

2020

The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?

Charles C. Jalloh

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

 Part of the [International Law Commons](#)

Recommended Citation

Charles C. Jalloh, *The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?*, 52 Case W. Res. J. Int'l L. 331 (2020)
Available at: <https://scholarlycommons.law.case.edu/jil/vol52/iss1/16>

This Article 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 FIRST DRAFT CONVENTION ON CRIMES AGAINST HUMANITY: CODIFICATION, PROGRESSIVE DEVELOPMENT, OR BOTH?

*Charles C. Jalloh*¹

ABSTRACT

In 2017, the International Law Commission (“ILC”) which was established by the UN General Assembly in 1947 to assist States with the promotion of (1) the progressive development of international law and (2) its codification, adopted on first reading a draft convention on crimes against humanity which it transmitted to States for comments. The draft convention seeks to help fill the present gap in the law of international crimes since States criminalized genocide in 1948 and war crimes in 1949, but missed the opportunity to do so for crimes against humanity. This Article examines the first reading text, as submitted to States in August 2017, using the lens of the ILC’s two-pronged mandate. Part II explains how the ILC selects new topics and the reasons why it decided to study crimes against humanity with the view to proposing a convention. Part III discusses positive features of the draft crimes against humanity convention, highlighting key aspects of each of the draft articles. Part IV examines challenges posed by the ILC’s definition of the crime, immunities, amnesties, and the lack of a proposal on a treaty monitoring mechanism. The final part draws tentative conclusions. The author argues that, notwithstanding the formal distinction drawn by the ILC Statute between progressive development, on the one hand, and codification, on the other hand, the ILC’s approach to the crimes against humanity topic follows an established methodology of proposing draft treaties that are judged

1. Professor of Law, Florida International University and Member, International Law Commission and Chair of the Drafting Committee, 70th session. This paper was initially prepared for a 70th anniversary symposium on “The Role and Contributions of the ILC to the Development of International Law: Codification, Progressive Development, or Both?” held at FIU College of Law in Miami on 26-27 October 2018. I thank Dean Michael Scharf for inviting me to present on the topic in the Case Western Law School symposium on “Atrocity Prevention: The Role of International Law and Justice” on 20 September 2019, which nudged me to finalize this piece. Ashira Vantrees, Cecilia Ruiz Lujan, Jennifer Triana provided excellent research assistance. Opinions and errors are mine alone. Email: jallohc@gmail.com.

likely to be effective and broadly acceptable to States rather than focusing on which provisions reflect codification and which constitute progressive development of the law. It is submitted that, if the General Assembly takes forward the ILC's draft text to conclude a new crimes against humanity treaty after the second reading, this will make a significant contribution to the development of modern international criminal law.

TABLE OF CONTENTS

ABSTRACT	331
TABLE OF CONTENTS.....	332
I. INTRODUCTION	333
II. BACKGROUND: THE ILC'S PROCESS AND THE DECISION TO STUDY CRIMES AGAINST HUMANITY	341
A. <i>The General Assembly and Proprio Motu Action as Two Potential Sources of New ILC Topics</i>	341
B. <i>The Addition of Crimes against Humanity to the Long-Term Program of Work</i>	343
C. <i>The Addition of Crimes against Humanity to the Current Program of Work</i>	346
III. POSITIVE ASPECTS TO THE ILC'S FIRST DRAFT CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY	348
A. <i>An Opportunity to Prepare a Draft Convention for the General Assembly</i>	348
B. <i>The ILC's "Composite" Approach to its Mandate and Application to Crimes against Humanity</i>	349
C. <i>Draft Article 1—Scope of the Draft Articles</i>	355
D. <i>Draft Article 2—General Obligation</i>	355
E. <i>Draft Article 3—Definition of Crimes against Humanity</i>	358
F. <i>Draft Article 4—Obligation of Prevention</i>	361
G. <i>Draft Article 5—Non-Refoulement</i>	363
H. <i>Draft Article 6—Criminalization under National Law</i>	365
I. <i>Draft Article 7—Establishment of National Jurisdiction</i>	367
J. <i>Draft Article 8—Investigation</i>	369
K. <i>Draft Article 9—Preliminary Measures When an Alleged Offender is Present</i>	371
L. <i>Draft Article 10—Aut Dedere Aut Judicare</i>	372
M. <i>Draft Article 11—Fair Treatment of the Alleged Offender</i>	374
N. <i>Draft Article 12 – Victims, Witnesses, and Others</i>	376
O. <i>Draft Article 13—Extradition</i>	378
P. <i>Draft Article 14—Mutual Legal Assistance</i>	379
Q. <i>Draft Article 15—Settlement of Disputes</i>	380
IV. SOME POTENTIALLY PROBLEMATIC ASPECTS OF THE FIRST READING DRAFT ARTICLES ON CRIMES AGAINST HUMANITY	381
A. <i>General Remarks</i>	381
B. <i>The Use of the ICC Definition of Crimes Against Humanity</i>	382

<i>C. Failure to Prohibit Immunities for Crimes Against Humanity</i>	389
<i>D. Failure to Reject Blanket Amnesties for Crimes Against Humanity</i> ...	397
<i>E. Absence of a Recommendation on a Monitoring Mechanism</i>	400
V. CONCLUSION.....	404

I. INTRODUCTION

The International Law Commission (“ILC” or “the Commission”) was established as a subsidiary body of the United Nations General Assembly in November 1947 to assist States with the promotion of the progressive development of international law and its codification.² This mandate is not only the statutory foundation on which the work of the ILC rests, but it is also at the heart of the discussions involving the ILC’s past contributions, its present projects, and if the statute remains unamended, its future potential.

2. G.A. Res. 174 (II), art. 1, Statute of the International Law Commission (Nov. 21, 1947).

In the seven decades since it was established, the Commission has been widely praised, by States³ and academics⁴ alike, for its various contributions to the development of the field of international law. The Commission's inputs include areas as diverse as the law of treaties,⁵ the

-
3. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Commemoration of the 70th Anniversary of the International Law Commission—1st Meeting (May 21, 2018), <http://webtv.un.org/search/commemoration-of-the-70th-anniversary-of-the-international-law-commission/5787804822001#t=22m35s> [<https://perma.cc/5J5Q-XNQM>]; *See also, e.g.*, Amadou Jaiteh, First Secretary of the Permanent Mission of the Gambia to the United Nations, Statement on Behalf of the African Group Before the Sixth Committee, 73rd Session of the United Nations General Assembly, Report of the International Law Commission on the Work of its Seventieth Session, at 2 (Oct. 22, 2018), <http://statements.unmeetings.org/media2/20304330/gambia-african-group-82-.pdf> [<https://perma.cc/XX2U-8496>]; H.E. Sheila Carey, Permanent Representative of the Commonwealth of the Bahamas to the United Nations, Statement on Behalf of the Caribbean Community (CARICOM), 73rd Session of the United Nations General Assembly, Report of the International Law Commission of the Work of its Seventieth Session, at 2 (Oct. 22, 2018), <http://statements.unmeetings.org/media2/20304299/bahamas-caricom-82-.pdf> [<https://perma.cc/8AH9-PK3S>]; Xu Hong, Statement of the Representative of China and Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China, 73rd Session of the United Nations General Assembly, Report of the International Law Commission of the Work of its Seventieth Session, at 2 (Oct. 22, 2018), <http://statements.unmeetings.org/media2/20304363/china-82-cluster-i.pdf> [<https://perma.cc/K726-2DEL>]; Eduardo Valencia-Ospina, Statement of the Chair of the International Law Commission, 73rd Session of the United Nations General Assembly, Report of the International Law Commission of the Work of its Seventieth Session, at 1 (Oct. 22, 2018), <https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/> [<https://perma.cc/N754-S8MS>].
 4. JEFFREY S. MORTON, *THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS* (U. of S. C. Press, 2000); SIR IAN SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* (Grotius Publications Ltd, 1987).
 5. *See* Int'l Law Comm'n, Rep. on the Work of the First Part of Its Seventeenth Session, U.N. Doc. A/CN.4/181, at 156–59 (1965), https://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_181.pdf&lang=EF [<https://perma.cc/465U-GUUK>]; Int'l Law Comm'n, Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/CN.4/191, at 173–77 (1966), https://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_191.pdf&lang=EFSRC [<https://perma.cc/MJ4J-XYQ8>].

law of diplomatic and consular relations,⁶ the law of the sea,⁷ international environmental law,⁸ and of course, the law of State responsibility.⁹ Much, if not all, of the Commission's work in those areas reflects the aspects of its mandate to assist States with both the codification and the progressive development of international law. But, arguably none of these areas, although foundational to the post World War II international legal order, have permeated the work of the Commission throughout the last seven decades as much as the field of international criminal law. Only two exceptions come to mind.

First is the Law of Treaties. The Law of Treaties, which might be the Commission's most important contribution to date, formed the basis for what eventually became the 1969 Vienna Convention on the Law of Treaties ("VCLT").¹⁰ Its significance is further exemplified by the many subsequent "spin-off" projects it has generated for the Commission since its entry into force.¹¹ Those studies, largely aimed at accounting for lessons learned following decades of application of the VCLT to concrete situations as well as new developments, continue to dominate the Commission's program of work.¹² Indeed, entire studies have been conducted based on provisions, and in some cases, sections

-
6. See Int'l Law Comm'n, Rep. on the Work of Its Eighteenth Session 1966, *supra* note 5, at 177; See also G.A. Res. 3233 (XXIX) (Nov. 12, 1974).
 7. See Int'l Law Comm'n, Rep. on the Work of Its Eighteenth Session 1966, *supra* note 5, at 192.
 8. See Luis Barrionuevo Arevalo, *The Work of the International Law Commission in the Field of International Environmental Law*, 32 B.C. ENV'T AFF. L. REV. 493, 493 (2005).
 9. Int'l Law Comm'n, Rep. on the Work of Its Eighteenth Session 1966, *supra* note 5, at 177; JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 1* (James Crawford ed., Cambridge University Press, 2002).
 10. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
 11. See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 138 (2015) [hereinafter Rep. in Sixty-Seventh Session].
 12. *Id.* (including the topic *Jus cogens*—a study of VCLT art. 53—in the Commission program of work) [hereinafter Rep. on Sixty-Seventh Session]; Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/67/10, at 105 (2011) (including the topic Provisional application of treaties—a study of VCLT art. 25—to the Commissions program of work); see also Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 12 (2018) (completing the second reading of Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties—a study of VCLT art. 31(2)(a)—submitted to the General Assembly in 2018) [hereinafter Rep. on Seventieth Session].

or paragraphs of articles from the VCLT. For instance, the Commission has completed additional work on reservations to treaties¹³ (section 2 of the VCLT, comprised of Articles 19 to 24) and subsequent agreements and subsequent practice (Article 31(3)).¹⁴ The Commission has ongoing work on provisional application of treaties (Article 25) and peremptory norms of general international law—*jus cogens* (Articles 53/64).¹⁵ Not to mention, at the request of the General Assembly, the application of the VCLT to unresolved questions concerning treaties concluded between States and international organizations or between international organizations.¹⁶

The second exception of an area that continues to influence the work of the Commission are the Articles on Responsibility of States for Internationally Wrongful Acts.¹⁷ The State responsibility articles have not (yet) been transformed into a multilateral convention, like the VCLT. The study on State responsibility coincided with the bulk of the Commission's existence. An outcome of about 40 years of work over a seventy-year period.¹⁸ In fact, from the commencement of the study in 1956 and its completion upon second reading and eventual submission with a final recommendation to the General Assembly in 2001, the topic was guided by no less than five ILC Special Rapporteurs.¹⁹ Questions of responsibility have also continued to generate further work for the

-
13. See Rep. on Seventieth Session, *supra* note 12, at 12 (draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties submitted to the General Assembly in 2018).
 14. *Id.* at 14; See also G.A. Res. 73/202, at 1–2 (Dec. 20, 2018).
 15. See Int'l L. Comm'n, Summaries of the Work of the International Law Commission, https://legal.un.org/ilc/summaries/1_12.shtml [<https://perma.cc/9BZP-6Q7C>] (last visited Feb. 17, 2020); Rep. Seventieth Session, *supra* note 12, at 227.
 16. See U.N. Conference on the Law of Treaties between States and International Organizations or between International Organizations, *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, U.N. Doc. A/Conf.129/15, U.N. Sales No. E.94. V.5 at 95 (Mar. 21, 1986) (not yet in force: 39 Signatories, 44 Parties).
 17. See James Crawford, Jacqueline Peel & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 963 (2001), <http://www.ejil.org/pdfs/12/5/1557.pdf> [<https://perma.cc/VYS3-SKAA>].
 18. *Id.*
 19. See *id.*

ILC, in relation to, for example, the responsibility of international organizations²⁰ and issues of State succession.²¹

This article examines the role and contributions of the ILC in the promotion of the progressive development of international law and its codification from the perspective of the nascent field of International Criminal Law (“ICL”). Though not unique, if we account for the law of treaties—which, like a ghost, continues to hang around the corridors of the Commission—and the sheer scope and depth of State responsibility, the ICL field appears to have occupied a special place in the life of the ILC. This is because the Commission’s first project, mandated to it by the General Assembly on November 27, 1947, was in fact the formulation of the principles of international law recognized in the Charter and in the Judgment of the Nürnberg International Military Tribunal (“IMT”).²² Recognizing the importance of this maiden ICL topic for the Commission appears important for both symbolic and substantive reasons.

Symbolically, the IMT was the first successful attempt to establish an ad hoc “international” penal tribunal to prosecute persons responsible for crimes under international law: namely, war crimes, crimes against humanity, and crimes against peace.²³ Thus, although the idea had been first planted just after World War I, it was World War II and the establishment of the IMT sitting at Nürnberg that cracked the door open to the hitherto unknown possibility of an international criminal tribunal that would address responsibility to individuals as part of the enforcement of certain fundamental values of the international community, Nürnberg became the “Grotian”²⁴

-
20. See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 54–68 (2011).
 21. Vienna Convention on Succession of States in Respect of Treaties, Nov. 6, 1978, 1978 U.N.T.S. 3; U.N. Conference of Succession of States in respect of State Property, Archives and Debts, *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, U.N. Sale No. E.94.V.6 (Apr. 8, 1983) (not yet in force); See also Pavel Šturma (Special Rapporteur on Succession of States in Respect of State Responsibility), *Second Rep. on Succession of States in Respect of State Responsibility*, U.N. Doc. A/CN.4/719 (Apr. 6, 2018).
 22. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int’l L. Comm’n 13, U.N. Doc. A/CN/SER.A/1950/Add. I.
 23. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 280.
 24. MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (Cambridge University Press, 2013).

moment for ICL. The new Commission was thereafter tasked with reflecting upon the implications of that watershed for States and the international community.²⁵ This included the possibility of developing an international criminal code²⁶ and a corresponding international enforcement mechanism to give effect to its prohibitions.²⁷

Substantively, the principles formulated by the Commission for the General Assembly now form part of the starting point and thus the bedrock of modern ICL. This is largely due to the foundational nature and broad acceptance²⁸ of the Nürnberg Principles, which in seven broad strokes helped to cement a new global norm—that is, the notion that any person who commits an act constituting a crime under international law, such as crimes against peace, war crimes, and crimes against humanity, is responsible therefor and liable to punishment.²⁹ The Nürnberg Principles, by taking up key issues that continue to be the basis of international criminal prosecutions, have directly and indirectly played a role in influencing international law's attitude towards the rights and duties of individuals as well as the obligations of States under international criminal law.

-
25. See G.A. Res. 177 (II) (Nov. 21, 1947).
26. G.A. Res. 36/106, ¶¶ 1–2 (Dec. 10, 1981).
27. G.A. Res. 260 (III) B, ¶¶ 1–3 (Dec. 9, 1948).
28. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision Pursuant to Art. 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 13 (Dec. 13, 2011), https://www.icc-cpi.int/CourtRecords/CR2012_04203.PDF [<https://perma.cc/8RJT-LNKE>]; *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Corrigendum to the Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 43 (Dec. 13, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF [<https://perma.cc/MR5G-6JEA>]; *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [<https://perma.cc/3TUL-TGUW>]; *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 485 (Nov. 28, 2007), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict99-52/appeals-chamber-judgements/en/071128.pdf> [<https://perma.cc/3A4P-RLMK>]; *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Judgment Summary, ¶ 2 (Apr. 26, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/Charles%20Taylor%20Summary%20Judgement.pdf> [<https://perma.cc/85EH-3R28>].
29. See, e.g., *Principles of International Law*, *supra* note 22 (explaining Principle III to mean that the official capacity of the criminal is irrelevant and Principle IV to mean that nations have a general obligation to prevent and punish crimes against humanity).

Nonetheless, the Commission's contribution to ICL did not end with the Nürnberg Principles. In fact, it proved to be just the beginning. It has since covered a diverse set of ICL issues; most prominently, the question of international criminal jurisdiction, a draft code of crimes against the peace and security of humankind, and ultimately, work on a draft statute for a permanent international criminal court.³⁰ Since its early forays in the subject area, often at the request of the General Assembly, the Commission has also, through its own initiative, taken up several topics aimed at advancing the largely twentieth century notion of individual criminal responsibility for international crimes, alongside mechanisms for the enforcement of such prohibitions—whether at the national or international levels.

The ILC's work in this area, some of which is ongoing as of this writing, has touched on central and inter-related topics for this sub-field. These include the question concerning the definition of aggression, which for reasons largely relating to the Cold War bounced back and forth for several years between the Commission and the Sixth Committee like ping-pong until the General Assembly itself completed the task with the adoption of a resolution on the topic by consensus in 1974;³¹ the obligation to prosecute or extradite (*aut dedere aut judicare*);³² immunity of State officials from foreign criminal jurisdiction; and most recently, crimes against humanity. The Commission appears open to the prospect of continuing to work in the area of criminal law with the addition to its long-term program of work in 2006 of the topic extraterritorial jurisdiction.³³ Even more recently - based on a proposal of this writer, approved in 2018 - and included in its report to the General Assembly on the work of its seventieth session, the ILC placed the topic universal criminal jurisdiction in its long-term program of work.³⁴

This article will not examine all the ILC's rich contributions to the development of the ICL field. Rather, its aim is to examine a specific

-
30. G.A. Res. 489 (V) (Dec. 12, 1950); *Draft Code of Crimes Against the Peace and Security of Mankind*, A/CN.4/L.532 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) [hereinafter *Peace and Security*]; *Draft Statute for an International Criminal Court with Commentaries*, [1996] 2 Y.B. Int'l L. Comm'n 20, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).
 31. *See* THE WORK OF THE INTERNATIONAL LAW COMMISSION 124–25 (United Nations Publ'n, 9th ed. 2017) (summarizing the completion of the topic of aggression in 2010).
 32. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 139-40 (2014); G.A. Res. 69/118, ¶ 3 (Dec. 10, 2014).
 33. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 526 (2006).
 34. Rep. on Seventieth Session, *supra* note 12, at 316.

and contemporary ICL topic which some might consider the Commission's current flagship project because it is the only explicitly declared convention project: the Commission's first Draft Convention on Crimes Against Humanity,³⁵ which draft was completed during the sixty-ninth session in August 2017 and submitted to States for comments via the General Assembly in September 2017. As usual, the Commission has invited State comments on the first reading text.³⁶ All States' comments are due at the beginning of December 2018.³⁷

The primary goal of the article, which focuses on the text as adopted on first reading, is to examine the positive, and less positive, aspects of the ILC's draft convention from the lens of codification and progressive development. The paper, in seeking to highlight key aspects of what will hopefully eventually form part of the ILC's latest codification contribution to the development of ICL, will suggest that even in highly technical areas, the theme of progressive development and codification, which is so central to the work and identity of the Commission, continues to remain important. The underlying feature of progressive development and codification, though it did not per se drive the debate on this topic as it has on other current topics such as immunity of State officials from foreign criminal jurisdiction, seemed to lurk in the background. The background hum of the Commission's mandate may be among the best explanations for the more contentious parts of the crimes against humanity project, which generally aims to provide substantive clarity on the vital aspects of probably the most important of the four core international crimes: crimes against humanity.

