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**TRANSNATIONAL CRIMINAL JUSTICE AND CRIME PREVENTION-AN INTERNATIONAL AND
AFRICAN PERSPECTIVE**

Paper submitted in partial fulfilment of the LL.M in Transnational Criminal Justice

RESEARCH PAPER

**THE NEED FOR A COMPREHENSIVE INTERNATIONAL COVENTION ON CRIMES AGAINST
HUMANITY**

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DECLARATION

I, Samuel Matsiko, declare that *“The need for a comprehensive international convention on crimes against humanity”* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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DEDICATION

To the victims of the Bogoro massacre.



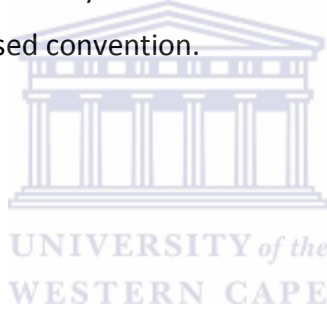
LIST OF ABBREVIATIONS

ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
PTC	Pre-Trial Chamber
UN	United Nations



ABSTRACT

In the field of international law three core crimes generally make up the jurisdiction of international criminal tribunals: war crimes; genocide; and crimes against humanity. Only two of these crimes (war crimes and genocide) are the subject of a global convention that requires States to prevent and punish such conduct and to cooperate among themselves toward those ends. By contrast, there is no such convention dedicated to preventing and punishing crimes against humanity. An international convention on prevention, punishment and inter-State cooperation with respect to crimes against humanity appears to be a key missing piece in the current framework of international law. The offence of crimes against humanity is a *jus cogens* and there is an *erga omnes* obligation for states to prosecute and extradite offenders of crimes against humanity. This can be achieved by having international obligations founded on a specialised convention.



CHAPTER I

CUSTOMARY INTERNATIONAL LAW AND HISTORICAL EVOLUTION OF CRIMES AGAINST HUMANITY

1. INTRODUCTION

Crimes against humanity are mass crimes committed against the fundamental human rights of a civilian population. They can be distinguished from genocide in that they need not target a specific group, but a civilian population in general and the perpetrators need not to have a specific intent to destroy a group in whole or in part. Crimes against humanity also include manifestations deriving from tragic historical experiences: persecution through discriminatory regulations, apartheid, torture of political opponents and enslavement through forced labour¹

It took nearly a century for crimes against humanity to evolve from moral condemnation to positive law. During this period millions of people had been killed in various conflicts, more than any other time in the history of humanity.² The vast majority of these victims were members of a civilian population. Some of these atrocities could be described as crimes against humanity. Despite these mass atrocities, the international community has nevertheless failed to adopt a comprehensive international convention on crimes against humanity³.

Currently the International Criminal Court exercises jurisdiction over three core crimes that include crimes against humanity, genocide and war crimes. The latter two crimes have been also codified outside of the Rome Statute, i.e. in the Genocide convention of 1948, as well as international conventions in the field of international humanitarian law such as the 1949 Geneva Convention and the additional protocols respectively. Some acts that may be individual acts in the context of crimes against humanity have also been codified outside the

¹ Werle.G & Florian.J 'Principles of International Criminal Law' 3 ed (2014)328

² Mullins. C, 'Conflict Victimization and Post-Conflict Justice 1945–2008'in: M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (2010) 67

³ M. Cherif Bassiouni , Crimes Against Humanity: The Case for a Specialised Convention.(2010)9 *Washington Global Studies Review*1

ambit of the Rome Statute, for example torture under the Torture convention,⁴ apartheid under the Apartheid Convention,⁵ and enforced disappearances under the Enforced disappearances convention⁶. However, unlike genocide and war crimes there is no comprehensive international convention addressing crimes against humanity.

The lack of a comprehensive international convention that addresses the normative foundations and contextual elements of crimes against humanity has not gone unnoticed. On 17th July 2014, the United Nations International Law commission decided to include the need for a treaty on crimes against humanity in its active agenda and appointed a Special Rapporteur. This decision was sparked by the work of the crimes against humanity initiative that was launched by Professor Leila Sadat in 2008. The objective was to study the current legal framework of the crimes against humanity and the need to address the impunity gaps in dealing with crimes against humanity.⁷

1.1 HISTORICAL EVOLUTION OF CRIMES AGAINST HUMANITY

The historical foundation of crimes against humanity can be traced to the preamble of the 1899 and 1907 Hague conventions in the so-called Martens Clause. The Martens Clause in the 1899 Hague convention read as follows:

*'Untill a more complete code of laws is issued ,the High contracting parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under protection and empire of the principles of international law, as they result from the usages established between civilised nations from laws of humanity, and the requirements of public conscience.'*⁸

The Hague conventions generally obligated the belligerent parties to obey the ' laws of humanity'. The coventions did not criminalise violations of laws of humanity nor prescribe a criminal sanction for such violation. The application of these conventions was restricted to

⁴10 December 1984, United Nations, Treaty Series, Vol. 1465, No. 24841

⁵ 30 November 1973, United Nations, Treaty Series, Vol. 1015, No.14861

⁶ 20 December 2006, United Nations Treaty Series , Vol 2716, No.48088

⁷ Facts about the crimes against humanity initiative. Available at http://law.wustl.edu/harris/crimesagainsthumanity/?page_id=1301. (accessed on 18 April 2015)

⁸Convention (II) with Respect to Laws and customs of War on Land and it annex: Regulation concerning laws and Customs of War on Land. The Hague 29th July 1899. Available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article>. (accessed on 7th April 2015)

war time.⁹ Theodor Meron states that although the 1899 and 1907 Hague conventions speak of laws of humanity it has become common practice to refer to them as principles of humanity.¹⁰

The term crimes against humanity came up for the first time ever in the arena of international politics and law on May 28th, 1915 when France, Russia and Great Britain issued a joint declaration exposing the mass killings of the Armenian population in Turkey as a crime against humanity¹¹

The common historical examples include the mass killings such as those by the Khmer Rouge regime in Cambodia with an estimate of 1.7 million to 2.5 million deaths from a population of 7 million. Despite the fact that these heinous crimes are often referred to as genocide, the Khmer Rouge regime killed, tortured, starved or worked individuals to death not because of their ascription to a particular racial, ethnic, religious or national group categories but because of their political or social class or the fact that they could be identified as intellectuals.¹² The prosecution of the Cambodia mass killings became problematic as most crimes committed did not fall within the ambit of the Genocide Convention¹³ and the international community attempted to resort to the Nuremberg legacy only to find out that the Nuremberg precedent had not been completed¹⁴

David Luban described crimes against humanity as '*politics gone cancerous*'.¹⁵ During the Nuremberg trials French chief prosecutor referred to them as crimes that shock the conscience and the spirit of human kind. At the Nuremberg trials crimes against humanity were included in Article 6(c) of the Nuremberg Charter and this included acts of murder, enslavement, extermination, deportation and other inhumane acts committed against any

⁹ Cassese.A, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky'(2000)11 *European Journal of International Law* 187

¹⁰ Meron.T, 'The Martens Clause, Principle of Humanity and Dictates of Public conscience'(2000)94 *American Journal of International Law* 78

¹¹Schwelb. E 'Crimes Against Humanity' (1946)23 *British Yearbook of International Law* 178

¹²Hannum.H 'International Law and Cambodian Genocide: The Sounds of Silence'(1989) 11*Human Rights Quarterly*,80

¹³9 December, 1948,United Nations, Treaty Series, Vol. 78, No. 1021

¹⁴Leila.S. 'Completing the Nuremberg Legacy: Towards a specialised Convention on Crimes against Humanity' conference presentation Utrecht University Available at http://www.schoolofhumanrights.org/fileadmin/user_upload/PDF_files/presentation_Leila_Sadat_1_.pdf.(accessed 17 April)

¹⁵Luban.D. 'A Theory of Crimes against Humanity' (2004) 29 *Yale Journal of International Law* 90

civilian population, before or during the war.¹⁶ The Nuremberg precedent further required a nexus to armed conflict as a requirement for crimes against humanity. However the Nuremberg trial did not focus or put emphasis on crimes against humanity despite the fact that 20 of the 22 defendants were indicted with crimes against humanity though these charges were brought in parallel with war crimes.¹⁷ The outcome of Nuremberg was the adoption by the general assembly and codification by the International Law Commission of the Nuremberg principles embodied in the International Military Tribunal Charter. This move was a step forward for crimes against humanity to evolve from rhetoric and narrative to actual offences prohibited under international law.

Crimes against humanity were also included in Article 5 (c) of the Tokyo Charter and Article II (1) of Control Council Law No. 10. While the Nuremberg and Tokyo Charters required that crimes against humanity evidence a connection to aggressive war or war crimes, this supplementary requirement was left out of Control Council Law No. 10.¹⁸

After this period a number of international instruments containing some proscriptions regarding criminal liability for acts and offences linked to crimes against humanity were adapted and these include:



1. The Draft code of Offences against the Peace and Security of Mankind.(1954)
2. The Convention on the Non –Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968).
3. The Convention on the Suppression and Punishment of the Crime of Apartheid (1973).
4. The Convention against Torture and other Cruel Inhuman, Degrading Treatment and Punishment (1984).
5. The Draft code of Offences against the Peace and Security of Mankind. (1991).
6. The Draft code of Offences against the Peace and Security of Mankind. (1996).
7. The International Convention on the Protection of all persons from Enforced Disappearances (2006).

¹⁶Article 6(c) The International Military Tribunal Charter. Available at <http://avalon.law.yale.edu>. (accessed on 18th march2015)

¹⁷Schwelb. E 'Crimes Against Humanity' (1946)23 *British Yearbook of International Law* 198

¹⁸Werle.G & Florian.J '*Principles of International Criminal Law*' 3 ed (2014) 329

1.2 ICTY AND ICTR JURISPRUDENCE ON CRIMES AGAINST HUMANITY

During the cold war period the discussion on crimes against humanity was in a state of hibernation. However due to the shocking and brutal conflicts in the former Yugoslavia and in Rwanda in 1991 and 1994 respectively, led to a reawakening of not only crimes against humanity but also international criminal law in general and a wave of intervention by the United Nations Security Council establishing two *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁹ and the International Criminal Tribunal for Rwanda (ICTR) respectively.²⁰ The statutes of the Yugoslavia and Rwanda Tribunals reaffirmed the customary character of crimes against humanity²¹ The International Criminal Tribunal for the former Yugoslavia in Article 5 provided that there must be a 'nexus to armed conflict whether international or internal in character'²² and directed against a 'civilian population.'²³ However the nexus to armed conflict was simply drawing a connection to a place and time to the Yugoslavia conflict. This was by no means a reintroduction of the long abandoned supplementary requirement of the Nuremberg Charter²⁴. On the other hand the Statute of the International Criminal Tribunal for Rwanda provided that crimes against humanity be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, The ICTR Statute 'did not require a nexus to armed conflict however it restricted the attack on a civilian population on national, political, ethnic, racial or religious groups.'²⁵ This provision did not necessarily limit the definition of the crime, but was a means of restricting the Tribunal's jurisdiction to those crimes against humanity typical of the Rwanda situation.²⁶

¹⁹ UN Security Council resolution 827 (1993) Establishing the International Criminal Tribunal for the former Yugoslavia Available at <http://legal.un.org/avl/ha/icty/icty>. (accessed on the 17th March 2015)

²⁰ UN Security Council resolution 955 (1994) Establishing the International Criminal Tribunal for Rwanda. Available at <http://legal.un.org/avl/ha/ict/ict>. (accessed on the 17th March 2015)

²¹ Werle, G & Florian, J 'Principles of International Criminal Law' 3ed (2014) 331

²² *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, Para. 23

²³ *Kunarac, Kovac and Vukovic*, (Trial Chamber), February 22, 2001, Para. 410

²⁴ Werle, G & Florian, J 'Principles of International Criminal Law' 3 ed (2014) 329

²⁵ *Prosecutor vs. Akayesu* Case No. ICTR 96-49, Judgment September 2, 1998, Para 774

²⁶ *Prosecutor vs. Akayesu* ICTR(AC) Judgment June 1, 2001, Para 464

1.3. THE ROME STATUTE DEFINITION OF CRIMES AGAINST HUMANITY

In 1998 with the adoption of the Rome Statute and the establishment of the International Criminal Court, crimes against humanity were defined in Article 7. The Rome Statute contains the most detailed and comprehensive definition on crimes against humanity. Article 7 was presumed as a codification of the customary international law character of crimes against humanity. The definition of crimes against humanity in Article 7 of the Rome Statute has a unique characteristic that has become a subject of controversy in recent times. The provision requires that crimes against humanity are committed in 'pursuant to or in furtherance of state or organisational policy'²⁷ and does not contain the requirement of 'a nexus to armed conflict.'²⁸ The policy element can be traced back to Article 18 of the 1996 Draft code on offences against peace and humankind. The intention was that isolated crimes by individuals were not included in the definition. A commentary by the International Law Commission on the 1996 Draft code required that acts are committed pursuant to a preconceived plan or policy.²⁹ However the ad hoc Tribunals have departed from this jurisprudence as it has no basis in international customary law³⁰

The material elements of crimes against humanity include the commission of one of the individual acts described in Article 7 (1)³¹ in the course of a widespread or systematic attack against a civilian population. The contextual elements are represented by the attack on the civilian population and the mental element requires intent and knowledge³² regarding the material element of the crime including the contextual element.³³

It is important to note that the Rome Statute in dealing with crimes against humanity is restricted to state parties of the International Criminal court³⁴ meaning that a number of countries remain outside the ambit of the Rome statute system and outside the jurisdiction

²⁷ 17 July 1998 United Nations Treaty Series, vol. 2187 No.38544

²⁸ 17 July 1998 United Nations Treaty Series, vol. 2187 No.38544

²⁹ Yearbook of the International Law Commission(1998)vol. II, Part Two 47

³⁰ ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23 and IT-96-23/1-A, Appeal Judgment, 12June 2002, Para. 98.

