

2018

2018 Klatsky Endowed Lecture in Human Rights: The International Law Commission's Proposal for a Convention on the Prevention and Punishment of Crimes Against Humanity

Sean D. Murphy

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Sean D. Murphy, *2018 Klatsky Endowed Lecture in Human Rights: The International Law Commission's Proposal for a Convention on the Prevention and Punishment of Crimes Against Humanity*, 50 Case W. Res. J. Int'l L. 249 (2018)

Available at: <https://scholarlycommons.law.case.edu/jil/vol50/iss1/15>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE INTERNATIONAL LAW
COMMISSION'S PROPOSAL FOR A
CONVENTION ON THE PREVENTION
AND PUNISHMENT OF CRIMES AGAINST
HUMANITY

*Sean D. Murphy**

*Klatsky Endowed Lecture on Human Rights
Case Western Reserve University School of Law
February 8, 2018*

My thanks to Case Western University School of Law for inviting me to give this year's Klatsky Endowed Lecture on Human Rights. It is a great pleasure to be here with you today and to spend some time with the Law School's students, faculty, alumnae, and friends.

It is also a great honor to receive the Cox International Law Center's Humanitarian Award for Advancing Global Justice. Given the impressive stature and renown of prior recipients of the Award, I am not quite sure how I slipped past your selection committee! But I'm very grateful that I did. Indeed, given that Dean Michael Scharf and many of Case's law professors are leaders in the field of international and comparative law, this honor is all the more special.

My topic today concerns "The International Law Commission's Proposal for a Convention on the Prevention and Punishment of Crimes against Humanity." I thought I would address the topic by discussing:

- first, the historical emergence of the concept of crimes against humanity;
- second, the fact that such crimes continue to be committed today in various parts of the world;
- third, the need to combat fully these crimes by strengthening national laws and national jurisdiction, as well as creating a legal structure for inter-State cooperation on extradition and mutual legal assistance;

*. Manatt/Ahn Professor of International Law, George Washington University; Member, U.N. International Law Commission; President-Elect, American Society of International Law. Aspects of this speech draw upon my work as the International Law Commission's special rapporteur for crimes against humanity.

- fourth, the International Law Commission's current project on drafting a new convention in this regard, and
- finally, concluding thoughts on the prospects for completion of the ILC's project in 2019, and its successful adoption and implementation by States.

I. HISTORICAL EMERGENCE OF THE CONCEPT OF "CRIMES AGAINST HUMANITY"

Let me begin by noting the emergence of the concept of "crimes against humanity" over the past century. The crux of the concept is to identify, stigmatize, prevent and punish heinous acts that are committed on such a scale that they are not just acts committed against one or a few persons, but against a civilian population as such. From its origins in the early part of the 20th century,¹ this concept of "crimes against humanity" was generally seen as having two broad features.² First, the nature of such crimes is so heinous that it is viewed as an attack on the very quality of being human.³ Second, the scale of such crimes is so heinous that they are an attack not just upon the immediate victims, but against all humanity, and hence the entire community of humankind has an interest in their prevention and punishment.⁴

In the aftermath of World War I, thought was given to whether there should be international prosecutions of the senior leaders of the defeated powers for heinous acts committed against their own populations, yet "crimes against humanity" were not included in Articles 228–29 of the Treaty of Versailles;⁵ those provisions relate solely to war crimes. Even so, the seeds were sown for such prosecutions in the aftermath of World War II, and "crimes against

-
1. An important forerunner of the concept of "crimes against humanity" is the "Martens clause" of the 1899 and 1907 Hague Conventions, the latter of which made reference to the "laws of humanity and the . . . dictates of public conscience" when crafting protections for persons in time of war. Convention Respecting the Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227.
 2. On the concept's origins and development during the 20th century, see generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION (2011).
 3. Hannah Arendt characterized the Holocaust as a "new crime, the crime against humanity—in the sense of a crime 'against human status,' or against the very nature of mankind." HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL, 268 (1965).
 4. See, e.g., Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, para. 21 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).
 5. Treaty of Peace between the Allied and Associated Powers of Germany and Protocol, arts. 228–29, June 28, 1919, 225 C.T.S. 188, 2 Bevans 43.

