On the Proposed Crimes Against Humanity Convention
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Codifying the ‘Laws of Humanity’ and the ‘Dictates of the Public Conscience’: Towards a New Global Treaty on Crimes Against Humanity

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On 17 July 2014, an historic, but little-noticed, event occurred: The United Nations International Law Commission voted to move the topic of a new treaty on crimes against humanity to its active agenda and appoint a Special Rapporteur. The expectation is that the Rapporteur will prepare, and the Commission will debate, a complete set of Draft Articles which will be sent to the United Nations General Assembly in due course. This could lead to the adoption of a new global treaty on crimes against humanity, filling a normative gap that has persisted for nearly seventy years.

This chapter asks why – and whether – the international community should finally codify crimes against humanity in an international convention, particularly given its recent inclusion in the Statute of the International Criminal Court. It considers the normative foundations and practical application of crimes against humanity by international and national courts, and how a new treaty might strengthen both the preventive and punishment dimensions of national and international responses to these

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crimes. Finally, given the recent challenge to the legitimacy of the International Criminal Court by States resisting its jurisdiction as well as the more existential challenge posed by sceptics of international justice writ large regarding its ultimate utility, it offers a modest defence of what one might call ‘the international criminal justice project’ on legal and moral grounds.

2.1. Crimes Against Humanity and Customary International Law

Crimes against humanity have been described as “politics gone cancerous”, or as crimes contre l’esprit (‘crimes against the spirit’) that “shock the conscience of humankind”. The concept emerged as a response to inhumane acts that transgressed the bounds of ‘civilized’ behaviour, even when committed by a government or Head of State, and particularly if carried out on a massive scale. Over time, they have become a residual category, addressing atrocities that cannot be categorized either as war crimes (because they address evils not within the purview of the laws of war or because they take place outside of armed conflict) or as genocide within the meaning of the Genocide Convention of 1948, because they do not represent the intentional destruction of one of the four groups (racial, religious, national or ethnic) it protects. They are controversial because they not only describe as immoral certain acts of government (and, later, non-State actors) but label them criminal – depriving the officials and other perpetrators accused of such crimes of defences they might wield as a function of State sovereignty. Moreover, released from their original moorings through the development of customary international law and their codification in the Rome Statute for the International Criminal Court, they have now come to represent attacks carried out not only during inter-State conflict, but in intra-State armed conflict, or even peace time, and attacks by State and non-State actors.

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The evolution from moral condemnation to positive law took nearly a century. The term ‘crimes against humanity’ or offenses against the ‘laws of humanity’ emerged in the nineteenth century to describe the evils of slavery and the slave trade. Subsequently, the ‘Martens Clause’ in the preamble of the 1907 Hague Convention Respecting the Laws and Customs of War on Land referenced the “laws of humanity, and […] the dictates of the public conscience” as protections available under the law of nations to human beings caught in the ravages of war. The declaration of France, Great Britain and Russia of 28 May 1915 described the massacre of the Armenians in Turkey as “crimes against humanity and civilization”, and the United Nations Report on the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties in 1919 used the term as well. In this way, it emerged as a term of art, but was not yet a legal rule capable of international (or national) enforcement. The provision in the Martens Clause was too uncertain to provide a clear basis for either State responsibility or criminal liability, and it is perhaps un-
surprising that efforts to prosecute ‘crimes against humanity’ following the First World War were unsuccessful.

The history of the failed efforts to conduct war crimes trials after World War I need not be recounted in detail here. The Treaty of Versailles provided for the establishment of a special tribunal to try William II of Hohenzollern, the German emperor. Two members of the Commission – Robert Lansing and James Scott Brown – both prominent members of the American Society of International Law10 – dissented, arguing that any such trials would violate the principle of sovereignty, particularly as there was no international treaty establishing either the nature of the crime or a court with jurisdiction over it.11 Although it was perhaps an American preoccupation at the outset, this insistence upon a treaty – as opposed to customary international law – as the basis for international criminal jurisdiction has persisted, differentiating, to some extent, international criminal law from other branches of international law in which reliance upon custom seems more natural and accepted by States. And indeed, no trial of the Kaiser took place as even States ostensibly supporting his trial, such as the Netherlands, refused his extradition, offering him refuge instead.12

It was not until World War II that a more serious effort to set out the specific parameters of ‘crimes against humanity’ in an international agreement occurred. ‘Crimes against humanity’ were specifically included in the Charters of the International Military Tribunals at Nuremberg13 and Tokyo14 after a great deal of negotiation which focused much more on the aggressive war and war crimes charges. In early drafts what became crimes against humanity were referred to as “atrocities and persecutions and deportations on political, racial or religious grounds”.15 It was not un-

11 Historical Survey, p. 58, see supra note 8.
13 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (‘IMT’), 8 August 1945, in UNTS, vol. 82, p. 279 (‘IMT Charter’).
15 “Revised Draft of Agreement and Memorandum Submitted by American Delegation, 30 June 1945”, in Report of Robert H. Jackson, U.S. Representative to the International Con-
til 31 July 1945 (the London conference convened on 26 June, and the Charter was signed on 8 August 1945) that the term ‘crimes against humanity’ appeared in the draft. A note by Robert Jackson indicated that the intention was to make sure that “we are reaching persecution, etc., of Jews and others in Germany as well as outside of it, and before as well as after commencement of the war”.16 Apparently Sir Hersch Lauterpacht proposed the addition to the text at a meeting with Jackson during which he put forward the idea of presenting the case against the accused under the three principal headings we know today: crimes against peace, war crimes and crimes against humanity.17 This ensured the entry of the term ‘crimes against humanity’ into the international legal lexicon, and perhaps obscured the fact that this was in many ways the most revolutionary of the charges upon which the accused were indicted and convicted, given that its foundations in international law were so fragile.18

The proceedings at Nuremberg did not themselves focus greatly on crimes against humanity; the Tokyo trials even less so. Article 6(c) of the London Charter defined them as:

namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.19

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18 The other was the crime of waging an aggressive war.