³¹ 17 July 1998 United Nations Treaty Series, vol. 2187 No.38544

³² 17 July 1998 United Nations Treaty Series, vol. 2187 No.38544

³³ Werle .G & Florian. J '*Principles of International Criminal Law*' 3 ed (2014) 333

³⁴ Only 123 countries have ratified the Rome Statute of the International Criminal court. Available at http://www.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. (accessed on 15th March 2015)

of the court. However the International Criminal Court's jurisdiction may apply to nationals of non-states parties by way of referral by the United Nations Security Council.

The Rome statute by its nature applies a vertical approach and does not provide for a horizontal approach for inter-state cooperation, mutual legal assistance, the duty to extradite and prosecute leaving gaps on the prosecution of atrocities committed across borders. The statute does not provide for an obligation to legislate and domesticate crimes against humanity.³⁵

1.4 THE NEED FOR AN INTERNATIONAL COVENTION ON CRIMES AGAINST HUMANITY

Despite the historical evolution of the concept of crimes against humanity and its customary international law character, the concept of crimes against humanity has not reached its final and satisfactory form. There are as many as twelve different definitions of crimes against humanity in international legal instruments;³⁶ however these definitions have not settled some of the impunity gaps that still exist. The commonality of the various definitions reveal that state actors are more likely to be prosecuted for crimes against humanity, which explains the resistance of governments to support a comprehensive convention. The absence of such a convention widens the impunity gap for perpetrators who commit these atrocities.³⁷ Therefore, one might ask whether the international community needs a comprehensive international convention on crimes against humanity.

The proposed convention will create an obligation for States to prohibit crimes against humanity in their domestic penal codes. The Rome Statute refers to domestic prosecutions for crimes against humanity but imposes no obligation on its state parties to adopt domestic penal legislation for these crimes, although the Preamble implies that States should do so. As a consequence, less than two-thirds of the States Parties to the Rome Statute appear to have domestic legislation prohibiting crimes against humanity³⁸. A new convention could impose an obligation to criminalise and fill this gap, both among States Parties to the Rome Statute and non-States Parties.

³⁵ Bassiouni.M, *'Crimes Against Humanity: Historical Evolution and Contemporary Application'*(2011)660

³⁶ Bassiouni.M, *'Crimes Against Humanity: The Case for a Specialized Convention'* (2010) 9 *Washington University Global Studies Review*, 583

³⁷ Bassiouni.M, *'Crimes Against Humanity: The Case for a Specialized Convention'*(2010) 9 *Washington University Global Studies Review*, 584

³⁸ Carrillo. J & Annalise. K *'Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction'* (2014)46 *George Washington International law Review*.482

The Rome statute falls short in dealing with issues of state responsibility and restricts itself to individual criminal responsibility and does not impose a duty for states to prevent and punish crimes against humanity. A new convention on the crimes against humanity would remedy this lacuna and enhance the development of the responsibility to protect norm (R2P). Linking the duty to prosecute with the responsibility to protect, the Proposed Convention has the capacity to push the doctrine of R2P from an ideal to a more binding legal obligation

A new convention would remedy gaps in the coverage of the Genocide Convention. The absence of social and political groups from the protection offered by the Genocide Convention, led to the conclusion that the Khmer Rouge did not commit the crime of genocide in the 1970s, but only crimes against humanity. The lack of a mechanism in holding states to account for their commission of crimes against humanity³⁹ has not gone unnoticed. In the *Bosnia V Serbia*⁴⁰ case before the International Court of Justice is a very good example. The court was of the opinion that crimes against humanity that were committed were outside the Jurisdiction of the court and the court could only provide redress to only genocide and therefore of 2.2 million people displaced, 200,000 deaths and 50,000 rapes the court held that only the massacre of 8,000 Muslims men and boys from Srebrenica was proved.⁴¹

A convention on crimes against humanity will add value in enhancing and promoting inter-state cooperation on evidentiary questions, extradition and transfer of proceedings when handling crimes against humanity cases. Such cooperation is necessary considering the complex nature of crimes against humanity cases and the large volume of evidence typically required when handling such cases. Furthermore a convention could bring about clarity on the obligation to prosecute or extradite '*aut dedere aut judicare*' crimes against humanity by establishing unambiguous obligation to prosecute or extradite crimes against humanity.

A new convention could establish a basis for universal jurisdiction over crimes against humanity, a State would be enabled to prosecute offenders found on its territory even if the offender's State of nationality is party neither to the Rome Statute nor the new convention.

³⁹ Gregory.H 'Why the World Needs an International Convention on Crimes Against Humanity' in Leila. S. (ed) '*Forging a Convention for Crimes Against Humanity*' (2011) 347

⁴⁰ *Application of the convention on the prevention and punishment of Genocide(Bosnia V Serbia)* 2007 I.C.J.191

⁴¹Goldstone.J 'Foreword' in Leila. S. (ed.) '*Forging a Convention for Crimes Against Humanity*' (2011) XVI

Finally, the existence of a substantial body of jurisprudence exists to guide States in domestic prosecutions of these crimes. Therefore it is prudent to adopt a convention to enable states prosecute these crimes more effectively considering the fact that most international criminal tribunals are winding up.

1.5 THE CRIMES AGAINST HUMANITY INITIATIVE AND LATEST DEVELOPMENTS

In 2008 Professor Leila Sadat of the Whitney. R. Harris World Law Institute launched the crime against humanity initiative to study the need for a global convention on crimes against Humanity and come up with a draft proposed convention. Although the task was ambitious in scope and conceptual design. The initiative was composed of a distinguished seven member steering committee composed of Judges and academics. The crimes against humanity initiative progressed in phases and at the time of writing the three phases had been completed and the last phase is ongoing:

1. Phase I. The methodological development and project design for the crimes against humanity convention
2. Phase II. The initiative was to embark on private study of the problem through the commission of working papers by leading experts and discuss the draft treaty language with experts at a meeting in The Hague and at St. Louis.
3. Phase III. To convene a conference and have a public discussion on the written consultation by the leading experts. Publish papers written in phase II, discuss a comprehensive history of the initiative, adopt the proposed convention on the prevention and punishment of the crimes against humanity and launch the publication of a book publication '*Forging a Convention for Crimes Against Humanity*' (Leila Nadya Sadat, ed., 2nd ed. Cambridge 2013).
- Phase IV. Engage in advocacy with members of the International Law Commission, civil society representatives, academics, government officials and other stakeholders in the international community and the promotion of the strengths and innovations of the proposed convention which has now been translated into Chinese, German, Arabic, French and Spanish.

The United Nations International Law commission in 2013 included the topic for the need of global treaty on crimes against humanity on the basis of a report⁴² prepared by Professor Sean Murphy. The report laid down four key elements a global convention on crimes against humanity must have:

1. Adoption of a definition of article 7 of the Rome statute.
2. Robust inter-state cooperation and mutual legal assistance.
3. Obligation to criminalise crimes against humanity within national legislation.
4. A clear obligation to extradite or prosecute offenders.⁴³

The report also put emphasis that the global convention on the crimes against humanity was to complement the Rome statute.⁴⁴

In October 2013 states had the opportunity to comment on the International law Commission's decision to include the topic on the need for crimes against humanity convention in its long term agenda at the United Nations General Assembly Sixth Committee. A number of states welcomed the idea for a convention for example **Slovenia** stated that 'This legal gap in international law has been recognised for some time is particularly evident in the field of state cooperation including mutual legal assistance and extradition; we believe all efforts should be directed at filling this gap.'⁴⁵ However countries like **Iran** questioned the need for a global treaty on the crimes against humanity and stated that 'it does not seem that ... there is a legal loophole to be filled through the adoption of a new international instrument.'⁴⁶

⁴²Report of the Working Group on the Obligation to Extradite or Prosecute and Crimes against Humanity. Report No. A/68/10 Available at <http://legal.un.org/ilc/reports/2013/english/annex>. (accessed on the 20th March 2015)

⁴³ Report of the Working Group on the Obligation to Extradite or Prosecute and Crimes against Humanity. Report No. A/68/10 Paragraph 8 .Available at <http://legal.un.org/ilc/reports/2013/english/annex>. (accessed on the 20th March 2015)

⁴⁴Report of the Working Group on the Obligation to Extradite or Prosecute and crimes against humanity. Report No. A/68/10 Paragraph 9-13 .Available at <http://legal.un.org/ilc/reports/2013/english/annex>. (accessed on the 20th March 2015)

⁴⁵ Statement by Mr.Borut Mahnic Director General Ministry of Foreign affairs Republic of Slovenia at the General Assembly Sixth committee. Available.<https://papersmart.unmeetings.org/media2/703847/slovenia>. (Accessed on the 20th March 2015).

⁴⁶Statement by Professor Momtaz legal adviser Ministry of Foreign affairs of the Islamic Republic of Iran at the General Assembly Sixth committee Available at <https://papersmart.unmeetings.org/media2/1156427/iran>. (Accessed on the 20th March 2015).

In May 2014, before the United Nations International Law commission July session, the crimes against humanity initiative convened a meeting under the theme '*Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity*' in Geneva Switzerland at the Villa Moynier with members of the commission and legal experts from around the world to discuss the complex issues the International Law Commission will face as it embarks on the study and drafting process on a global convention on the crimes against humanity.

Finally on July 17, 2014 a remarkable event occurred, the United Nations International Law commission voted to move the topic on the need for a new convention on crimes against humanity to its active agenda and finally appointed a Special Rapporteur whose role is to prepare the first report of the subject which will begin the process of proposing draft articles to the commission for its approval. The first report is expected to be circulated and discussed by the commission in its summer session this year. It is important to note that the crimes against humanity initiative already drafted a model convention on the crimes against humanity containing 27 Articles.

CONCLUSION

There is no doubt that an extensive and well-developed jurisprudence on crimes against humanity exists from Nuremberg to the Rome statute. However that jurisprudence on its own without standard rules in place to compliment it is unlikely to address the impunity gaps in dealing with crimes against humanity.

Although the International Criminal Court is an important step forward in combating crimes against humanity, without national enforcement, it will be of limited effect. Crimes against humanity are *jus cogens* and there is an *erga omnes* for states to prosecute, extradite offenders of crimes against humanity and this can only be achieved by having international obligations founded on a specialised convention.

CHAPTER II

ADOPTING THE POLICY REQUIREMENT DEFINITION IN THE PROPOSED COVENTION

2. INTRODUCTION

The conversation on the definition of crimes against humanity in the proposed convention will be a central feature of the draft convention. It has been observed that because of its disorganised history, important normative and doctrinal questions remain unanswered about this offense.⁴⁷ Due to the debates on the exact normative underpinnings of crimes against humanity, a number of questions regarding the definition of crimes against humanity remain unresolved.⁴⁸ This makes the notion of crimes against humanity vulnerable to challenges of being vague, over-inclusive and ambiguous in scope.

The precise legal definition of crimes against humanity has been elusive and a matter of uncertainty. This has been largely due to the lack of a comprehensive international convention on crimes against humanity. Since the early 1990s, there has been a general acceptance and convergence on the notions of ‘widespread or systematic attack directed against a civilian population.’ The statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) definition requires a nexus to armed conflict. The statute of the International Criminal Tribunal for Rwanda (ICTR) drops the nexus to armed conflict and requires a discriminatory motive towards an ethnic, racial or religious group. The International Criminal Court (ICC) definition statute eliminates the nexus to armed conflict and discriminatory motive, but requires a ‘state or organisational policy.’