humanity” were placed within the jurisdiction of the international military tribunals established at both Nürnberg⁶ and Tokyo.⁷

The principles of international law recognized in the Nürnberg Charter were affirmed in 1946 by the U.N. General Assembly,⁸ codified by the U.N. International Law Commission in 1950,⁹ and then further developed by the Commission in its 1954 Code of Offenses against the Peace and Security of Mankind.¹⁰ Such steps firmly entrenched “crimes against humanity” in the pantheon of crimes of the greatest international concern, alongside genocide and war crimes. But while there were hopes in the 1950’s for the establishment of a permanent international criminal court, those hopes were unfulfilled, and the prosecution of such crimes, if they were to occur, was left to national jurisdictions. In that regard, a modest 1968 Convention was adopted which called upon States to criminalize nationally “crimes against humanity” and to set aside statutory limitations on prosecuting the crime; that convention ultimately attracted the adherence by fifty-five States.¹¹

Yet many States did not adopt national laws on crimes against humanity and only a few moved forward with prosecutions when alleged offenders were identified. The prosecutions that typically come to mind are the *Eichmann* and *Demjanjuk* cases in Israel,¹² the

-
6. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280; International Military Tribunal, *Protocol Rectifying Discrepancy in Text of Charter*, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 17 (1947).
 7. Charter of the International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, 4 Bevans 20(amended Apr. 26, 1946).
 8. G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, , U.N. Doc. A/64/Add.1, at 188 (Dec. 11, 1946).
 9. Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries, Rep. of the Int’l Law Comm’n on the Work of its Second Session, U.N. Doc. A/1316 (1950), *reprinted in* 2 Yearbook of the International Law Commission, 374 (1950).
 10. Code of Offences against the Peace and Security of Mankind, with Commentaries, Rep. of the Int’l Law Comm’n on the Work of its Sixth Session, U.N. Doc. A/2691 (1954).
 11. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.
 12. Attorney General for the Government of Israel v. Eichmann, [1968] 36 Int’l L. Rep. 277 (Isr.); Attorney General for the Government of Israel v. Demjanjuk, Trial Judgment (Apr. 18, 1988) (Isr.); State of Israel v. Ivan (John) Demjanjuk, Isr. S.C. 221 (1993) (Isr.).

Menten case in The Netherlands,¹³ the *Barbie* and *Touvier* cases in France,¹⁴ and the *Finta* and *Munyaneza* cases in Canada.¹⁵ In some circumstances the issue of crimes against humanity arose in the context of national proceedings other than prosecutions, such as extradition¹⁶ or immigration¹⁷ proceedings.

Instead of focusing on developing national laws regarding such crimes, the end of the Cold War brought new hopes for the establishment of an international criminal court, which would have jurisdiction over crimes against humanity. In 1993, the U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY), which included crimes against humanity as part of the ICTY's jurisdiction.¹⁸ In 1994, the U.N. Security Council established the International Criminal Tribunal for Rwanda (ICTR), which similarly included such crimes in the ICTR's jurisdiction.¹⁹ And finally, in 1998 governments adopted the Rome Statute²⁰ establishing International Criminal Court (ICC), which provides in Article 5(1)(b) that crimes against humanity are within the jurisdiction of the ICC.²¹

Rome Statute Article 7(1) defines "crimes against humanity" as murder, extermination, enslavement, deportation, torture, sexual violence and various other inhuman acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."²² Article 7(2) further clarifies that such an attack "means a course of conduct involving the