19 IMT Charter, Article 6(c), see supra note 13. The definition in the IMFTE was similar, but removed the reference to persecution on “religious grounds”. IMFTE Charter, Article 5(c), see supra note 14.
Although the indictment charged 20 of the 22 defendants ultimately tried at Nuremberg with crimes against humanity, it was not very specific as to what crimes the accused had committed which fell within that rubric. The prosecution’s theory was essentially that the accused, by debasing the “sanctity of man in their own countries […] affront[ed] the International Law of mankind,” and in all but two cases in which crimes against humanity were charged, these charges were brought in parallel with war crimes charges and often charges of crimes against peace. The judgment of the Tribunal was similarly non-specific, acknowledging that crimes against humanity were somehow different than war crimes, but providing little interpretative guidance as to their elements. The preoccupation of the Tribunal as regards the charges was evidently the final solution and Hitler’s attempted extermination of European Jews. The two accused, Julius Streicher and Baldur von Schirach, who were found guilty only of crimes against humanity, were convicted, respectively, of “incitement to murder and extermination”, on the basis of virulently anti-Jewish propaganda (Streicher) and of deporting Jews from Vienna (von Schirach).

Following the trials, the Nuremberg Principles embodied in the IMT Charter and Judgment were adopted by the General Assembly in 1946, and codified by the International Law Commission in 1950, which largely retained the Nuremberg definition of the crime. In this way, ‘crimes against humanity’ were transformed from rhetorical flourish to a category of offences condemned by international law for which individuals could be tried and punished. During the same period, the Geneva Conventions of 1949 on the laws of war were adopted; and the Genocide
Convention, covering a certain narrow category of crimes against humanity, was adopted in 1948 and entered into force in 1951.25 No comprehensive treaty on crimes against humanity was ever proposed or negotiated, however, and customary international law often continued to link it to the commission of crimes against peace or war crimes. This requirement was not definitively removed until 1998, when the Rome Statute for the International Criminal Court finally abolished the linkage and acknowledged its autonomous nature.

Crimes against humanity under customary international law percolated into the legal systems of a handful of countries that had domesticated the crime, such as Canada, France, and Israel, and certain elements of their prohibition could be found in new international instruments prohibiting torture and apartheid.26 Israel prosecuted Adolph Eichmann, for example,27 and France conducted a series of trials relying essentially upon Article 6(c) of the Nuremberg Charter, convicting not only Klaus Barbie, the infamous ‘Butcher of Lyon’, but two French participants in the Vichy regime.28 But these cases were the exception, not the rule, and all involved a link to World War II. Latin American jurisprudence on crimes against humanity has only more recently begun to truly develop, notably in Peru, Argentina and most recently Ecuador, following decades of

sweeping amnesty laws, and a lack of political will or domestic codification under which to prosecute these crimes. 29 Scholarly articles sporadically appeared as well. 30 But even though the commission of mass atrocities continued apace during the second half of the 20th century, 31 there was little accountability imposed upon those ostensibly responsible, whether government officials or military leaders, rebels, insurgents or low-level perpetrators, 32 and there was no talk of a new convention on crimes against humanity, although the International Law Commission


31 A recent study suggested that between 1945 and 2008, between 92 and 101 million persons were killed in 313 different conflicts, the majority of whom were civilians. In addition to those killed directly in these events, others died as a consequence, or had their lives shattered in other ways – through the loss of property, victimization by sexual violence, disappearances, slavery and slavery-related practices, deportations and forced displacements and torture. M. Cherif Bassiouni, “Assessing Conflict Outcomes: Accountability and Impunity”, in M. Cherif Bassiouni (ed.), The Pursuit of International Criminal Justice: A World Study on Conflicts, victimization, and Post-Conflict Justice, Intersentia, 2010, p. 6.

continued to work on defining the crime under customary international law.\footnote{The ILC took up the question of crimes against humanity as part of its work on the Draft Code of Crimes Against the Peace and Security of Mankind, which was finalized in 1996, but never adopted. See “Report of the International Law Commission on the Work of its Forth-Eighth Session”, in Yearbook of International Law Commission, 1996, vol. 2, pp. 17, 45, UN Doc. A/ CN.4/SER.A/1996/Add.1 (Part 2).}

2.2. What Difference Could a Treaty Make?

The absence of a comprehensive treaty on crimes against humanity, of course, did not mean that international law did not prohibit their commission. It is well known that the Statute of the International Court of Justice identifies the sources of international law as including not only “international conventions”, but “international custom, as evidence of a general practice accepted as law”, and “general principles of law recognized by civilized nations”.\footnote{Statute of the International Court of Justice, 26 June 1946, Article 38 (1), in UNTS, vol. 33, p. 993.} While treaties are listed first, in Article 38(1)(a), followed by custom (paragraph (b)), and then general principles (paragraph (c)), it has been generally understood that the order in which the sources of law are listed in Article 38 does not establish a strict hierarchy amongst them, but instead are listed in the order in which a judge would typically consult them in addressing a particular legal question.\footnote{See, e.g., Ian Brownlie, Principles of Public International Law, Oxford University Press, 2008, p. 5.} Thus, to the extent crimes against humanity remained part of customary international law but was not codified in an international convention (other than the 1945 Nuremberg Charter), it could still presumably be the basis for future prosecutions or State responsibility. At the same time, the absence of a clear definition, and the crime’s continued linkage to other offenses (crimes against peace and war crimes), made it a clumsy rubric at best, and incomplete and ineffective at worst. Moreover, under the legality principle, which requires crimes to be defined prior to prosecution, and also requires them to be defined to a certain level of particularity, it is not clear that prosecuting an individual for violating customary international law – without a clear Statute defining it – is consistent with modern understandings of human rights law. Indeed, when the International Law Commission considered not defining the crimes in the ICC Statute, but simply list-
ing them, the nearly unanimous response of commentators was that this would violate the legality principle.\textsuperscript{36}

Thus, while customary international law remains important to international criminal law, the norm of this sub-specialty has been to adopt treaties defining crimes and imposing obligations upon States to enact penal legislation, to prevent the crimes (in some cases), to extradite or try the offenders, and to co-operate with each other in the apprehension, trial and even incarceration of the accused. There are now more than 318 international criminal law conventions, covering twenty-four general categories of international crime including terrorism, drug trafficking, hostage taking, aircraft hijacking, environmental crimes, non-applicability of statutes of limitations, apartheid, genocide, torture, unlawful use of weapons, aggression, piracy, bribery, environmental protection, corruption, destruction of cultural property and theft of nuclear materials, each one of which contains some combination of definitional provisions, provisions for interstate co-operation and other provisions related to the enforcement of the treaty itself.\textsuperscript{37}