Structurally, this article will proceed as follows. Part II seeks to provide some of the background context for the study. It explains the internal ILC process for the selection of new topics and considers why the crimes against humanity project seems important for both the ILC and the international community. Part III, which is the heart of the article, will examine each of the proposed articles and highlight some of the most prominent features of the draft convention as proposed by the Commission in its 2017 first reading text. Part IV then turns to the aspects of the text adopted by the ILC in relation to which I had some doubts. With respect to each of these parts, I will attempt to explain how the mandate of progressive development and codification could be relevant in appreciating the debate within the Commission and the

35. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10, at 10–20 (2017).

36. *Id.* at 10.

37. Int'l Law Comm'n, *Analytical Guide to the Work of the International Law Commission*, https://legal.un.org/ilc/guide/7_7.shtml (last updated Feb. 19, 2020) [<https://perma.cc/FJ9J-5G74>].

compromise text that was adopted and submitted to States for their consideration. The final part draws tentative conclusions.

Readers must bear in mind that there remains a final second reading step for the crimes against humanity project, which is expected to be completed during the 71st session of the Commission in 2019.³⁸ It is normal that, based on the comments of States and observers, some of the text adopted on first reading will change. A formal recommendation will thereafter be formulated by the Commission to accompany its final text to the General Assembly. At that stage, it will be up to the States to decide whether to take forward the item by convening a diplomatic conference or through direct negotiation of the treaty text by the General Assembly.³⁹ It is hoped that, after many years of placing on the shelf the more recent outcomes of the Commission's outputs, the General Assembly and States will see it fit to take forward the draft convention proposed by the ILC. In this way, they will not only better mind the present big gap in the prohibition of atrocity crimes, but also re-establish the relevance of the Commission's current work and its central role as the only general UN created body engaged in assisting them with the tasks of codification and progressive development of general international law.

II. BACKGROUND: THE ILC'S PROCESS AND THE DECISION TO STUDY CRIMES AGAINST HUMANITY

A. *The General Assembly and Proprio Motu Action as Two Potential Sources of New ILC Topics*

By way of background, there are two principal methods by which the ILC can carry out its statutory responsibilities to study international law questions for States and the international community. First, under the Statute, adopted by States in 1947, the General Assembly, other principal UN organs or specialized agencies may refer topics to the ILC for study in accordance with the provisions of the Statute of the Commission.⁴⁰ While this occurred relatively frequently in the past in relation to the General Assembly, including in respect of several ICL topics including the draft statute for a permanent International Criminal Court ("ICC") which was requested in 1994,

38. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 9-10.

39. *See id.* at 5.

40. G.A. Res. 174 (II), arts. 16-17, Statute of the International Law Commission (Nov. 21, 1947).

such referrals have been infrequent more recently.⁴¹ The latter was noticed, so much so that in 1996, the ILC review of its working procedures at the request of the General Assembly itself emphasized to the parent body that States and other relevant UN organs be encouraged to submit proposals for new topics involving codification and progressive development of international law.⁴²

Second, the ILC is statutorily entrusted with surveying the whole field of international law with the goal of selecting topics for *codification* and recommending them to the General Assembly.⁴³ Much of the Commission's work carried out in the past several decades was based on the first such survey of possible codification projects in a memorandum of the Secretariat in 1949. In its practice, dating back to 1949, the Commission concluded that it possessed the competence to work on proposed studies notified to States through the General Assembly for their feedback without necessarily first securing formal action before it proceeds.⁴⁴ This aspect apparently recognizes the independent role of the ILC as an expert body.

In reality, however, topics usually receive feedback from States after their addition to the long-term program of work before substantive work begins. This preserves the central role of States in the process and underscores the role of the technical experts is merely to assist the General Assembly in its primary responsibility to promote international cooperation in the political field and the promotion of the progressive development of international law and its codification.⁴⁵ This means that ILC proposed topics usually benefit from feedback and are formally endorsed or taken note of in a General Assembly resolution.⁴⁶ It is only after such a step that, based on several additional considerations like the nature of the comments received, that the ILC will take a separate and subsequent decision on whether to study the proposed topic further

41. See United Nations, *Rome Statute of the International Criminal Court*, <https://legal.un.org/icc/general/overview.htm> [<https://perma.cc/9FDK-CPMH>].

42. *Report of the Commission to the General Assembly on the Work of Its Forty-Eighth Session*, 51 U.N. G.A.O.R. Supp. No. 10, U.N. Doc. A/51/10 (1996), 1 Y.B. Int'l L. Comm'n, Sales No. E.97.I.1.

43. G.A. Res. 174 (II), *supra* note 40, art. 18.

44. Int'l L. Comm'n, *About the Commission: Organization, Programme and Methods of Work*, <https://legal.un.org/ilc/programme.shtml> (last updated Sept. 16, 2019) [<https://perma.cc/W6AK-33V2>] [hereinafter *Programme and Methods*].

45. See United Nations, *Codification and Progressive Development of International Law*, <https://legal.un.org/cod/> [<https://perma.cc/YA5W-AXRL>].

46. See *Programme and Methods*, *supra* note 44.

by moving it into its active program of work.⁴⁷ A topic that does not generate any interest amongst States is unlikely to make it into the current program of work.⁴⁸ Topics that only generate lukewarm interest or that are perceived as mostly political or policy oriented may also meet the same fate.⁴⁹ That said, while there is a rigorous process for inclusion of topics into the *long-term* program of work, the assessment of the potential suitability of topics for the *active* work program turns on various other considerations and becomes a matter of collective judgment.⁵⁰ The latter process, being sometimes dependent on whether a handful of oppositional members are willing to concede or block the (overwhelming) majority view, could no doubt be improved.

B. The Addition of Crimes against Humanity to the Long-Term Program of Work

Perhaps unsurprisingly, and due also to the increased development of other fora and sites of law making for States, the second path discussed above wherein topics are mostly internally generated has formed the basis for most of the ILC's work and outputs in the past seventy years.⁵¹ Of late, for various complex reasons, it has been the only path. This means that, like all the Commission's current projects, the topic crimes against humanity, which is the focus here, began with a proposal initiated by a member.⁵² The proposal in this case was presented by Sean Murphy (USA). All member proposals are considered by the Working Group on the Long-Term Program of Work, which is a subsidiary body of the Planning Group.⁵³ The latter is established by the Commission to which it reports and retains the same membership

47. *Programme and Methods*, *supra* note 44.

48. See Yota Negishi, *The International Law Commission Celebrating Its 70th Anniversary*, ESIL: Reflections (Nov. 12, 2018), <https://esil-sedi.eu/wp-content/uploads/2018/11/ESIL-Reflection-Negishi-3.pdf> [<https://perma.cc/94RA-VV4G>].

49. *See id.*

50. *See, e.g.*, Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 126 (noting with appreciation the decision of the Commission to add the topic of provisional application of treaties to the Commissions programme of work, thus showing the need for General Assembly support).

51. *See Programme and Methods*, *supra* note 44.

52. *See* Int'l Law Comm'n, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Sixty-Ninth Session, U.N. Doc. A/CN.4/678, at 21-22 (2015).

53. *See Programme and Methods*, *supra* note 44.

each year.⁵⁴ A topic proposal must fulfill certain criteria agreed by the Commission in 1996 and reiterated in 1998 before it can secure approval.⁵⁵

As part of a multi-stage internal review process, in the more recent practice, the long-term program working group operating on the basis of consensus decides whether the formal topic selection criteria have been fulfilled. In this regard, it carefully assesses (1) whether a given proposal appears to meet the needs of States in respect of the progressive development and codification of international law; (2) if the topic is sufficiently advanced in stage in terms of State practice; and (3) if the topic is concrete and feasible, provided that (4) the Commission shall not restrict itself to traditional topics but could also reflect those newer and pressing concerns of the international community as a whole.⁵⁶ In this case, in regards crimes against humanity, the working group concluded that all these criteria had been fulfilled.⁵⁷

The principal argument in favor of the crimes against humanity topic was that there exists, in the present international legal framework, a yawning gap in the field of ICL.⁵⁸ In particular, as it relates to the law of “core international crimes,” that is, genocide, war crimes, crimes against humanity, and although the last was not mentioned in the proposal, the crime of aggression.⁵⁹ Whereas genocide and war crimes have been codified in standalone multilateral treaties requiring States to investigate and prosecute those who commit them within their national courts, there is no equivalent global convention concerning crimes against humanity.⁶⁰ Considering that the latter crime is the

-
54. Int'l Law Comm'n, *About the Commission*, <https://legal.un.org/ilc/structure.shtml> (last updated Jan. 11, 2019) [<https://perma.cc/BH33-ARQB>].
55. *Report of the Commission to the General Assembly on the Work of Its Forty-Eighth Session*, *supra* note 42, at 87-88.
56. *Programme and Methods*, *supra* note 44.
57. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, U.N. Doc. A/68/10, at 144 (2013).
58. *Id.* at 140-41.
59. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].
60. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949,

broadest crime available, vis-à-vis the other core crimes, the need to codify it in its own separate instrument and thereby provide greater legal certainty in its use becomes very important.

As a second main justification, there is at present no regime of inter-State cooperation providing for mutual legal assistance and extradition for crimes against humanity at the horizontal level.⁶¹ Yet, perhaps partly because of how suppression or transnational crimes conventions have evolved on a separate track vis-à-vis atrocity crimes, the international community has developed such cooperation regimes for numerous transnational crimes conventions such as corruption.⁶² The latter may be considered less heinous crimes than crimes against humanity.⁶³ By providing for a treaty that would address crimes against humanity specifically, it was felt that this could enhance the investigation and prosecution of crimes at the national level.⁶⁴ Empowering domestic courts to prosecute crimes against humanity is distinct from the jurisdiction of international criminal tribunals such as the ICC, which operates at the vertical/international level.⁶⁵ Thus, especially given that the Rome Statute does not as such include an explicit duty for States to prosecute crimes against humanity but requires States to act as the first line of defense against impunity, a special convention on crimes against humanity was found as a potential useful complement of that system.⁶⁶ This should enhance the complementarity regime under the ICC system. In the end, based on the syllabus proposal, it was decided that it was about time that the ILC considered taking up this important topic with the view of potentially assisting States to codify this important international crime in a separate treaty aimed at both prevention and punishment of those who perpetrate it.⁶⁷

75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, June 8, 1977, 1125 U.N.T.S. 3.

61. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 110.
62. Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *First Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/680, at 6 (Feb. 17, 2015) [hereinafter Murphy, *First Rep.*]
63. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 21.
64. *Id.*
65. *Id.* at 22.
66. *Id.*
67. Murphy, *First Rep.*, *supra* note 62, at 7.

As usual with the Commission topic selection process, the decision of the working group on the work program is reported to the parent Planning Group chaired by the first vice chair of the Commission for that session.⁶⁸ The Planning Group, in turn, reports to the plenary of the ILC as a whole.⁶⁹ The Commission, after consideration of the report, endorsed the working group decision at the level of the plenary of the Commission which then subsequently decided to recommend the inclusion of the topic crimes against humanity to the Long-Term Program of Work during the Sixty-Fifth Session.⁷⁰ The crimes against humanity topic, the syllabus for which was annexed to the 2013 report, was thereafter notified to the General Assembly with a request for feedback from States on the proposed topic.⁷¹ There, States proved to be generally favorable towards the topic, though there was some concern that whatever the Commission does in the topic, should complement rather than undermine the legal regime anchored by the ICC.⁷² The General Assembly took note of the topic in its resolution that year.⁷³

C. The Addition of Crimes against Humanity to the Current Program of Work

Upon resumption of its work in the summer of 2014, the ILC analyzed the feedback of States on the crimes against humanity proposal in the General Assembly.⁷⁴ Given the generally favorable State reactions towards the topic, and the availability of space on its program of work, the Commission decided to move crimes against humanity on to the Commission's current program of work.⁷⁵ Consistent with the ILC practice, Mr. Murphy, the proponent of the topic was appointed as Special Rapporteur.⁷⁶ Special rapporteurs play an important role for the Commission in a volunteer capacity, helping to guide the formulation of a plan and leading the effort on the topic.⁷⁷ The special

68. *About the Commission, supra* note 54.

69. *Id.*

70. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, *supra* note 57, at 116.

71. *Id.* at 140, 144.

72. *See id.* at 142–43.

73. G.A. Res 69/118, *supra* note 32, ¶ 7.

74. *See* Int'l Law Comm'n, 66th Sess., 3227th mtg. at 3, U.N. Doc. A/CN.4/SR.3227 (July 18, 2014).

75. *Id.*

76. *Id.*

77. *About the Commission, supra* note 54.

rapporteurs typically prepare reports each year to further the work plan on the topic, explain the state of the law and make proposals for draft articles.

Consistent with that role, in this topic as well, the Special Rapporteur prepared three reports for each of 2015, 2016 and 2017.⁷⁸ The reports would be circulated to the members just before arrival in the Swiss city of Geneva each summer, and following their introduction by the rapporteur, they would be debated by the members of the Commission in the plenary.⁷⁹ After the debate closes, signified by the summing up by the special rapporteur, the proposed draft articles contained in each report would be transmitted to the Drafting Committee.⁸⁰ In the drafting process, the members of the Commission that volunteered to serve on the drafting team for the topic would engage in a detailed and substantive process of review of every single paragraph, sentence, and comma.⁸¹ Issues of substance are also discussed, with the chair of the drafting committee and special rapporteur playing important roles, in plenty of informal discussions and negotiations to find a consensus.⁸² Once the articles are completed, they are reported back to the Plenary of the Commission, where they are adopted.⁸³ The Commission would approve and subsequently include them in its annual report for onward transmission to the General Assembly where States get the opportunity to comment on

78. Murphy, *First Rep.*, *supra* note 62; Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *Second Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/690 (Jan. 21, 2016) [hereinafter Murphy, *Second Rep.*]; Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *Third Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/704 (Jan. 23, 2017) [hereinafter Murphy, *Third Rep.*].

79. Murphy, *First Rep.*, *supra* note 62; Murphy, *Second Rep.*, *supra* note 78; Murphy, *Third Rep.*, *supra* note 78.

80. *About the Commission*, *supra* note 54.

81. *See id.*

82. *See id.*

83. *See, e.g.*, Mathias Forteau, Chairman of the Drafting Committee of the International Law Commission, Statement on Crimes Against Humanity (June 5, 2015), https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_crimes_against_humanity.pdf&lang=EF [https://perma.cc/VHQ6-HYTS] (reporting on the first draft of the Convention on Crimes Against Humanity and requesting the plenary to adopt the draft).

them in the Sixth (Legal) Committee.⁸⁴ The draft articles would typically be accompanied by commentaries explaining the text.

At the Sixty-Ninth Session in 2017, that is, just four years after the project began, the Commission successfully adopted a complete set of draft articles on crimes against humanity.⁸⁵ The first reading package contained a preamble, 15 draft articles, and a draft annex, all of which were accompanied by draft commentary.⁸⁶ These were transmitted to States, through the Secretary-General, with a request inviting written comments from States by December 1, 2018.⁸⁷

III. POSITIVE ASPECTS TO THE ILC'S FIRST DRAFT CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY

A. An Opportunity to Prepare a Draft Convention for the General Assembly

Before I highlight the substance of the draft articles, as adopted by the Commission upon first reading in August of 2017, it seems noteworthy that the crimes against humanity project is important both for the ILC and the international community. First, and though perhaps the least important reason is that for the ILC, which has in the past been criticized for its deliberative—or should I say *too deliberative*—pace of work, the completion of the first reading of the draft articles on crimes against humanity stands as a major accomplishment. All the more so given the relatively short period between the addition of the topic to its program of work in the summer of 2014, the appointment of a Special Rapporteur the same year, and the completion of the first reading with a full set of draft articles with commentary in the summer of 2017.⁸⁸ The credit for this lightning speed, in ILC terms, must go to the Commission as a whole. But it would not have been possible without a dedicated Special Rapporteur, as well as an engaged and cooperative Drafting Committee and

84. See Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Seventieth Session, Prepared by the Secretariat, U.N. Doc. A/CN.4/689, at 8-10 (Jan. 28, 2016).

85. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 10-21.

86. *Id.* at 9-10.

87. *Id.* at 10.

88. *Id.*

Commission.⁸⁹ The significance of this point should not be underestimated as it in some respects confirms – contrary to external criticisms of the Commission in the 1980s – that the ILC is capable of taking up a new topic and turning around a rigorous first draft instrument within a relatively short time frame. Second, the crimes against humanity project can also be seen as important to the ILC; for it is, at present, the only topic whereby the Commission has explicitly declared, from day one in the Syllabus for the topic, that it will be working in the most traditional or classical part of its mandate,⁹⁰ that being to prepare legal texts, for the General Assembly, which have the potential, or capacity, to become treaties.⁹¹ This too is important because many of the ILC's more recent projects have softer forms such as draft conclusions and draft guidelines. The seeming shift towards the preparation of other types of instruments does not mean that the Commission will neglect its primary function to assist also with the codification of international law through the proposal of draft articles capable of creating binding legal obligations for States. In this regard, the Crimes against Humanity draft will soon join the 2016 draft articles on protection of persons in the event of disasters text which was the most recently adopted on second reading during the ILC's sixth-eighth session and recommended to the General Assembly for the elaboration as a convention.⁹²

B. The ILC's "Composite" Approach to its Mandate and Application to Crimes against Humanity

In accordance with Article 1 of its Statute, the Commission has as its object the "promotion of the progressive development of international law" and its "codification."⁹³ The terms "codification" and "progressive development" are defined, albeit merely for convenience, in Article 15 of the Statute of the Commission.⁹⁴ Article 15 states that "progressive development of international law" is a reference to the

89. See Aniruddha Rajput, Chairman of the Drafting Committee on Crimes Against Humanity of the International Law Commission, Statement on Crimes Against Humanity (June 1, 2017), https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_cah.pdf&lang=E [https://perma.cc/AZ85-SXRH].

90. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, *supra* note 57, at Annex B.

91. *Id.* ¶¶ 14–16.

92. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 12-13 (2016).

93. G.A. Res. 174 (II), *supra* note 40, art. 1.

94. *Id.* art. 15.

“preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.”⁹⁵ In contrast, “codification of international law” is said to mean “the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine.”⁹⁶

As a matter of principle, regarding this distinction in its founding instrument, the ILC has adopted a “composite” approach to its mandate.⁹⁷ Thus, though seemingly formally bound to a division between progressive development and codification under Article 15 of its statute, the Commission has preferred to present legal texts that may reflect a mix of both.⁹⁸ This is because, in practice and drawing on the experience with prior codification efforts tracing back to the pre-ILC League of Nations period, the Commission found that it is near impossible to separate the two sets of tasks which were essentially intertwined, inter-related, and indivisible. For that reason, as a *general* rule, the ILC has not flagged which of its provisions contained in texts forwarded to the General Assembly constitute one or the other.⁹⁹ It has done so in a relatively small set of instances over a seventy-year period. It would, when it speaks to the point, often be content to state, at the outset, that the text in the package being sent to States should be presumed to include a mixture of both codification and progressive development.¹⁰⁰ This approach seemed to generally work well. It also seems more protective of States law-making role since they would then, irrespective of the ILC classification of text as codification or progressive development, go on to negotiate a treaty text based on the Commission’s work. The ability to (re)negotiate, on the basis of the texts, binding conventions ensures a balance can be struck by the States themselves between the aspects that may reflect codification and those that may constitute progressive development. This might include a

95. *Id.*

96. *Id.*

97. Charles C. Jalloh, *The Role and Contributions of the International Law Commission to the Development of International Law*, 13 F.I.U. L. REV. 975, 979 (2019); Dire Tladi, *The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?*, 32 LEIDEN J. INT'L L. 169, 172 (2019).

98. *See* Jalloh, *supra* note 97.

99. Tladi, *supra* note 97, at 182.

100. *See, e.g.*, Draft Articles on the Effects of Armed Conflicts on Treaties, in Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third session, U.N. Doc. A/66/10, at 222 (2011); Draft Articles on the Law of Transboundary Aquifers, in Int'l Law Comm'n, Rep. on the Work of Its Sixtieth Session, U.N. Doc. A/63/10, at 19 (2008).

refinement, revision, consolidation or even development of the substantive law, as has happened in some cases with draft ILC texts prepared for the General Assembly including the 1994 draft Statute for a permanent international criminal court, a function that is obviously the legitimate purview of States as legislators of the law that bind them rather than the task of ILC members. The question that might now arise is whether this established practice should continue given the increasing tendency of the ILC's current projects to be of a softer nature in the form of draft principles, guidelines, or conclusions rather than draft articles designed for possible transformation into multilateral conventions negotiated by States.

Some aspects of the ILC's first reading draft crimes against humanity treaty appear to go beyond codification of the existing customary law of crimes against humanity and may reflect its progressive development. Indeed, the fact that the Commission embarked upon the path of preparing draft articles for the crimes against humanity topic does not mean that the work on this or any of its other projects could be regarded as limited to codification of the existing law. Pure codification tasks will, in methodological terms, entail an in-depth assessment of the customary law status of each given rule. That would in turn call for a detailed examination of whether there exists a general practice among States that is accepted as law in relation to a given rule. A second step would then determine whether the rule needs to be improved even as it is reduced into writing as part of the exercise of codification within the meaning of Article 15 of the ILC Statute. Even in the task of codification, it can be presumed to include minor changes or additions to clarify issues or fix gaps. As Professor Brierly explained well in the expert committee discussions preceding the creation of the ILC in relevant part:

...codification cannot be absolutely limited to declaring existing law. As soon as you set out to do this, you discover that the existing law is uncertain, that for one reason or another there are gaps in it which are not covered. If you were to disregard these uncertainties and these gaps and simply include in your code, rules of existing law which are absolutely clear and certain, the work would have little value. Hence, the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest which is the better view; where a gap exists, he will suggest how it can best be filled. If he makes it clear what he is doing, tabulates the existing authorities, fairly examines the arguments pro and con, he will be doing his work properly. But it is true that in this aspect of his work he will be suggesting legislation—he will be working on the *lex*

ferenda, not the *lex lata*—he will be extending the law and not merely stating the law that already exists.¹⁰¹

There are, of course, other aspects of the draft convention that constitute “progressive development,” as the phrase is understood in Article 15 of the Statute of the Commission.¹⁰² The latter provides for the preparation of draft conventions on subjects that have either not yet been regulated or encompasses situations where the law itself has not been sufficiently developed in State practice.¹⁰³ The description of some provisions contained in the first reading text of crimes against humanity might fit the progressive development category.¹⁰⁴ The extension of rules on extradition and mutual legal assistance specifically to crimes against humanity could be illustrations of this.¹⁰⁵

Yet, there is extensive practice of States in that regard in relation to several other (transnational) crimes.¹⁰⁶ In fact, this example suggests that the distinction between codification and progressive development is to some extent facile, in the sense that both concepts mandated in Article 15 of the Commission’s statute admit of a measure of change to a given rule whether framed as codification or progressive development.¹⁰⁷ In the present example, all that takes place is that the existing rule which is known in the transnational crimes context is extended to cover a new situation addressing atrocity crimes.¹⁰⁸ If that contention is true, the question might arise whether this approach was sound for this specific topic. I would argue that it is for several reasons.

-
101. HERBERT W. BRIGGS, *THE INTERNATIONAL LAW COMMISSION* 135 (1969).
102. Hannes Jöbstl, *An Unforeseen Pandora’s Box? Absolute Non-Refoulement Obligations Under Article 5 of the ILC Draft Articles on Crimes Against Humanity*, *EJIL: TALK!* (May 5, 2019), <https://www.ejiltalk.org/category/international-criminal-law/crimes-against-humanity/> [https://perma.cc/JJ69-N542].
103. G.A. Res. 174 (II), *supra* note 40, art. 15.
104. *See* Jöbstl, *supra* note 102.
105. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 15–17.
106. *See, e.g.*, U.N. OFF. OF DRUGS & CRIME, *Mutual Legal Assistance (MLA)*, <https://www.unodc.org/e4j/en/organized-crime/module-11/key-issues/mutual-legal-assistance.html> [https://perma.cc/7KFW-7UGT].
107. *See* Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC’s Work Product*, *GEO. WASH. L.* (Oct. 27, 2012), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1915&context=faculty_publications [https://perma.cc/GWS4-6WN5].
108. *See* Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 15–17.

First, given the nature of the subject matter, especially the gravity of the crimes under consideration. A related point, already mentioned above, is the virtually inseparable nature of the task of codification from the task of progressive development.¹⁰⁹

Second, although there is some practice to investigate and prosecute these crimes within international tribunals such as the ICTY, the ICTR, the SCSL, and the ICC, there is relatively more limited State practice concerning the investigation and prosecution of such crimes at the national level and within *national* courts.¹¹⁰ Yet, at least indirectly, the practice of international courts set up to prosecute crimes against humanity would be relevant,¹¹¹ more so where the law in this area has been developed by the judges of those courts without objection from States.

Third, and relatedly, since the ILC crimes against humanity project was partly justified as a gap filling convention, there is, ultimately, a need for an effective regime at the national level for the prevention and punishment of crimes against humanity.¹¹² This apparently requires a study of treaties which are highly developed in respect of transnational crimes. Those treaties, which contain rules reflecting codification and those that reflect progressive development, may offer useful models for crimes against humanity. In such circumstances, rather than emphasize which aspect of its draft articles constitute progressive development and which reflect codification of existing law, the Commission necessarily blends the two to advance draft articles deemed to be useful, effective, and likely to find acceptance among a broad range of States.¹¹³ This would include parties or non-parties to the ICC Statute.

In a nutshell, both for principled and pragmatic reasons, the draft crimes against humanity articles adopted on first reading in 2017 conform to the long-standing practice of the Commission.¹¹⁴ As the study itself aims at producing a draft convention, which contains elements of existing law and elements of proposals for progressive development of the law, the Commission enjoys some freedom to suggest provisions based primarily on whether they are expected to be

109. Murphy, *Codification, Progressive Development, or Scholarly Analysis?*, *supra* note 107, at 2.

110. *See* Murphy, *First Rep.*, *supra* note 62, at 15, 18, 25, 31.

111. Rep. on Seventieth Session, *supra* note 12, at 130–31.

112. *See* Anturo J. Carrillo & Annalise Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, 46 GEO. WASH. INT'L L.R. 481, 482 (2014).

113. *See* Jalloh, *supra* note 97.

114. *See* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 9–10.

useful and effective in the prohibition and punishment of crimes against humanity.¹¹⁵ Thus, it seems plausible that some of the provisions will go beyond existing law, that is to say, beyond codification as defined under the Statute. The safeguard for States is that, if they take forward the draft convention, they would negotiate the text and make it their own irrespective whether some of the proposed provisions are restatements of customary law and others amount to progressive development. Once satisfied, they can through signature, ratification and accession express their consent to be bound by the obligations contained within it. In such circumstances, where the guiding consideration will be on whether they are establishing a workable legal regime to prohibit and punish crimes against humanity, it seems not as material for each specific draft article to reflect the *lex lata*.

With the above context in mind, let us now proceed to assess the *form* and *substance* of the ILC's draft crimes against humanity articles adopted by the Commission on first reading in 2017. Two brief observations seem warranted. First, the first draft crimes against humanity convention consists of a preamble, 15 draft articles, and a draft annex, all of which are accompanied by commentary.¹¹⁶ Though perhaps an unfair comparison, this is a much shorter and more compact instrument, compared to the 19 clauses of the 1948 Genocide Convention and between the 63 and 163 clauses and several annexes of the four separate Geneva Conventions.¹¹⁷

Second, and focusing on substance, even a cursory review would show that the draft crimes against humanity articles reflect many benefits of having a standalone treaty. It compares favorably, and in nearly all respects, improves upon the Geneva and Genocide Convention frameworks. The duty to prevent and the duty to punish are both given great weight.¹¹⁸ The draft convention also contemplates strong mini-extradition and mutual legal assistance regimes that are missing from the war crimes and genocide conventions.¹¹⁹ For the latter reason, it would have been beneficial for the Commission to broaden the crimes against humanity project to also include war crimes and genocide in its study.

115. See Murphy, First Rep., *supra* note 62, at 7, 8.

116. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 10.

117. Genocide Convention, *supra* note 60; Geneva I, *supra* note 60; Geneva IV, *supra* note 60.

118. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 11–13.

119. *Id.* at 15–17.

C. *Draft Article 1—Scope of the Draft Articles*

Besides the preambular paragraphs, which among other things recognize that the prohibition of crimes against humanity is a peremptory norm of general international law and that it is the duty of States to exercise their criminal jurisdiction over the crime, this opening provision, which is standard in ILC draft texts, sets the stage for the whole project. It provides that “[t]he present draft articles apply to the prevention and punishment of crimes against humanity.”¹²⁰ The thrust looks both to the future and to the past. Future in the sense that, by criminalizing crimes against humanity, it seeks to *prevent* them from being committed.¹²¹ In terms of the past, when crimes have been or are being committed, it seeks to create a mechanism that would require States to take measures to prevent others who would otherwise carry them out.¹²²

Regrettably, although crimes against humanity, genocide, war crimes and the crime of aggression are typically committed together, the draft instrument does not encompass those other grave crimes.¹²³ To have covered war crimes and genocide would have broadened the scope of the ILC’s project. Nonetheless, it would have better addressed the realities of international crimes by providing a regime for horizontal cooperation on extradition and mutual legal assistance than solely addressing the single crime. Incidentally, although the ILC decided to limit its work to only crimes against humanity, several States have initiated a separate project that would encompass at least three of the four core crimes under international law.¹²⁴

D. *Draft Article 2—General Obligation*

Article 2 essentially provides that States undertake both to prevent and to punish crimes against humanity, which are crimes under international law, whether committed in peace time or during wartime.¹²⁵ The first part of the provision can be said to constitute codification.¹²⁶ The ILC had, in some of its prior work, concluded that crimes against humanity were clearly prohibited as a crime under

120. *Id.* at 10.

121. *Id.*

122. *Id.*

123. *Id.* at 11.

124. *See* Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 110.

125. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 85, at 11.

126. *See id.*

international law since there is an extensive body of State practice prohibiting the crime dating back to at least 1945.¹²⁷ The latter obligation in Article 2, which entails the element of prevention of crimes against humanity, may constitute progressive development even if it logically follows from the ambition of punishment.¹²⁸

In advancing this provision, the Special Rapporteur provided multiple treaty references including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, 1954 Draft Code of Offences Against the Peace and Security of Mankind, 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, and others.¹²⁹ Although, none of those instruments included the exact language of Article 2, the Special Rapporteur emphasized that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, with 150 State signatories, as a similar convention which represents that States bear an obligation to prosecute and prevent these crimes of atrocity which are punishable during times of armed conflict, and times of peace.¹³⁰ The Genocide Convention, which contains the duty of prevention in relation to that crime, is usually considered to be part of customary international law.¹³¹ As a crime analogous to a crime against humanity, and considering the subsequent developments in international criminal law since 1948, an extension of this obligation to cover this crime is warranted.¹³²

The text of the preventative part of the provision seems well anchored by its alignment with the analogous obligation set forth in Article 1³³ of the 1948 Genocide Convention via use of the words “undertake to” rather than “shall,” and identifies crimes against humanity as “crimes under international law,” an expression previously used by the ILC, for example in Article 1, paragraph 2 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind.¹³⁴ The assertion in this draft article that crimes against humanity are crimes

127. Murphy, *First Rep.*, *supra* note 62, at 20.

128. Forteau, *supra* note 83, at 3–5.

129. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 26–27, 30, 45.

130. *Id.* at 45.

131. *Genocide*, U.N. OFF. ON GENOCIDE PREVENTION AND THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide.shtml> [<https://perma.cc/6L2A-EG7Q>].

132. Murphy, *First Rep.*, *supra* note 62, at 6–7.

133. Genocide Convention, *supra* note 60, at 280.

134. Peace and Security, *supra* note 30, at 17.

under international law affirms the prohibition of crimes against humanity exists, even if not included in national law. The aspect concerning “whether or not committed in time of armed conflict”¹³⁵ is also important due, firstly, to the long debate among international criminal lawyers about the so-called conflict nexus, and secondly, the fact that the origins of the crime in an international armed conflict (World War II) does not mean it has not been recognized as also prohibited in the context of internal armed conflicts under customary law. As explained by the Chairperson of the Drafting Committee in relation to the conflict nexus which is now settled:

The Drafting Committee considered it important to maintain this element from the original proposal by the Special Rapporteur in view of the historic evolution of the definition of crimes against humanity. As explained in the First Report, these crimes were originally linked to the existence of an armed conflict in the context of the Nürnberg Tribunal. Customary international law has developed since then, and *it is now firmly established* that no such connection is required.¹³⁶ [Emphasis added].

The important duty to prevent crimes against humanity is further explained in the Commission’s commentary, and was also addressed in later substantive provisions of the draft articles.¹³⁷ Unresolved issues concerning this provision will include the *scope* and *depth* of the duty of prevention, in particular, whether it applies only *internally* in the concerned State or also *externally* in relation to other States.¹³⁸ Consideration of this will presumably account for the more recent developments concerning the responsibility to protect which was endorsed in relation to crimes against humanity by the UN General Assembly in 2005.¹³⁹ The duty to prevent, as important as it is, would seem to be implicit in the prohibition of crimes against humanity but may be a form of progressive development.

135. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 11; Forteau, *supra* note 83, at 5.

136. Forteau, *supra* note 83, at 5.

137. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 25–28.

138. See William A. Schabas, *Prevention of Crimes Against Humanity*, 16 J. INT’L CRIM. JUST. 705, 714–21 (2018) (discussing the background and various interpretations of prevention provisions throughout the history of the ILC).

139. G.A. Res. 60/1, at 30 (Sept. 16, 2005).

E. Draft Article 3—Definition of Crimes against Humanity

The first reading crimes against humanity text also provides, in four paragraphs, a single definition of crimes against humanity.¹⁴⁰ This should help develop the type of definitional coherence we see for the crime of genocide and war crimes but that has been abjectly missing for crimes against humanity.¹⁴¹ In terms of origin, the first three paragraphs of this article essentially reproduced Article 7 of the Rome Statute, which incidentally, did not purport to reflect the customary international law definition of crimes against humanity when the treaty was negotiated in 1998.¹⁴² The preference for the ICC definition stems from the view within the Commission, both in Plenary and Drafting Committee, that the crimes against humanity definition in the Rome Statute should not be altered for the purposes of the draft articles.¹⁴³ This approach, which also apparently reflected the preference of some States Parties to the Rome Statute in the General Assembly, seemed uncontroversial within the Commission and was a pragmatic choice that was also stressed in the sixth paragraph of the preamble to the first reading text recalling the ICC definition.¹⁴⁴

At the same time, though the Commission's settled methodology in preparation of draft articles is a more integrated approach, the adoption of Article 7 should have provoked a more robust discussion. This might have included consideration of whether the definitional provision was a codification or progressive development of international criminal law, especially given the differing definitions of this crime since the Nuremberg Tribunal. The discussion would be important because the definition of the crime has potentially far reaching implications about the scope of the prohibition and therefore the reach of the crime. There are also diverging views among jurists on the customary law status of the Rome Statute definition, with most authorities and ad hoc courts concluding that the ICC Statute is much narrower than customary international law.¹⁴⁵ The difficulty was implicitly recognized. Thus, although only directed at definitions found in national legislation and

140. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 11–12.

141. *See id.* at 21.

142. *Id.* at 29.

143. Forteau, *supra* note 83, at 6.

144. *See* Murphy, *First Rep.*, *supra* note 62, at 57–58.