-
13. Public Prosecutor v. *Menten*, 75 I.L.R. 362 (1981) (Neth.).
 14. *Fédération National des Déportées et Internés Résistants et Patriotes and Others v. Barbie*, [1988] 78 I.L.R. 125 (Fr.); *Fédération National des Déportées et Internés Résistants et Patriotes and Others v. Barbie*, [1988], 100 I.L.R. 331 (Fr.); *France v. Touvier*, [1992] 100 I.L.R. 338 (Fr.).
 15. *Regina v. Finta*, [1994] 1 S.C.R. 701, [1997] 104 I.L.R. 284 (Supreme Court of Canada); *Munyaneza v. R.*, 2014 QCCA 906 (Quebec Court of Appeal).
 16. See, e.g., *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).
 17. See, e.g., *Mugesera v. Canada*, [2005] 2 SCR 100 (Supreme Court of Canada).
 18. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827, Annex at art. 5 (May 25, 1993).
 19. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955, Annex at art. 3 (Nov. 8, 1994).
 20. Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.
 21. *Id.*, art. 5(b).
 22. *Id.*, art. 7(1).

multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such acts.”²³ In addition to the jurisdiction of the ICTY, ICTR and ICC, crimes against humanity have featured in the contemporary jurisdiction of “hybrid” tribunals that contain a mixture of international law and national law elements, such as the Special Court of Sierra Leone ²⁴ or the Extraordinary Chambers in the Courts of Cambodia.²⁵

All told, this historical arc has led us to a place where several features of the contemporary concept of crimes against humanity may be identified. A crime against humanity is an *international* crime that can be committed by an individual whether or not the national law of the territory in which the act was committed has criminalized the conduct. The crime is directed against a civilian population and hence has a certain *scale or systematic nature* that generally extends beyond isolated incidents of violence or crimes committed for purely private purposes. The crime concerns the *most heinous acts of violence and persecution* known to humankind. The crime may be connected with an armed conflict, but that need not be the case; crimes against humanity *can occur in peacetime*. The crime can be committed *within* the territory of a single State or can be committed *across* borders. Finally, the crime can be committed by a *government*, but can also be committed by *other actors*, including rebel movements, militias, or terrorist organizations.²⁶

II. CONTINUED COMMISSION OF CRIMES AGAINST HUMANITY TODAY

While the development of the concept of crimes against humanity is an important intellectual achievement of the past century, and the development of international courts and tribunals an important institutional development, it is sadly the case that crimes against humanity continue to occur today, on a daily basis, in various parts of the globe. With this audience, I do not need to run through all the places in which such crimes are occurring, as you can read about them every day in the newspaper or online.

23. *Id.*, art. 7(2).

24. Agreement on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., art. 2, Jan. 16, 2002, 2178 U.N.T.S. 138.

25. G.A. Res. 57/228B (May 13, 2003); Agreement Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-U.N., June 6, 2003, art. 5, 2329 U.N.T.S. 117.

26. See L. Sadat, “Crimes Against Humanity in the Modern Age,” *American J. Int’l L.*, vol. 107, p. 334 (2013).

But at least consider the following. At the outset of our twenty-first century, atrocities committed in Sudan were front page news,²⁷ though now, you have to look a bit harder to see that such atrocities continue, with perhaps some 200,000 civilian deaths over the past two decades. A recent report by the U.S. government, for example, found that:

Government forces, government-aligned groups, rebels, and armed groups committed human rights abuses and violations throughout the year. The most serious human rights abuses and violations included: indiscriminate and deliberate bombings of civilian areas; ground attacks that included the killing and beating of civilians, sexual and gender-based violence, forced displacement, looting and burning entire villages, and destroying the means necessary for sustaining life; and attacks on humanitarian targets, including humanitarian facilities and peacekeepers.²⁸

Atrocities in Sudan were, to a certain extent, displaced in the press by atrocities in Syria, after that country descended into civil war in 2011. By some estimates, more than 500,000 Syrian civilians have died in that conflict, and this in a country whose population is about one-fifteenth that of the United States. Perhaps the most notorious incidents involve the use of chemical weapons, but the widespread attacks on civilians by various means is such that it likely will take generations for the country to recover.²⁹ Not all such atrocities can be laid at the feet of the Syrian government. Some non-