A few examples may be useful to illustrate the difficulties engendered by the absence of a treaty covering crimes against humanity. In the 1990s, when war broke out in the former Yugoslavia, and the Rwandan genocide took place, the international community reached for the Nuremberg precedent only to find that it had failed to finish it. This made the task of elaborating statutes for the two new ad hoc Tribunals difficult and complex. The uncertainty in the law was evidenced by the texts of the Statutes for the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) adopted by the Security Council in 1993 and 1994, respectively, which although similar in many respects, contained different and arguably contradictory definitions of crimes against humanity. The ICTY Statute, for example, included a link to

\textsuperscript{36} The International Law Commission took the position that the draft statute was primary an “adjectival and procedural instrument”, and therefore did not define the crimes. 1994 Draft Statute for the International Criminal Court, Report of the International Law Commission, U.N. GAOR, 49\textsuperscript{th} Session, Supplement No. 10, U.N. Doc. A/49/10 (1994). This position was criticized by most experts, and ultimately the Preparatory Committee for the Court and later the Diplomatic Conference assumed the task of setting out complete definitions of the three crimes currently in the Court’s jurisdiction. See, e.g., Sadat, 1996, p. 667, see supra note 12.

armed conflict whereas the ICTR Statute did not. Conversely, the ICTR Statute required a persecutory or discriminatory element in its chapeau, which the ICTY Statute did not. These substantive and potentially important variations in the definition of the crime were difficult to square with the idea of universal international crimes under customary international law.\textsuperscript{38} M. Cherif Bassiouni underscored this problem in an important but little-noticed article, in which he lamented the “existence of a significant gap in the international normative proscriptive scheme, one which is regrettably met by political decision makers with shocking complacency”.\textsuperscript{39}

At the international level, then, the absence of a clear definition led to some difficulties in the elaboration of the Statutes for the \textit{ad hoc} international criminal tribunals.\textsuperscript{40} Equally problematic was the inability to use national or hybrid mechanisms to pursue accountability under universal jurisdiction. A case in point is the Cambodian ‘genocide’\textsuperscript{41}. From 1975 to 1979, the Khmer Rouge regime killed an estimated 1.7 to 2.5 million Cambodians, out of a total population of seven million.\textsuperscript{42} For the most part, individuals were killed, tortured, starved or worked to death by the Khmer Rouge not because of their appurtenance to a particular racial, eth-

\begin{itemize}
  \item \textsuperscript{38} See, \textit{e.g.}, ICTY Statute; ICTR Statute. The IMT Statutes for Tokyo, see \textit{supra} note 12, and Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946, also differed slightly from the Nuremberg definition.
  \item \textsuperscript{39} Bassiouni, 1994, p. 457, see \textit{supra} note 30.
  \item \textsuperscript{40} The Statute of the Special Court for Sierra Leone is not identical to either the ICTY, the ICTR or the ICC Statute, although it was adopted in 2002. See, Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, 16 January 2002, Article 2, in \textit{UNTS}, vol. 2178, p. 149, which provides that the Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts.
  \item \textsuperscript{41} Gareth Evans, “Crimes Against Humanity and the Responsibility to Protect”, in Leila Nadya Sadat (ed.), \textit{Forging a Convention for Crimes Against Humanity}, Cambridge University Press, 2011 (‘Forging a Convention’).
  \item \textsuperscript{42} \textit{Cf.}, Craig Etcheson, \textit{After the Killing Fields: Lessons from the Cambodian Genocide}, Praeger, 2005, pp. 118–120.
\end{itemize}
nic, religious or national group – the four categories to which the Genocide Convention applies – but because of their political or social classes, or the fact that they could be identified as intellectuals.\(^{43}\) While theories have been advanced suggesting ways that the Genocide Convention applied to these atrocities\(^{44}\) and the Co-Prosecutors in Case 2/2 at the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) have argued that some groups were exterminated *qua* groups – such as the Cham Muslims and the Vietnamese\(^{45}\) – most experts agree that:

>[F]or all its compelling general moral authority the Genocide Convention had absolutely no legal application to the killing fields of Cambodia, which nearly everyone still thinks of as the worst genocide of modern times. Because those doing the killing and beating and expelling were of exactly the same nationality, ethnicity, race and religion as those they were victimizing – and their motives were political, ideological and class-based [...] the necessary elements of specific intent required for its application were simply not there.\(^{46}\)

This raised problems at the ECCC, as Prosecutors were forced to rely upon crimes against humanity and had to prove (absent a treaty) that it did not violate the legality principle to indict the accused on that ground for their conduct in the 1970s, a laborious task given its lack of codification.\(^{47}\) Likewise, prior to the ECCC’s establishment, when Pol Pot was subsequently arrested in Cambodia in 1997, he could not be tried. Cambodia could not muster the political will, and other countries lacked the necessary legal infrastructure. Although many countries (such as the

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\(^{46}\) Gareth Evans, 2011, p. 3, see supra note 41.


Likewise, although the \textit{Pinochet} case is often referred to as an example of the power of universal jurisdiction with respect to international crimes, the decision of the House of Lords in \textit{Pinochet III} is more a testament to the requirement of a treaty-based definition of international crime and jurisdiction. For the Law Lords, in considering the legality of Pinochet’s potential extradition from the UK to Spain for crimes he had allegedly committed in Chile, limited extradition to the crime of torture, committed after the entry into force of the Torture Convention for the UK, Spain and Chile.\footnote{\textit{R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), [1999] 1 A.C. 147, 154 (H.L.)} (appeal taken from England).} Without the existence of a treaty – the Torture Convention in this particular case – the \textit{Pinochet} case would not have been successfully prosecuted. Unfortunately, the limitations imposed by the Lords’ reliance upon the entry into force of the Torture Convention for all three countries meant that virtually all of the most serious crimes could not be considered.\footnote{\textit{Ibid.}, pp. 175–176, 179, 188.} Likewise, in \textit{Belgium v. Senegal}, the International Court of Justice found that Senegal had an obligation to either try or extradite former Chadian leader Hissène Habre who was indicted by a Belgian investigating judge “as the perpetrator or co-perpetrator, \textit{inter alia} of serious violations of international humanitarian law, genocide, crimes against humanity and war crimes”, but not under customary international law.
Rather, it was pursuant to the express provisions of Articles 6 and 7 of the Torture Convention, which applied as both States were parties.\(^{52}\)