Article 7(2) (a) of the Rome Statute stipulates that crimes against humanity are preconditioned on the existence of an attack on a civilian population pursuant to or in furtherance of a state or organisational policy to commit such attack.⁴⁹

There are two plausible options to consider when crafting a definition in the draft convention and these include;

1. Adopt the ICC definition in Article 7 of the Rome Statute.
2. Advance a new definition.

The latter option has some advantages as it would offer an opportunity for scholars and international criminal lawyers to revise and rewrite some aspects of article 7 of the Rome

⁴⁷ Guzman. M ‘Crimes against Humanity’ in Schabas. A & Nadia.B (eds)*Hand Book of International Criminal Law* (2011)121

⁴⁸ Guzman. M ‘Crimes against Humanity’ in Schabas. A & Nadia.B (eds)*Hand Book of International Criminal Law* (2011)121

⁴⁹ 17 July 1998 United Nations Treaty Series, vol. 2187 No.38544.

statute. The most eligible candidate for such revision would be the 'policy element' perceived by many as problematic and an impediment to prosecution.⁵⁰

However at the time of writing the general consensus is in favour of adopting the ICC definition in Article 7 of the Rome statute because of the following reasons;

1. Article 7 is regarded by some authorities as having customary international law status though hotly debated.⁵¹
2. To re-negotiate a new definition in the current international criminal justice landscape would be more restrictive than progressive.
3. The definition in the ICC statute was the result of multilateral negotiations developed by States with broad participation. This definition is more likely to be accepted by state parties.
4. The definition in the ICC statute has already been domesticated by some state parties, having uniformity and consistency with that definition may simplify implementation and acceptance of the convention at national level.
5. To renegotiate a new definition is not only time consuming it would increase the problems of fragmentation of international criminal law.

There number of aspects in Article 7 that are desirable for clarification, for example, the attack on a civilian population, clarification on the term organisation and the controversy surrounding the context to qualify an inhumane act.⁵² However my research will restrict itself to the contextual aspects of the 'policy requirement' which i consider to be the dominant feature subject for clarity.

It is also important to note that although the customary international law character of the policy requirement is still hotly debated, the chapter is based on the premise that Article 7 that provides for the policy requirement is the plausible definition in the convention on crimes against humanity. Therefore the chapter is not intended to resolve the customary international law status of the policy requirement.

This chapter does not offer a comprehensive remedy to the controversial aspects of the policy requirement; rather it offers a modest contribution to the debates on the inclusion of the policy requirement in the proposed convention on crimes against humanity. The chapter address briefly the policy requirement concept and the nascent debates surrounding the inclusion of the policy requirement.

⁵⁰ Darryl.R 'The Draft Convention on Crimes Against Humanity: What to Do With the Definition' in Morten.B & Tianying. S (eds) *On the Proposed Crimes Against Humanity Convention* (2014)105

⁵¹ 17 July 1998 United Nations Treaty Series, Vol. 2187 No.38544

⁵² 17 July 1998 United Nations Treaty Series, Vol. 2187 No. 38544

The chapter concludes by suggesting the need for an International Law Commission *commentary on* the policy requirement to be accompanied and annexed to the proposed convention on crimes against humanity.

2.2 THE POLICY REQUIREMENT

There is dearth of literature as to the precise meaning of the policy element, However Mettraux, G. attempts to define the policy element and generally capture the essence of the policy requirement as follows;

‘An agreement, plan or practice pursued by or on behalf of a government, authorities, or bodies, official or nonofficial, for the purpose or with a view to commit, aid or support criminal activities’⁵³

From the wording, it is clear that the policy element is premised on the notion that for ordinary crimes to amount to crimes against humanity there must be an agreed scheme or plan by some authorities⁵⁴. Therefore the policy element does not focus on individual ordinary crimes rather it transcends the perpetration of these ordinary crimes on a massive scale into crimes against humanity. There is no doubt that the purpose of the policy requirement is to screen out ordinary crimes from crimes against humanity.

Over the years it has been noticed that the disjunctive test of ‘widespread or systematic’ does not actually suffice to exclude ordinary crimes. It is important to recognise that during the debates at the Rome conference the permanent member countries of the Security Council and many Arab and Asian countries raised concerns about this disjunctive test.⁵⁵

The argument was that the term widespread does not exclude random and unconnected crimes. Therefore crimes can be widespread but unconnected. A section of the delegation was of the view that unconnected and random crimes could not constitute an ‘attack’. Therefore at the Rome conference, a compromise was reached to retain the disjunctive test of ‘widespread or systematic’ on condition that the definition of ‘attack’ provides explicit assurance to exclude unconnected crimes.

In the *Tadic decision* the term policy was used to explain the idea that an attack is not composed of isolated, random acts of individuals and cannot be the work of isolated individuals alone⁵⁶. In the 1996 International Law Commission draft code (ILC) on crimes against humanity provided that an attack must be instigated or directed by a Government or

⁵³Mettraux. G ‘The Definition of Crimes against Humanity and the Question of a Policy Element’ in Leila.S (ed)*Forging a Convention for Crimes against Humanity* (2011) 142

⁵⁴Mettraux. G ‘The Definition of Crimes against Humanity and the Question of a Policy Element’ in Leila.S (ed)*Forging a Convention for Crimes against Humanity* (2011) 143

⁵⁵ Herman.H & Darryl R, ‘Crimes within the Jurisdiction of the Court’, in Roy.L (ed.) *The International Criminal Court: The Making of the ICC Statute* (1999)79

⁵⁶ *Prosecutor vs. Dusko Tadic* ICTY T. Ch. II 7.5. 1997. Para. 653.

by any organisation or group⁵⁷ During the negotiations at the Rome conference a delegation from Canada proposed a compromise based on the *Tadic* decision passage and the 1996 ILC draft code.⁵⁸The rationale of this proposed compromise was to exclude ordinary crimes.

2.3 MISCONCEPTIONS OF THE POLICY REQUIREMENT

Though the policy element is not new in the jurisprudence it is frequently misunderstood. The general misconception of the policy element is the perception that it implies of something official or highly formal. That the policy element is linked to some sort of manifesto or programme based on internal mechanisations or secret plans.⁵⁹ The worst misconception is to equate it with systematic.

It is important to briefly outline and clarify some of these misconceptions as follows;

1. A policy need not be expressly stated or formalised, and need not involve the highest levels of a State or organisation.
2. A policy may be implicit and inferred. The policy may be inferred from the manner in which the acts occur.
3. A policy does not require active orchestration, it can be realised by deliberate inaction to encourage crimes where a state or organisation has a duty to intervene.⁶⁰Whereas a policy may be orchestrated by the actions of a State or organisation, it may also be manifested by a deliberate omission or failure to act which is consciously aimed at encouraging an attack.
4. The term policy is not equivalent to the term systematic. Policy does not necessarily require deliberate planning, direction or orchestration: it requires only that some State or organisation must have at least encouraged the attack, either actively or passively.
5. The attribution of the policy element to a state or organisation is intermediate between two extremes: on the one hand, a policy need not implicate the highest levels of a state or organisation, and on the other hand, the crimes cannot merely be the product of a few isolated members acting on their own. Thus the purpose of the policy element is to filter out ordinary crime.

2.4. CUSTOMARY LAW STATUS OF THE POLICY REQUIREMENT

The policy element is in a state of flux currently due to the uncertainty of its customary law status. The customary law status of the policy element is hotly debated and there are

⁵⁷ Article 18 Draft Code of Crimes against the Peace and Security of Mankind with Commentaries in *Yearbook of the International Law Commission*(1998)vol. II, Part Two 47

⁵⁸ Darryl.R 'Defining Crimes Against Humanity at the Rome Conference' (1999) 93 *American Journal of International Law* 43

⁵⁹ Darryl .R 'Crimes against Humanity: A Better Policy on Policy' in Carsten. S(ed) *The Law and Practice of the International Criminal Court*(2014)8

⁶⁰ Ambos.K & Wirth.S, 'The Current Law of Crimes Against Humanity' (2002) 13 *Criminal Law Forum* 31–4

credible arguments in favour and against the customary law status of policy requirements. Scholarly debate as to the customary law status of the policy element has evolved. There are mainly two schools of thought as regards to whether the policy element is a legal requirement under customary international law.

The first school of thought argues that the policy element is a legal requirement under customary international law. In the early 1990s, as the element was recognised in the *Tadic* decision and the Rome Statute, scholarly debate moved quite decisively against the element.⁶¹ Recently there has been resurgence, with scholars such as Kress, Schabas and Wirth arguing that the element has support in precedents and is conceptually important.⁶² These scholars assert that under existing customary international law crimes against humanity do require the Policy Element. For these scholars, there exists sufficient state practice and *opinio juris* since the inception of the concept of crimes against humanity, that the policy element is a requirement for crimes against humanity.

These scholars agree that discarding the policy element outright has the potential to make crimes against humanity applicable to, as Schabas argues: serial killers, the Mafia, motorcycle gangs and small terrorist bands.⁶³ The policy element is, therefore, the requirement that transcends common waves of crime into the international criminal law arena in the form of crimes against humanity.

Of recent a new debate has emerged to whether the policy element envisaged is only that of the state and state-like entities or can be extended to other entities generally.⁶⁴ Under the ICC Statute, for example, where the policy element is expressly provided for as a legal requirement, a debate currently rages on. This debate was sparked by the *Decision on the Authorisation of Investigations in Kenya*.⁶⁵ The majority of the pre-trial chamber II established a new threshold question of whether a group has the capability to perform acts which infringe on basic human values is regarded as an organisation within the meaning of Article 7(2)(a). The late Judge Peter-Hans Kaul dissented and opted for a stringent interpretation of the policy element that covered states and only state-like organisations.

Scholars like Kress agree with the dissenting opinion. Kress argues that the state practice and *opinio juris*, as observed since Nuremberg, indicates the existence of customary international law requiring the policy element envisaged being either that of a state or

⁶¹ Phyllis.H 'Defining Crimes Against Humanity in the ICC Statute of the International Criminal Court (1998) 22 *Fordham International Law Journal* 457

⁶² Claus .K, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855

⁶³ Schabas. A 'State Policy as an Element of International Crimes' (2008)98 *Journal of Criminal Law and Criminology* 960

⁶⁴ Werle.G & Burghardt.B 'Do Crimes against Humanity Require the Participation of a State or a State-like Organization?' (2012)10 *Journal of International Criminal Justice* 1151-1170

⁶⁵ Decision on the Authorization of an Investigation into the Situation in Republic of Kenya, 31 March 2010.

state-like organisation. However Gerhard Werle and Boris Burghardt⁶⁶ advocate for an approach that focuses on the ordinary meaning of the term 'organisational policy' in interpreting the policy element in the ICC Statute. According to Werle and Burghardt the ordinary meaning of phraseology employed to manifest the policy element in article 7(2) (a) covers any organisation with sufficient capacity to carry out a widespread or systematic attack on a civilian population.

The second school of thought argues that the policy element is not a legal requirement under customary international law. Some scholars argue that a survey of international and national jurisprudence overwhelmingly supports the non-existence of the policy element for crimes against humanity than its existence⁶⁷ furthermore that there is no sufficient state practice and *opinio juris* to justify the existence of the policy element under customary international law.

2.3 THE KUNARAC DECISION

It is important to briefly address the *Kunarac* case, because many scholars and jurists regard the case as determinative of the customary law question.

2.3.1 Brief Background

The relevant facts of the *Kunarac* Decision concern an armed conflict between Bosnian Serbs and Bosnian Muslims from 1992 to 1993 in the area of Foca, a municipality in Bosnia and Herzegovina. In 1992 Foca fell under the control of Serbian paramilitaries. As a result non-Serb civilians were killed, raped or otherwise abused by the Serbian paramilitaries.

In 2001, the appellants, Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, who took active part in the armed conflict as members of the paramilitaries, were charged with crimes against humanity and war crimes in the Trial Chamber of the ICTY. They were convicted on all charges and sentenced to 28 years, 20 years and 12 years respectively.⁶⁸

The appellants appealed to the Appeals Chamber against both their convictions and the sentences. They lodged several grounds of appeal including alleged errors by the Trial Chamber with respect to: (i) its finding that Article 3 of the ICTY Statute applies to their conduct; (ii) its finding that Article 5 of the Statute applies to their conduct; (iii) its definitions of the offences charged; (iv) the cumulative charging; and (v) the cumulative convictions entered by the ICTY.⁶⁹

⁶⁶ Werle.G & Burghardt.B 'Do Crimes against Humanity Require the Participation of a State or a State-like Organization?' (2012)10 *Journal of International Criminal Justice* 1154

⁶⁷Sluiter. G 'Chapeau Elements of Crimes against Humanity of the United Nations Ad Hoc Tribunals' in Sadat.L (ed)*Forging a Convention for Crimes against Humanity*(2011)129

⁶⁸ *Prosecutor vs. Dragoljub Kunarac et al* ICTY A. Ch. 12.6.2002. Para 10, 18 and 22

⁶⁹ *Prosecutor vs. Dragoljub Kunarac et al* ICTY A. Ch. 12.6.2002. Para 24

Of particular importance to this discussion, the appellants contended that the crimes against humanity as defined under the statute of ICTY required that crimes against humanity against the non-Serb Muslim women should be committed in furtherance of a plan or a policy.