145. *See, e.g.*, Antonio Cassese, *Crimes Against Humanity, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 373 (Cassese, Gaeta & Jones, eds., 2002) (arguing that “In some respects, Article 7 elaborates and clarifies customary international law. In other respects, it is more narrow than customary international law.”).

in other international instruments, the Commission included a savings clause in paragraph 4 to the borrowed definition from Article 7 of the ICC Statute.¹⁴⁶ That fourth paragraph clarifies that the draft article is without prejudice to any broader definition of crimes against humanity provided in any international instrument or national law.¹⁴⁷

This without prejudice clause also allowed the ILC to set aside potentially positive developments in the definition of crimes against humanity since the Rome Statute was adopted in July 1998, in relation to for example, the subset crime of enforced disappearance that now has a standalone treaty concluded in 2006. The issue was explained as follows:

[T]he definition adopted for these draft articles has no effect upon broader definitions that may exist currently in other instruments, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, or in national laws . . . [and which] also makes clear that the present draft articles have no effect on the adoption, in the future, of a broader definition of crimes against humanity in an international instrument or a national law.¹⁴⁸

Interestingly, although there were references to definitions of crimes against humanity under *national law* or *other international instruments*, the without prejudice clause was virtually silent regarding *customary international law*.¹⁴⁹ That omission was surprising considering that custom is one of the most important sources of law with serious implications for national jurisdictions and their prohibition of crimes against humanity.¹⁵⁰ It is even more surprising since the Commission was simultaneously also undertaking a separate study on identification of customary international law.¹⁵¹ In States that would have incorporated the crime, through national legislation, the prosecution of the crime would be possible as paragraph 4 captured their scenario.¹⁵² For those States that have the possibility of doing so

146. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 44-45.

147. *Id.*

148. Forteau, *supra* note 83, at 6.

149. *See id.* at 6-7.

150. *See* Murphy, *First Rep.*, *supra* note 62, at 7.

151. *See* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 192-93.

152. *See* Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/725, at 37-38 (Feb. 18, 2019) [hereinafter Murphy, *Fourth Rep.*].

under customary law, without first having passed legislation, the omission in the without prejudice clause of customary law would pose some legal difficulties. The ILC will presumably revisit this aspect during the second reading on the topic.

There is a further concern about the ILC definition that is more forward-looking than backward-looking. What the Commission does should not in any way inhibit the growth of the customary law of crimes against humanity.¹⁵³ Ironically, even the ICC Statute, from which the ILC crimes against humanity definition is borrowed, two points make the intention of States not to disturb customary law crystal clear. First, the opening formulation of Article 7 of the Rome Statute, uses the language of “for the purpose of this Statute”.¹⁵⁴ This phrase was included to avoid any doubts about the specific crimes against humanity definition in the context of the establishment of a permanent ICC.¹⁵⁵

Second, in Article 10 of the ICC Statute, States were unequivocal that their preference for a particular definition of crimes against humanity for the specific purposes of the Rome Statute was not to be interpreted “as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”, meaning outside the ICC context.¹⁵⁶ The ILC took note of Article 10 in its commentary to Article 3 but could also have taken on board developments in international law since the Rome Statute was negotiated in July 1998.¹⁵⁷ Elements of the definition of the crime, for example in relation to enforced disappearances as a crime against humanity, has since been phrased in a way that is much broader than the definition actually included in Article 7, paragraph 2(i), of the Rome Statute in Article 2 of the 2006 International Convention for the Protection of All Persons against Enforced Disappearance.¹⁵⁸

We shall return to these and related concerns about the use of the ICC definition in Part IV of the present article. For now, it can be concluded that the definition of crimes against humanity contained in the first reading text is closer to an exercise in codification rather than

153. See G.A. Res. 174 (II), *supra* note 40, art. 1; Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 910–11 (2000).

154. Rome Statute, *supra* note 59, art. 7.

155. See *id.*

156. See Rome Statute, *supra* note 59, art. 10; see also Sadat, *supra* note 153, at 910–11.

157. See Rome Statute, *supra* note 59, art. 125.

158. See International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2176 U.N.T.S. 3 (the article 2 “enforced disappearance”).

progressive development – to the extent that most (though not all) of the elements contained in the Rome Statute definition would appear to be part of customary international law.

F. Draft Article 4—Obligation of Prevention

One of the most important features of the first reading text is the duty to prevent crimes against humanity. Draft Article 4, composed of two paragraphs, provides one of the most significant advances when it requires that each State undertakes to prevent crimes against humanity, in conformity with international law, through the adoption of various measures in any territory under its jurisdiction. It would establish an independent duty, from that of the duty to punish, to prevent crimes against humanity including mandating States to affirmatively adopt “effective legislative, administrative, judicial or other preventive measure in any territory under its jurisdiction” and “cooperate with other States, relevant intergovernmental organizations and, as appropriate, other organizations” to prevent crimes against humanity.

The ILC Article 4 complements Article 2 and makes the case why certain acts, which qualify as crimes against humanity, already require States to engage in proactive measures of prevention. The comparison was made to certain other widely condemned crimes such as genocide, apartheid, enforced disappearances, and torture. The prohibition of those crimes requires States to take preventive measures. By parity of reasoning, even if the obligation did not exist in relation to all the acts that comprise crimes against humanity, it was felt necessary to extend it to also cover such crimes since all of those crimes are themselves crimes against humanity when committed in the context of a widespread or systematic attack against any civilian population. Here, a strict line dividing *codification* from *progressive development* might have required separating the three underlying acts for which there are independent treaties *to the extent* that those could be said to constitute customary law (i.e. torture, enforced disappearances and apartheid) from the rest of the eight others that constitute crimes against humanity (i.e. murder, extermination, enslavement, deportation, imprisonment, rape, persecution, other inhumane acts).

Most of the rest of these crimes, for instance, murder, enslavement, imprisonment, rape and persecution are so prevalent in virtually all States that it will be hard for them not to constitute forms of codification even if one might have to fill a gap to derive the duty to prevent them in addition to the duty to punish. The autonomous duty to prevent crimes against humanity is also consistent with the practice of States in concluding numerous largely suppression treaties, especially since the 1960s, that feature a duty to take steps to prevent particular crimes such as terrorism, human trafficking and hostage taking.

To justify the argument for prevention, reliance was also placed on multilateral human rights treaties establishing obligations to prevent human rights violations though it was recognized that these were not necessarily penal in nature. Reference was also made to the jurisprudence of international courts, most notably, the International Court of Justice which has found the duty to prevent and the duty to punish are distinct but connected obligations.¹⁵⁹ All would support the commonsense position that, like the case for genocide, States can be asked to undertake the duty to prevent crimes against humanity. In the commentary, the Commission went on to explain what exactly prevention would entail. Here, it relied on a four-part duty for States based on the ICJ judgment in relation to Genocide which was viewed as naturally extending to crimes against humanity.¹⁶⁰ The ICJ, as part of this, reasoned that the duty to prevent genocide is not necessarily territorially limited, meaning that the similar duty could apply to crimes against humanity in areas under both *de facto* and *de jure* control of the State concerned.¹⁶¹

As framed, this provision would require States to develop mechanisms which they may use to promote the prevention of crimes against humanity.¹⁶² The majority of the language for Article 4 (1) (a) and the commentary concerning the treatment of the duty to prevent crimes against humanity broadly followed and applied to this crime derive from the findings of the ICJ in relation to the interpretation of this same obligation under Article 1 of the Genocide Convention in the *Bosnia Genocide Case*. The obligation of prevention being placed on States is important and would be read in light of the circumstances and the risks they are being confronted with at the time as well as their capacity to influence the course of events.¹⁶³ Measures taken, of course, must remain in full conformity with international law.¹⁶⁴ In other words, a State may not violate international law and unlawfully use force in the name of preventing crimes against humanity.¹⁶⁵

The duty to take preventive measures could be seen as a form of codification, or perhaps more plausibly, as a form of progressive development. The Commission, without drawing such a distinction,

159. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), Judgment, 2007 I.C.J. Rep. 42, ¶¶ 430–431 (Feb. 26).

160. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, *supra* note 35, at 49–51, 54.

161. *Id.* at 53–54.

162. *Id.* at 51.

163. Rep. on Sixty-Seventh Session, *supra* note 11, at 53.

164. *Id.*

165. *Id.*

essentially derived the obligation to prevent from a combined reading of State practice, jurisprudence and the established prohibition providing for punishment of those who commit crimes against humanity. This in a way represents the consolidation of a body of law on crimes against humanity that first emerged in the immediate aftermath of World War II and that extends through to the modern period with the establishment of the UN international tribunals as well as various prosecutions of the crime within national courts. Yet, in many ways, the categorization of the draft article may not be as significant. This is because, as with the case of the Genocide Convention, there is no automatic extension of the obligation of prevention onto States until a convention containing this express obligation is adopted. The safeguard for States remains in that they would have to choose to negotiate and then join such a convention and to give their consent in relation to the duty to prevent before it would apply to them from the point of entry into force.¹⁶⁶

Paragraph two of the draft article forecloses any exceptional circumstances as justifications for the crime.¹⁶⁷ This paragraph was inspired by but is not entirely identical with article 2, paragraph 2 of the Convention against Torture.¹⁶⁸ The provision was naturally tweaked to better fit the crimes against humanity context. As the Chair of the Drafting Committee explained, “it was thought that an advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors.”¹⁶⁹

G. *Draft Article 5—Non-Refoulement*

Draft Article 5, which is in some respects also preventive, contemplates in paragraph 1 that no person is to be expelled, returned (*refoul er*), surrendered or extradited to a State 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.”¹⁷⁰ This language is largely derived from the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. But the textual addition of “territory under” has the effect of narrowing down the version included in the draft crimes

166. United Nations, *Towards Universal Participation and Implementation 2011 Treaty Event*, available at: https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_1_english.pdf [perma: <https://perma.cc/KN9V-Z3AE>].

167. Rep. on Sixty-Seventh Session, *supra* note 11, at 53.

168. *Id.*

169. Forteau, *supra* note 83.

170. Rep. on Sixty-Ninth Session, *supra* note 35, at 12.

against humanity text.¹⁷¹ The focus should be on the change of jurisdiction which is not necessarily coextensive with territory.

The second paragraph of Draft Article 5 requires States to examine factors triggering non-refoulement; such grounds are broad and would require taking into account “all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concern of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.”¹⁷² This clause, or close variants of it, has previously been included in a number of international and regional treaties including: the 1951 Convention relating to the Status of Refugees and the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.¹⁷³ Nonetheless, and appropriately so in my view, no exceptions to the prohibition of non-refoulement similar to that found in refugee law allowing the return of a refugee who has committed a particularly serious crime or deemed to be a national security risk was incorporated in the context of crimes against humanity.¹⁷⁴

A wider formulation of this duty was already included in the Commission's own project on diplomatic protection.¹⁷⁵ The use of certain limiting language, concerning the formula regarding the “territory under the jurisdiction of” raises a number of concerns that might merit revisiting during the second reading stage. A related issue is whether, if a person is in danger of crimes against humanity, the obligation should be limited to assessing only that risk. Surely, it would be more consistent with the letter and spirit of the provision if the States concerned are required to assess the potential risk also in relation to other crimes. It is unclear whether the individual can be deported to a situation where other international crimes, such as war crimes or genocide or even other non-criminal gross human rights violations, are being committed. In the end, given that most of Draft Article 5 matches existing law and is found in numerous treaties and other instruments already widely accepted by States, it can be seen as a codification of an existing and fundamental rule of international law that prohibits

171. International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 158, art. 9(1)(a).

172. Rep. on Sixty-Ninth Session, *supra* note 35, at 12.

173. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 86.

174. Convention Relating to the Status of Refugees, *supra* note 173.

175. Int'l Law Comm'n, *supra* note 31, at 17.

against refolement. The rule is even sometimes said to possess a *jus cogens* character.¹⁷⁶

H. Draft Article 6—Criminalization under National Law

Draft Article 6 requires States to take measures to ensure that crimes against humanity are criminalized under their national law, which – if followed – would do much to prevent crimes against humanity from occurring.¹⁷⁷ This draft article, which seems like a mix of codification and progressive development, further obliges States to address in their national laws the liability of others as well: for various modes of liability, *including* committing, attempting, ordering; to provide for command or superior responsibility; and provide appropriate penalties for the gravity of the crimes; the liability of legal persons; while providing that liability would follow despite official position of a person, which would not serve to exclude the person from criminal responsibility and affirming the inapplicability of a statute of limitations and the superior orders defense for such crimes.¹⁷⁸

Specifically, given divergent definitions of the crime in national laws, draft article 6 is significant in mandating that States take the necessary measures to ensure that crimes against humanity are criminalized under their national law *as such*, and equally importantly, that they ensure that such measures cannot be defeated by pleas to procedural bars that might otherwise gut the essence of the prohibition.¹⁷⁹ The Special Rapporteur believed that State practice regarding the liability of legal persons for the offences referred to in the draft articles was varied.¹⁸⁰ The idea of corporate criminal liability for crimes against humanity and other atrocity crimes was mooted but was not taken forward during the 1998 negotiations of the Rome Statute. More recently, in the African Union, African States adopted the Malabo Protocol providing for the criminal liability of legal persons.¹⁸¹ Interestingly, the provision contemplates the application of such

176. *Id.* at 22.

177. Rep. on Sixty-Ninth Session, *supra* note 35, at 13.

178. *Id.*

179. *Id.*

180. Int'l Law Comm'n, Provisional summary record of the 3296th mtg., Sixty-eighth session, U.N. Doc. A/CN.4/SR.3296, at 9 (2016).

181. *See* article 46, African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, adopted by the Twenty-third Ordinary Session of the Assembly of Heads of State and Government, 27 June 2014 (15 signatories as of this writing but not yet in force).

liability for both transnational¹⁸² crimes and crimes against humanity as well as a longer list of international crimes than the four contained in the ICC Statute.¹⁸³

However, even if that practice varies and could be insufficient to reach the threshold of codification, several members of the Commission highlighted the need for a provision requiring the establishment of liability of legal persons for crimes against humanity.¹⁸⁴ There was considerable support in the Plenary discussions of the Commission for the inclusion of a provision of this kind, to account for new realities of legal persons being accomplices or aiders and abettors to the commission of mass violations of human rights, and in some cases, even crimes against humanity.¹⁸⁵ There are no doubt various parts of this provision that are forms of progressive development. There are also other parts, especially the modes of liability, that may already have sufficient rooting in customary international law.¹⁸⁶

It is regrettable that the ILC, though relying on the individual criminal responsibility clause set out in Article 25(3) of the Rome Statute for inspiration, did not include other established modes of liability such as inciting/incitement and conspiracy, for crimes against humanity, both of which are found in its own prior and well-known work on the Draft Code of Crimes and in the Genocide Convention.¹⁸⁷ Incitement as a form of accessorial liability seems well rooted in customary international law.¹⁸⁸ It is a vital form of criminal

182. The distinction between international and transnational crimes is, of course, not always clear. See Charles C. Jalloh, “*The Distinction Between “International” and “Transnational” Crimes in the African Criminal Court*”, in LEGAL RESPONSES TO TRANSNATIONAL AND INTERNATIONAL CRIMES, 272 (Harmen Van der Wilt & Christophe Paulussen eds., 2017).

183. THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES’ RIGHTS: DEVELOPMENT AND CHALLENGES (Charles Jalloh, Kamari Clarke & Vincent Nmeielle eds., 2019). See, in particular, Chapter 27 on Article 46C by Joanna Kyriakakis.

184. Int’l Law Comm’n, Provisional summary record of the 3300th mtg., Sixty-eighth session, U.N. Doc. A/CN.4/SR.3300, at 14 (2016).

185. *Id.*

186. *Id.* at 3.

187. See Convention on the Prevention and Punishment of Genocide, art. III(b)-(c), Dec. 9, 1948, 78 U.N.T.S. 277.

188. See TERJE EINARSEN & JOSEPH RIKHOF, A THEORY OF PUNISHABLE PARTICIPATION IN UNIVERSAL CRIMES (2018) 257-304 (providing a thoughtful critique pointing out inconsistencies in the ILC’s approach to modes of liability including in relation to the crimes against humanity project).

participation in relation to genocide,¹⁸⁹ and given the systemic nature of such core crimes, also in relation to crimes against humanity.¹⁹⁰ This mode of criminal participation is reflected in extensive State practice and in the practice of international criminal courts that have prosecuted crimes against humanity.¹⁹¹ Interestingly, the ILC departs from its earlier work by omitting both incitement and conspiracy from the draft crimes against humanity articles.

I. Draft Article 7—Establishment of National Jurisdiction

Draft article 7 addresses the obligation of States to establish jurisdiction over crimes against humanity in certain circumstances. It provides, in relevant part, that “[e]ach State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles”¹⁹² Its three subsections delineate the circumstances under which States shall take the necessary measures to establish jurisdiction: territorial jurisdiction, active personality jurisdiction, and passive personality jurisdiction.¹⁹³ In order to properly appreciate this draft article, the contents must be explained prior to the analysis. Though it can already be said that the bulk of this would appear to be a form of codification even if there are also aspects that could be read as progressive development.

First, territorial jurisdiction is based on the location of the crime. This subsection provides a basis to assert territorial jurisdiction “when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State.”¹⁹⁴

Second, active personality jurisdiction is a common form of jurisdiction in national law based on the nationality of the alleged offender. This subsection provides for the assertion of jurisdiction “when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who habitually resides in that State’s territory.”¹⁹⁵

Third, passive personality provides the final basis on which to assert jurisdiction. Passive personality has been described as

189. See for the pernicious role of incitement in fomenting atrocity crimes, Gregory S. Gordon, *ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION* (2017).

190. *Id.*

191. See generally Wibke Kristin Timmermann, *Incitement in international criminal law*, 88 *INT’L REV. OF THE RED CROSS* 164, 823-852 (2006).

192. Int’l Law Comm’n, *supra* note 32, ch. IV, art. 7(1)(a).

193. *Id.*

194. *Id.*

195. *Id.* art. 7(1)(b).

controversial by some academics even though it exists in several national criminal systems. This final subsection provides that jurisdiction may be asserted “when the victim is a national of that State”¹⁹⁶ National law is instrumental regarding this subsection because it will provide the definition.¹⁹⁷

Moving on to paragraph two of the same draft article, which provides that: “[e]ach State shall also take necessary measures to establish jurisdiction over the offences covered by the present draft articles . . . where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person”¹⁹⁸ This paragraph, which in some respects is residual in character to encompass situations not covered by the earlier grounds of jurisdiction, creates a duty for States to establish such jurisdiction. No prior territorial or active or passive personality connection to the crime is required. The provision contemplates situations where a suspect, say in an attempt to find safe haven, becomes present in a State Party having no other connections to the offense. However, the draft articles consider the possibility that a State may extradite or surrender the alleged offender, which is addressed in greater detail in other draft articles specifically article 9.¹⁹⁹

Next, the third and final paragraph of article 7 makes clear that “the exercise of criminal jurisdiction established by a State in accordance with its national law” is not excluded when using other jurisdictional grounds that may be available to it.²⁰⁰ For instance, the exercise of jurisdiction on the basis of universal jurisdiction for crimes against humanity would be permissible. The Commission did not explicitly say anything on this, which might strike the reader as odd given the widespread acceptance by States of the existence of universal jurisdiction for crimes against humanity. At the same time, given earlier ILC work in this regard, it was understood that the omission of the reference did not constitute a departure from its earlier works on the subject.²⁰¹ Indeed, under Article 8 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the Commission was clear that it would be up to States to establish broad forms of jurisdiction

196. *Id.* art. 7(1)(c).