Finally, the case of *Bosnia v. Serbia*\(^{53}\) evidences the difficulty created by gaps in States’ responsibility for the commission of crimes against humanity. Because ICJ jurisdiction was based on a compromissory clause in the Genocide Convention, the Court’s discussion – which centred upon whether the atrocities committed in Bosnia constituted genocide – missed the point. Despite the 200,000 deaths, estimated 50,000 rapes, and 2.2 million people forcibly displaced as a result of the Serb ethnic cleansing campaign, genocide was held to have been proven only in the massacre of some 8,000 Muslim men and boys in the Srebrenica area in July 1995.\(^{54}\) Although the Court recognized that crimes against humanity had been committed, it could not address them. Had a global treaty on crimes against humanity equipped the ICJ with jurisdiction, the Court could have more fully addressed Bosnia’s allegations.\(^{55}\)

The latter example raises one more difficulty engendered because crimes against humanity do not have their own convention – and that is a tendency to ‘overuse’ the Genocide Convention because it is the only tool available. This leads to confusing rhetoric and anger on the part of victim’s groups who insist that the wrongs done to them constituted ‘genocide’, to overly technical discussions by governments and the international community as to whether a particular atrocity constitutes ‘genocide’ or not, which could give rise to a duty to prevent, not just a requirement of

\(^{52}\) ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, p. 450 (“[A]ny State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.”).


\(^{55}\) Article 26 of the Proposed Convention grants such jurisdiction. See “Proposed International Convention on the Prevention of Crimes Against Humanity”, Appendix 1 in *Forging a Convention*, see *supra* note 41. The same can also be said for the actions brought to the Court by Croatia and Serbia. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 18 November 2008.
punishment,\textsuperscript{56} and to disappointment when an atrocity turns out to be ‘only’ a crime against humanity, as opposed to a genocide, which implicitly downgrades the significance of crimes against humanity as a legal and sociological category.

From the above examples, we see that the absence of a global treaty on crimes against humanity leads to several categories of difficulties: (i) an impunity gap, in which individuals are unable to be prosecuted or are prosecuted only with difficulty at both the national and international levels; (ii) a State responsibility gap, because the definition of crimes against humanity is uncertain and no compromissory clause exists to permit litigation before the ICJ (or other fora) regarding their commission; (iii) a situation of definitional uncertainty leading to difficult questions regarding whether a particular atrocity was or was not a crime against humanity; and (iv) a downgrading of crimes against humanity and overuse of the Genocide Convention as a legal tool.

2.3. Codification of Crimes Against Humanity in the International Criminal Court Statute: Necessary but not Sufficient

With the adoption of the International Criminal Court Statute in 1998, crimes against humanity were at last defined and ensconced in an international convention. The ICC definition is similar to earlier versions, but differs in important respects, such as the requirement that crimes against humanity be committed “pursuant to a State or organizational policy”,\textsuperscript{57} and the absence of any linkage to armed conflict. The addition of the policy element continues to elicit controversy, because the \textit{ad hoc} tribunals rejected that element as a matter of customary international law.\textsuperscript{58} Of

\textsuperscript{56} See, e.g., Power, 2002, see \textit{supra} note 43; \textit{Bosnia v. Serbia}, para. 427, see \textit{supra} note 53 (stating “[t]he obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty”).

\textsuperscript{57} ICC Statute, Article 7(2)(a), see \textit{supra} note 4.

course, the ICC Statute by its own terms did not purport to represent customary law, but only law defined for the purposes of the Statute itself, suggesting that perhaps it is possible for ‘Rome law’ to be different than customary international law outside the ICC Statute. At the same time, given that the ICC Statute applies to nationals of ICC non-States Parties through the possibility of referral by the Security Council, as well as the Court’s territorially based jurisdiction, most have concluded that it is difficult to support the notion of different versions of crimes against humanity law existing inside and outside the ICC Statute, and have suggested that the ICC definition has ultimately come to represent customary international law.

If so, perhaps the ICC Statute is sufficient to fill the gaps identified in the preceding sections flowing from the absence of a treaty on crimes against humanity? Certainly, the negotiation of the ICC Statute arguably solved the question of definitional uncertainty and clearly gave crimes against humanity an autonomous status, definitively delinking it from war crimes and genocide. But other gaps and difficulties remain. First, the ICC Statute applies only to cases to be tried before the ICC, that is, to a handful of perpetrators from the limited number of cases that fall within the jurisdiction of the Court. Unlike the ad hoc tribunals, the ICC has a very broad mandate to not only assist with punishment but also prevention of atrocity crimes, in situations scattered all over the world. Given its small size and limited resources, the Court has had to be very judicious about limiting the number of cases per situation. This will leave many potential perpetrators outside the reach of the ICC Statute, and other mechanisms will be required to bring them to book.


59 See, e.g., ICC Statute, Article 7(1) (“For the purpose of this Statute, ‘crime against humanity’ means […]”). Whether it has subsequently come to represent customary international law is the subject of some debate, see Guénaël Mettraux, “The Definition of Crimes Against Humanity and the Question of a ‘Policy’ Element” and Kai Ambos, “Crimes Against Humanity and the International Criminal Court”, in Forging a Convention, pp. 142, 279, respectively, see supra note 41.


61 Sadat, 2013, pp. 372–374, see supra note 5.
Second, the ICC Statute does not require States to adopt implementing legislation on the crimes within the Statute, although many have done so and the Statute assumes that they have an obligation to do so.62 A recent study suggests that 34% of ICC States parties do not have legislation on crimes against humanity; the percentage is much higher for non-States parties.63 Moreover, the ICC Statute provides no vehicle for inter-State co-operation, leaving gaps in mutual legal assistance, extradition and other aspects of the horizontal co-operation needed for the prosecution of atrocity crimes across State borders.

Third, the ICC Statute does not provide for State responsibility but only addresses the possible criminal responsibility of individuals, and does not explicitly impose an obligation upon States to prevent as well as punish crimes against humanity. A new treaty could do so, along the lines of the Genocide Convention, and consistently with the Responsibility to Protect.

Finally, although 122 States have ratified the ICC Statute at the time of writing, many remain outside the Rome Statute system. Just as many of these jurisdictions – like Russia, India and the United States – have ratified the Genocide and Geneva Conventions,64 it is not impossible to imagine that they would support and ultimately ratify a new convention on crimes against humanity. Indeed, the ABA House of Delegates recently adopted – unanimously – a resolution calling for federal legislation and for the United States to take the lead in negotiating a new treaty on crimes against humanity.65 These States could support a crimes against humanity convention, thereby agreeing to the treaty definition of the crime, agree upon the need to prevent, punish and co-operate regarding it, but still take the time they need to become comfortable with the adjudicative jurisdiction of the International Criminal Court.