The appellants therefore had to have requisite knowledge of that plan or policy and a demonstrable willingness to participate in its furtherance. With that premise, the appellants contended that the charges of crimes against humanity could not hold since the crimes they were accused of were disparate and there was no proof that the appellants had been in contact during the armed conflict. In essence, they argued that there was no evidence of any common plan or common purpose to commit the crimes against the non-Serb Muslim women.⁷⁰

The Appeals Chamber rejected this argument and held that the statute of the ICTY does not require the policy element for crimes against humanity. The Chamber went further to hold that there is no such requirement under customary international law. Below is the reasoning of the ICTY.

The reasoning of the court was that since neither the ICTY Statute nor customary international law at the time of the alleged acts required proof of the existence of a plan or policy to commit the said acts, it could not justify a finding that the policy element was a requirement for the charges of the crimes against humanity. The ICTY further held that the legal elements for crimes against humanity included: proof of an attack against a civilian population and that the said attack should be widespread or systematic. However, to prove these elements, it was not necessary to establish that they were the result of the existence of a policy or plan. The existence of a plan or policy could be useful to establish these two elements. However, it was entirely possible to establish the said elements without reference to any plan or policy. Furthermore the court reasoned that the existence of a policy or plan could merely be of probative value in appropriate circumstances, but in the legal scheme of the ICTY it was not a required element for crimes against humanity.⁷¹

The ICTY further attested to the existence of a debate in the jurisprudence of the tribunal as to whether a policy or plan constituted an element of the definition of crimes against humanity. However, the ICTY, in a single footnote, categorically dismissed the existence of the Policy Element thus: „The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law.⁷² In a nutshell the ICTY Appeals Chamber declared rather categorically that there is nothing in customary law that required a policy element and an overwhelming case against it.

⁷⁰ *Prosecutor vs. Dragoljub Kunarac et al* ICTY A. Ch. 12.6.2002. Para. 75

⁷¹ *Prosecutor vs. Dragoljub Kunarac et al* ICTY A. Ch. 12.6.2002. Para.98

⁷² *Prosecutor vs. Dragoljub Kunarac et al* ICTY A. Ch. 12.6.2002. Para 30

2.3.2 A critic of the *Kunrac* decision

There is need for caution when relying on the *Kunrac* decision as an indicator or determinant to the customary law status of the policy requirement. First the assertion that the policy element has no customary law status only appeared in a tiny reasoned foot note and was based on authorities that were either silent on or indeed contrary to the Chamber's assertion and many authorities in favour of the policy element were either excluded and ignored.

Secondly according to Daryl Robinson there is more to customary law than just ICTY and ICTR jurisprudence. For example, the Rome Statute, reflecting a simultaneous statement of many States purporting to reflect customary law, is also entitled to some weight. There is also a long tradition of national and international case law and other expert bodies that must be taken into account.⁷³

2.3.4 Observations of the policy requirement in light of the proposed convention

For purposes of this research, it is important not to over emphasise whether or not the policy element is a legal requirement under customary international law. At the time of writing the consensus is that the definition in the proposed convention will be premised on the definition in the Rome Statute. The fact remains that the element appears in the ICC Statute, in the national legislation of many countries⁷⁴, and will likely appear in the Draft Convention, and thus must be interpreted.

Irrespective of whether the policy element is a requirement under customary international or it has no legal basis under customary international law, it is in the interest for both the protagonist and antagonist of the policy element to have clarifications geared at assisting the courts at interpreting the policy requirement. Therefore it is important that a *commentary* to clarify the policy requirement be accompanied with the proposed convention on crimes against humanity.

2.4. PROPOSED ILC COMMENTARY ON THE POLICY ELEMENT

The International Law Commission established by the United Nations General Assembly is mandated to promote the progressive development of international law and its codification. It is the practice by the International Law Commission in its codification procedure to have

⁷³ Darryl .R 'Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience, in Lattanzi. F & Schabas. A. (eds) *Essays on the ICC Statute of the International Criminal Court*, (1999)152–164

⁷⁴ International Criminal Court Act Uganda act. No.11. 2010 *Uganda Gazette No. 39 Volume CIII dated 25th June, 2010*

commentaries as guides to proposed draft articles of conventions for example the 1966 Draft Articles on the Law of Treaties with commentaries.⁷⁵

Daryl Robinson a scholar of international criminal law is at the forefront in advocating for the need of an international law commission *commentary* on the policy element to be accompanied with the proposed draft convention on crimes against humanity. According to Daryl Robinson it is highly desirable that the commentary to the draft Convention may mitigate the concerns by explaining some key terms in accordance with pertinent authorities.⁷⁶

This paper fully concurs with this position and finds merit in Daryl Robinson's suggestion. A proposed commentary on the policy element drawn from various authorities and jurisprudence will illustrate that the policy element is an *in limine*,⁷⁷ a filter, screening out scenarios of unconnected ordinary or isolated crimes. Such a commentary would have a value addition purpose not only in relation to the draft Convention, but also for customary law, by clearly illustrating the consistency of authorities in support of a workable definition.

2.4.1 What are the merits of an ILC commentary on the policy element?

First, an International Law Commission commentary is often used to aid in interpretation and as a guide to customary law; it will be of assistance not only in relation to the convention but also for national and international judicial bodies applying crimes against humanity law for any reason. Second, a commentary can facilitate general acceptance by those who are cautious about the dangers of misinterpretation or over extension of the policy element. Third, a commentary may help reduce the fragmentation of international criminal law by drawing on national and international authorities, many of which are not well known and show that there is considerable harmony in the different authorities. Fourth and most importantly, the commentary can facilitate prosecution and make the convention more effective, by demonstrating how the policy element has been understood and applied.

There are a number of key prospective *commentaries* I list below that may be desirable in the commentary on the policy requirement. However these comments are neither exhaustive nor reflect hierarchy or gradation in terms of value, rather these are comments that are central and at the core of the policy element discourse. The proposed comments are as follows;

1. The essence of the policy element is to screen out ordinary crime.
2. The term policy is not equivalent to the term systematic.

⁷⁵Draft Articles on the Law of Treaties with commentaries .Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966. (accessed 10 August 2015)

⁷⁶Darryl. R 'The Draft Convention on Crimes Against Humanity: What to Do With the Definition' in Morten.B & Tianying. S (eds) *On the Proposed Crimes Against Humanity Convention* (2014)128

⁷⁷ Darryl. R 'The Draft Convention on Crimes Against Humanity: What to Do With the Definition' in Morten.B & Tianying. S (eds) *On the Proposed Crimes Against Humanity Convention* (2014)128

3. A policy may be implicit or inferred.
4. A policy may be manifested by action or inaction

2.4.2. The essence of the policy element is to screen out ordinary crime

The text of the first proposed comment ought to read as follows;

'The purpose of the policy element is to screen out 'ordinary crime', that is, haphazard or uncoordinated acts of individuals on their own unconnected criminal initiatives'

The proposition that isolated or random acts of individuals do not constitute a crime against humanity is so frequently stated that it hardly needs any repetition.⁷⁸ The policy element is therefore premised on this assurance that crimes against humanity exclude random acts of individuals pursuing their own criminal initiatives.

This aspect has also been articulated by some national courts for example the Supreme Court in Peru in the *Fujimori* case stated that;

*A policy requires only that the casual acts of individuals acting on their own, in isolation, and with no one coordinating them, be excluded*⁷⁹

It is worthwhile to pause and consider some of the scholarly arguments against the policy element. Mettraux argues that the 'widespread or systematic' disjunctive test is by itself sufficient to exclude and screen out random, isolated crime. He goes on to state that policy element is redundant and unnecessary.⁸⁰ To some extent there is some merit in his argument especially when applying the systematic test to exclude random acts. However when you apply the alternative widespread it fails because it merely requires scale. A good example is the high murder rates in South Africa would easily satisfy the widespread test.

I will not emphasise the merits and demerits of the disjunctive widespread or systematic test rather state that if we apply the tests literally in isolation of the policy element, then each and every serious crime committed in a context of rampant serious crime would constitute a crime against humanity.

Therefore there is need for a commentary to clarify the purpose of policy which is simply to screen out ordinary crimes.

⁷⁸ Article 18 Draft Code of Crimes against the Peace and Security of Mankind with Commentaries in *Yearbook of the International Law Commission* (1998) vol. II, Part Two p. 47

⁷⁹ *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases*, Case No. AV 19-2001, Judgment, 7 April 2009, Para. 715

⁸⁰ Mettraux, G 'The Definition of Crimes against Humanity and the Question of a Policy Element' in Leila S (ed) *Forging a Convention for Crimes against Humanity* (2011) 153

2.4.3. The term policy is not equivalent to the term systematic

The text of the second proposed comment ought to read as follows;

The term 'policy' is not equivalent to the term 'systematic'. 'Policy' does not necessarily require deliberate planning, direction or orchestration; it requires only that some State or organisation must have at least encouraged the attack, either actively or passively

The misconception of systematic and policy is not new and it has been recurring in scholarly discourse. This misconception is understandable due to complexity of Article 7 of the Rome Statute. This misconception can be traced to some legal instruments that equated systematic to policy.⁸¹ For example, the 1996 ILC Draft Code refers to systematic as referring to a preconceived plan or policy. Systematic requires some orchestration and some high level of planning while in contrast policy does require active orchestration and may be implicit or inferred from the occurrence of acts.

Scholars like Ambos and Wirth have articulated that a key to distinguishing policy from systematic is that policy does not require active orchestration but can include encouragement through deliberate passivity.⁸² To them policy must be of a lower threshold than systematic.

This commentary does not offer a remedy to the misconception of systematic and policy rather the commentary serves a modest purpose to recognise that the policy element and systematic cannot be equated.

2.4.4 A policy may be implicit or inferred

The text of the third proposed comment ought to read as follows;

A policy need not be expressly stated or formalised, and need not involve the highest levels of a State or organisation. A policy may be implicit. The existence of a policy can be inferred from the manner in which the acts occur. In particular, it can be inferred from the implausibility of coincidental occurrence

In the *Tadic* decision it was emphasised that a policy can be deduced from the way the manner in which the acts occur and need not be formalised⁸³ In the *Blastic* decision it was noted that a policy need not be formulated or conceived at the highest level and need not be expressly formulated⁸⁴ In the *Gbabgo* confirmation decision the court reasoned that

⁸¹ Draft Code of Crimes against the Peace and Security of Mankind with Commentaries in *Yearbook of the International Law Commission*(1998)vol. II, Part Two p. 47

⁸²Ambos.K &Wirth.S 'The Current Law of Crimes against Humanity: An analysis of UNTAET Regulation 15/2000' (2002) 13 *Criminal Law Forum* 28, 31–34

⁸³ *Prosecutor vs. Dusko Tadic et al* ICTY T. Ch. II 7.5. 1997. Para. 653

⁸⁴ *Prosecutor vs. Blaškić*, Judgment, 3 March 2000, IT-95-14-T, Para. 205

there is no requirement that a policy be formally adopted and that evidence of planning is relevant but not required⁸⁵

There is a web of authorities on this aspect however the gist of the commentary is to simply clarify that a policy may be implicit or inferred from the manner in which the acts occur.

2.4.5 A policy may be manifested by action or inaction

The text of the third proposed comment ought to read as follows;

While a policy will typically be manifested by the actions of a State or organization, it may also be manifested by a deliberate failure to act which is consciously aimed at encouraging an attack.

The ICC Elements of crimes document⁸⁶ article 7 contains a small relatively unnoticed footnote⁸⁷ that clearly spells out, that a policy which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action.

This means that in exceptional cases a policy may be inferred from omission or failure to take action.

Ambos and Wirth have argued that the possibility of policy by inaction is not only supported by authorities, but is also relevant for the logical construction of Article 7, since 'policy' must be distinguished from 'systematic'. 'Systematic' requires State or organisational action, because the crimes must be planned and orchestrated, whereas 'policy' includes, inter alia, passive encouragement.⁸⁸

CONCLUSION

As of August 7th 2015, the International Law Commission has adopted Article 7 in the verbatim as the definition for crimes against humanity in draft article 3 of the proposed draft articles of the crimes against humanity convention.⁸⁹ This definition provides for a policy requirement. Therefore the proposal to have a *commentary* on the policy requirement is not only timely but necessary.

⁸⁵ *Prosecutor v. Laurent Gbagbo*, Decision on Confirmation of Charges against Laurent Gbagbo, International Criminal Court (Pre-Trial Chamber I), 12 June 2014, ICC-02/11-01/11-656, Para. 210, 215, 216

⁸⁶ Article 7 ICC Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) Para. 3.