197. For further comments on article 7, see Antonio Coco, *The Universal Duty to Establish Jurisdiction over and Investigate Crimes Against Humanity: Preliminary Remarks on Draft Articles 7, 8, 9, and 11 by the International Law Commission*, 16 J. INT’L CRIM. JUST. 751, 761 (2018).

198. Int’l Law Comm’n, *supra* note 35, ch. IV, Article 7(2).

199. *Id.* art. 9(1).

200. *Id.* ch. IV, art. 7(3).

201. *See id.*

over atrocity crimes, including crimes against humanity, “irrespective of where or by whom those crimes were committed.”²⁰² It can thus be concluded that the universality principle remains a viable jurisdictional basis for the investigation and punishment of crimes against humanity.

Since it appears that there is universal criminal jurisdiction for crimes against humanity under customary international law, consistent with the views of many States as expressed before the Sixth Committee, article 7 could be misread as restricting the “combined approach to jurisdiction based on the broadest jurisdiction of national courts” envisioned by the ILC in 1996 in commentary paragraph (2) to article 8 of the draft code.²⁰³ Indeed, according to the Commission, “The phrase “irrespective of where or by whom those crimes were committed” is used in the first provision of the article to avoid any doubt as to the existence of universal jurisdiction for those crimes.”²⁰⁴ Additionally, this broad concept of universal jurisdiction finds support in international and domestic law and in other scholarly and other works as evidenced by, for instance, Principles 1 of both the Princeton Principles and the Madrid-Buenos Aires Principles of Universal Jurisdiction.²⁰⁵

J. Draft Article 8—Investigation

Article 8 mandates that, when there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed on their territory, the competent authorities of a State must take measures to ensure a prompt and impartial investigation.²⁰⁶ This approach, of directing the issue of investigation to the States that may have crimes against humanity occurring in their territory, is in line with existing international instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—article 12 of which provides a base for the formulation of

202. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, Supp. No. 10, at 110–11, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n 1, 29, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

203. *Id.* at 205.

204. *Id.* at 29.

205. See *The Princeton Principles on Universal Jurisdiction*, Princeton Program in Law and Public Policy (2001) <http://hrlibrary.umn.edu/instreet/princeton.htm> [<https://perma.cc/9KSN-GWR6>]; FIBGAR, *International Congress on Universal Jurisdiction: Dissemination of the Madrid-Buenos Aires Principles on Universal Jurisdiction* (Sept. 10, 2015), <https://fibgar.org/upload/proyectos/35/en/principles-of-universal-jurisdiction.pdf> [<https://perma.cc/NT99-CP84>].

206. Int'l Law Comm'n, *supra* note 35, ch. IV, art. 8.

draft article 7.²⁰⁷ Torture, when committed in a widespread or systematic context, is a crime against humanity.²⁰⁸

More expressly, article 8 relates to a States' obligation to promptly and impartially investigate offences constituting crimes against humanity "in any territory under its jurisdiction."²⁰⁹ To avoid unnecessary confusion, it could be explained in the commentary that the intention was to also encompass situations where there is both *de facto* and *de jure* exercise of such jurisdiction.²¹⁰ Undoubtedly, when crimes against humanity occur, the "competent authorities" of States have an obligation to proceed to a prompt and impartial investigation. However, neither the commentary, nor the text, of this draft article define or explain the term "competent authorities."²¹¹

Competent authorities may be read narrowly as including only the law enforcement authorities of a State. It could also be read more broadly to encompass other types of judicial or quasi-judicial bodies created by a State to investigate or document atrocity crimes. Consequently, it would seem beneficial for the commentary to clarify whether quasi-judicial investigations such as special commissions of inquiry or truth commissions are encompassed in this draft article. Further, it may not be entirely clear whether competent authorities are only the law enforcement bodies, or as is typical in some States, would encompass investigative branches of the judiciary especially in civil law jurisdictions.

Questions that may arise about this provision concern the use of terms, for example, whether *thorough* should also be used, rather than only "prompt and impartial investigation" as currently worded.²¹² The formulation could then become "prompt, thorough and impartial investigation."²¹³ Further, investigations should only qualify if they are carried out in good faith. Sham investigations that are intended to shield or exonerate the suspects should not qualify. One might also query about the type of knowledge that would trigger such an investigation. I tend to the view that a State's duty to ensure its competent authorities investigate should be automatically triggered as soon as the State simply becomes *aware* of the commission of crimes against humanity. In the end, as to classification, it seems hard to put

207. *Id.* art. 12.

208. Rome Statute, *supra* note 59, art. 7(1)(f).

209. Int'l Law Comm'n, *supra* note 35, ch. IV, art. 8.

210. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, *supra* note 202, at 212.

211. Int'l Law Comm'n, *supra* note 35, ch. IV, art. 8.

212. *Id.*

213. *Id.*

this provision into the category of codification or progressive development. The reality is that, while this draft article seemingly consolidates the implicit duty to investigate norm found in international and regional human rights treaties as well as penal instruments (torture) and applies it explicitly to crimes against humanity, it could be a mix of codification and progressive development. At the same time, since extensive State practice, precedent and doctrine seems lacking, within the codification meaning of Article 15 of the ILC Statute, it may more plausibly be a form of progressive development.²¹⁴

K. Draft Article 9—Preliminary Measures When an Alleged Offender is Present

Article 9 provides that States have a duty, when an alleged offender is present in their territory, to take preliminary measures such as placing the suspect in custody or taking other legal measures.²¹⁵ For the most part, draft article 9, which is comprised of three separate paragraphs, is a replica of article 6 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²¹⁶

In the first paragraph, it provides that where 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.”²¹⁷

In the second paragraph, “[s]uch State shall immediately make a preliminary inquiry into the facts.” Finally, in the third paragraph, when the State “has taken a person into custody, it shall immediately

214. Sarah M. H. Nouwen, *Is there Something Missing in the Proposed Convention on Crimes Against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission*, 16 J. INT'L CRIM. JUST. 877, 908 (2018) (arguing that the ILC in recalling the duty of States to exercise their criminal jurisdiction over crimes against humanity in the preamble has implicitly determined that the duty of every State to exercise its criminal jurisdiction over crimes against humanity exists without necessarily providing the basis for that conclusion, and thus, that the approach to the crimes against humanity project represents progressive development rather than codification).

215. *Id.*

216. Int'l Law Comm'n, Statement of the Chairman of the Drafting Committee (June 9, 2016), http://legal.un.org/docs/?path=../ilc/documentation/english/statement_s/2016_dc_chairman_statement_cah.pdf&lang=E [<https://perma.cc/57LQ-7B4Y>].

217. *Id.*

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.”

The idea that States must take preliminary measures to address crimes against humanity has been expressed in General Assembly and Security Council resolutions. It is also supported in State practice, at least in so far as torture and other similar penal treaties are concerned. The Commission’s commentary draws on relevant ICJ jurisprudence, on torture, to flesh out the nature of the obligation that such measures would ordinarily entail. Given the paucity of investigations and prosecutions of the crime at the national level, however, it is not entirely clear whether this provision can be said to constitute codification instead of progressive development.

L. Draft Article 10—Aut Dedere Aut Judicare

The draft convention also includes the perhaps misnamed duty to prosecute or extradite (*aut dedere aut judicare*) in draft article 10.²¹⁸ This provision is a natural follow-up to article 9 and provides that, if the circumstances so warrant, States must submit the cases to their competent authorities for the purpose of prosecution unless they extradite that person to another State or competent international penal tribunal.²¹⁹ In reality, as framed in the first reading draft convention, the provision only establishes an obligation on the State in the territory under whose jurisdiction *the alleged offender is present* to submit the case to its competent authorities for the purposes of prosecution, *unless* it extradites or surrenders the person to another State or competent international criminal tribunal.²²⁰ One issue that could arise is whether an international instrument should impose on prosecutorial discretion by requiring the prosecution of a case when the decision to do so would typically depend on the quality and quantity of evidence available. Generally, members speaking in the ILC Plenary debate supported the inclusion of this provision, with some linguistic suggestions.²²¹ In the Drafting Committee, there was discussion over this provision—specifically the following:

218. Int’l Law Comm’n, *supra* note 35, ch. IV, art. 10.

219. *Id.* art. 9.

220. *Report of the International Law Commission on the Work of Its Forty-Eighth Session, supra* note 202, at 31.

221. *Id.*

[W]hether to assert in [then] draft article 9 that the obligation contained therein was “without exception whatsoever and whether or not the offence was committed in a territory under its jurisdiction.” This expression is used in some treaties as a matter of emphasis. The Drafting Committee concluded that it was not necessary to include this clause, but that the unequivocal nature of the obligation set forth in the draft article should be stressed in the commentary.²²²

This idea was indeed stressed in the commentary for this provision.²²³

[D]iscussion also took place as to whether “international criminal tribunal” should be qualified by language to say that it must be a tribunal whose jurisdiction the sending State has recognized, as appears in article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance.²²⁴

However, this was ultimately deemed to be unnecessary.

The final report on the Commission’s separate project, on the duty to prosecute or extradite, was clear that there are important gaps in existing international law concerning this duty in relation to most crimes against humanity.²²⁵ It had concluded, in the context of its work on the Draft Code of Crimes against the peace and security of mankind of 1996, that there was an obligation to prosecute or extradite in relation to crimes against humanity alongside genocide and war crimes.²²⁶ The more recent project has since concluded that this obligation stated in the 1996 code was driven by the need for an effective system of criminalization and punishment, suggesting that it had been adopted as a matter of progressive development.²²⁷ While that does not make it less authoritative or more doubtful because of its inclusion in the draft crimes against humanity convention, the more specific project had even conceded that the earlier finding did not appear to be driven by State practice and *opinio juris* to that effect. Yet, as an analogous crime to genocide, a rudimentary equivalent that

222. Int’l Law Comm’n, *supra* note 75, at 147.

223. *Id.*

224. *Id.*

225. See generally Final Report of the Int’l Law Comm’n, The Obligation to Extradite or Prosecute (2014), http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf [<https://perma.cc/P2B8-CSTV>].

226. *Id.* ¶ 3.

227. *Id.*

does not necessarily match the text found in draft article 9 can be found in the Genocide Convention.

In the circumstances, though this point is not free of difficulty, considering the practices of States in relation to other crimes since the 1950s, it would appear that the inclusion of this standard can be said to be a form of progressive development of existing law prohibiting specific crimes albeit now applied in relation to crimes against humanity.²²⁸ This approach helps to fill a void in the contemporary legal framework that could not exist in relation to this crime since no multilateral treaty has been concluded to prohibit it in the same way we have had for torture or enforced disappearances.²²⁹

M. Draft Article 11—Fair Treatment of the Alleged Offender

Draft Article 11 of the first reading text requires that States shall take necessary measures pertaining to the rights of alleged offenders.²³⁰ It requires that any person against whom measures are being taken in connection with an offence covered by the 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.²³¹ It also requires the person who is arrested or detained to be notified of the right to communicate without delay with the State of nationality of the person or the State which is otherwise entitled to protect his/her rights. Such persons also have the right to a visit by the representative of the State(s) concerned.²³²

The provision has two components at least one of which represented pure codification. The first relates to the concept of fair trial rights, which will fall in the former category and second, the issue of fair treatment, most likely constituting progressive development.²³³ There are aspects of the provision, which for example confers the benefits of consular access also to stateless persons, that may or may not reflect current customary international law and thus amount to progressive development.²³⁴

Fair trial rights are relatively narrower in scope and are provisions prevalent in national constitutions, legislation, and numerous decisions found at all levels of national courts and regional and international

228. *Id.*

229. *Id.*

230. Int'l Law Comm'n, *supra* note 35, ch. IV, art. 11 (1).

231. *Id.*

232. *Id.*

233. *Id.*

234. *See id.*

courts and tribunals.²³⁵ The pedigree of this provision in international human rights, including in the International Bill of Rights²³⁶ and in regional and national instruments is so well settled, that it would be consistent with a view that it amounts to the extensive State practice, precedent and doctrine that is required for codification. Such fair trial standards, which could be read as inclusive of the broader notion of “fair treatment,” also apply in the field of international criminal law.²³⁷ Indeed, just about all the statutes of international penal courts established to prosecute international crimes since World War II, including crimes against humanity, incorporates fair trial provisions.²³⁸ The references to the highest protections offered by international law provide an additional form of protection to alleged offenders under the draft article.²³⁹

Two questions arise for me here. First, the language of the draft article and its commentary carries some ambiguity. On the one hand, it suggests that it is intended to ensure the “fair treatment” of “any person” against whom measures are being taken in connection with crimes against humanity covered by the draft articles “at all stages of the proceedings.”²⁴⁰ One could read the latter to include preliminary investigations against a suspect in line with Draft article 9, paragraph 2, through to commencement of criminal proceedings when the target of the investigation is arrested or detained.²⁴¹ Suspects, before they are formally charged, enjoy certain rights. The clearest expression of this can be found in the Rome Statute.²⁴² Though this standard here would be applicable in relation to national courts, which have other

235. See e.g., ICRC, *Rule 100: Fair Trial Guarantees*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [<https://perma.cc/6PBC-QGN5>].

236. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 9, Dec. 14, 1973, 1035 U.N.T.S. 167; Convention against Transnational Organized Crime art. 16, Dec. 12, 2000, 2225 U.N.T.S. 209; Vienna Convention on Consular Relations art. 36, Mar. 4, 1964, 596 U.N.T.S. 261; Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 10, (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

237. See ICRC, *supra* note 235.

238. *Id.*

239. Int'l Law Comm'n, *supra* note 35, ch. IV, art. 11(1).

240. *Id.*

241. Int'l Law Comm'n, *supra* note 35, ch. IV, art. 9.

242. Rome Statute, *supra* note 59, art. 55.

protections, it might be helpful to clarify how this distinction can be accommodated.

Second, although it seems implied, there is no specification in the draft articles that the fair treatment provision (and for that matter several others such as Draft Article 9, 11 and 12) may only apply to natural (not also legal persons).²⁴³ It might be worth clarifying this since some national jurisdictions may provide for the prosecution of legal persons for crimes against humanity under Draft Article 6. Any provisions in that regard must be consistent with the national law of the State concerned. Presumably, since a corporate body is a mere legal fiction through which human beings act, it might not be entitled to the same fair trial rights as those enjoyed by a natural person.

N. Draft Article 12 – Victims, Witnesses, and Others

The draft articles also provide, under draft article 12, for the protection of the rights of victims, witnesses and others.²⁴⁴ Such a provision is not typically found in international instruments before the 1980s but now has a similar place in, among others, Article 68 of the Rome Statute.²⁴⁵ The provision, a form of progressive development, requires each State to take the necessary measures to ensure that 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; provides for protective measures for complainants, victims, witnesses and others who participate in any investigation, prosecution, extradition or other proceeding; and requires States to ensure that victims of a crime against humanity have the right to obtain reparation for material or 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.²⁴⁶

This broadly framed provision indicates that the rights of victims under international law are also of significance in the context of crimes against humanity.²⁴⁷ The clause addresses a range of issues, from participation to reparations for victims of crimes against humanity.²⁴⁸ This provision, in view of the enhanced standing for victims in both modern international human rights and international criminal law, could be read as constituting codification. It could be understood as an

243. Int'l Law Comm'n, *supra* note 35, art. 9.

244. *Id.* art. 12.

245. Rome Statute, *supra* note 59, art. 68.

246. Int'l Law Comm'n, *supra* note 35, at 92.

247. *Id.*

248. *Id.*

existing standard merely extended to apply to a draft convention. The case could be stronger for progressive development.

In the Drafting Committee debate of this clause, some members of the Commission suggested the inclusion of the elements set forth in Article 68 of the Rome Statute in the commentary to draft article 12.²⁴⁹ There were also some reservations about this provision.²⁵⁰ While many members welcomed it, some questioned whether it would be better to include a definition of who a victim is.²⁵¹ I could see the argument to not have a definition, which was the preference of the Special Rapporteur and ultimately the Commission itself. At the same time, in my view, a basic definition of “victims” could have been provided to establish a floor, rather than a ceiling, for States.

In plain terms, this means that it would be without prejudice to a broader definition that may be available to provide even greater protections under national law. This could better ensure that a common or shared understanding of victimhood is provided for, as different national systems would have different definitions. A basic definition could also help ensure greater consistency and greater rights across different national jurisdictions. For instance, in some national systems, legal persons can be victims. Yet, in the crimes against humanity context, it might be more in line with the goals of the prohibition of the crime to encompass natural persons only. The latter posture would be consistent with Rule 85 of the ICC’s Rules of Procedure.²⁵²

A second potential issue relates to the duty to provide a remedy for victims in the form of reparations which, in principle, I fully share. That said, I wondered whether it would be imposing a realistic obligation for many States afflicted with mass commission of crimes against humanity to provide that the State must ensure 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. This could work well in circumstances of small-scale commission of such crimes. It would no doubt be highly beneficial for victims. On the other hand, since crimes against humanity occur when there are widespread or systematic attacks against a civilian population, the question arises whether the

249. Int’l Law Comm’n, Statement of the Chairman of the Drafting Committee on Crimes Against Humanity, art. 12 (June 1, 2017), http://legal.un.org/docs/?path=../ilc/documentation/english/statement_s/2017_dc_chairman_statement_cah.pdf&lang=E [<https://perma.cc/PZ5C-NMP4>].

250. *Id.*

251. *Id.*

252. Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, U.N. Doc. ICC-ASP/1/3, 10 (Oct. 31, 2002).

same obligation might not work as well in situations of commission of mass atrocity crimes.

For example, take States such as Sierra Leone, Rwanda, and Liberia, all of which were embroiled in devastating conflicts or transitioning out of them in the 1990s.²⁵³ Hundreds of thousands were victims of those conflicts.²⁵⁴ The question is when there are so many victims, how a State might approach the duty to give effect to victims' rights. In some of these atrocity contexts, the concerned State may also be on the verge of failure and have many priorities. Can such States realistically give effect to such a right to obtain individual and collective reparations? The commentaries to the provision seemed to acknowledge this difficulty, leaving a margin of discretion for States. But that margin might not be as wide as might be necessary for post conflict States. There were also additional concerns about, if the crimes are perpetrated by non-State actors rather than State actors, what duty would that entail for the concerned States. Will they bear the duty, say in civil wars, to compensate the victims even if they or their organs did not cause or participate in causing the harm?