Although it has recently been proposed that a new interstate mutual legal assistance convention be adopted covering all of the crimes in the

62 ICC Statute, Preamble, para. 6, see supra note 4.
64 A complete list of ratifications of the Genocide and Geneva Conventions are available at https://treaties.un.org/.
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ICC Statute,\(^{66}\) that effort has not received much attention largely because it fills only one of the gaps identified above (interstate co-operation) and, additionally, 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. It also would not address many of the critical subsidiary elements required for the effective prosecution of atrocity crimes: the non-applicability of Statutes of limitation, the lifting of immunities, setting out modes of liability, and other provisions essential to establishing a comprehensive regime for the prevention and punishment of crimes against humanity.

2.4. A New Treaty for Crimes Against Humanity? The Crimes Against Humanity Initiative and the Task Now Before the International Law Commission

2.4.1. The Work of the Crimes Against Humanity Initiative

Concerned about the problems of continued impunity for the commission of atrocity crimes, in 2008, the Whitney R. Harris World Law Institute at Washington University School of Law launched the Crimes Against Humanity Initiative, with three primary objectives: (1) to study the current state of the law and sociological reality as regards the commission of crimes against humanity; (2) to combat the indifference generated by an assessment that a particular crime is ‘only’ a crime against humanity (rather than a ‘genocide’); and (3) to address the gap in the current law by elaborating the first-ever comprehensive specialized convention on crimes against humanity.\(^{67}\)

The Initiative progressed in phases, each building upon the work of the last. In 2011, the first edition of Forging a Convention for Crimes Against Humanity was published, which included a major study of issues that needed to be considered if a new treaty was to be elaborated, as well as a model text of a Proposed International Convention for the Prevention

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\(^{67}\) Leila Nadya Sadat, “A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity”, in Forging a Convention, pp. xxiii–xxiv, see supra note 41.
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and Punishment of Crimes Against Humanity in English and in French.\(^6^8\)
The work was overseen by a Steering Committee of distinguished experts.\(^6^9\)

During Phase II of the Initiative, papers written by leading experts were presented and discussed at a conference held at Washington University School of Law on 13–14 April 2009, and then revised for publication.\(^7^0\) They addressed the legal regulation of crimes against humanity and examined the broader social and historical context within which they occur. Each chapter was commissioned not only to examine the topic’s relationship to the elaboration of a future treaty, but to serve as an important contribution to the literature on crimes against humanity in and of itself.

The papers ranged from technical discussions of specific legal issues such as modes of responsibility, immunities and amnesties, enforcement and gender crimes to broader conceptual treatments of earlier codification efforts, the definition of the crime in the ICC Statute and customary international law, and the phenomenon of ethnic cleansing. Several of the papers contrasted the ICC and ad hoc tribunal definition of crimes against humanity and were very helpful to the discussions as the drafting effort progressed; the same can be said for the many other contributions which addressed specific topics such as crimes against humanity and terrorism, universal jurisdiction, and the Responsibility to Protect.

In discussing the scholarly work more questions were raised than answered. What was the social harm any convention would protect? Atrocities committed by the State, or a broader concept that would include non-State actors? Would a new legal instrument prove useful in combating atrocity crimes? How would any new instrument interact with the

\(^6^8\) “Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity”, in Forging a Convention, p. 359, see supra note 41 (‘Proposed Convention’). The Proposed Convention can also be found on p. 403 in French and on p. 503 in Spanish. These texts, as well as Arabic, Chinese, German and Russian translations, are also available at crimesagainsthumanity@wustl.edu.

\(^6^9\) The Steering Committee is composed of Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Mendez, Professor William Schabas and Judge Christine Van den Wyngaert.

\(^7^0\) One paper was commissioned subsequent to the April meeting based upon the emphasis in that meeting on inter-state co-operation as a principal need to adopt the Convention: Laura M. Olson, “Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the Aut Dedere Aut Judicare Obligation”, in Forging a Convention, p. 323, see supra note 41.
Rome Statute for the International Criminal Court? As the initial scholarly work was undertaken, a preliminary draft text of the convention, prepared by M. Cherif Bassiouni, was circulated to participants at the April meeting to begin the drafting process. As the Initiative progressed, nearly 250 experts were consulted, many of whom submitted detailed comments (orally or in writing) on the various drafts of the proposed convention circulated, or attended meetings convened by the Initiative either in the United States or abroad. Between formal meetings, technical advisory sessions were held during which every comment received – whether in writing or communicated verbally – was discussed as the draft convention was refined. The Proposed Convention went through seven major revisions (and innumerable minor ones) and was approved by the members of the Steering Committee in August 2010 in English (and is annexed to this volume).

The Proposed Convention has begun, not ended, the debate. Elaborated by experts without the constraints of government instructions (although deeply cognizant of political realities), it is a platform for discussion by States, the International Law Commission, civil society and academics with a view to the eventual adoption of a United Nations Convention on the Prevention and Punishment of Crimes Against Humanity. The Proposed Convention builds upon and complements the ICC Statute by retaining the Rome Statute definition of crimes against humanity but has added robust interstate co-operation, extradition and mutual legal assistance provisions in Annexes 2–6. Universal jurisdiction was retained (but is not mandatory), and the Rome Statute served as a model for several additional provisions, including Articles 4–7 (Responsibility, Official Capacity, and Non-Applicability of Statute of Limitations) and with respect to final clauses. Other provisions draw upon international criminal law and human rights instruments more broadly, such as the recently negotiated Enforced Disappearance Convention, the Terrorist Bombing Convention, the Convention Against Torture, the United Nations Conventions on Corruption and Organized Crime, the European Transfer of Proceedings Convention, and the Inter-American Criminal Sentences Convention, to name a few.71

71 A complete list can be found in the table at the back of the Proposed Convention, reproduced in Appendices I and II of Forging a Convention, pp. 398–401, 445–448, see supra note 41.
Yet although the drafting process benefited from the existence of current international criminal law instruments, the creative work of the Initiative was to meld these and our own ideas into a single, coherent model convention that establishes the principle of State responsibility as well as individual criminal responsibility (including the possibility of responsibility for the criminal acts of legal persons) for the commission of crimes against humanity. Thus, Article 1 of the Proposed Convention reads:

