁹ U.N. Doc. A/CN.4/SR.3351, pp. 3-4.

²²⁰ *Ibid.*

Rome Statute, as was the case in the draft articles produced by the Crimes Against Humanity Initiative at Washington University.^{221, 222}

4.2.3 The Decision to Exclude an Explicit Provision

To conclude the topic on a provision regulation the relationship between the proposed treaty on crimes against humanity and the Rome Statute, the Special Rapporteur proposed, and the Drafting Committee agreed, that such a provision was not needed for several reasons. To begin with, no conflict had been identified. Also, there are several concerns regarding a provision that gives blanket priority to obligations arising with respect to all future international criminal tribunals. Furthermore, as many members of the International Law Commission pointed out, it is confusing for the principle of complementarity, which gives priority to national proceedings, to operate together with a rule that gives priority to international proceedings. The necessity of the provision was also questioned on the grounds that there are standard conflict rules in international law that can be applied in the unlikely event that a conflict arises. Therefore, the Drafting Committee decided to leave out the provision on the relationship to competent international criminal tribunals.²²³

4.3 The Significance of ICC Case Law

4.3.1 The Overall Significance

The creation of the International Criminal Court, the world's only permanent international court, is one of the most progressive advancements in the history international criminal justice. It has become a central network of international advocates, lawyers and non-governmental organizations committed to advancing international criminal justice, with over 120 states, a majority of the world's states, having ratified the Rome Statute.

²²¹ U.N. Doc. A/CN.4/SR.3353, p. 3.

²²² The preamble of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity states the following: "Recalling Article 7 *and other relevant provisions* of the Rome Statute of the International Criminal Court" (emphasis added).

²²³ Rajput 2017.

Principally, the International Criminal Court derives its authority from what it is, especially the principles it embraces and the commitments it stands for.²²⁴

In the words of the International Law Commission, the Rome Statute is primarily an adjectival and procedural instrument. It is not its function to define new crimes, nor is it the function of the Statute authoritatively to codify crimes under general international law.²²⁵ This approach welcomes the guidance of case law when it comes to the interpretation of the offence of crimes against humanity.

4.3.2 Crimes Against Humanity in ICC jurisprudence

The Rome Statute marked a big milestone for defining crimes against humanity, for no accepted definition existed, either as a matter of treaty or customary international law.²²⁶ The International Criminal Court case law that followed the codification forms significant jurisprudence and defines the substance on law on crimes against humanity, perhaps the most authoritative and widely referred to in the practise of states.

The 1998 Rome Statute's definition of crimes against humanity has been accepted by more than 120 States parties to the Rome Statute and is being used by several states in their national laws. According to Special Rapporteur Murphy, 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.²²⁷

Thus the Commission considered Article 7 of the Rome Statute an appropriate basis for defining such crimes in the draft Article 3 of the proposed treaty.²²⁸ The decision to establish the definition of crimes against humanity verbatim the text of the 1998 Rome

²²⁴ Vinjamuri 2018, p. 331.

²²⁵ Draft Statute for an International Criminal Court with commentaries, p. 36.

²²⁶ Sadat 2001, p. 148.

²²⁷ Murphy 2015, p. 307.

²²⁸ U.N. Doc. A/72/10, pp. 29-31.

Statute highlights the importance of the International Criminal Court's jurisprudence in the interpretation of the proposed treaty.²²⁹

The definition of "crimes against humanity" has been illuminated in the case law of the International Criminal Court.²³⁰ The contextual elements of crimes against humanity have been well established in several proceedings.²³¹ The structure of the definition can be divided into the 'chapeau elements' present in all crimes against humanity, and the list of acts that may, without prejudice to other acts, constitute crimes against humanity.²³² For example in the case of the situation in the Republic of Kenya the Chambers recognizes the following requirements that can be distinguished in all crimes against humanity: (i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack.²³³

The jurisprudence of the International Criminal Court has been especially valuable in further specifying the definition of crimes against humanity by considering the meaning the 'widespread or systematic' attack and the requirements related to the perpetrator.²³⁴ The widespread and systematic concepts play a screening role to determine the type of violence that should attract the interest, condemnation, and action of the international community.²³⁵ In the *Bemba* case²³⁶ the International Criminal Court held that the attack must be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'. Moreover, it held that the attack must be 'made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against any civilian population'. Therefore, the perpetrator's identity is not defined in terms of state or non-state nature nor the capacity to commit a variety of horrid acts, but the capacity to con-

²²⁹ Rome Statute, Article 7 v. Draft Treaty on Crimes Against Humanity, Article 3.