-
27. See, e.g., Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Jan. 25, 2005), http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.
 28. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Sudan 2015 Human Rights Report (2015), <https://www.state.gov/documents/organization/252945.pdf>.
 29. OHCHR, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/36/55 (Aug. 11, 2016), <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/33/55&Lang=E>; OHCHR, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A.HRC.28.69_E.doc; OHCHR, Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016- 28 February 2017, U.N. Doc. A/HRC/34/CRP.3 (Mar. 10, 2017), http://www.ohchr.org/Documents/Countries/SY/A_HRC_34_CRP.3_E.docx; OHCHR, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68 (Feb. 11, 2016), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-68.pdf>.

state actors, and most notably the Islamic State (or ISIS, ISIL, or Daesh), also have inflicted terrible harm upon civilians, in both Syria and Iraq, including attacks on religious groups, journalists, and others.³⁰

Today's front-page stories are mostly about the treatment of the Rohingya people in Myanmar, who have been exposed to brutal violence by Myanmar military and paramilitary units, and forced to flee from their homes to the point of leaving the country entirely.³¹ Yet we are on the eve of the Winter Olympics in Seoul, so perhaps our attention should turn back to the horrific conditions in North Korea, where more than one hundred thousand people are held in camps, subjected to deliberate starvation, executions, torture, rape, infanticide and forced labor.³² Indeed, these camps resemble the

-
30. OHCHR, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/36/55 (Aug. 8, 2017). <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/36/55&Lang=E>; OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, U.N. Doc. A/HRC/28/18 (Mar. 27, 2015). http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_ENG.docx; OHCHR, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: "They came to destroy": ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016). http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.
31. OHCHR, Interviews with Rohingyas fleeing from Myanmar since 9 October 2016, U.N. Flash Rep. (Feb. 3, 2017). <http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>; OHCHR, Situation of human rights of Rohingya Muslims and other minorities in Myanmar Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/32/18 (June 29, 2016). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/135/41/PDF/G1613541.pdf?OpenElement>; Yanghee Lee (Special Rapporteur on the situation of human rights in Myanmar), *Report of the Special Rapporteur on the situation of human rights in Myanmar*, U.N. Doc. A/HRC/34/67 (Mar. 14, 2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/057/07/PDF/G1705707.pdf?OpenElement>.
32. OHCHR, Report of the detailed finding of the commission of inquiry on human right in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.CRP.1_ENG.doc; OHCHR, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014). <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc>; *The Inquiry on Crimes Against Humanity in Political Prisons in the Democratic People's Republic of Korea*, WAR CRIMES COMM. INT'L. B. ASS'N. (Dec. 2017),

horrors of camps that totalitarian States established during the twentieth century; our past is repeating itself.

III. NEED TO DEVELOP NATIONAL CRIMINAL LAWS AND JURISDICTION

Given the continued commission of crimes against humanity today on a horrific scale, what more might be done to prevent and punish them? While continued efforts to develop and strengthen international courts and tribunals are warranted, it would appear that much greater attention now should be paid to the harnessing of national laws and institutions, as a complement to international jurisdictions, so as to deny any refuge worldwide to alleged offenders and, in so doing, hopefully to deter such behavior.

Under the influence of the Rome Statute, in recent years several States have adopted or amended national laws that criminalize crimes against humanity, as well as other crimes. Yet many States, both that are party to and not party to the Rome Statute, have no such national law. For example, the United States has no national law on crimes against humanity as such. While it has criminal statutes on torture, war crimes, and genocide,³³ these statutes do not criminalize all conduct that might amount to crimes against humanity, and some of the constituent acts of crimes against humanity as defined in certain international texts are not found in U.S. national law.