**Article 1**

**Nature of the Crime**

Crimes against humanity, whether committed in time of armed conflict or in time of peace, constitute crimes under international law for which there is individual criminal responsibility. In addition, States may be held responsible for crimes against humanity pursuant to principles of States responsibility for internationally wrongful acts.\(^{72}\)

The Proposed Convention innovates in many respects by attempting to bring prevention into the instrument in a much more explicit way than predecessor instruments, by including the possibility of responsibility for the criminal acts of legal persons, by excluding defences of immunities and statutory limitations, by prohibiting reservations, and by establishing a unique institutional mechanism for supervision of the Convention. Echoing its 1907 forbearer, it also contains its own ‘Martens Clause’ in the Preamble, as follows:

Declaring that in cases not covered by the present Convention or by other international agreements, the human person remains under the protection and authority of the principles of international law derived from established customs, from the laws of humanity, and from the dictates of the public conscience, and continues to enjoy the fundamental rights that are recognized by international law \[\ldots\].\(^{73}\)

Elaborating the 27 articles and six annexes of the treaty was a daunting challenge, and one that could not have been accomplished without the dedication and enthusiasm of many individuals.\(^{74}\) The effort has

\(^{72}\) Proposed Convention, Article 1, see *supra* note 68.

\(^{73}\) *Ibid.*, Preamble, para. 13. Credit is due to Morten Bergsmo for this provision’s inclusion.

\(^{74}\) I am particularly grateful to M. Cherif Bassiouni for his extraordinary efforts in leading the drafting effort and his service as a member of the Initiative’s Steering Committee, and
been well-rewarded; in 2010, more than 75 experts endorsed the objectives of the Initiative in a Declaration adopted on 12 March 2010, in Washington, D.C., as did the Prosecutors of the world’s international criminal courts and tribunals in the Kigali Declaration of the Fifth Colloquium of Prosecutors of the International Criminal Tribunals adopted on 13 November 2009, and the Fourth Chautauqua Declaration adopted on 31 August 2010. The Proposed Convention has now been translated into Arabic, Chinese, German, Russian and Spanish, and continues to attract discussion and debate.

2.4.2. The International Law Commission Moves Forward

The International Law Commission first included the topic of crimes against humanity on its long-term work program in 2013 on the basis of a report prepared by Professor Sean Murphy. The report identified four key elements a new convention should have: a definition adopting Article 7 of the ICC Statute; an obligation to criminalize crimes against humanity with national legislation; robust inter-State co-operation procedures; and a clear obligation to prosecute or extradite offenders. The report also emphasized how a new treaty would complement the ICC Statute.

In autumn 2013, States had an opportunity to comment on the Commission’s decision to include the topic in its long-term work programme at the General Assembly Sixth Committee. Many States commented favourably on the prospect of a new crimes against humanity convention. Each member brought tremendous energy and expertise to the project, guiding its methodological development and conceptual design, and carefully reading, commenting upon and debating each interim draft of the Proposed Convention extensively. As with all such projects, many supported – and continue to support – the effort without being on the front pages of it, so to speak. Their contributions are noted in “Preface and Acknowledgments”, in Forging a Convention, pp. xxvi–xxviii, see supra note 41.

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76 For a list of the Initiative’s activities, see http://crimesagainsthumanity.wustl.edu/.


78 Ibid., para. 8.

79 Ibid., paras. 9–13.
Codifying the ‘Laws of Humanity’ and the ‘Dictates of the Public Conscience’: Towards a New Global Treaty on Crimes Against Humanity

Convention. Slovenia, for example, stated that “all efforts should be directed at filling this gap”. 80 Austria, the Czech Republic, Italy, Norway, Peru, Poland and the United States also welcomed the decision. 81 A major focus was the importance of ensuring a new treaty complements the ICC Statute, as the comments of Malaysia and the United Kingdom, for example, made clear. 82 Some States questioned the need for a new treaty. For example, Iran stated that it “does not seem that […] there is a legal loophole to be filled through the adoption of a new international instrument”. 83 Other States questioning the need for a treaty included France, Malaysia, Romania and Russia. 84

In May 2014, prior to the Commission’s July session, the Proposed Convention was the basis of an Experts’ Meeting held at the Villa Moynier in Geneva bringing together international justice experts and members of the International Law Commission. Participants discussed the need for a new convention, its potential content and the process of building support amongst States. These discussions are summarized in a Report

80 Statement by Mr. Borut Mahnič, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 30 October 2013, p. 8.
81 Statement by Gregor Schusterschitz, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 28 October 2013, p. 5; Statement by Mr. Petr Válek, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 29 October 2013, p. 3; Statement by Min. Plenipotentiary Andrea Tiriticco, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 29 October 2013, p. 5; Statement on behalf of the Nordic Countries by Mr. Rolf Einar Fife, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 28 October 2013, pp. 3-4; Intervención de la Misión Permanente del Perú, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 29 October 2013, p. 2; Statement by Ambassador Ryszard Sarkowicz, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 30 October 2013, p. 5; Statement by the United States, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 2013, p. 4.
82 Statement by Ms. Sarah Khalilah Abdul Rahman, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 30 October 2013, p. 1; Statement by Mr. Jesse Clarke, 68 Session of the General Assembly, 6th Committee, under agenda item 81, 28-30 October 2013, p. 5.
83 Statement by Professor Djamchid Montaz, 68th Session of the General Assembly, 6th Committee, under agenda item 81, 5 November 2013, p. 7.
Participants noted the long involvement of the Commission on the subject of crimes against humanity and commented upon the progressive stance of the Commission in de-linking crimes against humanity from armed conflict in its formulation of the Nuremberg Principles. In paragraph 123 of its commentary to ‘Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal’, the Commission noted “that [crimes against humanity] may take place also before a war in connection with crimes against peace.”

It was also observed that the Commission was nearing completion of its work on the obligation to extradite or prosecute (aut dedere aut judicare), and was therefore in an excellent position to take up the question of a new convention on crimes against humanity.

Following this meeting, the Commission voted, on 18 July 2014, to add the topic of crimes against humanity to its active agenda and appointed Professor Murphy as Special Rapporteur. The Rapporteur will prepare draft articles for discussion by the Commission, and comment by States. Under the Commission’s Statute, it can suggest further study at that point, depending upon government reaction; or the convening of a diplomatic conference to negotiate a new treaty. The work could be completed in as little as four years; or could take considerably longer, depending upon the reaction of governments.