²³⁰ U.N. Doc. A/72/10, p. 31.

²³¹ See, for example, the *Bemba* case and the *Katanga* case.

²³² See chapter 1.2 for the full definition of crimes against humanity.

²³³ Situation in The Republic of Kenya, p. 84, para 79.

²³⁴ Bassiouni 2010, p. 585.

²³⁵ Jalloh 2013, p. 421

²³⁶ *Bemba* case.

trol an entire territory on which the attack occurs and thereby the people in that territory. The nature of the capacity makes the agent of a crime against humanity comparable to state or state-like entities.^{237, 238} As Article 7 of the Rome Statute does not provide for the inclusion of non-state actors, the approach leans on the judicially endorsed approach.²³⁹

Furthermore, several acts which initially were not listed as specific inhumane acts were qualified as 'other inhumane acts' in the case law of the International Criminal Court and were later codified as specific inhumane acts in the Rome Statute. Examples include sexual violence, forcible transfer of population, enforced prostitution, and the enforced disappearance of persons. The case law of the International Criminal Court can lead the way in including more heinous acts in the list of acts under Article 7 of the Rome Statute and thereby the identical draft Article 3 of the proposed treaty. Especially when a particular crime with unique characteristics has certain prevalence in conflict situations and is likely to reoccur, its inclusion in the crimes against humanity provision might be considered.²⁴⁰

Despite the specificity of the requirements of Article 7 of the Rome Statute, it must be considered that the Rome Statute was never meant to exactly define crimes against humanity but let it further develop through case law. However, there remains certain ambiguity in the jurisprudence on its interpretation.²⁴¹ Nevertheless, the case law of the International Criminal Court helps advice national authorities, especially courts, of the meaning of the definition, through which it promotes harmonization in approaches on national level. The relevant case law continues its evolvement over time.²⁴²

²³⁷ Zysset 2016, p. 250.

²³⁸ The actors committing crimes against humanity are increasingly non-state actors, often acting according to a group policy rather than state policy. At times, these policies are not part of a defined policy, but reflect a systematic pattern of conduct. See Bassiouni 2010, p. 585.

²³⁹ Bassiouni 2010, p. 585.

²⁴⁰ Haenen 2013, p. 822.

²⁴¹ Jalloh 2013, p. 421.

²⁴² U.N. Doc. A/72/10, p. 31.

4.4 Horizontal and Vertical Cooperation

The Rome Statute regulates matters between its states party and the International Criminal Court but does not regulate relations among the parties themselves or among parties and non-parties. In this sense, the Rome Statute is focused on the vertical relationship of states to the Court, but not the horizontal relationship of interstate cooperation. Part IX of the Rome Statute on International Cooperation and Judicial Assistance essentially states that interstate cooperation on crimes within the jurisdiction of the Court should be extended beyond the Rome Statute, but does not offer regulation on that cooperation.²⁴³

The Rome Statute does not include an obligation to prosecute or extradite between state parties. Some argue that crimes against humanity is a *jus cogens* crime²⁴⁴ and that there is an *erga omnes* obligation for states to prevent, prosecute, or extradite. However, this national obligation, stated to be part of customary international law obligation, is not evidenced in the practice of states. The only way to fill this gap is by having international obligations founded on a multilateral treaty such as the draft treaty on crimes against humanity.²⁴⁵

Currently, there is no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Thus, the cooperation occurs voluntarily as a matter of comity or, if they exist, through bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally. Although mutual legal assistance regarding crimes against humanity can take place through existing mutual legal assistance treaties, in many cases there is no such treaty between the requesting and requested states. When cooperation is needed with respect to crimes against humanity, there is often no legal framework in place to facilitate such cooperation.²⁴⁶

²⁴³ Murphy 2015, p. 307.