Various studies have attempted to analyze the existence of national laws worldwide on crimes against humanity, as well as the scope of existing laws, both in terms of the substantive crimes and the circumstances when jurisdiction may be exercised over such crimes.³⁴

www.ibanet.org/Document/Default.aspx?DocumentUid=5228d915-42d4-4880-8b07-c4703f074b19.

33. See 18 U.S.C. § 2340A (2018) (prohibiting torture); 18 U.S.C. § 2441 (2018) (prohibiting war crimes); 18 U.S.C. § 1091 (2018) (prohibiting genocide).
34. See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011); Bassiouni (especially chapter 9 on “A Survey of National Legislation and Prosecutions for Crimes Against Humanity”); International Committee of the Red Cross, *International Humanitarian Law National Implementation Database* (updated periodically), available at <http://www.icrc.org/ihl-nat.nsf>; International Human Rights Law Clinic, George Washington University Law School, *Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction* (2013), updated and reprinted in part in Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, *The George Washington Int'l Law Rev.*, vol. 46, p. 481 (2014) (hereinafter GW Law Study).

Important elements to consider when assessing such laws are: (1) whether there exists a specific law on “crimes against humanity” (as opposed to ordinary criminal statutes on penalizing acts of violence or persecution); (2) if a specific law exists on “crimes against humanity,” whether that law includes all the components encompassed in the most relevant contemporary definition of the crime, which is Article 7 of the Rome Statute; and (3) if a specific law exists on “crimes against humanity,” whether that law is limited only to conduct that occurs within the State’s territory, or whether it also extends to conduct by or against its nationals abroad, or even extends to acts committed abroad by non-nationals against non-nationals.

One relevant study, completed in 2013 at George Washington University Law School (GW Law Study), reached several conclusions. First, it found that earlier studies, when read collectively, indicate that at best 54 percent of U.N. Member States (104 of 193) have some form of national law relating to crimes against humanity.³⁵ The remaining U.N. Member States (89 of 193) appear to have no national laws relating to crimes against humanity. Further, the GW Law Study found that earlier studies, again when read collectively, indicate that at best 66 percent of Rome Statute parties (80 of 121) have some form of national law relating to crimes against humanity, leaving 44 percent of Rome Statute parties (41 of 121) without any such law.³⁶

Second, the GW Law Study undertook an in-depth, qualitative review of the national laws of a sample of 83 States (U.N. Member States listed alphabetically from A to I). Since 12 of those States were thought by earlier studies to have no law relating to crimes against humanity, the qualitative review focused on assessing the laws of the 71 other States. That review concluded that, in fact, only 41 percent of States in the sample actually possessed a national law specifically on “crimes against humanity” (34 of 83).³⁷ Of the 58 Rome Statute parties within the sample of 83 States, the review indicated that 48 percent of them possessed a national law specifically on “crimes against humanity” (28 of 58).

Third, for the 34 States that possessed a national law specifically on “crimes against humanity,” the GW Law Study analyzed closely

35. GW Law Study, at 487.

36. *Id.* at 488.

37. *Id.*, at 493. By contrast, 20 percent of States in the sample possessed laws that did not actually address “crimes against humanity,” but that arguably contained some features in common with the crime, such as a prohibition of one or more of the prohibited acts listed in Article 7(1)(a)–(k) of the Rome Statute (17 of 83). Within this group are States possessing a law that is labeled “crimes against humanity,” but which in fact only covers war crimes and genocide. *Id.*, at 490-91. The remaining 39 percent of States in the sample had no discernible law relating to crimes against humanity (32 of 83).