2.5. How Does a New Convention on Crimes Against Humanity Fit within the International Justice Project More Generally?

Thus far, this chapter has assumed that the prevention and punishment of crimes against humanity is desirable. This section will take up just a few of the issues and controversies surrounding international criminal justice and its application and attempt to place the elaboration and adoption of a

87 International Law Commission, 66th Session, Provisional Summary Record of the 3227th Meeting, A/CN.4/SR.3227.
89 Geneva Report, para. 79, see supra note 85.
new global convention on crimes against humanity in context of the overall picture today.

The considerable effort required to negotiate and elaborate a new global convention on crimes against humanity is only valuable if the prevention and punishment of such crimes is a useful public good, and if a new treaty would assist in such an effort. Moreover, for the International Law Commission’s efforts to be successful, States must be willing to expend political capital to support a new convention on crimes against humanity, and civil society must become excited about it. A new inter-State convention, of course, is different than a treaty like the ICC Statute, because it is about empowering States to do the job of preventing, punishing and building capacity to address, atrocity crimes. It is not about creating a new supranational jurisdiction to do so. In this sense, then, many of the concerns that have arisen regarding the appropriateness, or not, of particular cases before the International Criminal Court, have no relevance in considering the utility of a new convention on crimes against humanity. It is also why States that have not yet accepted the adjudicative jurisdiction of the ICC Statute, but do accept the content of the substantive law, might be willing to ratify a new convention on crimes against humanity.

At the same time, the reality is that – assuming a new treaty will look at least as ‘progressive’ as the 1984 Torture Convention or the more recently enacted terrorism treaties – the exercise of universal jurisdiction will be an option for States Parties to the treaty, under their obligation of aut dedere aut judicare, meaning that there may be friction between governments as to the proper outcome of a particular case (as was true in the Pinochet and Habre examples discussed above). And indeed, the Proposed Convention removes any defence of statutes of limitations (Article 7), imposes an obligation to prosecute or extradite (Article 9) and provides for jurisdiction if “the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State […] or an international criminal tribunal”. This language draws upon the language of Article 9(2) of the Enforced Disappearance Convention and Article 5(2) of the Torture Convention. Thus, many of the concerns raised as regards international criminal justice, such as the al-

91 Proposed Convention, Articles 7, 9, 10(3), see supra note 71.
leged conflict between peace and justice or the concern that Africans are being disproportionately targeted by the ICC, to name just two, may arise in connection with the negotiation of a new global convention on crimes against humanity. And certainly, even if not specifically relevant, these concerns may influence the context in which the elaboration and negotiation of such a treaty takes place.

So what would be the purpose of a new convention, and what would its elaboration hope to bring about? First, as a legal matter, it has been asserted that as a ‘core crime’, crimes against humanity is a *jus cogens* norm under international law, and is, by its nature, non-derogable, meaning that States may not justify their commission (and perhaps non-State actors as well), just as they may not justify the commission of genocide through legal argument. That is, a treaty on crimes against humanity would speak to the fact that the prohibition of crimes against humanity is a fundamental rule of international law, a *grundnorm*, and of course would, in this way, support the Responsibility to Protect doctrine as well as other efforts to establish their universal prohibition and call for their protection. In terms of their prevention, a treaty mechanism could be established (and many were suggested during the conferences held by the Initiative) that could help with monitoring situations likely to turn bad, that is, to deteriorate into the kinds of widespread and systematic attacks on civilians that become crimes against humanity. Although many such mechanisms exist today, the situations in Syria, North Korea, Honduras, and many countries in Africa suggest that more needs to be done in terms of prevention. A new treaty could prohibit incitement to crimes against humanity, for example, which was omitted from the ICC Statute, and could contain provisions on capacity building and education to address the problems of lesser-developed States. The importance of crimes against humanity to atrocity crime prevention is critical: because crimes against humanity can be committed in peacetime, and because the bar to prosecution is lower for crimes against humanity than for genocide, we have seen that nearly 30% of the cases at the International Criminal Court are ‘crimes against humanity only’ cases, including the situations in Côte d’Ivoire, Kenya and Libya.92 We have also seen prevention become a legal requirement under the Genocide Convention under the jurisprudence of the ICJ in *Bosnia v. Serbia*. It could be very powerful if that were true.

92 Sadat, 2013, pp. 356–357, see *supra* note 5.
for crimes against humanity as well. Although the Kenya case has raised difficult political problems for the International Criminal Court as two indictees in the political violence were elected to office following their indictment, leading to a firestorm of criticism from some quarters that the ICC was ‘anti-African’ and a threatened pull out of African Union members from the Court. However, consider the fact that following the opening of the ICC investigation and the confirmation of the case against individuals from both political parties in 2010, when Kenya subsequently held elections, they were by and large, peaceful. Did the ICC proceedings cast a shadow that helped contain the ethnic violence that had erupted so powerfully in during the 2007 elections? It is hard to know. But Kenya seems more peaceful than before.

In terms of punishment of offenders, there is no doubt that international criminal justice as a modality for the prevention and punishment of atrocity crimes has always faced scepticism. Whether it be from government officials wary of being constrained by law, or by legal scholars arguing that international criminal justice may be ineffective and even harmful to the restoration of social peace, since the establishment of the ad hoc tribunals 20 years ago, the international criminal justice project has always needed to articulate its objectives and establish its utility. While perhaps this is less so at the national level, the intense scrutiny of the French example evoked above, and the debates about the appropriateness of trying French perpetrators decades after the crimes were committed, is an indicator that this is an issue even before national courts. Indeed, it has arisen in Latin America, where prosecutions have occurred, including Argentina, Chile, Peru, and most recently Ecuador.

93 See, e.g., Press Release, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 14 July 2009, available at http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/African%20Union%20Press%20Release%20-%20ICC.pdf (stating that the Union’s refusal to co-operate with the ICC’s request for the arrest and surrender of President Omar El Bashir of the Sudan was “a logical consequence” of the Union’s position “on the manner in which the prosecution against President Bashir has been conducted, the publicity-seeking approach of the ICC Prosecutor, [and] the refusal by the UN Security Council to address the request made by the African Union [...] for deferment of the indictment against President Bashir”).