O. *Draft Article 13—Extradition*

The purpose of this relatively lengthy draft article 13 is to set out the rights, obligations and procedures applicable to the extradition process, in the event that extradition is to take place.²⁵⁵ It anticipates each of the offences covered by the draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States.²⁵⁶ States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. This provision can be described as a “mini-extradition treaty within the treaty.”²⁵⁷ It is one of the most important provisions, considering present gaps in the law, which I fully supported.²⁵⁸ It is rooted, at bottom, in a long line of legal instruments on extradition

253. See e.g., Mba Chidi Nmaju, *The Role of Judicial Institutions in the Restoration of Post-Conflict Societies: The Cases of Rwanda and Sierra Leone*, 16 J. CONFLICT & SEC. L. 357 (2011).

254. World Peace Foundation, *Mass Atrocity Endings Sierra Leone*, (Aug. 7, 2015) <https://sites.tufts.edu/atrocityendings/2015/08/07/sierra-leone/> [<https://perma.cc/K7QZ-SFLD>]; World Peace Foundation, *Rwanda: 1994 genocide and aftermath* (Aug. 7, 2015) <https://sites.tufts.edu/atrocityendings/2015/08/07/rwanda-1994-genocide-aftermath/> [<https://perma.cc/V8ZV-S5A4>].

255. Int'l Law Comm'n, *supra* note 35, art. 13.

256. *Id.* art. 14(2)–(3).

257. *Id.*

258. *Id.*

that may suggest its inclusion constitutes a form of codification of existing law, again, albeit, now applied specifically to crimes against humanity.

Furthermore, although they frequently occur in political contexts and are sometimes perpetrated for political gain, core international crimes such as genocide, crimes against humanity and war crimes are not to be regarded as “political offences” for the purposes of denying extradition. Paragraph 2 of the draft article makes this clear.²⁵⁹ This principle is enshrined in Article VII of the Genocide Convention.²⁶⁰ Equally, though not found in the 1949 Geneva Conventions, it is consistent with the more recent State practice when concluding multilateral treaties addressing specific international and transnational crimes.²⁶¹ Thus, its inclusion likely would help crystallize State practice and consolidate customary international law.

One concern with this provision is that Draft Article 13, paragraph 1, provides for “each of the offences covered by the present draft articles” to be deemed extraditable offences.²⁶² There seems to be some lack of clarity regarding the scope of application. One plausible reading is that this only applies to Draft Article 3, which defines crimes against humanity, and is the object of the entire draft articles. Another reading is that it would additionally include Draft Article 6 requiring States to take the necessary measures to ensure that various other acts (such as attempting or ordering and soliciting crimes against humanity) are also offences under their national criminal laws. The former interpretation might be the preferable one. This uncertainty would be hopefully clarified by the Commission during the second reading stage of the topic. This article, being largely derived from existing standards albeit applied in transnational crimes and other contexts, could largely constitute customary international law and therefore be a form of codification.

P. Draft Article 14—Mutual Legal Assistance

Article 14 contains general obligations with respect to mutual legal assistance.²⁶³ It requires States to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the draft articles in

259. *Id.* art. 13(2).

260. Genocide Convention, *supra* note 60, art. 7.

261. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

262. Int'l Law Comm'n, *supra* note 35, art. 13(1).

263. *Id.* art. 14.

accordance with the draft article.²⁶⁴ Like the preceding clause on extradition, this detailed provision on mutual legal assistance appears equally fundamental to the regime that would be established by a future crimes against humanity convention based on the ILC draft.²⁶⁵

The wide scope of paragraph 1 and its applicability to the different forms of “investigations,” “prosecutions,” and “judicial proceedings” seems important.²⁶⁶ Mutual legal assistance is to be provided to the “fullest extent possible” under paragraph 3.²⁶⁷ In paragraph 3, which sets out the types of assistance that may be sought, the list contained therein is illustrative and not intended to be exhaustive.²⁶⁸ We can also assume that requests for mutual assistance may also be made for more than one of the purposes mentioned. The provision also has an annex which must be read together with it.

In the end, though seemingly applied for the first time in the context of this crime, I am tempted to argue that this provision constitutes a codification of existing law. There were also some changes to standard clauses found in extradition treaties to better address the specificities of crimes against humanity. The removal of the dual criminality requirement makes sense, in the context of crimes against humanity since it would otherwise stand as an obstacle to inter-State cooperation. But it might constitute a form of progressive development. Given the nature of crimes against humanity, this seems warranted—as mentioned in my intervention on the topic during the first reading in 2017.²⁶⁹

Q. Draft Article 15—Settlement of Disputes

The purpose of draft Article 15, which is the last substantive provision in the first reading of the draft convention, is to govern the settlement of inter-State disputes concerning the interpretation or application of the draft articles.²⁷⁰ The Commission typically does not address such final clauses, since these types of issues are usually the preserve of States.²⁷¹ In this case, it was felt that it ought to do so.²⁷² It

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* art. 14(2)–(3).

268. *Id.* art. 14(3).

269. U.N. Int'l Law Comm'n., 69th Sess., 3350th mtg. at 9, U.N. Doc. A/CN.4/SR.3350 (May 3, 2017).

270. Int'l Law Comm'n, *supra* note 35, art. 15.

271. Int'l Law Comm'n, *supra* note 249.

272. *Id.*

thereafter sought to adopt a provision that would give a measure of flexibility for States in that they could agree to arbitration instead of litigating their differences before the ICJ.²⁷³

Such an approach makes sense, especially in the context of treaties that entail reciprocal obligations for States, for instance, treaties of an economic nature. I wondered whether, given the inherently humanitarian purpose of the subject matter under consideration, this approach would be a realistic one. Furthermore, for reasons of parity, I preferred that the Commission basically follow the dispute settlement clause provided in Article IX of the 1949 Genocide Convention.²⁷⁴

IV. SOME POTENTIALLY PROBLEMATIC ASPECTS OF THE FIRST READING DRAFT ARTICLES ON CRIMES AGAINST HUMANITY

A. *General Remarks*

On balance, though in my view a potentially groundbreaking development from an ICL point of view, it can be noted that some of the ILC's draft provisions were at times sensitive within the Commission itself.²⁷⁵ Thus, as is so often the case with such processes, it seems important to explore what the ILC omitted from its first ever draft crimes against humanity convention. For the same reasons, wearing the hat of an independent academic, one might query certain choices made by the Commission. Among the various substantive issues that the ILC did not fully address in the draft articles in my view, some of which were well debated within the Commission, four aspects seem particularly worth highlighting. Here, I will set aside controversies regarding final clauses, such as the issue of permissibility of reservations or the format of the dispute settlement clause, to focus only on four aspects. Those issues are important, but generally tend to be matters for States to address during treaty negotiations.

My concerns relate to the following four substantive issues: (1) retention of potentially problematic aspects of the definition of crimes against humanity; (2) the lack of a full immunity clause, tracking Article 27 of the Rome Statute in its entirety, for a convention aimed at complementing the ICC's jurisdiction; (3) the lack of a provision prohibiting State grants of blanket amnesties for crimes against humanity; and lastly, (4) lack of a substantive proposal for a treaty monitoring mechanism. Addressing these issues might have been more in line with the underlying purpose of such a convention. They would have been, if not codification, useful proposals for States as forms of progressive development. It would then have been up to States to

273. Int'l Law Comm'n, *supra* note 35, at 118.

274. Genocide Convention, *supra* note 60, art. 9.

275. *See generally*, Int'l Law Comm'n., *supra* note 249.

accept or reject them once they receive the final text and recommendation from the Commission in the General Assembly.

B. The Use of the ICC Definition of Crimes Against Humanity

Firstly, as already indicated, the ILC draft article 3 definition of crimes against humanity was largely copied from Article 7 of the Rome Statute.²⁷⁶ It was said that only three slight textual changes were necessary to reflect the different context in which the definition is being used.²⁷⁷ The reality was that some of these changes were deeper and more substantive. They had the effect of narrowing down the definition of the crime even vis-à-vis the Rome Statute definition. In this regard, three potential criticisms could be highlighted.

First, Article 7 of the Rome Statute contains a definition of “gender” which was a compromise provision to satisfy certain groups that wanted to specify a meaning that would guide the future application.²⁷⁸ Interestingly, this definition of gender appears to have been overtaken by events since the adoption of the Rome Statute in July 1998.²⁷⁹ More inclusive definitions of the term have been offered by numerous human rights bodies.²⁸⁰ To the point that even organs of the ICC itself, such as the Office of the Prosecutor (“OTP”), has abandoned this definition as per the Prosecutor’s June 2014 “Policy Paper on Sexual and Gender Based Crimes.”²⁸¹ Though that OTP policy paper was published several years ago, the issue appeared to not have been raised or even debated in the Commission up to the first reading stage. It would be interesting to see whether States and others will make submissions on the issue, and if so, what the response of the ILC might be.

One possibility would be to review the definition if the members could agree a change is required and use a more recent definition of gender. The challenge with this option would be that what is accurate today might be quickly deemed out of touch with evolving understandings in another ten, twenty, or thirty years. This will essentially bring us back to where we are now with the ICC Statute.

276. Int’l Law Comm’n, *supra* note 35, ch. IV, art. 3 commentary, ¶ 1.

277. *Id.*

278. *Id.* ¶ 59.

279. *See, e.g.*, U.N. Office of the High Commissioner on Human Rights, *Gender Equality Policy*, https://www2.ohchr.org/english/issues/women/docs/GenderEqualityPolicy_September2011.pdf [<https://perma.cc/RA4E-KVNA>].

280. *Id.* at 24.

281. International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, ICC, 3 (June 2014), <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf> [<https://perma.cc/FN9L-GKFJ>].

Another option, which is perhaps more likely as it is more practical, would be to simply delete the definition. The disadvantage of the latter approach might be that an inconsistency may result for States party to the Rome Statute, which may have incorporated this aspect into their national law, when domesticating the ICC Statute. The solution, of course, would be—should those same States join the future convention—to modify their national laws to match the draft convention approach. Of course, there will be some States that prefer the retention of the ICC definition, for reasons of consistency or a deep commitment to the Rome Statute definition of gender.

A second issue concerns the definition of some of the underlying crimes in the Rome Statute. Some were seen as narrower than customary international law following the ICC Statute's adoption on 1 July 1998.²⁸² For instance, the ICTY Trial Chamber in *Kupreškić* has found that the ICC definition of the crime of persecution is not consistent with customary international law.²⁸³ By using the ICC definition of crimes against humanity, in Article 7, the ILC risks reinforcing a definition of persecution as a crime against humanity that was not only considered narrower than customary law but that contradicts its own earlier position on the matter. This is especially the case during its work on crimes against humanity in the Draft Code of Crimes Against the Peace and Security of Mankind.²⁸⁴

Of course, the inconsistent definitions of crimes against humanity dates back many decades, starting with the Nürnberg and Tokyo Tribunal definitions through to an array of definitions used in the modern ad hoc tribunals such as the ICTY and ICTR and even the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind.²⁸⁵ In Article 5 of the ICTY Statute, the crime required a link to armed conflict, whether international or non-international in character.²⁸⁶ Whereas, in Article 3 of the ICTR Statute, the crime was defined to require discriminatory intent in order to establish proof of it whether on “national, political, ethnic, racial or religious grounds” which requirement was not reflected in Article 18 of the 1996 Draft

282. See generally, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese et al. eds., 2002).

283. Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-A, Appeal Judgment, ¶1 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

284. Peace and Security, *supra* note 30.

285. *Id.*

286. United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 5, S.C. Res. 827 (May 25, 1993)

Code.²⁸⁷ If anything, there has been a shifting mix of legal ingredients concerning, in addition to the requirement of a nexus to an armed conflict, whether a widespread and/or systematic attack against any civilian population, or discriminatory grounds, are required.²⁸⁸ These elements of the definition have, in the words of Larissa van den Herik, “been swapped back and forth in a cacophony of definitions.”²⁸⁹ And, we have not yet even mentioned the apparent confusion, including among ICC judges, surrounding the State or organizational policy requirement of crimes against humanity contained in Article 7 of the Rome Statute.²⁹⁰

One might make suggestions for changes for the second reading stage of the project. Let us take a prominent example of the crime of persecution as a crime against humanity. As defined, it prohibits, in Draft Article 3(1)(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.”²⁹¹ A good potential change could be to Draft Article 3 paragraph 1(h) to remove the wording “in connection with the crime of genocide or war crimes” since this terminology does not reflect customary international law.²⁹²

The deletion of the entire second half of subparagraph (h) will bring the definition of persecution as a crime against humanity into consistency with the prior work of the ILC on the Draft Code of Crimes against the Peace and Security of Mankind as well as its definition under customary international law. Indeed, this connector requirement

287. United Nations International Tribunal for Rwanda art. 3, S.C. Res. 955 (Nov. 8, 1994).

288. Int'l Law Comm'n, *supra* note 35, at 31–42.

289. Larissa van den Herik, *Using Custom to Reconceptualize Crimes Against Humanity*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 80 (Shane Darcy & Joseph Powderly eds., 2010).

290. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 50-54 (Mar. 31, 2010), <https://www.legal-tools.org/doc/338a6f/pdf> [<https://perma.cc/F2ST-ZR53>] (containing a seminal ruling regarding the scope of crimes against humanity); *see also* Charles C. Jalloh, *Situation in the Republic of Kenya*, 105 AM. J. INT'L L. 540 (2011) (discussing the seminal ruling regarding the first ever *proprio motu* prosecutorial investigation pursuant to Article 15 of the Rome Statute); *What Makes a Crime*, *supra* note 290, at 419.

291. Int'l Law Comm'n, *supra* note 35, art. 3(1)(h).

292. *Id.*

between the crime of persecution and two other core crimes, which is specific to the ICC, cannot be found in the statutes of any of the ad hoc international or internationalized tribunals, nor in the national legislation of States in different parts of the world or in the authoritative leading case law. A related issue is that, even if the connector is kept, then it would make sense to revise it for the sake of consistency. Revising it allows the curing of an omission. The reason being that, at present, it essentially excludes another important ICC connector crime from the definition (*i.e.*, the crime of aggression) while retaining the connection requirement for the other three Rome Statute crimes. This is an understandable omission as the ICC States only incorporated and activated that crime four months after the ILC first reading text was adopted.

As the ICTY Trial Chamber ruled in *Kupreškić*, “although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law.”²⁹³ This appears all the more striking considering that the application of the provisions contained in Part II of the Statute (on jurisdiction, admissibility and applicable law), including Article 7 on crimes against humanity, are restricted by Article 10 of the ICC Statute which affirms in unequivocal language that “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.”²⁹⁴ It follows, as the States that drafted the Statute themselves made clear, “the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of, among other crimes, crimes against humanity.”²⁹⁵

Further, the complexity of defining persecution could lead to confusion. This is because the retention of a connecting link to “any act referred in this paragraph” could be read as a requirement of a link to one of the underlying crimes against humanity set out in paragraph 1, namely, (a) murder, (b) extermination, (c) enslavement, (d) deportation or forcible transfer of population, etc. This would be a high threshold but would be consistent with general understandings of this paragraph in the ICC Statute and most academic literature.

293. Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-T, Judgment, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> [<https://perma.cc/UG7Z-6MUA>].

294. Rome Statute, *supra* note 59, art. 10 (emphasis added).

295. Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-T, Judgment, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> [<https://perma.cc/UG7Z-6MUA>].

On the other hand, some academics such as Robert Cryer and others have speculated that if the connection required can be “satisfied by a linkage to even one other recognized act (a killing or other inhumane act),”²⁹⁶ the “requirement should not pose a significant obstacle for legitimate prosecutions of persecution.”²⁹⁷ In any event, as the ICTY Trial Chamber explained in *Kupreškić*, this restriction in the definition “might easily be circumvented by charging persecution in connection with “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k).”²⁹⁸

Relatedly, it seems possible to contemplate a serious form of persecution, which is not connected to another underlying crime. The ICTY/ICTR jurisprudence, for the most part, have considered persecution in situations where it examined crimes for which an accused had already been found responsible and then examined whether those same crimes were also committed with a discriminatory intent, and if so, the person was then *also* responsible for the crime of persecution. This shows gravity without a connection. Moreover, in the ad hoc tribunals, there have been instances where persecution was used almost as a residual crime with no connection whatsoever to the contents of other residual crimes, specifically in the area of hate speech and property crimes; to require a connection could stunt this development altogether.²⁹⁹

On the other hand, to complicate matters even further, the crime as defined in the ILC’s first draft of the crimes against humanity convention is evidently narrower than the present definition of it under customary international law.³⁰⁰ It seems settled that today the crime would require “a widespread or systematic attack against any civilian population.”³⁰¹ It equally seems settled that it can be committed by perpetrators, during times of war or peace.³⁰² Yet, other questions remain. For instance, take the State policy requirement, which is

296. ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (3d ed. 2014).

297. *Id.*

298. Prosecutor v. Zoran Kupreki (Kupreškić), Case No. IT-95-16-T, Judgement ¶ 580 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> [<https://perma.cc/UG7Z-6MUA>].

299. *Id.*

300. Int’l Law Comm’n, *supra* note 249, at 44.

301. Int’l Law Comm’n, *supra* note 35, art. 3(1).

302. *Id.* art. 2.

arguably settled under customary law.³⁰³ The ICTY Appeals Chamber, in its earlier case law found the State or organizational policy requirement relevant, but later it held in *Kunarac* in 2002 that the crime as defined in customary law no longer required proof or furtherance of a State or organizational policy for finding the existence of a crime against humanity.³⁰⁴ This important judicial decision was made in contradiction to the decision of States meeting in Rome in 1998, which had chosen to codify the State or organizational policy requirement in the chapeau of Article 7(2)(a) of the Rome Statute.³⁰⁵

Against this wider historical context, it seems prudent to emphasize that, for the ILC, the focus was not to resolve the legal debate between the customary law or Rome Treaty definitions of crimes against humanity. The Commission seemed to choose the ICC definition purely for pragmatic reasons, as mentioned earlier on in this article.³⁰⁶ It should not be read as a rejection of the wider definition still available to States to investigate and prosecute crimes under customary international law. For that reason, I welcomed the explanation in its commentary to the definition contained in Article 3 of the draft crimes against humanity convention.³⁰⁷ The ILC has explained that the definition it had borrowed from Article 7 of the ICC Statute was “appropriate” mainly because it had already been accepted by more than 120 State parties to the Rome Statute.³⁰⁸ The Commission also considered it highly relevant that the same definition is now being used by many States when adopting or amending their national laws to domesticate the ICC Statute.³⁰⁹ On top of that, a good number of States, which are

303. See *What Makes a Crime*, *supra* note 290; William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 961–62 (2008); LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (2004); Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections of the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT’L L. 855, 861 (2010).

304. Prosecutor v. Dragoljub Kunarac et al., Case. No. IT-96-23-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [<https://perma.cc/2KCY-8CZA>].