the provisions of those laws. Of those States, only 29 percent adopted verbatim the text of Article 7 of the Rome Statute when defining the crime (10 of 34).³⁸ As such, of the 83 States within the sample, only about 12 percent adopted the formulation of Rome Statute Article 7 in its entirety (10 of 83). Instead, most of the 34 States that possessed a national law specifically on “crimes against humanity” deviated from the components of Article 7, such as by: omitting components of the chapeau language of Article 7(1); omitting some prohibited acts as set forth in Article 7(1); or omitting the second or third paragraphs of Article 7, including the component relating to furthering “a State or organizational policy.” All told, of those 34 States that possessed a national law specifically on “crimes against humanity,” 71 percent of them (24 of 34) possessed national laws that lacked key elements of the Article 7 definition, revealing a wide range of minor to major substantive differences.³⁹

Finally, the 2013 study analyzed whether the 34 States that possess a national law specifically on “crimes against humanity” could exercise jurisdiction over a non-national offender who commits the crime abroad against non-nationals. The study concluded that nearly 62 percent (21 of 34) could exercise such jurisdiction. However, this meant that only 25 percent of the States within the sample were able to exercise such jurisdiction over “crimes against humanity” (21 of 83). Further, of the 58 Rome Statute parties within the sample, 33 percent both possess a national law specifically on “crimes against humanity” and are able to exercise such jurisdiction (19 of 58).⁴⁰

The unevenness in the adoption of national laws relating to crimes against humanity has collateral consequences with respect to inter-State cooperation in seeking to sanction offences. Existing bilateral and multilateral agreements on mutual legal assistance and on extradition typically require that the offence at issue be criminalized in the jurisdictions of both the requesting and requested States (referred to as “double” or “dual criminality”); if their respective national laws are not comparable, then cooperation usually is not required. With a large number of States having no national law on crimes against humanity, and with significant discrepancies among the national laws of States that have criminalized the offence, there at present exist considerable impediments to inter-State cooperation. Further, the absence in most States of national laws that allow for the exercise of jurisdiction over non-nationals for crimes against humanity inflicted upon non-nationals abroad means that offenders often may seek sanctuary simply by moving to a State in which the acts were not committed. Even in circumstances in which States have adopted

38. *Id.*, at 492.

39. *Id.*, at 493-95, 497-503.

40. *Id.*, at 505-13.

harmonious national laws on crimes against humanity, there may exist no obligation as between the States to cooperate with respect to the offence, including by way of an obligation to extradite or prosecute the alleged offender.

IV. INTERNATIONAL LAW COMMISSION'S PROJECT ON CRIMES AGAINST HUMANITY

The unevenness in national laws and the ability to exercise national jurisdiction with respect to crimes against humanity suggests that now is a propitious time for the development a treaty that would address such matters. Consequently, building upon the work of others,⁴¹ in 2012 I proposed within U.N. International Law Commission that it take up the topic of crimes against humanity, believing that this was a gap in the field of international criminal law and human rights law where the Commission might be of assistance.⁴²

After extensive discussions during 2012-2013, the Commission in 2013 added the topic to its long-term work program,⁴³ thereby signaling to the U.N. General Assembly that the Commission was seriously considering pursuing the matter. The syllabus for the topic expressly indicated that the objective of the topic would be "to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity."⁴⁴ Further, such a convention would address the obligation of a State Party to criminalize crimes against humanity under its national laws and to exercise jurisdiction over offenders who turn up in its territory, even when the crime is committed abroad by and against nonnationals. Unlike the ICC's Rome Statute, the convention would address inter-

-
41. See, e.g. M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 Colum. J. Transnat'l L. (1994); Forging a Convention for Crimes against Humanity (Leila Nadya Sadat ed., 2011); On the Proposed Crimes against Humanity Convention (Morten Bergsmo & Song Tianying eds., 2014).
 42. For more detailed discussion of the Commission's work on these draft articles, see Sean D. Murphy, *Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission*, 109 AM. J. INT'L L. 822, 835-36 (2015); Sean D. Murphy, *Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission*, 110 AM. J. INT'L L. 718, 727-29 (2016); Sean D. Murphy, *Crimes against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, 111 AM. J. INT'L L. 970, 970-78 (2017).
 43. Report of the International Law Commission on the Work of Its Sixty-Fifth Session, UN GAOR, 68th Sess., Supp. No. 10, at 115-16, paras. 169-70, UN Doc. A/68/10 (2013).
 44. *Id.* at 140, para. 3 (Annex B).