⁸⁷ Article 7 ICC Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) Para. 3.

⁸⁸ Ambos.K &Wirth.S 'The Current Law of Crimes against Humanity: An analysis of UNTAET Regulation 15/2000' (2002) 13 *Criminal Law Forum* 28, 31-34.

⁸⁹Text of draft articles 3 provisionally adopted by the Drafting Committee June 2015. Available at <http://legal.un.org/docs/?symbol=A/CN.4/L.853>

A commentary on the policy element will be of assistance not only in relation to the convention but also for national and international judicial bodies applying crimes against humanity law for any reason. Most importantly, the commentary can facilitate prosecution and make the convention more effective, by demonstrating how the policy element has been understood and applied. The hope is that the proposal for a *commentary* will not only be a mere academic exercise, it will be a relevant contribution to the codification of a well-crafted comprehensive international convention on crimes against humanity.



CHAPTER III

THE OBLIGATION TO PREVENT AND PUNISH CRIMES AGAINST HUMANITY

3. INTRODUCTION

International conventions that attempt to criminalise certain acts often put emphasis on punishment rather than prevention. Most of the conventions tend to focus on the notion of retribution at the expense of prevention. Prevention is *ex-ante*, meaning before the offence whereas punishment is *ex-post facto* after the offence.

Prevention is often underrated in the international criminal justice discourse. In this chapter i will argue that prevention ought to be the fulcrum of the long term strategy in dealing with crimes against humanity. Preventing crimes against humanity should be a dominant feature in the proposed convention. As the english idiom states 'prevention is better than cure'.

States obligations to prevent may either be of conduct or result.⁹⁰Obligations by conduct often deals with certain measures undertaken in order to secure respect for human rights whereas obligations by result often deal with states general obligations to respect rights or to refrain from encroaching on human rights. The current literature on the proposed crimes against humanity convention describes the latter as general obligations⁹¹and the former as specific measure obligations.⁹²Therefore a well-crafted comprehensive international convention on crimes against humanity will be a mixed bag of general obligations and specific measure obligations.

In this chapter, I will give examples of treaties that have articles dedicated to prevention obligations. Then i will deconstruct the prevention obligations in the proposed convention into general obligations and specific measure obligations to prevent crimes against humanity. I will then briefly address the need for a non-derogation clause that often accompanies general and specific obligations on prevention.

I will go on to discuss the obligation to punish crimes against humanity. Then briefly address the duty to investigate and the duty to prosecute. In this chapter i will propose the need for a specialised technical assistance article as an incentive for developing countries to adopt the convention. Finally I will discuss the latest developments and provide the text of the draft article that deals with prevention and punishment of crimes against humanity.

⁹⁰ Cerone. J, 'Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context' (2007)*Israel Law Review* Vol. 40 p. 416

⁹¹First Report of the Special Rapporteur on Crimes against Humanity United Nations International Law Commission (2015) A/CN.4/680, p. 38 Available at <http://legal.un.org/docs/?symbol=A/CN.4/680>. (accessed 16 August 2015)

⁹² First Report of the Special Rapporteur on Crimes against Humanity United Nations International Law Commission (2015) A/CN.4/680, p. 39 Available at <http://legal.un.org/docs/?symbol=A/CN.4/680>. (accessed 16 August 2015)

I will conclude by arguing that the obligation to prevent crimes against humanity in the proposed convention ought to be mandatory and not hortatory. The wording of the text should explicitly be mandatory with no implicit escape clauses and reservations in favour of domestic law.

3.1 TREATIES WITH PREVENTION OBLIGATIONS

There are several treaties that have articles dedicated to prevention obligations. Some treaties have these obligations in the title of the treaty, for example, The Convention on the Prevention and Punishment of the Crime of Genocide⁹³ and the Convention on Preventing and Combating Corruption.⁹⁴ A number of these treaties have binding and non-binding articles dedicated to prevention obligations. Examples of these treaties include:

1. Convention on the Safety of United Nations and Associated Personnel article 11 provides that States Parties shall cooperate in the prevention of the crimes set out in article 9.⁹⁵
2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.⁹⁶
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Article 4(1) provides that States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories.⁹⁷
4. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Article 10 provides that the contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.⁹⁸
5. International Convention on the Suppression and Punishment of the Crime of Apartheid. Article 4(a) provides that the States Parties to the present Convention undertake and to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.⁹⁹

⁹³ 9 December 1948, United Nations Treaty Series, Vol 78, No.1021

⁹⁴ 31 October 2013, United Nations, Treaty Series, Vol.2349, No. 42146

⁹⁵ 9 December 1994, United Nations, Treaty Series, Vol. 2051, No. 34547

⁹⁶ 10 December 1984, United Nations, Treaty Series, Vol. 1465, No. 24841

⁹⁷ 14 December 1973, United Nations, Treaty Series, Vol. 1035, No. 15410

⁹⁸ 23 September 1971, United Nations, Treaty Series, Vol. 974, No.14118

⁹⁹ 30 November 1973, United Nations, Treaty Series, Vol. 1015, No.14861

6. International Convention for the Suppression of Terrorist Bombings. Article 15 provides that States Parties shall cooperate in the prevention of the offences set forth in article 2.¹⁰⁰
7. International Convention for the Protection of All Persons from Enforced Disappearance. The preamble provides that the convention is determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance.¹⁰¹
8. Inter-American Convention on the Forced Disappearance of Persons. Article 1(c) provides that States Parties to this Convention undertake to cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.¹⁰²
9. Inter-American Convention to Prevent and Punish Torture. Article 1 provides that State Parties undertake to prevent and punish torture in accordance with the terms of this Convention. Article 6 provides that States Parties shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.¹⁰³
10. United Nations Convention against Transnational Organized Crime. Article 9(2) provides that each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.¹⁰⁴

There is an extensive list of treaties with prevention obligations whether it is a human rights treaty or a treaty linked to transnational crimes. The obligation to prevent is a key component of most conventions. The obligation to prevent may be general or may be detailed with specific preventive measures. These obligations may in some instances be mandatory and binding whereas in other instances the treaties may have non-binding soft obligations that are hortatory.

3. 2 GENERAL OBLIGATIONS TO PREVENT

A general obligation to prevent simply calls upon a state party to take an undertaking to prevent acts in violation of international law. The best example of a general obligation to prevent obligation is in the Genocide convention. Article 1 of the Genocide provides that the

¹⁰⁰ 15 December 1997, United Nations, Treaty Series, Vol. 2149, No. 37517

¹⁰¹ 20 December 2006, United Nations, Treaty Series, Vol. 2716, No. 48088

¹⁰² 9 June 1994, International Legal Materials, Vol. XXV, 1994, p. 1529

¹⁰³ 9 December 1985, OAS Treaty Series, No. 67

¹⁰⁴ 15 November 2000, United Nations, Treaty Series, Vol. 2225, No. 39574

contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.¹⁰⁵

There are two ways in which the general obligation to prevent crimes under international law manifests itself;

1. First, it calls upon States Parties to use available means to prevent non state entities and persons from committing the acts in question.¹⁰⁶
2. Second, it calls upon States Parties not commit such acts through their entities or persons they control to the extent that the persons conduct is attributable to the state.¹⁰⁷

In the first scenario, the state may only act within the limits permitted by international law.¹⁰⁸The state will also apply a due diligence approach in situations where it has the capacity to influence effectively the action of persons likely to commit, or already committing crimes. This is depends on the State's political affiliations or geographical connection to the persons or groups. In a nutshell the general obligation to prevent raises issues of State responsibility.

A breach of this general obligation implicates the responsibility of the State if the conduct in question is attributable to the State pursuant to the rules on State responsibility under international law. However, the breach of the obligation to prevent is not a criminal violation by the State but, rather, concerns a breach of international law that covers traditional State responsibility.¹⁰⁹

The special rapporteur for crimes against humanity initiative in his first report asserts that the general obligation to prevent template in the Genocide convention remains a useful model for the crimes against humanity convention.¹¹⁰According to him he argues that the general obligation to prevent model will help in harmonising the draft articles of the proposed convention with a widely adhered to convention on another core crime of international criminal law.

The other important feature is the word '*undertake*' the word creates mandatory binding obligations to prevent and punish. In the case of *Bosnia & Herzegovina v. Serbia & Montenegro* the International Court of Justice stated that '*undertake*' means to give a

¹⁰⁵ 9 December 1948 United Nations Treaty Series , Vol 78, No.1021

¹⁰⁶ Simma.B, 'Genocide and the International Court of Justice,' in Safferling.C and Conze .E (eds.),*The Genocide Convention Sixty Years After its Adoption*, (2010) p.259- 262

¹⁰⁷ *Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, I.C.J. Rep [2007] 43, Para 166

¹⁰⁸ *Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, I.C.J. Rep [2007] 43, Para 430

¹⁰⁹ *Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, I.C.J. Rep [2007] 43, Para 167

¹¹⁰ First Report of the Special Rapporteur on Crimes against Humanity United Nations International Law Commission (2015) A/CN.4/680, p. 39 Available at <http://legal.un.org/docs/?symbol=A/CN.4/680>. (accessed 16 August 2015)

formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation.¹¹¹

A general obligation to prevent is a key component of any article dedicated to prevent and punish crimes under international law. At the time of writing the International Law commission working group on crimes against humanity had adopted the general obligation to prevent model of Genocide convention with minimal adjustments. The wording '*contracting party*' in the text of the genocide convention was replaced with the words '*each state party*' in the draft articles of the proposed crimes against humanity convention.¹¹²

3. SPECIAL MEASURES OBLIGATIONS

The obligation to pursue special measures is intended to prevent the offence from occurring. This puts a state in a position where it has to put in place specific measures or safeguards often legislative, executive, administrative, and judicial in character to prevent the conduct of a crime from occurring in any territory under their jurisdiction. The best example of specific measure obligations is article 2(1) of the convention against torture that provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.¹¹³

The measures have to be contextualised to that particular state in respect of the prevailing conditions of that state. This means special measures vary from state to state and there is no one size fit all model on specific measures obligations. Often this provides flexibility and direction for states parties to decide the character of the measures to taken.

The measures to be taken may include;

1. Establishing institutions to deal with the preventing such acts.
2. Adopting national laws and policies.
3. Training programmes for the police, military and prosecutorial services.
4. Capacity building in the Judiciary.

These special measure obligations often trigger other obligations, for example, commission of a proscribed act will reinforce the state party to pursue its other obligations to investigate and prosecute. It is worthwhile to note that a number of measures dealing with the underlying crimes linked to crimes against humanity may already be in place, for example, murder, most legal systems have national laws that prohibit murder.

¹¹¹ *Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, I.C.J. Rep [2007] 43, Para. 166

¹¹² Text of draft articles 1, 2, and 4 provisionally adopted by the Drafting Committee June 2015. Available at <http://legal.un.org/docs/?symbol=A/CN.4/L.853>. (accessed 7 September 2015)

¹¹³ 10 December 1984, United Nations, Treaty Series, Vol. 1465, No. 24841

3.3 NON-DEROGABLE CLAUSES

In the realm of international conventions that provide for general and special measure obligations to prevent certain offences, often such provisions are accompanied by what is termed as a non-derogable clause. A non-derogable clause often provides that no exceptional circumstances for example, a humanitarian emergency, political instability or an armed conflict may be invoked as a justification for the offence in question. The non-derogable clause is often placed at the outset of the convention. A non-derogable clause in the proposed convention ought to expressly provide that no exceptional circumstances whatsoever may be invoked. The text should use words like 'whatsoever' to illustrate the non-derogable character of these obligations.

The best example of a non-derogable clause is in the torture convention article 2(2) provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

This formulation clearly stresses that the obligation not to commit the offence is non-derogable in character. For the crimes against humanity convention a non-derogable clause ought to adapt the same language as provided in the Torture Convention.

3.4 OBLIGATION TO PUNISH CRIMES AGAINST HUMANITY

There is an obligation on states not to commit crimes against humanity. States are obliged to neither provide aid nor assistance to facilitate the commission of crimes against humanity by another State.¹¹⁴ In the event that these crimes are committed, the state has an obligation to investigate, prosecute and punish offenders. Breach of these obligations may give rise to state responsibility for wrongful acts. This does not mean that State responsibility necessarily attaches, rather specific reference to State responsibility underscores the applicability of State responsibility principles to the proposed Convention

The preamble of the proposed convention on crimes against humanity provides that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, including crimes against humanity.¹¹⁵ This is similar to the preamble in the Rome statute that recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crime. This obligation is not contained expressly in any of the operative provisions of the Rome Statute. The wording 'every state' will raise important legal questions for states that may not be party to the proposed convention. A commentary may be necessary to address this issue.