²⁴⁴ If nothing else, crimes against humanity are among the most frequently cited candidates for the status of *jus cogens*. See U.N. Doc. A/CN.4/L.682, para. 374.

²⁴⁵ Bassiouni 2010, p. 575.

²⁴⁶ U.N. Doc. A/72/10, p. 110.

The key to the effective fight against impunity is a well-functioning enforcement mechanism. Therefore, the proposed treaty on crimes against humanity could bridge gaps in enforcement by providing the badly needed provision on interstate cooperation in investigation and punishment of perpetrators of crimes against humanity. This would both fill a normative gap and provide critically important enforcement mechanisms.²⁴⁷

As noted above in chapter 3.2.2., inter-state cooperation is naturally linked to the notion that states have an obligation to prosecute. The obligation should be coupled with a true capability to prosecute, which necessarily involves prosecutions requiring interstate cooperation in the form of mutual legal assistance.²⁴⁸

Thus, the great value of the treaty on crimes against humanity would be the establishment of horizontal relationship between states. This would be the case with both the state parties to the Rome Statute, as well as non-party states that are expected to join the treaty. In so doing, the treaty is capable of establishing a connecting link between non-state parties and the International Criminal Court through the new and comprehensive mechanism of international cooperation in the prevention, investigation, prosecution and punishment of persons alleged and convicted perpetrators of crimes against humanity.²⁴⁹

The present draft articles address inter-state cooperation on the prevention of crimes against humanity, as well as on the investigation, arrest, prosecution, extradition and punishment in national legal systems of perpetrators of crimes against humanity. This objective is consistent with the Rome Statute, and contributes to the implementation of the principle of complementarity under the Statute.²⁵⁰

Thus, such a specialized treaty completes the missing parts of a universal scheme of accountability for crimes against humanity violations and reduces the gap of impunity that

²⁴⁷ Olson 2011, p. 323.

²⁴⁸ *Ibid.*, p. 324.

²⁴⁹ Bassiouni 2010, p. 589.

²⁵⁰ U.N. Doc. A/72/10, p. 22.

currently exists.²⁵¹ In filling this gap the draft treaty on crimes against humanity focuses on the adoption of national laws, building up the capacity of national legal systems and on inter-state cooperation, the horizontal relationship.²⁵²

²⁵¹ Bassiouni 2010, p. 589.

²⁵² U.N. Doc. A/72/10, p. 22.

5 CONCLUSION

There is a lacuna in international law that needs to be filled by a specialized treaty on crimes against humanity in order to build a true international community for the repression of atrocity crimes. While researching the topic, I reached the conclusion that at the core of this gap lies a certain 'trinity' that needs to function effectively for the gap to be filled; complementarity, the horizontal relationship between states and *aut dedere aut judicare*.

5.1 The ICC Cannot Stand Alone

The preamble to the Rome Statute provides that “the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution must be ensured by taking measures at the national level*”, and further “that it is *the duty of every State to exercise its criminal jurisdiction* over those responsible for international crimes” (emphasis added).

It is a widespread view that the adoption of the Rome Statute of the International Criminal Court was a great step forward in ending impunity for those guilty of violating international criminal law and crimes against humanity. Unfortunately, the impact of the Rome Statute is not as revolutionary as is often thought. While the work of the International Criminal Court is praiseworthy, without further support for domestic trials of crimes against humanity most perpetrators will go unpunished.

Additionally, not all states are parties to the Rome Statute. Even though Article 7 on crimes against humanity could be jurisprudentially interpreted by the Court to encompass non-state actors who have been the main perpetrators of such crimes, the limited capabilities of the International Criminal Court to reach state and non-state actors who commit these crimes remain an issue. The Court has demonstrated that it does not have, nor is it intended to have, the institutional capability and resources needed to prosecute all perpetrators of crimes against humanity in different conflicts occurring around the

world. Moreover, the Court is highly dependent on state cooperation and is a court of last resort.