305. See Int’l Law Comm’n Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 8 (2015).

306. See *What Makes a Crime*, *supra* note 290, at 391.

307. See Statement of the Chair of the Drafting Committee (May 22, 2019), https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_cah.pdf [<https://perma.cc/79HC-J5R3>].

308. See Rome Statute, *supra* note 59.

309. See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, U.N. A/72/10 (2017) (detailing the comments and observations from the

presumably more likely to accept the future convention, had indicated that they supported the ILC crimes against humanity project on the condition that it retained consistency with the Rome Statute.³¹⁰ So, this is all about pragmatics, which in context makes sense, rather than about freezing developments in the customary law of crimes against humanity.

The threshold question, in relation to these three select concerns about the definition now being used by the Commission and borrowed from the Rome Statute: (1) the meaning of gender, (2) persecution, and (3) the State or organizational policy, will be whether to reopen Article 7 of the Rome Statute based definition in the ILC draft upon second reading. If it is reopened, the question will be what changes can be justified, and what changes cannot be justified, and the basis for making that decision. Guidance could be found using standard criteria. For example, making only the changes proposed by a large group of States. On the other hand, if States do not raise the issues and the ILC does not revisit the definition, it could be argued that consistency with the ICC would have been achieved. The cost could be that an opportunity for potentially positive advances in clarifying the law of crimes against humanity, especially as codified in a possible future convention, would have been lost. Assuming, of course, the States themselves do not choose to amend the draft definition if and when they negotiate a crimes against humanity convention based on an ILC draft.

Overall, the criticisms raised above do not take up the question whether the Commission should have reflected advances since the Rome Statute was adopted in July 1998 to use, for example, the broader definition of enforced disappearances reflected in the treaty adopted by the General Assembly in New York in December 2006.³¹¹ Nor did they take up the possible need that might have existed to include severe damage to the environment as crimes against humanity. Of course, States could always choose to address those issues once they receive the final ILC draft crimes against humanity treaty in 2019 – as they did

Republic of Sierra Leone on the International Law Commission's Draft Articles on Crimes Against Humanity).

310. See Leila Nadya Sadat, *A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity*, 16 J. INT'L CRIM. JUST. 683, 690–91 (2018).

311. See Committee on Legal Affairs and Human Rights, *The International Convention for the Protection of All Persons from Enforced Disappearances*, COUNCIL OF EUROPE (Nov. 4, 2011), <http://assembly.coe.int/CommitteeDocs/2011/ajdoc45.pdf> [<https://perma.cc/X24B-TEBY>].

with respect to several matters arising from the Commission's draft statute for a permanent ICC in 1996.³¹²

C. Failure to Prohibit Immunities for Crimes Against Humanity

A second issue that the Commission did not address in the text of the draft articles as adopted on first reading was the question of immunity of State officials, or for that matter, the officials of international organizations in relation to investigations and prosecutions of crimes against humanity.³¹³ As discussed in the Special Rapporteur's Report, "treaties addressing crimes typically do not contain a provision on the issue of immunity, leaving the matter to other treaties addressing the immunities of classes of officials or to customary international law."³¹⁴ The Special Rapporteur listed several treaties and conventions that do not include provisions on immunity of State officials or officials of international organizations.³¹⁵ Ultimately, the position was that the Commission need not address the issue of immunity in the context of the crimes against humanity topic.³¹⁶ There was already a separate topic considering the issue of immunity of State officials from foreign criminal jurisdiction.³¹⁷ This position makes sense, and ultimately, is defensible.

But there was also another view. In the Plenary debate, of the Special Rapporteur's report, several members proposed that the Commission could address one aspect of the immunity issue.³¹⁸ It could, for the sake of complementing the ICC system at the national level, advance the equivalent of Article 27 of the Rome Statute in the draft articles.³¹⁹ Article 27 is the ICC's irrelevance of official capacity clause,

312. See, e.g., *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, [1996] 2 Y.B. Int'l L. Comm'n 35.

313. See INT'L L. COMM'N, *Current status of the work of the Commission and forthcoming deadlines*, <https://legal.un.org/ilc/status.shtml> [<https://perma.cc/Q2YS-D5ZU>] (showing the question of immunity was not addressed until 2013).

314. Murphy, *Third Rep.*, *supra* note 78, ¶ 281.

315. See *id.*

316. See *id.* ¶ 284.

317. See *id.*

318. See Int' Law Comm'n Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/CN.4/SR.3350, at 11 (2017).

319. See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/CN.4/SR.3349, at 5 (May 2, 2017); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/CN.4/SR.3350, at 7 (June 2, 2017); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/CN.4/SR.3351, at 12 (June 12, 2017); Int'l Law

which makes procedural and substantive immunities, whether at the national or international level, irrelevant for the purposes of prosecution of four of the most serious international crimes, including crimes against humanity.³²⁰

For the ICC States Parties, this rule applies because the States have consented by expressly accepting this clause.³²¹ The thought was that using such a clause could offer a more complementary regime to the ICC even if it is a form of progressive development rather than codification of existing law. States would have the opportunity to not only pronounce on that clause in written comments, but to also decide whether to keep it, should they accept to negotiate a convention on crimes against humanity based on an ILC draft.³²² The non-inclusion of a full Article 27 equivalent seemed to also be problematic because, at the least, it was thought that the ILC should not advance a gap-filling draft crime against humanity convention partly rationalized on a logic of parity with the Genocide Convention while including less than the minimum terms provided for in the parallel treaty adopted in 1948 for the prevention and punishment of the crime of genocide.³²³

As far back as 1947, the ILC was tasked with formulating the Nürnberg Principles referred to at the opening of this article.³²⁴ Those were later endorsed by the General Assembly.³²⁵ Principle III provides that “the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under

Comm’n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/CN.4/SR.3352, at 8 (June 2, 2017). *But see* Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/CN.4/SR.3352, at 10 (June 2, 2017).

320. *See* David P. Stewart, *Official Immunity Under the Rome Statute: The Path from Principle to Practice Is Seldom Straight*, JUST SECURITY (Apr. 10, 2018), <https://www.justsecurity.org/54678/official-immunity-under-rome-statute-path-principle-practice-seldom-straight/> [<https://perma.cc/L3GC-ZVHW>].

321. *See, e.g., id.*

322. *See, e.g., Sixth Committee Debate Agenda Item 79: Report of the International Law Commission on the Work of its 71st Session*, UNITED STATES MISSION TO UNITED NATIONS (Oct. 29, 2019), <https://usun.usmission.gov/sixth-committee-debate-agenda-item-79-report-of-the-international-law-commission-on-the-work-of-its-71st-session/> [<https://perma.cc/MU8G-KFYP>].

323. *See generally* G.A. Res. 260 A(III) (Dec. 9, 1948) (detailing the terms in the 1948 Prevention and Punishment of the Crime of Genocide).

324. *See Text of the Nürnberg Principles Adopted by the International Law Commission*, [1950] 2 Y.B. Int’l L. Comm’n 374, U.N. Doc. A/CN.4/L.2.

325. *See id.*

international law.”³²⁶ Building on that development, which is said to constitute customary international law, Article IV of the 1948 Genocide Convention explicitly provided that “persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”³²⁷

It followed that, if as far back as 1948 States were willing to give up the immunities of their leaders involved with the commission of genocide for the purposes of prosecution in their own territories; or those of other contracting parties to the convention at the *horizontal* level; or before an international penal tribunal that might be established for such purpose at the *vertical* level, why might the Commission not ask them to consider doing so for the equally heinous crimes against humanity? That fundamental question, in my view, was insufficiently debated and ultimately remained unanswered by the ILC which essentially followed the preference of the Special Rapporteur on the issue.

Interestingly, in both its past work on the 1954 and 1996 Draft Code of Crimes, the Commission had carefully examined the issue of official position.³²⁸ It concluded that such a principle was totally irrelevant to the question of individual criminal responsibility in Articles 3 and 7 respectively, which were to apply in respect of both national and international courts.³²⁹ In fact, in its helpful commentary to Article 7 of the 1996 Draft Code, the Commission did not mince words when it stated:

The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.³³⁰

326. Int'l Law Comm'n, Rep. on the Work of Its Second Session, U.N. Doc. A/1316, at 375 (1950).

327. Genocide Convention, *supra* note 60, arts. 4, 12.

328. Peace and Security, *supra* note 30 (detailing the Commission's examination of the issue of official position in 1954 and detailing the Commission's examination of the issue of official position in 1996).

329. *See id.* at 27.

330. Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at ¶ 50 (1996) (Articles of the draft Code of Crimes against the Peace and Security of Mankind).

Accordingly, in adopting a more recent stance that apparently reverts to an earlier abandoned distinction between substantive and procedural immunities with the applicability of the former to crimes against humanity but not the latter, the ILC can be said to have adopted a contradictory doctrinal position. The new position appears to not have taken into enough account if not ignored the prior work of the Commission and may raise other questions.³³¹ Indeed, it muddies the waters concerning the value of the practice of States in respect of crimes against humanity, since at least the Nürnberg and Tokyo Tribunals.³³² This is because the statutes of those special tribunals also engendered the same non-immunity clauses as reflected in Article 7 of the Nürnberg Charter and Article 6 of the Tokyo Charter as well as Article 11(4) of Control Council Law No. 10.³³³ Ironically, the same ILC, in the context of its separate project on immunity of state officials from foreign criminal jurisdiction, has provisionally adopted Draft Article 7 providing that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of, among others, crimes against humanity.³³⁴ The Commission had adopted an earlier article addressing immunity *ratione personae*, in Draft Articles 3 and 4, which remain intact for the troika for all acts performed during or prior to their term of office.³³⁵ The immunities continue to attach under Draft Article 6(3) even after the term of office ends.³³⁶

The ILC's 2017 decision not to include a full irrelevance of official capacity clause, in the draft crimes against humanity convention, could also risk the significant advances made by States in developing the admittedly still nascent field of international criminal law. The trend, which many thought settled until recently, has been to limit immunities in the context of the commission of core crimes since at least the early 1990s if not much earlier back to Nürnberg, a process to which the

331. Peace and Security, *supra* note 30, at 11–12 (detailing some examples of the Commission's prior work and questions surrounding the official position).

332. *See* Jalloh, *supra* note 306, at 395.

333. *See id.* at 395–96.

334. *See* Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 311 (2019).

335. *See id.* at 312 (detailing Draft Article 3); Sean D. Murphy, *Immunity Ratione Personae of Foreign Government Officials and other Topics: The Sixty-Fifth Session of the International Law Commission*, 108 AM. J. INT'L L. 41 (2014) (detailing Draft Article 4).

336. *See* Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10 (1991).

Commission itself has made useful contributions.³³⁷ Indeed, since the adoption of the Nürnberg Principles, the statute of every full international criminal tribunal has repeatedly affirmed the essence of the Third Nürnberg Principle.³³⁸ Thus, we find the logic of the principle enshrined in Article 7(2) of the ICTY Statute and Articles 6(2) of the ICTY and SCSL Statutes, and ultimately, it was embedded in a fuller form in Article 27 of the ICC Statute.³³⁹ A plea to official capacity has not been successful in the judicial practice of all the modern tribunals as the trials of *Milosevic*,³⁴⁰ *Kambanda*,³⁴¹ and *Taylor*³⁴² amply demonstrated.

Despite the significant precedents, which admittedly occurred in an international tribunal rather than *national court* context, it was positive that the ILC could find a compromise to include a Draft Article 6, paragraph 5 in the first reading text of the convention.³⁴³ That barebones, but still important provision, along the lines of Article 27 (1) of the Rome Statute of the ICC, provides that “[e]ach 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 the holding of an official position is not a ground for excluding criminal responsibility.”³⁴⁴ This clause was directed at ensuring that States will take measures to deny persons involved with crimes against humanity the opportunity to claim exemption from substantive criminal responsibility or to use it as a defense to criminal liability.³⁴⁵ Elsewhere, in the commentary, it is also usefully clarified that official

337. See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10, at 179–80 (2017).

338. See *id.* at 168.

339. See 2 INTERNATIONAL CRIMINAL LAW 236-37 (M. Cherif Bassiouni ed., 3rd ed. 2008).

340. See Prosecutor v. Milosevic, Case No. IT-02-54, Decision on Preliminary Motions, ¶ 26–34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001).

341. See Prosecutor v. Kambanda, Case No. ICTR-97-23, Judgment, ¶ 37–38, 48 (Int'l Crim. Trib. for Rwanda Oct. 19, 2000).

342. See Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 458 (Special Court for Sierra Leone Sept. 26, 2013).

343. See Madaline George, *Prospects for a Convention on the Prevention and Punishment of Crimes against Humanity*, OPINIO JURIS (Aug. 10, 2019), <http://opiniojuris.org/2019/10/08/prospects-for-a-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/> [<https://perma.cc/QR47-QCL9>].

344. Rome Statute, *supra* note 59, at art. 27.

345. *Id.*

position is not a mitigating factor that can be used to claim a reduction in a sentence.³⁴⁶

The commentary to the compromise clause, however, goes on to make crystal clear that at paragraph 31 that “paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.”³⁴⁷ In addition, the commentary clarifies that “paragraph 5 is without prejudice to the Commission’s work on the topic of “[i]mmunity of State officials from foreign criminal jurisdiction.”³⁴⁸ The provision, in Draft Article 7, indicates that immunities *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of crimes against humanity which are as defined in Article 7 of the Rome Statute.³⁴⁹ Yet, to be consistent with the ILC’s own work on the immunity topic, which had provided that no exceptions to immunity would apply in relation to crimes against humanity, it might have been appropriate to examine the implications of that stance also for this topic.³⁵⁰ The ICC definition of the crime, of course, formed the basis for the ILC definition (as discussed above in Part III).³⁵¹ This would mean, that if given effect, it might have meant there would also be no immunity *ratione materiae* for crimes against humanity at the national level.³⁵²

Consequently, although a handful of members argued against downgrading the ILC’s historically strong position against immunity for core crimes, the result is that the first reading of the draft articles on crimes against humanity do not contain the equivalent of Article 27 (2); instead, it only contains a rough equivalent of Article 27(1).³⁵³

346. See COMMENTARY OF THE LAW OF THE INTERNATIONAL CRIMINAL COURT 276 (Mark Klamberg ed., 2017).

347. See Int’l Law Comm’n, *supra* note 37.

348. THE ROME STATUTE OF THE ICC AT ITS TWENTIETH ANNIVERSARY 33 (Pavel Šturma ed., 2019).

349. See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10 (2017) (stating Draft Article 7); Rome Statute, *supra* note 59, at art. 7.

350. See generally *Tladi*, *supra* note 97.

351. Compare Rome Statute, *supra* note 59, at art. 7 (showing the ICC’s definition of crimes against humanity) with Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/CN.4/L/853 (2015) (detailing the ILC’s definitions of crimes against humanity).

352. See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10 (2017).

353. See Adil Ahmad Haque, *Immunity for International Crimes: Where Do States Really Stand?*, JUST SECURITY (Apr. 17, 2018),

Adding the second paragraph would have rendered immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, as no bars preventing the courts of a State Party to the future convention from exercising their jurisdiction over such a person.³⁵⁴ The consent of the State, expressed through ratification or accession, would effectively have acted as a national jurisdiction's waiver of any available immunities of its leaders from prosecution for crimes against humanity in the national courts of other States. The State consent element offers the vital safeguard needed, even if one believes that customary law immunities at present remain intact for crimes against humanity before the national court of third states for heads of state, heads of government or foreign ministers, as the ICJ ruled in its somewhat controversial *Arrest Warrant* ruling in early 2002.³⁵⁵ Of course, should they so wish, the ICJ statement of customary law on a given legal point such as immunity before national courts does not stand as an impediment to States with regard to their adoption of a (new) rule that might be contrary to such ruling since, as a matter of principle, ICJ rulings are only binding on the parties to a case and even so only in respect of that particular case. Following Article 27 in its entirety would, in the end, arguably have been more consistent with the Rome Statute position. The ILC first reading approach of divorcing Article 27, paragraph 1 from Article 27, paragraph 2 was not inevitable. Although it has sometimes been disputed whether it removed all procedural and substantive immunities, or only some of them, an alternative approach might have been to resort to full importation of Article IV of the Genocide Convention. That provision basically stated that persons who commit genocide, or conspiracy to genocide, or incitement to genocide, shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. If the full Article 27 of the ICC Statute could not be reproduced in the first draft of the ILC's draft crimes against humanity convention, why not use similar language to that of the Genocide Convention which seemed to be familiar with and to enjoy broad support among States.

That said, this alternative suggestion, which seemed initially agreeable to the Special Rapporteur, later changed without

<https://www.justsecurity.org/54998/immunity-international-crimes-states-stand/> [<https://perma.cc/G2YZ-L3J8>].

354. See Rome Statute, *supra* note 59, art. 27.

355. Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877, 877 (2002).

explanation.³⁵⁶ The Rapporteur fell back on the Article 27 (1) equivalent, when inserting the prior negotiated compromise.³⁵⁷ No reason for the change was given.³⁵⁸ One can speculate that this might have been because of a desire to avoid the possible argument of parity with Article IV of the Genocide Convention. Such an article could then have simply provided that persons committing crimes against humanity shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Some literature under the latter, as well as the ILC's prior work, suggests that all forms of procedural and substantive immunities are irrelevant for the purposes of investigation and prosecution of that crime. The same would be true for crimes against humanity.

If that argument holds water, for the crime of genocide, it would perhaps not be too much of a stretch to accept and argue that the same can be true for crimes against humanity in respect of State parties to a future draft crime against humanity convention. Copying the whole of Article 27, rather than picking it apart, might have ensured greater coherency with the ICC regime at least in relation to the treatment of officials of the ICC's current 123 State parties who may commit crimes against humanity.³⁵⁹

In the end, one could see the above argument as idealistic, especially given the current environment where the very idea of multilateralism and international law appears to be under attack. From this point of view, it might be that the Commission has taken a position that is more in line with the world in which it is functioning today. A world that reflects pushback at international institutions such as the type of pushback we see between the ICC and African States. The latter has been largely driven by concerns about potential abuse and misuse of rules on immunity.³⁶⁰ In this environment, it can be argued that a

356. Compare Rome Statute, *supra* note 59, at art. 27 (detailing Article 27 of the Rome Statute) and G.A. Res. 260 A(III) (Dec. 9, 1948) (detailing Article 4 of the Genocide Convention).

357. See Rome Statute, *supra* note 59, art. 27.

358. See *Commentary Rome Statute: Part 3*, CASE MATRIX NETWORK, [https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute-part-3/](https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/part-3/) [<https://perma.cc/8QPL-EF7R>] (detailing the comments behind the drafting of Article 27 of the Rome Statute) (last accessed Feb. 21, 2020).