State obligations with respect to the crime, including *aut dedere aut judicare* and the provision of mutual legal assistance.⁴⁵

The debate within the Assembly's Sixth (Legal) Committee in the fall of 2013 was largely supportive, such that the Commission moved the topic in 2014 onto the current program of work and appointed me as special rapporteur.⁴⁶ In 2015, I submitted a first report to the Commission,⁴⁷ which led it to adopt four draft articles with commentary.⁴⁸ In 2016, I submitted a second report,⁴⁹ which led to the Commission's adoption of an additional six draft articles with commentary.⁵⁰ In 2017, I submitted a third report,⁵¹ which led to the Commission's adoption of a final five draft articles, a new paragraph for an existing draft article, a draft preamble, and a draft annex.

Since these various pieces constituted a complete first draft of the project, the Commission reviewed the entire text in 2017 "on first reading" and approved it.⁵² All told, the draft articles – which are annexed to this speech – address: scope (article 1); general obligation (article 2); definition of crimes against humanity (article 3); obligation of prevention (article 4); *non-refoulement* (article 5); criminalization under national law (article 6); establishment of national jurisdiction (article 7); investigation (article 8); preliminary measures when an alleged offender is present (article 9); *aut dedere aut judicare* (article 10); fair treatment of the alleged offender (article 11); victims, witnesses and others (article 12); extradition (article 13); mutual legal

45. *Id.* at 142–48.

46. Report of the International Law Commission on the Work of Its Sixty-Sixth Session, UN GAOR, 69th Sess., Supp. No. 10, at 265, para. 266, UN Doc. A/69/10 (2014).

47. International Law Commission, First Report on Crimes Against Humanity, UN Doc. A/CN.4/680 (Feb. 17, 2015) (prepared by Special Rapporteur Sean Murphy).

48. Report of the International Law Commission on the Work of Its Sixty-Seventh Session, UN GAOR, 70th Sess., Supp. No. 10, at 49–83, UN Doc. A/70/10 (2015).

49. International Law Commission, Second Report on Crimes Against Humanity, UN Doc. A/CN.4/690 (Jan. 21, 2016) (prepared by Special Rapporteur Sean Murphy).

50. Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 241–80, UN Doc. A/71/10 (Sept. 19, 2016).

51. International Law Commission, Third Report on Crimes Against Humanity, UN Doc. A/CN.4/704* (Jan. 23, 2017) (prepared by Special Rapporteur Sean Murphy) (hereinafter Third Report).

52. *See* Report of the International Law Commission on the Work of Its Sixty-Ninth Session, UN GAOR, 72nd Sess., Supp. No. 10, at 9–127, UN Doc. A/72/10 (Sept. 11, 2017) (hereinafter 2017 Report).

assistance (article 14 and the annex); and settlement of disputes (article 15).

While the black letter provisions of the draft articles themselves are central, the commentary provides detailed explanation as to the meaning of those rules and precedent for them in prior treaties addressing other crimes. In accordance with its practice, “the Commission has not included technical language characteristic of treaties (for example, referring to ‘States Parties’) and has not drafted final clauses on matters such as ratification, reservations, entry into force or amendment.”⁵³ Even so, my reports to the Commission analyzed certain issues, such as options for addressing the issue of reservations⁵⁴ or for establishing a monitoring mechanism for the convention,⁵⁵ which may be of use to States if negotiations toward a convention ultimately proceed.