5.2 Complementarity

The principle of complementarity governs the relations between national jurisdictions of states parties and the jurisdiction of the International Criminal Court. However, this principle is presently questionable because even some member-states have yet to include the crimes in the Statute in their national legislation. The fact that limited number of state parties have adopted specific national legislation on crimes against humanity within their respective criminal codes is clear evidence that complementarity cannot, at this point in time at least, be relied upon for the national prosecution of crimes against humanity. However, enhanced national enforcement is the most effective approach for the future.

The proposed treaty on crimes against humanity is written specifically to complement the Rome Statute with the goal of avoiding prejudice to the work of the International Criminal Court. In fact, the draft articles avoid any conflicts with the obligations of states arising under the constituent instruments of international or “hybrid” (containing a mixture of international law and national law elements) criminal courts or tribunals. Part IX of the Rome Statute on “International Cooperation and Judicial Assistance” assumes that inter-state cooperation on crimes within the jurisdiction of the International Criminal Court will continue to exist without prejudice to the Rome Statute, but does not regulate this cooperation. The present draft articles address inter-state cooperation on the prevention and punishment of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition, an objective consistent with the Rome Statute.

As a whole, the present draft articles contribute to the implementation of the principle of complementarity under the Rome Statute. The Rome Statute addresses the prosecution of persons for the crimes within their jurisdiction, not steps that should be taken by states to prevent such crimes before they are committed or while they are being commit-

ted. Indeed, the contribution of special importance which the proposed treaty would make is the observance of the principle of complementarity. It goes without saying that a robust criminal justice system at the national level in all states is an essential element for the proper functioning of our global society. In advancing this goal it is crucial that national law on crimes against humanity is as homogenous as possible, which is one of the improvements that the proposed treaty would offer.²⁵³

5.3 National Legislation and the Horizontal Relationship

Whereas the Rome Statute establishing the International Criminal Court regulates relations between the International Criminal Court and its states parties and creates a “vertical” relationship, the focus of the proposed treaty is on the adoption of national laws and on inter-state cooperation, the horizontal relationship. As such, compared to the Rome Statute, the proposed treaty on crimes against humanity is a very different type of treaty – the missing piece.

As most states do not appear to have domestic legislation on crimes against humanity, one important aspect of the proposed treaty is that it imposes an obligation for states to prohibit crimes against humanity in their domestic penal codes. A new treaty on crimes against humanity could guide states in adopting domestic legislation and could expedite this process, both among states parties to the Rome Statute and non-states parties. The new treaty could expand the global reach of crimes against humanity prosecutions beyond just the states parties to the Rome Statute or to the new treaty itself. With the establishment of a basis for universal jurisdiction over crimes against humanity a state would be enabled to prosecute offenders found on its territory even if the offender’s state of nationality is party neither to the Rome Statute nor the proposed treaty. Additionally, a state that prohibits crimes against humanity pursuant to the new treaty would be able to use existing legal tools to pursue cooperation with non-states parties to the proposed treaty. Without further support for domestic trials of crimes against humanity, most perpetrators will go unpunished.

²⁵³ Corell 2015, p. 5.

Treaty provisions clearly establishing the mechanisms for inter-state enforcement are essential for combatting impunity with regard to crimes against humanity. Implementation of state obligations is crucial for an effective mechanism, together with technical assistance and capacity building to ensure that enforcement provisions adopted in a treaty are effective in practice. Therefore, the proposed treaty providing these means could be broadly effective in combatting impunity.

5.4 Aut Dedere Aut Judicare and Judicial Assistance

The *obligation* to prosecute or extradite is a necessary element in ensuring there is always a state that has jurisdiction over offences against international crimes and that perpetrators of such crimes are brought to justice. Considering the nature of crimes against humanity prosecuting the perpetrators might present several challenges. Bringing a national leader to justice might prove to be a politically difficult case. Also, there is unwillingness to take on international cases on crimes against humanity committed by non-nationals against non-nationals abroad when the perpetrator resides on the state's territory. Therefore, in some cases extradition might prove to be the best and only way of bringing the perpetrators to justice.