¹¹⁴ *Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, I.C.J. Rep [2007] 43, Para 428

¹¹⁵ Preamble .Para 5 The Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12,September 2015)

Article 2 of the proposed convention provides that the States Parties to the present convention undertake to prevent crimes against humanity and to investigate, prosecute, and punish those responsible for such crimes. The wording 'undertakes' would make this obligation mandatory on states parties.

The article goes to provide for co-operation¹¹⁶ with other states, prosecution, punishments and investigations. With regard to co-operation, the proposed convention provides that States Parties shall cooperate with States or tribunals established pursuant to an international legal instrument having jurisdiction in the investigation, prosecution, and punishment of crimes against humanity. My understanding of this provision is that it means a state party to the crimes against humanity convention may in some instances co-operate with the International Criminal Court even when it is not a party to the Rome statute. In a similar manner it would co-operate with the International Criminal Court if it is dealing with a State party to the Rome statute.¹¹⁷

It is worthwhile to note that obligation to prevent and obligation to punish are distinct yet connected and linked to each other. The most effective ways of preventing criminal acts is to provide punishment and penalties for persons committing such acts and by imposing penalties and punishments on those who commit the acts one is preventing. The International Court of Justice in *Bosnia & Herzegovina v. Serbia & Montenegro Judgment* stated that the duty to prevent genocide and the duty to punish its perpetrators are two distinct, yet connected obligations.¹¹⁸

3.5 THE NEED FOR A SPECIALISED TECHNICAL ASSISTANCE ARTICLE

The obligation to prevent and punish may seem good on paper but without the capacity to enforce these obligations an enforcement deficit will occur. Rhetoric is one thing and implementation is another. The special measure obligations to prevent and the obligations to investigate and punish require resources. It is on this premise that I propose a specialised technical assistance article ought to be given some serious thought and consideration. This article ought to precede the article on obligations to prevent and punish crimes against humanity. The availability of technical assistance will be an incentive for poorer countries to come on board.

An article on technical assistance is not something new. The United Nations Convention against Corruption (UNCAC) has an entire chapter dedicated to technical assistance.¹¹⁹

¹¹⁶ Article 8(17) The Proposed International Convention on the Prevention and Punishment of Crimes against Humanity. Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (accessed 12 September 2015)

¹¹⁷ Article 2(c) The Proposed International Convention on the Prevention and Punishment of Crimes against Humanity. Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (accessed 12 September 2015)

¹¹⁸ *Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, I.C.J. Rep [2007] 43, Para 430 Para. 425

¹¹⁹ Chapter VI Article 60 United Nations Convention against Corruption 43 ILM 37(2004)

Article 2 of UNCAC provides that States Parties shall according to their capacity consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries and economies in transition.

There is no formula or template on what particular components a technical assistance article on crimes against humanity will entail. However there a number of key components necessary for a well-crafted technical assistance article. These include;

1. Training programmes for personnel responsible for preventing and punishing crimes against humanity for example, the judiciary and prosecutorial services.
2. Capacity building in investigative methods and gathering of evidence.
3. Training on how to carry out requests for extraditions and mutual legal assistance.
4. Voluntary financial contributions.
5. Information sharing.
6. Training of police, military and even journalists on crimes against humanity.

In sum a technical assistance article should provide the infrastructure to enable countries especially developing countries to implement the obligations in the proposed convention. The technical assistance article can even go further by providing an option for States Parties to conclude bilateral and multilateral agreements or arrangements on material and logistical assistance.

3.6 LATEST DEVELOPMENTS AND TEXT OF THE DRAFT ARTICLE

The International law Commission held its sixty-seventh session at the United Nations European Headquarters in Geneva from 4 May to 5 June and 6 July to 7 August 2015. The Commission considered the first report of the Special Rapporteur, Mr. Sean D. Murphy, on the topic which contained, inter alia, two draft articles relating respectively to the prevention and punishment of crimes against humanity and to the definition of crimes against humanity. It decided to refer draft articles 1 and 2 to the Drafting Committee taking into account the observations and comments made during the debate. The Chairman of the Drafting Committee subsequently presented the report of the Drafting Committee on Crimes against humanity. The Commission considered the report and provisionally adopted three draft articles¹²⁰ on the obligation to prevent and punish crimes against humanity. These include draft article 1, 2 and 4, draft article 3 dealt with the definition of crimes against humanity

¹²⁰ Text of draft articles 1, 2, and 4 provisionally adopted by the Drafting Committee June 2015. Available at <http://legal.un.org/docs/?symbol=A/CN.4/L.853>

3.6.1 The text of the draft articles provisionally adopted by the drafting committee

Crimes against humanity

Draft article 1

Scope

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

Draft article 2

General obligation

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

Draft article 4

Obligation of prevention

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

- (a) Effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and
- (b) Co-operation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations.

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

The text adopted by the commission has the same language as obligation to prevent and punish model of the Genocide convention with a few adjustments. The wording 'contracting party' in the text of the genocide convention was replaced with the words 'each state party' the text has a general obligation to prevent crimes against humanity in draft article 2. The specific measures obligations are set out in draft article 4 accompanied by a non-derogable clause.

CONCLUSION

The obligation to prevent and punish crimes against humanity in the proposed convention ought to be mandatory and not hortatory. The wording of the text should explicitly be mandatory with no implicit escape clauses and reservations in favour of domestic law. The

draft article 2 laid out by the International Law Commission drafting committee is promising. The article uses the word 'undertake' which reflects the mandatory character of this article.

The challenge with the obligations to prevent and punish is the issue of state responsibility. Breach of these obligations may give rise to state responsibility for wrongful acts. This often makes states sceptical about signing onto treaties that give rise to state responsibility. However there is need for advocacy to convince states that this article does not mean that State responsibility necessarily attaches, rather specific reference to State responsibility underscores the applicability of State responsibility principles to the proposed Convention.

Finally my proposal on having a technical assistance article preceding the article on the duty to prevent and punish ought to be give some consideration. It is one thing to have a convention strong on rhetoric and another thing to have a convention that can be implemented and enforced. Without technical assistance you will have a convention that is good on paper but shrouded with an enforcement deficit. This is a crucial aspect especially for developing countries with minimal resources, technical assistance will be an incentive for such developing states to come on board and will serve a value addition purpose to the obligation to prevent and punish crimes against humanity.



CHAPTER IV

PROCEDURAL ISSUES AND PRINCIPLES OF ICL IN THE PROPOSED COVENTION ON CRIMES AGAINST HUMANITY

4. INTRODUCTION

Crafting a comprehensive international convention on crimes against humanity goes beyond the definition and obligation to prevent and punish crimes against humanity. It involves dealing with the procedural aspects and principles of international criminal law. These principles and procedural aspects of international criminal law include: the obligation to prosecute or extradite, inter-state co-operation, mutual legal assistance, transfer proceedings, evidence, immunities, amnesties, the application of universal jurisdiction, application of reservations, statute of limitations. This chapter addresses these procedural issues in relation to the proposed convention on crimes against humanity and the current debates surrounding the inclusion of these concepts in the proposed convention.

4.1. THE DUTY TO PROSECUTE OR EXTRADITE

To effectively combat the most egregious crimes, states must be required to prosecute alleged offenders or extradite them to a state that is able and willing to do so.¹²¹ The obligation to prosecute or extradite is referred to *aut dedere aut is judicare*. The phrase *aut dedere aut judicare* is derived from the work of Hugo Grotius in his publication *De Jure Belli Ac Paris*¹²² who came up with the *aut dedere aut punire* maxim, i.e. extradite or punish.

However, in 1973 Professor Bassiouni postulated the Grotian maxim as *aut punire* to *aut judicare*, since the goal of contemporary criminal law is to *judicare* those believed to have committed a crime and not to punish them, until guilt has been established.¹²³ Professor Bassiouni states that the use of the phrase *aut dedere aut judicare* can be misleading as the term *judicare* implies full trial,¹²⁴ for example, the Hague Convention for the Suppression of Unlawful Seizure does not require a trial in lieu of extradition.¹²⁵

¹²¹ Olson. M 'Re-enforcing Enforcement in a Specialised Convention on Crimes Against Humanity Inter-State Cooperation, Mutual Legal Assistance, and the Aut Dedere Aut Judicare' in Leila.S(ed)*Forging a Convention for Crimes against Humanity* (2011) 324

¹²² Grotius .H 'De Jure Belli Ac Paris' in James.B.(ed) *Classics on International Law*(1925)526

¹²³ Bassiouni.M. & Wise. E 'Aut Dedere Aut is Judicare: The Duty to Prosecute or Extradite in International Law'(1995)5

¹²⁴ Bassiouni.M. & Wise. E 'Aut Dedere Aut is Judicare: The Duty to Prosecute or Extradite in International Law'(1995)4

¹²⁵ 10 March 1988, United Nations, Treaty Series, vol. 1678 No. 29004

The concept of *aut dedere aut judicare* is very broad and to fully analyse it, is an academic exercise worth a habilitation, therefore i will restrict my analysis of *aut dedere aut judicare* in relation to the proposed convention on crimes against humanity.

There are over sixty treaties that contain an *aut dedere aut judicare* provision,¹²⁶ however when it comes to core international crimes like genocide and crimes against humanity there is no treaty with this obligation except for grave breaches in the Geneva conventions.¹²⁷ The proposed International Convention on Prevention and Punishment of Crimes against Humanity is a welcome initiative that will address this by prescribing an obligation to prosecute or extradite.¹²⁸ This initiative will narrow the gap in the present conventional regime governing the obligation to extradite or prosecute in relation to core international crimes.

4.1.1. Typology of treaties containing *aut dedere aut judicare*

The relationship between extradition and prosecution clauses in existing treaties can be classified into two broad categories: The first category covers international conventions which impose an obligation to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. The second category covers international conventions which impose an obligation to submit to prosecution, with extradition being an available option.

In the first category, the conventions do not impose any general obligation on States parties to submit to prosecution, the alleged offender. The obligation arises only if a request for extradition has been refused.¹²⁹ Examples of conventions in this category include;

1. International Convention for the Suppression of Counterfeiting Currency(Article 9)¹³⁰
2. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography(Article 5)¹³¹
3. The African Union Convention on Preventing and Combating Corruption(Article 15)¹³²

¹²⁶ 18 June 2010, U.N. Doc. A/CN.4/630 ('U.N. Secretariat Survey'), Para. 4

¹²⁷ Report of the Working Group on the Obligation to extradite or prosecute (*aut dedere aut judicare*), 22 July 2013, U.N. Doc. A/CN.4/L.829, Para. 20. Available at <http://legal.un.org/docs/?symbol=A/CN.4/L.829>. (accessed 30 September 2015)

¹²⁸ Article 9 Proposed International Conventions on the Prevention and Punishment of Crimes against Humanity. Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (accessed 12 September 2015)

¹²⁹ Final Report of the International Law Commission Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) 2014 Para 11 Available at http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf. (accessed on 20 September 2015)

¹³⁰ 20 April 1929 ,United Nations Treaty Series , Vol 112, No.2623

¹³¹ 25 May 2000 ,United Nations Treaty Series , Vol 2171, No.27531

¹³² 11 July 2003 ,United Nations Treaty Series , Vol 2860, No.50008

In the second category, there is coexistence of duties of the two options. A state can choose to prosecute or extradite. Examples of conventions and instruments in this category include;

1. The Convention against Torture(Article 7)¹³³
2. The Draft Code of Offences against the Peace and Security of Mankind(Article 9)¹³⁴
3. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft(Article 7)¹³⁵
4. The Convention against the Taking of Hostages(Article 8)¹³⁶
5. The four Geneva conventions and additional protocols

According to the International Law Commission when drafting treaties, States can decide for themselves which conventional methodology on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice, it would be futile for the Commission to engage in harmonising the various treaty clauses on the obligation to extradite or prosecute.¹³⁷ Therefore the obligation to extradite or prosecute has to be contextualised to the objectives of that particular treaty.