Having completed a full first draft, the Commission also decided in 2017 to transmit the draft articles through the U.N. Secretary-General to governments, international organizations, and others for comments and observations, requesting that they be submitted by no later than 1 December 2018.⁵⁶ Consequently, the Commission is currently in “listening mode,” receiving written and oral comments from others regarding to the strengths and weaknesses of its work. Based on views received, the Commission in 2019 will be in a position to modify the draft articles (and the commentary) as appropriate, on “second reading,” at which point the Commission’s work will be completed. Further, the Commission may then transmit the final draft articles to the General Assembly, along with a recommendation as to next steps, such as the elaboration of a convention on the basis of the draft articles, either by the Assembly itself or by an international conference of States.

V. CONCLUDING THOUGHTS ON THE PROSPECTS FOR A NEW CONVENTION

In conclusion, it is possible that, as of late 2019, the U.N. General Assembly will have before it draft articles with commentary serving as the basis for the negotiation and adoption by States of a new Convention on the Prevention and Punishment of Crimes against Humanity. At present, it is unclear if States will move forward with

53. *Id.*, at 22, para. (3).

54. *See* Third Report, at 140–50.

55. *See id.* at 100–13; *see also* Memorandum Prepared by the Secretariat on Information on Existing Treaty-Based Monitoring Mechanisms Which May Be of Relevance to the Commission’s Future Work on the Topic “Crimes Against Humanity,” UN Doc. A/CN.4/698 (2016).

56. 2017 Report, at 10, para. 43.

such a negotiation and, if so, on what time frame. Moreover, even if a convention is successfully negotiated and adopted, further tasks will remain. States must sign and ratify the convention, hopefully on a widespread basis comparable to the 1948 Convention against Genocide and the 1949 Geneva Conventions. Even then, States must implement their obligations under the Convention; they must take the steps necessary to enact national laws as required by the Convention, and take other steps that assist in the prevention and punishment of such crimes.

None of these steps is guaranteed and none of them will be easy to achieve. But as an international community, we must continue to strive to build a system of international law that stops atrocities from occurring, using whatever lawful means are available to us. And I say this not just to the experienced lawyers present today, but to the students as well, for the ultimate success of this initiative will turn in large part on the commitment and hard work of the next generation of international lawyers.

ANNEX: ILC DRAFT ARTICLES ON CRIMES AGAINST
HUMANITY (2017)⁵⁷

CRIMES AGAINST HUMANITY

Preamble

...

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

57. 2017 Report, at 10-20, para. 3, UN Doc. A/72/10 (2017).

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering 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,

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

...

Article 1 [1]⁵⁸
Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2 [2]
General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3 [3]
Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;

58. The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.

- (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 in connection with the crime of genocide or war crimes;
- (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.

2.For the purpose of paragraph 1:

- (a)“attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b)“extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c)“enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d)“deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e)“torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f)“forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g)“persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h)“the crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

3.For the purpose of the present draft articles, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

4.This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4 [4]
Obligation of prevention

1.Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Article 5
Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 6 [5]
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his

or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

8. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 7 [6]
Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 8 [7]
Investigation

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes

against humanity have been or are being committed in any territory under its jurisdiction.

Article 9 [8]

Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 10 [9]

Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 11 [10]

Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Article 12

Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages,

on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Article 13
Extradition

1. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For 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. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

4. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

7. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

8. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

9. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

10. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Article 14
Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. Mutual 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 8, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

- (a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
- (b) taking evidence or statements from persons, including by video conference;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites, including obtaining forensic evidence;
- (f) providing information, evidentiary items and expert evaluations;
- (g) providing originals or certified copies of relevant documents and records;
- (h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;
- (i) facilitating the voluntary appearance of persons in the requesting State; or
- (j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. 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.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

Article 15
Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the

central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

- (a) the identity of the authority making the request;
- (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;
- (e) where possible, the identity, location and nationality of any person concerned; and
- (f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

6. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to

the national law of the requested State and where possible, in accordance with the procedures specified in the request.

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft annex;

(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.

9. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

14. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a

witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

- (a) the person freely gives his or her informed consent; and
- (b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

- (a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
- (b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;
- (c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and
- (d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so

agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

20. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.