359. See *Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014*, INT'L CRIM CT. (Sept. 8, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146&ln=en> [<https://perma.cc/2AX6-8M22>].

360. See, e.g., THE INTERNATIONAL CRIMINAL COURT AND AFRICA (Charles C. Jalloh & Ilias Bantekas eds., 2017).

more pragmatic view might be that the project as a whole, even in the absence of a proposal for a full immunity clause, reflected the right balance since it is a more incremental way of developing ICL. In any event, though this seems quite unlikely, States could also always choose to incorporate such a standard during their negotiations of a new crimes against humanity treaty. By the same token, though perhaps unlikely, they could even choose to amend other aspects of the draft articles such as the definition of the crime to address, for instance, severe environmental destruction as a crime against humanity.

D. Failure to Reject Blanket Amnesties for Crimes Against Humanity

A third issue regarding another element of the draft convention is that the text of the draft articles did not substantively address the challenging issue of amnesty for crimes against humanity. It was thought that State practice regarding amnesties was too varied to resolve the question whether amnesties for crimes against humanity are permissible before national courts.³⁶¹ There was no “consensus” on the issue since earlier treaties such as the Genocide, Geneva, Apartheid and Torture Conventions did not prohibit amnesties.³⁶² Conversely, Article 6(5) of Additional Protocol II encouraged States to enact amnesties to end hostilities.³⁶³ More recent instruments addressing serious international crimes, such as the ICC Statute and the Enforced Disappearances Convention, did not preclude amnesties either.³⁶⁴ The conclusion can thus be reasonably reached, as did the Commission, and that there is at present no general prohibition imposed on States from passing amnesty laws for these types of crimes.

On the other hand, some members of the Commission were of the view that the ILC’s no blanket amnesty clause position could have better considered the rich if admittedly still evolving domestic, regional, and international jurisprudence on the topic.³⁶⁵ The Special Rapporteur’s third report on the topic, speaking mostly to the Belfast

361. See Max Pensky, *The Amnesty Controversy in International Law*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 42 (Leigh Payne & Francesca Lessa eds. 2012).

362. See *id.* at 45.

363. See *Amnesties and International Humanitarian Law: Purpose and Scope*, INT’L COMM. OF THE RED CROSS (Oct. 4, 2017), <https://www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope>.

364. See Pensky, *supra* note 361, at 49 (detailing the Enforced Disappearances Convention); *id.* at 65 (detailing the ICC Statute).

365. See *Fifth Report on State Responsibility*, [1993] 2 Y.B. Int’l L. Comm’n 99, U.N. A/CN.4/SER.A/1993/Add.1 (detailing the different discussions around amnesty and its role in evolving law).

Guidelines on Amnesty and Accountability, seemingly obfuscated the issue.³⁶⁶ It did not fully account for the distinction between blanket and conditional amnesties, which might lead to different legal results.³⁶⁷ The ILC could have better grappled with the rich body of jurisprudence of the ad hoc international criminal tribunals on amnesty and their full implications for the system. From there, the ILC could have then contemplated whether, and if so, how to apply a similar system at the horizontal inter-State level.

Let me take the example of the SCSL 13 March 2004 Appeals Chamber decision on amnesty in the *Kallon* Case.³⁶⁸ In that case, the defendant filed a preliminary challenge to the jurisdiction of the SCSL.³⁶⁹ He submitted that the Government of Sierra Leone was bound to observe the amnesty granted under Article IX³⁷⁰ of the Peace Agreement to the RUF and that it could not thereafter participate in establishing a special tribunal whose statute included a clause denying legal effect to the amnesty conferred on them. The Appeals Chamber determined that the grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as the crime is concerned, to the criminal jurisdiction of the State of Sierra Leone which was exercising such sovereign power.³⁷¹

That said, where jurisdiction was shared with other States—as would be the case for a future crime against humanity convention—one State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. The SCSL Appeals Chamber rightly ruled that, for this reason, it would be unrealistic to regard as universally effective the grant of amnesty by a State regarding grave international crimes, such as crimes against humanity, in which there would exist a broad grant of jurisdiction as per the provisions discussed earlier.³⁷² Indeed, it would stand to reason, as the SCSL Appeals Chamber explained that “[a] State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which

366. See Murphy, *Third Rep.*, *supra* note 78, ¶¶ 285–297.

367. See Rachel W. Smith, *From Truth to Justice: How Does Amnesty Factor In? A Comparative Analysis of South Africa and Sierra Leone's Truth and Reconciliation Commissions* (University of Connecticut, Honors Theses 2010), https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1124&context=srhonors_theses.

368. See *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004).

369. See *id.*

370. *Id.*

371. *Id.*

372. *Id.* at 67.

other States are entitled to keep alive and remember.”³⁷³ If this is true, of the Sierra Leone vis-à-vis the SCSL situation, would it not be even more true for a future crime against humanity convention which States can freely agree to?

Furthermore, one could also take note of the policies of the Secretary-General of the United Nations since the Lomé Peace Accord in July 1999.³⁷⁴ Under that policy, blanket amnesties are not permissible for core international crimes.³⁷⁵ In the end, although the practice of an organ of an international organization may not be conclusive evidence of the practice of the Member States in that regard, it is also not entirely irrelevant to the analysis given that States do not appear to have objected to the Secretary General’s policy. The ILC has in fact, while working on the topic of identification of customary international law, accepted that it might secondarily be relevant to look at the practice of States undertaken within the context of an international organization.³⁷⁶ In the final analysis, on the amnesty issue, the Commission compromise forged was the fall back inclusion of some commentary better discussing the more recent State practice relating to amnesties in draft article 10 on “*Aut dedere aut judicare*” at paragraphs 8 to 11.³⁷⁷

The commentary is fairly strong in almost looking down on amnesties. It acknowledges “that a national law would not bar prosecution of a crime against humanity by a competent international criminal tribunal or foreign State with concurrent jurisdiction over that crime.”³⁷⁸ And, even within the State that has adopted the amnesty, the ILC has now made ever clearer that “its permissibility would need to be evaluated, inter alia, in the light of that State’s obligations under the future draft articles requiring that they criminalize crimes against humanity, as well as against their duty to comply with their *aut dedere*

373. *Id.*

374. *See, e.g.*, Press Release, Security Council, Security Council Establishes UN Mission for Sierra Leone to Aid with Implementation of Lomé Peace Agreement, U.N. Press Release SC/6742 (Oct. 22, 1999) (showing examples of policies since the Lomé Peace Accord in July 1999).

375. *See* Rep. of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, ¶ 22; Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 71 (Mar. 13, 2004).

376. *See Draft conclusions on identification of customary international law, with commentaries*, [2018] 2 Y.B. Int’l L. Comm’n 122, U.N. Doc. A/73/10.

377. *See* Int’l Law Comm’n, Final Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/CN.4/579 (2014).

378. Murphy, *Third Rep.*, *supra* note 78, ¶ 297.

aut judicare obligation as well as those in relation to victims and others.”³⁷⁹ These are important elements that needed to be added to the commentary for clarification of the ILC position on amnesty, lest it be another *carte blanche* for States to continue to pursue such amnesties in their national law including for crimes against humanity which are some of the world’s worst crimes. It was not obvious that these important clarifications would have been made without serious pushback from a minority of members of the Commission. The present author played a role leading informal negotiations to find an acceptable compromise on the amnesty issue as well as immunities/irrelevance of official capacity.

E. Absence of a Recommendation on a Monitoring Mechanism

Finally, the ILC draft articles has not proposed any provisions for a monitoring mechanism, such as that under the Convention against Torture. A monitoring mechanism could help ensure future State party compliance with the obligations derived from a future convention on crimes against humanity. Such monitoring mechanisms are standard features of the major human rights treaties, including the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR).³⁸⁰ They are also found in many other modern human rights instruments, including those concerning racial discrimination,³⁸¹ women,³⁸² children,³⁸³ and disability.³⁸⁴ Monitoring bodies are also familiar in criminal law treaties such as the Torture Convention.³⁸⁵ The Third Report of the Special Rapporteur surveyed monitoring mechanisms, such as those within the UN human rights system, that already exist and could include crimes against humanity; however, the Special Rapporteur preferred not to make a specific

379. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Ninth Session, UN GAOR, 72nd Sess., Supp. No. 10, at art. 10, para. 11 UN Doc. A/72/10 (2017).

380. See *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/45A6-Z6BS>] (last updated Apr. 2019).

381. See International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

382. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

383. See Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

384. See Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3.

385. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 17, June 26, 1987.

proposal in this regard, a view that found support within the Commission.³⁸⁶

Though controversial, it was argued that the element of choice on whether to propose one was more a matter of policy rather than law.³⁸⁷ The decision turns on, for example, the availability of resources and the relationship of a new mechanism with those that already exist. So, it was argued, such issues are best left for States to decide, should they wish to do so.³⁸⁸ Borrowing from an ILC Secretariat study of the issue, it was observed that the present treaty monitoring body system had caused significant financial and other strains on States.³⁸⁹ States could also choose to establish a treaty monitoring body for crimes against humanity alongside other such mechanisms already in place, as part of cost rationalization.³⁹⁰ This is all true and defensible.

A minority view was that the Commission is equally well placed to offer a recommendation.³⁹¹ A monitoring body was both a legal and policy question, meaning that the ILC could study the issue and formulate a recommendation. This group did not accept that this was only a matter of policy, but also saw it as about being effective in the design of a horizontal treaty framework.³⁹² A small number of members even appeared to favor the idea of a monitoring body.³⁹³ Given the stage

386. Murphy, *Third Rep.*, *supra* note 78, ¶ 10.

387. *Id.* ¶ 238.

388. *See id.*

389. *See* Kelisiana Thynne, *Reform of United Nations Human Rights Institutions: Current Developments- Enhancing the rule of law in international human rights treaty bodies*, WORLDLII, www.worldlii.org/int/journals/IHLRes/2007/9.html [<https://perma.cc/BFA3-PBNW>] (last updated Nov. 19, 2007).

390. *See* Adrienne Komarovics, *Strengthening the Human Rights Treaty Bodies: A Modest but Important Step Forward*, PECS J. INT'L & EUR. L. 7 (2014).

391. *See* United Nations, THE WORK OF THE INTERNATIONAL LAW COMMISSION 60 (8th ed. 2012), https://legal.un.org/avl/ILC/8th_E/Vol_I.pdf.

392. *See* Int'l Law Comm'n, Sixty-Ninth Session, Provisional summary record of the 3350th meeting (May 3, 2017), U.N. Doc. A/CN.4/SR.3350, at 10–11 (June 2, 2017) (detailing Mr. Jalloh's statement, concerning the existence of a treaty-based monitoring mechanism).

393. *See, e.g., id.* at 10 (detailing Mr. Jalloh's statement supporting a possible monitoring mechanism); Int'l Law Comm'n, Sixty-Ninth Session, Provisional summary record of the 3351st meeting (May 4, 2017), U.N. Doc. A/CN.4/SR.3351, at 7–8 (June 12, 2017) (detailing Mr. Hmoud's statement supporting the inclusion of a monitoring mechanism in the draft articles); *id.* at 13–15 (detailing Mr. Saboia's statement supporting the inclusion of a monitoring mechanism to ensure a future convention fulfills its goals); Int'l Law Comm'n, Sixty-Ninth Session, Provisional summary record of the 3353rd meeting (May 8, 2017), U.N. Doc.

of the project, it would be interesting to see if any State wishes to see a recommendation for a monitoring body for crimes against humanity. In the absence of an independent enforcement mechanism, the future convention could be extremely weak and dependent solely upon State cooperation, which can be more regularly monitored if a treaty body mechanism is contemplated.³⁹⁴ Thus, rather than being a policy question outside of the ILC's domain, this was a technical legal question of a long-awaited treaty instrument concerning a core crime under international law.

Thus, rather than taking no substantive proposals forward, the Commission should not shy away from weighing the pros and cons of such a mechanism and offering up a studied recommendation to States. The Commission could have even developed alternative options for States to consider using the existing mechanisms to cover this future convention, even if on an optional protocol basis. The latter would allow the main instrument to focus on prevention and punishment of crimes against humanity. The optional protocol would then provide the choice to join the treaty monitoring system. In any event, as with other aspects of the proposed draft crimes against humanity convention as a whole, it would be up to the States to decide ultimately whether they would retain or abandon any final ILC proposals concerning a treaty monitoring body. An interesting historical footnote here is that, while the main ILC proposals for the ICC draft statute were retained, in some cases such as the trigger mechanism which provided for an independent prosecutor, the ILC was more modest in its proposals than States when they met at Rome in 1998 to negotiate the ICC instrument.³⁹⁵

For that reason, it may be that had a clause been included and properly justified, it would likely have bolstered the case for such a mechanism to UN Member States. Whereas the converse, that is the non-inclusion of one, might also weaken the case for it. It could be misread as sending a signal that the ILC did not consider the topic important enough. Ultimately, the omission of a recommendation was hidden behind policy rationales, but at bottom, it seemed aimed at increasing the future political acceptability of the future convention. The same might be said, concerning the issues of immunity, amnesties,

A/CN.4/SR.3353, at 3 (June 2, 2017) (detailing Mr. Ouazzani's statement supporting a monitoring body mechanism); *id.* at 6 (detailing Mr. Vazquez-Bermudez's statement supporting the draft articles calling for the creation of two monitoring mechanisms); *id.* at 7 (detailing Mr. Gomez-Robledo's statement calling for the Commission to make a recommendation regarding a monitoring mechanism).

394. *What Makes a Crime*, *supra* note 290, at 419.

395. Lawyers Committee for Human Rights, *The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor* (1997).

and even the definition of crimes against humanity. This concern appears true about other aspects of the draft convention as well.

In sum, there are many positive aspects the ILC's first draft convention on crimes against humanity. The present author is highly encouraged by the progress that the Commission has accomplished to date since taking up the crimes against humanity topic in 2014.³⁹⁶ One must particularly appreciate that we have a full draft convention that may offer a single commonly accepted definition of the crime, as well as the explicit duties of prevention and punishment that are required of State parties under Articles 4 to 15 of the draft convention, including the crucial elements of prevention and punishment, as well as modalities for extradition and mutual legal assistance.³⁹⁷ The latter were borrowed from the transnational crimes context and offer the additional advantage of addressing current normative gaps in the Rome Statute legal framework.³⁹⁸

I am also highly encouraged by the generally positive responses received from approximately fifty States during the debate on crimes against humanity in the Sixth Committee in October 2017.³⁹⁹ It is my hope that many if not all those States, as well as others, will go on to provide the detailed commentary that the Commission has invited by December 2018. This will enable the ILC, especially if States reflect and provide guidance on the difficult questions including the definition, immunities, amnesties, and monitoring mechanisms, to further strengthen the final instrument that it will present to them after completion of the second and final reading of the draft convention.

One potentially major challenge, which is already evident, is that all friends of the ILC and ICL will need to work hard to ensure that States in the General Assembly do not place the draft convention on the shelf—as they have so often done with many other more recent ILC

396. See generally Leila Nadya Sadat & Kate Falconer, *The UN International Law Commission Progresses Towards a New Global Treaty on Crimes Against Humanity*, ASIL (Jan. 25, 2017), <https://www.asil.org/insights/volume/21/issue/2/un-international-law-commission-progresses-towards-new-global-treaty> [https://perma.cc/8DXF-VNJP] (showing examples of the progress made with the crimes against humanity topic).

397. See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10 (2015) (detailing the definition of crimes against humanity); Int'l Law Comm'n, *Prevention and punishment of crimes against humanity*, U.N. Doc. A/CN.4/L.935 (2019) (discussing Articles 4 to 15).

398. See Caroline Davidson, *How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Court*, 91 ST. JOHN'S L. REV. 37, 86 (2017).

399. See Int'l Law Comm'n, Rep. on the Work of Its Seventy-Second Session, U.N. Doc. A/C.6/72/SR.20, at ¶ 22 (2017).

projects. There are States that are working on a parallel mutual legal assistance initiative, led by the Netherlands. The content of the draft treaty that they seek to conclude is not known, save that it will address mutual legal assistance and extradition for three core crimes, namely, crimes against humanity, genocide and war crimes. Those same States will hopefully also support, if not adopt, the outcome of the ILC's work when it is completed as possibly a starting point for the negotiation of their treaty text.⁴⁰⁰ I hope that the ICC too, which so far has shown little substantive interest in the crimes against humanity project, will engage with the Commission on the issue—as the ICRC does regularly on subjects concerning the law of armed conflict.

V. CONCLUSION

Overall, this article sought to demonstrate that the ILC's mandate to promote the progressive development and codification of international law permeates all its work. The mix of the two can be found in many of its projects over the course of the past seventy years. That in turn reflects the integrated nature of the tasks of codification and progressive development of international law. This mix of progressive development and codification can also be found in the subfield of international criminal law, as demonstrated by this article, which has focused on the Commission's latest project in this subfield in relation to the topic of crimes against humanity. The paper has suggested that some, if not most of the 15 draft provisions adopted by the Commission on first reading in 2017, may reflect codification of existing law. To the extent that the extension of an existing rule already recognized by States to cover a new situation will fall within the meaning of that term under Article 15 of the Statute and in the practice of the Commission.

In any event, even if some of the other provisions can be said to be progressive development, that too would be within the mandate entrusted to the ILC by States. Indeed, far from being separable, the tasks seem intertwined, interdependent and indivisible. In this scheme, even within a single provision such as the crimes against humanity definition, there will be aspects that can also be said to reflect customary international law, meaning that those aspects will be considered codification rather than forms of progressive development. The recognition of the delicate task seems to be confirmed by the earlier practice and experience of the ILC and the works of academics. In other words, the draft articles on crimes against humanity are not one or the other; rather, as with most ILC texts, they are an approximate mix of both.

400. *See id.*

It is also appropriate for the effective prevention and punishment of one of the worst crimes known to international law for the Commission, where necessary, to advance gap filling proposals even though these may amount to progressive development. Importantly, to the strict constructionists of international law that might insist on a clear distinction between the two tasks, it is important to emphasize that it will in the end be up to States to decide how to approach the Commission's final work product. This topic on crimes against humanity will be no different. The way it has been treated also properly recognizes the separation of functions between the role of independent experts and the representatives of States in the Sixth Committee of the General Assembly.⁴⁰¹ It is hoped that, when they eventually receive the recommendation of the Commission on the draft convention on crimes against humanity, States will find it fit to take the item forward and finally fill one of the currently missing links in the substantive law of international crimes. Well over half a century later, this important crime will have been put on the same plane as genocide and war crimes, both of which were codified in multilateral treaties as far back as 1948 and 1949.⁴⁰² If States choose to do so, it would potentially constitute one of the Commission's most important contributions to the development of the nascent field of ICL.

401. *See id.*

402. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, June 8, 1977, 1125 U.N.T.S. 3.