4.1.2 The proposed convention on crimes against humanity and *aut dedere aut judicare*

The Proposed Convention on crimes against humanity contains a provision on the obligation to extradite or prosecute. The convention falls into the category of conventions which impose an obligation to submit to prosecution, with extradition being an available option. The language of the *aut dedere aut judicare* clause in the proposed convention on crimes against humanity is similar to that in the Draft Code of Offences against the Peace and Security of Mankind¹³⁸ and the Enforced Disappearances Convention¹³⁹

Article 9 of the proposed convention on crimes against humanity convention, binds States Parties to either prosecute or extradite persons accused of crimes against humanity. The proposed convention has a provision that clearly stipulates that crimes against humanity are to be considered as an extraditable offence in existing extradition treaties between the

¹³³ 10 December 1984, United Nations, Treaty Series, Vol. 1465, No. 24841

¹³⁴ Yearbook of the International Law Commission(1998)vol. II, Part Two 47

¹³⁵ 16 December 1970, United Nations Treaty Series , Vol 860, No.12325

¹³⁶ 17 December 1979, United Nations Treaty Series , Vol 1316, No.21931

¹³⁷ Final Report of the International Law Commission Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) 2014 Para 12 Available at

http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf. (accessed on 20 September 2015)

¹³⁸ Yearbook of the International Law Commission(1998)vol. II, Part Two 47

¹³⁹ 20 December 2006,United Nations Treaty Series , Vol 2716, No.48088

states parties.¹⁴⁰ The proposed convention goes on to require that crimes against humanity be included as an extraditable offence in any future extradition treaty.¹⁴¹

The text of article 9(1) of the proposed convention reads that: *Each State Party shall take necessary measures to establish its competence to exercise jurisdiction over crimes against humanity when the alleged offender is present in any territory under its jurisdiction, unless it extradites him or her to another State in accordance with its international obligations or surrenders him or her to the International Criminal Court, if it is a State Party to the Rome Statute, or to another international criminal tribunal whose jurisdiction it has recognised.*

Therefore where there is no request for extradition, the obligation to prosecute is absolute. Once such a request is made, the custodial State has the discretion to choose between extradition and prosecution. This reflects the decision of the International Court of Justice. In the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*¹⁴² case the International Court of Justice held that such an interpretation gives certain priority to prosecution by the custodial State. It is in this sense that the term obligation to prosecute or extradite is used to denote an obligation to submit to prosecution, with extradition being an available option.

This provision goes on to provide for surrender to an international court or tribunal it recognises, or to the International criminal court. Unlike other treaties providing for the obligation to prosecute or extradite the proposed convention is unique and takes on a progressive approach. Article 9 (2) of the proposed convention provides that; *In the event that a State Party does not, for any reason not specified in the present Convention, prosecute a person suspected of committing crimes against humanity, it shall, pursuant to an appropriate request, either surrender such a person to another State willing to prosecute fairly and effectively, to the International Criminal Court, if it is a State Party to the Rome Statute, or to a competent international tribunal having jurisdiction over crimes against humanity.*

With regard to this provision's reference to a State Party surrendering an accused individual to the International Criminal Court, it should be noted that States Parties to the Rome Statute may have such an obligation. States which are not Party to the Rome Statute may have no such obligation, but may cooperate with the International Criminal Court. This

¹⁴⁰ Article 12 Proposed International Conventions on the Prevention and Punishment of Crimes against Humanity. Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (accessed 12 September 2015)

¹⁴¹ Article 12 (Annex 2A) Proposed International Convention on the Prevention and Punishment of Crimes against Humanity. Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (accessed 12 September 2015)

¹⁴² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012 Para. 94

provision recognises that such States may cooperate with the International Criminal Court, but does not impose an independent obligation to do so.¹⁴³

In a nutshell an obligation to prosecute or extradite in the proposed convention is welcome. This provision will narrow the gap for core international crimes treaties that lack such an obligation despite the web of other multilateral treaties providing for such obligations. A comprehensive international convention on crimes against humanity must have a mandatory obligation to prosecute or extradite with no reservations in order to meet its primary objective to end impunity.

4.2 INTER-STATE COOPERATION AND MUTUAL LEGAL ASSISTANCE

The Rome statute by its nature applies a vertical approach and does not provide for a horizontal approach for robust inter-state cooperation, mutual legal assistance, extradition and transfer of proceedings and other aspects of the horizontal co-operation needed for the prosecution of atrocity crimes across State borders.¹⁴⁴ A new convention on crimes against humanity could provide the basis for inter-state cooperation on evidentiary questions, extradition and transfer of proceedings. The importance of such cooperation is necessary in light of the factual complexity of crimes against humanity cases and the large volume of evidence typically required to proving such offences.

The proposed Convention has robust provisions dealing with evidence, extradition, and mutual legal assistance, transfer of criminal proceedings and enforcement of punishment. This is very crucial especially when it comes to enforcement. A treaty that is strong on rhetoric ought to have strong and effective enforcement measures to achieve its objective of ending impunity. I will briefly address some of these proposed provisions.

4.2.1 Co-operation

When you read the text of the proposed convention, from the preamble all the way to the operative articles you get a feel that co-operation is a key feature in the proposed convention. The nature of crimes against humanity offences requires co-operation of states with other states and international tribunals.

Article 8(d) of the proposed convention provides that States Parties shall cooperate with States or tribunals established pursuant to an international legal instrument having jurisdiction in the investigation, prosecution, and punishment of crimes against humanity.

¹⁴³ Article 9(2) Proposed International Convention on the Prevention and Punishment of Crimes against Humanity Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (accessed 12 September 2015)

¹⁴⁴ Leila .S. 'Codifying the Laws of Humanity and the Dictates of the Public Conscience: Towards a New Global Treaty on Crimes against Humanity' in Morten.B & Tianying. S (eds) *On the Proposed Crimes Against Humanity Convention* (2014)33

The proposed convention calls upon states to afford each other the greatest measures possible for cooperation regardless of existing bilateral arrangements. Article 8(d) of the proposed convention provides that States Parties shall afford one another the greatest measure of assistance and cooperation in the course of any investigation or prosecution of persons alleged to be responsible for crimes against humanity irrespective of whether there exist between said States Parties any treaties on extradition or mutual legal assistance. From the wording of text it is clear that cooperation will arise irrespective of the existence of any bilateral treaties between the States Parties.

4.2.3 Extradition

When it comes to extradition, modalities of the extradition regime could be strengthened beyond the rudimentary regime under the Convention for the Prevention and Punishment of the Crime of Genocide. The Genocide convention¹⁴⁵ and Geneva Convention¹⁴⁶ have more rudimentary approaches to extradition than subsequent international criminal law instruments, such as the Torture Convention¹⁴⁷ and the Convention on Enforced Disappearance.¹⁴⁸ There is need to shift from this rudimentary approach of extradition to providing states with a legal basis for extradition. For example, if a state does not have a national legislation or is a signatory to a treaty providing for extradition, what would be the legal basis to enforce an extradition request?

The proposed convention provides for a legal basis for extradition. Annex 2(b) provides that in the absence of relevant national legislation or other extradition relationship, States Parties shall consider the present Convention as the legal basis for extradition in order to fulfil their obligation to prosecute or extradite persons alleged to be responsible for crimes against humanity pursuant.

Article 12 and annexure 2 in the proposed convention provides for extraditable offences. The proposed convention provides that crimes against humanity are extraditable offences. Annexure 2 provides the crimes against humanity shall be deemed to be included as an extraditable offense in any extradition treaty existing between States Parties before the entry into force of the present Convention. States Parties undertake to include crimes against humanity as an extraditable offense in any extradition treaty subsequently to be concluded between them.

The proposed convention also recognises that for the purposes of extradition between States Parties, crimes against humanity shall not be regarded as a political offense or as an offense connected with a political offense.¹⁴⁹

¹⁴⁵ Article VII, 9 December, 1948, United Nations, Treaty Series, Vol. 78, No. 1021

¹⁴⁶ Article 49, 12, August 1949, United Nations, Treaty Series, Vol. 75, No. 970

¹⁴⁷ Article 8, 10 December 1984, United Nations, Treaty Series, Vol. 1465, No. 24841

¹⁴⁸ Article 13, 20 December 2006, United Nations Treaty Series, Vol 2716, No. 48088

¹⁴⁹ Annex 2 Para 5 Proposed International Convention on the Prevention and Punishment of

When it comes to extradition, it is important for the drafters to take caution because at times extradition clauses have a contaminating effect on other areas of the law, for example immunities. The judgment of the U.K. House of Lords in *R., ex parte Pinochet v. Bartlew* is an example because Chile's acceptance of the provision for extradition in Article 8 of the Torture Convention was interpreted as a waiver of immunity *ratione materiae* in all cases of torture.¹⁵⁰

4.2.4 Mutual Legal Assistance

The proposed convention on crimes against humanity provides that States Parties shall afford one another the greatest measure of assistance in connection with investigations, prosecutions and judicial proceedings brought with respect to crimes against humanity.¹⁵¹

The proposed convention goes on to provide that legal assistance between States Parties shall be afforded to the fullest extent possible under relevant laws, treaties, agreements, and arrangements of the requested State Party and may be afforded on the basis of the present convention and without the need for reliance on a bilateral treaty or national legislation.

This means the lack of bilateral arrangements or domestic law is not an impediment for mutual legal assistance, however, the proposed convention also provides that provisions on mutual legal assistance shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.¹⁵²

When it comes to mutual legal assistance, it is important to briefly draw your attention to the proposed mutual legal assistance convention that has not received much attention. The convention stalled largely because it only dealt with inter-state cooperation. Scholars like Leila Sadat argue that the proposed convention on mutual legal assistance is not a realistic alternative for States not party to the ICC Statute, given that they may not have incorporated the ICC crimes into their national legislation and may not, therefore, be in a position to cooperate with other States on questions of mutual legal assistance.¹⁵³

Crimes against Humanity Available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12, September 2015)

¹⁵⁰Leila. S & Pivnichny. D 'Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity' (2014) 22 Conference report. Available at <http://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf>. (accessed on 14 September 2015)

¹⁵¹ Article 13 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12, September 2015)

¹⁵² Annex 3 (C) Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12, September 2015)

¹⁵³Leila .N. 'Codifying the Laws of Humanity and the Dictates of the Public Conscience: Towards a New Global Treaty on Crimes against Humanity' in Morten.B & Tianying. S (eds) *On the Proposed Crimes Against Humanity Convention* (2014)34

In sum, the provision on mutual legal assistance is very comprehensive it covers types of mutual legal assistance, transmission of information, transfer of detained persons and refusal of requests. Although the provision does not deal with the issue of resources, mutual legal assistance requires resources and without resources mutual legal assistance becomes complicated. Overall these mutual legal assistance provisions are good on paper but they ought to be complimented by political will. States should be willing to assist each other.

4.2.5. Evidence

The proposed convention provides that the rules of evidence required for prosecution shall be those in existence under the national laws of the State Party conducting the investigation, prosecution, or post-trial proceedings but shall in no way be less stringent than those that apply in cases of similar gravity under the law of the said State Party.¹⁵⁴ This means the national laws of the state party have primacy when dealing with evidentiary issues.

The proposed convention does not exclude evidence gathered illegally for use in prosecutions of crimes against humanity except for torture under the torture convention.¹⁵⁵ The proposed convention permits States to recognise the validity of evidence obtained by another State Party, even where the requested conditions or procedures are not followed, provided that the evidence is deemed credible and that it is obtained in conformity with international standards of due process, including the obligation under Article 15 of the Torture Convention, which would exclude any statement made as a result of torture.

Overall the proposed convention puts emphasis on States Parties to endeavour to conform to international standards of due process in relation to collection of evidence.

4.2.6 Transfer Proceedings

Transfer proceedings in the proposed convention shall be by agreement between competent authorities of the States for example, the prosecutorial services or the judiciary. The proposed convention does not require prior bilateral arrangements or national legislation for transfer of proceedings. The proposed convention provides that whenever a State Party, having jurisdiction over a person charged with crimes against humanity, agrees with another State Party, also having jurisdiction, to cede jurisdiction and to transfer the record of the proceedings undertaken to the requesting State Party, the transfer procedure shall be established by agreement between their respective competent authorities. Such a procedure shall be based on the present Convention and shall not require the existence of a

¹⁵⁴ Article 11 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12, September 2015)

¹⁵⁵ Leila. S & Pivnichny. D 'Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes against Humanity' (2014) 22 Conference report. Available at <http://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf>. (accessed on 14 September 2015)

bilateral treaty between the respective States Parties or national legislation.¹⁵⁶ This provision draws upon the European Transfer of Proceedings Convention.¹⁵⁷

4.3 IMMUNITIES AND AMNESTIES

4.3.1 Immunities.

The proposed convention provides for no immunity. Article 6 of the proposed convention provides that Convention shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present Convention, nor shall it, in and of itself, constitute a ground for reduction of sentence.

The second paragraph of provision goes on to state that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar a court from exercising its jurisdiction over such a person.¹⁵⁸

It is important to note that the wording of the text draws heavily upon Article 27 of the Rome Statute. However, in paragraph 2 of this Article, 'the Court' has been changed to 'a court,' meaning any duly constituted judicial institutions having jurisdiction. Paragraph 2 draws upon the dissenting opinion of Judge Vanden Wyngaert from the ICJ's judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) and supports a different and more expansive principle than Article 27(2) of the Rome Statute.