96 See supra note 29.
committed by the State, crimes against humanity become political crimes, and the same push and pull extant at the international level is found at the national level as well.

These problems are magnified at the international level, however, because, unlike domestic criminal justice systems, which are taken for granted as necessary for social peace in every State in which they exist, international criminal justice is not yet a given. As one observer remarked regarding the transition of the Central European countries away from communism, “[i]t will take six months to reform the political systems, six years to change the economic systems, and sixty years to effect a revolution in the people’s hearts and minds”,97 Yet the same factors that animate the need for justice at the domestic level operate in the international context: the need to recognize the sufferings of the victims, the possibility of specific or even general deterrence, and finally the need to promote rehabilitation of the offender and perhaps offer an element of retribution for the wrongs done. At the international level, international justice has two additional goals: rendering an historic and accurate account of the atrocity crimes commission and assisting with the rebuilding of a damaged and possibly war-torn society.98 While the evidence is as yet limited in terms of whether international justice is achieving these goals, there is some anecdotal evidence that the work of the past two decades is having a positive effect,99 States continue to ratify the ICC Statute at high rates,100 and there have been increasing instances of domestic prosecutions and commissions of inquiry regarding atrocity crimes. When a crisis erupts and violence


One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today’s world. The establishment of a permanent international criminal court (ICC) is seen as a decisive step forward.

100 As of 24 September 2014, there are 139 signatories to the Statute, and 122 ratifications. A complete list of treaty ratifications is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.
ensues, a fact-finding enquiry is likely to follow. Individuals appear interested in justice even when it is rendered decades after the alleged crimes have been committed, as demonstrated by the very high rates of attendance at the ECCC hearings (more than 135,000 individuals have visited the courtroom since it began holding hearings),\textsuperscript{101} or the fascination in Israel and France during the prosecutions that took place of Eichmann, Barbie and Touvier. Finally, in the case of a new global convention on crimes against humanity, perhaps one of the most compelling reasons for a State to embrace it is the idea that it should not be providing sanctuary for an individual who has committed such crimes and then fled to another jurisdiction to avoid being held accountable. Just as international law does not permit States to ‘harbour’ terrorists, they should not be offering refuge or exile to individuals credibly accused of atrocity crimes.

A related issue regarding the utility of a new global treaty on crimes against humanity that is often raised by government officials I have met with, especially from those living in Western and developed countries least likely to need its protections is, why should we care? Of course, there is the argument of self-interest, enlightened or otherwise; there is also a moral response. The work of John Rawls offers an interesting perspective. In A Theory of Justice, Rawls argues that one should evaluate the fairness – justness – of social rules from behind a “veil of ignorance”. Put succinctly, the idea is that everyone should choose the rules that apply to them to produce the highest payoff for the least advantaged position, as if they did not know whether or not they would be born weak or strong, poor or rich. From this original position, rules that promote social equality are the most desirable as they protect everyone. Extrapolating to the international arena, the question we might ask when considering what system of international justice we prefer, is not what system we (as a U.S. citizen, in my case) might like to maximize our freedom to do as we please, but what system would protect us if we were born in a different place and time – and unlucky enough to have been Jewish during the Holocaust, Tutsi during the Rwandan Genocide, a wearer of eyeglasses during the Khmer Rouge regime, or a Masalit or Fur tribe member in contemporary Darfur, Sudan.

In terms of self-interest, a new global convention on crimes against humanity could assist in isolating leaders that are disrupting international peace and security and make the world safer for the international trade that fuels the high standard of living the developed world expects. International criminal law conventions contain key elements required for effective counterterrorism, including the duty of States to try or to extradite international criminals; the obligation of States not to give safe haven to international criminals; and the right of the international community to act together, if States are unable or unwilling to fulfil their obligations. Shoring up these obligations for the ‘core crime’ of crimes against humanity can strengthen both the political will and legal obligation of other States to comply with these provisions in the dozens of terrorism, trafficking, organized crime and corruption conventions that have been negotiated at the international and regional levels.

2.6. Conclusion
The Nuremberg legacy suggests that to meet the challenges of a world in which the commission of atrocity crimes is but too common, three elements are required: rules, institutions and enforcement – rules that govern human behaviour, and institutions to assist with the formulation, the application and the enforcement of those rules. Although the International Criminal Court is an important step forward in the prevention and punishment of atrocity crimes, without national enforcement, it will be of limited effect.

When beginning the Crimes Against Humanity Initiative it was daunting to ask both whether it would make a difference, and whether it represented the right step forward. While concerns remain regarding the content of any new treaty that might be negotiated as well as the relationship of any new convention with the ICC Statute, the absence of a global treaty on crimes against humanity means that we are effectively depriving our strongest institutions – national governments – of the tools they need to comprehensively address this most ubiquitous of crimes. It also leaves significant enforcement gaps, and the law may remain unclear, particularly with respect to ICC non-States Parties. The work of the Initiative over several years, as well as the decision taken by the International Law Commission, suggests that the time has come at last to remedy this normative and enforcement gap in international law.
On the Proposed Crimes Against Humanity Convention
Morten Bergsmo and SONG Tianying (editors)

This anthology is about the need for and nature of a convention on crimes against humanity. It uses the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity as an important reference point. 16 authors discuss how such a convention may consolidate the definition of crimes against humanity, and develop measures for their prevention and punishment, decades after the conclusion of the Genocide Convention and Geneva Conventions. The authors include Leila N. Sadat, Eleni Chaitidou, Darryl Robinson, Maria Luisa Piqué, Travis Weber, Julie Pasch, Rhea Brathwaite, Christen Price, Rita Maxwell, Mary Kate Whalen, Ian Kennedy, SHANG Weiwei, ZHANG Yueyao and Tessa Bolton. It contains a preface by late Judge Hans-Peter Kaul and a foreword by Hans Corell.

The book is inspired by the rationale of crimes against humanity to protect against the most serious violations of fundamental individual rights, and its realization especially through domestic mechanisms. Such consciousness calls upon appropriate definition and use of contextual elements of the crime, effective jurisdiction for prevention and prosecution, and robust inter-State co-operation. The book considers individual State experiences in combating crimes against humanity. It underlines the importance of avoiding that the process to develop a new convention waters down the law of crimes against humanity or causes further polarisation between States in the area of international criminal law. It suggests that the scope of the obligation to prevent crimes against humanity will become a decisive question.

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