Most states require a treaty or national legislation in order to extradite, but problematically approximately half of the states do not have legislation containing provisions on extradition. To eliminate the need for a treaty or national legislation, the proposed treaty itself establishes the legal basis for extradition for crimes against humanity. As crimes against humanity often are a result of a state policy, it is welcomed that in the proposed treaty political offenses are expressly not grounds for refusing to extradite.

Overall, the proposed treaty would clarify the content of the obligation to prosecute or extradite with respect to crimes against humanity. It would establish an unambiguous obligation to prosecute or extradite, with a possibility to satisfy this obligation by surrender to the International Criminal Court.

Inter-state cooperation is especially important in light of the factual complexity of crimes against humanity cases and the large volume of evidence typically required to prove such charges. In support, it is important that there are provisions for situations where state cooperation is necessary. The proposed treaty provides the basis for inter-state cooperation in matters relating to investigations, prosecutions and judicial proceedings.

5.5 The Responsibility to Protect

One topic closely related to the repression of crimes against humanity, that ought to be given attention but did not fit into the scope of this thesis, is the emerging concept of the responsibility to protect (“R2P”). The responsibility to protect redefines sovereignty by including the duty of states to protect the rights of people in their territories and even beyond. According to the 2005 World Summit Outcome and the 2009 Report of the Secretary-General on Implementing the Responsibility to Protect, states have the primary responsibility to protect their people from mass atrocities.^{254, 255}

In 2005, more than 150 heads of state and government affirmed their commitment to R2P by incorporating its basic principles in paragraphs 138 to 139 of the World Summit Outcome Document, which was endorsed by consensus at the UN General Assembly. Paragraph 138 on state responsibility provides that:

“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. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability (emphasis added).”²⁵⁶

²⁵⁴ Mills 2015, p. 74.

²⁵⁵ U.N. Doc. A/63/677, para 13.

²⁵⁶ 2005 World Summit Outcome.

The 2005 World Summit Outcome points to an emerging, though neither codified nor necessarily enforceable, norm of international law. The anticipated approach is to set forth a state responsibility to criminalize mass atrocities in domestic law and the states' responsibility itself, and to provide a normative framework for preventing and stopping mass atrocity situations, such as crimes against humanity.²⁵⁷ Implementing the proposed treaty on crimes against humanity is a logical step in fulfilling this responsibility, with obligations regarding the prevention and the prosecution of perpetrators of crimes against humanity as means of protecting civilian populations.

The responsibility to protect enhances the human rights protection mechanism by emphasizing the primary responsibility of the sovereign state, even while requiring the international community to assist the state in this duty. The endorsement of the responsibility to protect is considered as signifying and reshaping the new international order based on the principle of humanity.²⁵⁸ These objectives align with the ones of the proposed treaty, and as such it would be interesting to research the relationship of the proposed treaty and the responsibility to protect.

²⁵⁷ Mills 2015, p. 73.

²⁵⁸ Rim 2017, p. 71.

Afterword

The case for a specialized international treaty on crimes against humanity has existed since the end of World War I, and has been evident since the end of World War II. For the number of victims of crimes against humanity since then, as well as the few instances of national legislation and of national prosecutions since the end of the war, it is abundantly clear that such a specialized treaty is needed. However, notwithstanding the era of globalization that we are in, at times states still consider their strategic and economic interest superior to those of international criminal justice. Nevertheless, experience tells us that if such a treaty is adopted and enforced, it is likely to have a preventive and deterring effect that will save many lives. In the words of Cherif Bassiouni, “ultimately, there is no peace without justice”.

About 100 years since the first appearance of the term “crimes against humanity” in international law, the International Law Commission’s work to elaborate a text of a new global treaty on crimes against humanity is historically significant and clearly an important contribution to both the progressive development and codification of international law. An international treaty is needed to reinforce the Rome Statute, clarify some of its slight ambiguities, to fill the gap in national criminal legislation and to become the basis for more effective bilateral and multilateral international cooperation in the prevention, control, and repression of crimes against humanity.