Judge Vanden Wyngaert argues that 'there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity'.¹⁵⁹

By ratifying such a provision means, States would abrogate the immunities *rationae personae* that their officials would otherwise enjoy, not just before the ICC, but all national and international courts and tribunals with jurisdiction over cases of crimes against humanity. This expansive approach is still hotly debated; some argue that this expansive

¹⁵⁶ Annexure 4 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12, September 2015)

¹⁵⁷ Article 8, 15 May 1972, United Nations, Treaty Series, Vol. 1137 No. 17825

¹⁵⁸ Article 6(2) Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12, September (2015)

¹⁵⁹ ICJ, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Dissenting Opinion 14 February 2002, Para 10

attempt may be a leap too far, too soon.¹⁶⁰ They argue that the ambition of the Proposed Convention is a departure from the current state of international law, and runs against recent attempts to shore up the definition and scope of head of State immunity by the International Law Commission.¹⁶¹

In sum, irrespective of the debates I concur with the position of Article 6 of the proposed convention. The concept of no immunity for grave crimes irrespective of official capacity of a person is at the bedrock of international criminal justice ideals. Personally I believe that the object of fighting and ending impunity for the most heinous crimes ought to supersede the desire to allow for the peaceful conduct of international relations between senior government officials. Therefore the drafters of crimes against humanity convention ought to consider a mandatory no immunity declaration.

4.3.2 Amnesties

The proposed convention does not have a provision on amnesties. A provision prohibiting amnesties is necessary. The provision could be drawn from the amnesty clauses in the Statute of the Special Tribunal for Lebanon¹⁶² and the statute of Special Court for Sierra Leone (SCL).¹⁶³ Article 6 of the Special Tribunal for Lebanon provides that an amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution. In similar language article 10 of the SCL statute provides that an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in the present Statute shall not be a bar to prosecution. The drafters of the proposed convention ought to give the explicit inclusion of a clause prohibiting amnesties consideration.

4.4 UNIVERSAL JURISDICTION

The inclusion of a Universal Jurisdiction article in the proposed convention is a progressive step towards the establishment of a duty of exercising universal jurisdiction. Article 10(3) of the proposed convention provides that each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offense of crimes against humanity when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised.

¹⁶⁰Tessa. B. 'The Proposed Convention on the Prevention and Punishment of Crimes against Humanity: Developments and Deficiencies' in Morten.B & Tianying. S (eds) *On the Proposed Crimes Against Humanity Convention* (2014)393

¹⁶¹ Murphy. S, 'Immunity *Ratione Personae* of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission,' (2014) 108 *American Journal of International Law*,42

¹⁶² 21 January 2007, United Nations, Treaty Series, Vol. 2461, No. 44232

¹⁶³ 16 January 2002, United Nations, Treaty Series, Vol.138, No. 2179

The wording of text clearly illustrates that this is not mandatory rather it is optional. Meaning that the exercise of universal jurisdiction could be permissive, rather than mandatory, allowing States the choice whether to try or extradite a particular offender. It is worthwhile to note that obliging States to operate universal jurisdiction is substantially more powerful than the option to do so. However, despite the non-mandatory character of this provision, it is a plausible start for the long term legitimisation and acceptance of universal jurisdiction and accountability.

4.5 NON –APPLICABILITY OF STATUTES OF LIMITATION

The proposed covention provides that Crimes against humanity as defined by the present Convention shall not be subject to any statute of limitations.¹⁶⁴ This means that States Parties in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of crimes against humanity as defined in the convention and that, where they exist, such limitations shall be abolished.

4.6 RESERVATIONS

The proposed convention provides that no reservations may be made to the present Convention.¹⁶⁵ This is consistent with Article 120 of the Rome Statute. Treaties that often allow reservations attract more ratification compared to treaties that do not allow reservations. The task for the drafters and negotiators of the convention is to decide and strike a balance on whether to finally have a treaty with wide participation with reservations or a treaty strong on ending impunity that doesn't allow reservations. Personally I am in favour of the latter especially in regard to the duty to prosecute or extradite, no reservations should be permitted.

CONCLUSION.

The proposed convention on crimes against humanity addresses key procedural issues and enforcement measures necessary to achieve its objective. From duty the to prosecute or extradite to issues of mutual legal assistance and non-applicability of statutes of limitations. The crimes against humanity initiative did a commendable job in addressing these aspects. While certain aspects of the proposed Convention may be criticised, the negotiation process is unpredictable. It is too early to predict the outcome of the negotiations considering the current international criminal justice landscape and the *real politik* of international relations.

¹⁶⁴ Article 7 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12,September 2015)

¹⁶⁵ Article 23 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. (Accessed 12,September 2015)

My hope is that the drafters and negotiators will be bold enough to take the tough decisions for the right reasons, for example a strong declaration on the issue of no immunity and no reservations for the duty to prosecute or extradite offenders of crimes against humanity. The object of fighting and ending impunity for the most heinous crimes coupled with effective enforcement measures ought to be the dominant script in crafting a comprehensive international convention on crimes against humanity.



CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

5. INTRODUCTION

The research paper set out to provide an analysis on the need for a comprehensive international convention on crimes against humanity. The paper finds that there is already an inclination within the international criminal law discourse to have a comprehensive international convention on crimes against humanity.¹⁶⁶ The discourse to have an international convention on crimes against humanity is not new and began as early as 1994 in an important but little noticed article by M.Cherrif Bassiouni.¹⁶⁷ The article underscored the existence of a significant gap in the international normative proscriptive regime in addressing crimes against humanity. The article lamented that this gap was regrettably met by political decision makers with shocking complacency.¹⁶⁸

The research paper explored the work of the crimes against humanity initiative launched in 2008 to study the need for a comprehensive convention on the prevention and punishment of crimes against humanity. The research paper addressed some of the key features in the proposed convention on crimes against humanity in terms content and legal ramifications of such provisions. The research paper also addressed the current efforts of the International Law Commission in drafting a crime against humanity treaty.

This Chapter will draw conclusions from the preceding findings. The chapter will briefly address the challenges that may hinder the adoption of a comprehensive treaty on the crimes against humanity especially issues of *'realpolitik'* at the international and national level. Finally I will give recommendations and conclude.

5.1 CHALLENGES AND REAL POLITIK IN ADOPTING A CRIMES AGAINST HUMANITY CONVENTION

National and international legal regimes differ with respect to processes, values, objectives and above all enforcement measures. The international criminal justice regime, is essentially premised on the notions of co-operation and voluntariness. When there is limited cooperation often an enforcement deficit in implementing international criminal justice ideals will arise.

¹⁶⁶ Gregory.H 'Why the World Needs an International Convention on Crimes against Humanity' in Leila. S. (ed) *'Forging a Convention for Crimes Against Humanity'* (2011) 347

¹⁶⁷ Bassiouni. M, 'Crimes Against Humanity': The Need for a Specialized Convention'(1994)31 *Columbia Journal of Transnational Law* 457

¹⁶⁸ Bassiouni. M, 'Crimes Against Humanity': The Need for a Specialized Convention'(1994)31 *Columbia Journal of Transnational Law* 458

States may at times consider economic and sovereign interests way above international criminal justice ideals. Political realist that subscribe to the *real politik* school of thought assume that relations between nations are in constant anarchic state of change because they reflect an ongoing power struggle restrained only by countervailing powers.¹⁶⁹ Professor Bassiouni argues that *realpolitik* has historically stood in the way of achieving international criminal justice goals. States, notwithstanding the era of globalization that we are in, still consider their strategic and economic interests superior to those of international criminal justice.¹⁷⁰

Issues of *real politik* have already started to manifest at the international level with regard to the crimes against humanity convention. In the fall of October 2014 states had the opportunity to comment on the International Law Commission's decision to include the topic on the need for crimes against humanity convention in its long term agenda at the United Nations General Assembly Sixth Committee. Romania stated that the topic crimes against humanity should be treated with great caution. A definition of such crimes should be avoided, as existing international law already contained sufficient guidance in that respect. Romania argued that the purpose of the Commission's work on the subject should be clearly defined, and careful consideration should be given to developments in the International Criminal Court and other initiatives in the field.¹⁷¹ Economic power houses like China, India and Russia have their reservations, I would assume their national strategic interests supersede the desire to combat impunity or simply this not a priority for them.

On 24th November 2014 during the sixty ninth sessions at the United Nations General Assembly Sixth Committee, Malaysia stated that that the time was not yet ripe for the elaboration of a new international instrument on crimes against humanity.¹⁷² South Africa and Netherlands were a bit hesitant to comment on the subject and argued that there is already an existing international criminal justice framework to deal with the subject of crimes against humanity and a convention was not necessary.¹⁷³

In sum the fate of the proposed convention is in the hands of the international diplomatic political processes at the International Law Commission and the United Nations. My prayer is that political processes and national strategic interests will not stand in the way of achieving an international convention geared at ending impunity. International criminal justice ideals and our shared values of humanity ought to prevail over political processes.

¹⁶⁹ Bassiouni.M, 'The Perennial Conflict Between International Criminal Justice and Realpolitik,' (2005) 22 *Georgia State University Law Review* 547

¹⁷⁰ Bassiouni.M, 'The Perennial Conflict Between International Criminal Justice and Realpolitik,' (2005) 22 *Georgia State University Law Review* 541

¹⁷¹ Romania (A/C.6/69/SR.19, Para. 147). Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/69/SR.19. (accessed 7 October 2015)

¹⁷² Malaysia (A/C.6/69/SR.27, Para. 54). Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/69/SR.27. (accessed 7 October 2015)

¹⁷³ Netherlands and South Africa (A/C.6/69/SR.20, Paras. 15, 16,114). Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/69/SR.20. (accessed 7 October 2015)

The crimes against humanity initiative is still a work in progress, facing visible and invisible obstacles.

5.2 RECOMMEDATIONS

5.2.1 Establish an international coalition for the crimes against humanity convention

There is need to establish a coalition of friendly States, civil society organisations and experts in the field with the ability to provide diplomatic support and advocacy. A coalition could be founded on a model similar to that of the Coalition for the International Criminal Court (CICC). The CICC that was established in 1995 did a commendable job in calling upon governments to the diplomatic conference that negotiated the ICC treaty. A coalition for the crimes against humanity convention could learn from the experiences of the CICC. A coalition for the crimes against humanity convention may set up a steering committee and advisory board that will bring on board states and organisations. This coalition could be spearheaded by countries in favour of the convention for example, the Nordic countries.

5.2.2 Pre-emptive domestication

It is without a doubt that the current domestic legislative framework with respect to crimes against humanity is inadequate for the effective prosecution and prevention of crimes against humanity. States in favour of the convention can embark on a pro-active role by criminalising crimes against humanity and enacting legislation. States can adopt specialised domestic legislation that embodies the fundamental principles in the proposed convention such as: prevention and punishment, obligation to prosecute and extradite co-operation, mutual legal assistance, universal jurisdiction and no immunities. After all at the end of the day the proposed convention will require the States Parties to criminalise the offence in their national legislation, why not start early? Pre-emptive domestication may be overly ambitious in scope but it is possible. Whether legislation by states is enacted prior to a convention requiring them to do so or after adoption of the convention; the underlying goal is to prevent and punish crimes against humanity.

5.2.3 Adopt a technical assistance article in the proposed convention

I propose that a specialised technical assistance article ought to be given some serious thought and consideration. A technical assistance article in the proposed convention would be an incentive for poor and developing countries to come on board, most of these countries desire to pursue international criminal justice ideals but lack the necessary resources for implementation. Technical assistance article should provide the infrastructure to enable countries especially developing countries to implement the obligations in the proposed convention. The technical assistance article can even go further by providing an option for States Parties to conclude bilateral and multilateral agreements or arrangements on material and logistical assistance.

CONCLUSION

In the international law paradigm, three core crimes have emerged: war crimes, genocide and crimes against humanity. While genocide and war crimes have been codified crimes, no comparable convention exists in preventing and punishing crimes against humanity, even though the perpetration of such crimes remains an egregious phenomenon in numerous conflicts and crises worldwide. The proposed codification is an indispensable continuation on the path to fulfilling the common value of prohibiting the most serious violations against individuals and their fundamental rights.

The need for crimes against humanity convention is way overdue, the international political environment may not be perfect but the aspirations of the crimes against humanity convention project are commendable. The proposed convention will address the normative foundations of crimes against humanity, provide for robust inter-state cooperation, require states to criminalise crimes against humanity in their national legislation and impose an obligation on states to prevent and punish crimes against humanity. This value addition to international criminal law can only be achieved by having obligations founded on a well-crafted comprehensive international convention.

There is a lot of work to be done for the realisation of crimes against humanity convention. The tentative road map by the International Law Commission is to prepare three more reports in 2016, 2017 and 2018 respectively. Members of the Commission elected for the quinquennium 2017-2021 will determine the subsequent programme of work on the project. The special rapporteur is of the view that if such a timetable is maintained, it is anticipated that a first reading of the entire set of draft articles could be completed by 2018 and a second reading could be completed by 2020. I hope that at that time the convention on crimes against humanity will not be a matter of if but rather when.

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